

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.

" THE LORD ORDINARY, in respect the note was of the hand-writing of the defender, decerned for the sum. Upon two reclaiming bills and answers, the LORDS adhered."

No 315.

Act. Raz.
A. R.

Alt. Alex. Gordon, Junior.

Clerk, Home.

Fol. Dic. v. 4. p. 107. Fac. Col. No 31. p. 54.

1775. November 30.

CHEAP against CORDINER.

MARGARET CORDINER being sued at the instance of William Cheap, as factor appointed by the Court upon the sequestrated estate of Archibald Miller, merchant in Edinburgh, for payment of L. 9 : 19 : 0, for tow and lint, conform to an account produced, said to be furnished to her deceased husband on the 14th October 1764, afterwards amended to 14th October 1765, and interest thereof from that period, she pleaded the defence of prescription founded upon the act of Parliament 1579, cap. 83d, which runs in these words: " All actions of debt for house-mail, servants' fees, merchant's accounts, and others of the like debts that are not founded upon written obligations, shall be pursued within three years, otherwise the creditor shall have no action, except he either prove by writ or oath of party."

No 316.

The triennial prescription of a merchant's account not obviated by production of a written commission for the goods.

In order to elide the defence of prescription, Mr Cheap produced a letter from the defender's husband, commissioning the goods, of date, Oldeer, 8th October 1765, concluding thus: " And this shall oblige me to pay you, as others, upon the shipmaster's receipt;" and, in a postscript, he says, " as Mr Farquhar refused to carry this money to you, (*i. e.* L. 2 of a former balance,) as I thought he would have done, so draw upon me at Aberdeen or Oldeer, and I shall honour your order, and mind the needful." The pursuer further produced, from Mr Miller's letter book, a copy of the answer to this letter, in these words: " I am favoured with yours of the 8th instant, and, conform to your orders therein, I have sent you *per* the Mary of Gardenston, William Sangster for Peterhead, *per* his receipt thereon, say eight matts tow, and 87½ lb. dressed lint, *per* account hereon, amounting to L. 19 : 19s. at your debit, and for which hereon is my draught on you, at six months, which please return accepted."— From these letters, the pursuer *contended*, that this case falls under the exception in the act of Parliament, of accounts founded on written obligations.

Answered; It is very true that the act makes an exception of accounts founded upon writ, and declares that no other proof is competent after three years, except by writ or oath of party. Now, though it is very true, that the letter founded on by Mr Cheap does prove the commission of the goods, it does, in no shape, prove, that they were actually furnished, nor is there any acknowledgment produced from the defender's husband, of the goods being delivered, nor an obligation upon him to pay the price. In that case, indeed, the defender could