

1755. July 22.

FRANCIS FARQUHARSON *against* HIS MAJESTY'S ADVOCATE.

No 313.

A clerk to a submission found to have no claim for his trouble, after three years, unless proved resting owing by writ or oath.

FRANCIS FARQUHARSON having been clerk to a submission between Lord Lovat and Fraser of Phopachy, in the year 1738, entered a claim upon the estate of Lovat for L. 100 Sterling to himself, and L. 20 Sterling to his clerk, alleging that he had not been paid by Lord Lovat.

*Objected* for the Crown ; That the claim was cut off by the triennial prescription, unless proved by writ or oath of party.

*Pleaded* for the claimant ; This debt does not fall under the statute 1579 ; only accounts current, and debts contracted *de die in diem*, are under the statute, and may not be proved by witnesses ; because of the danger of making up accounts, consisting of a variety of articles, from the memory of witnesses ; but a debt, such as this, being a *honorarium* for a single article of service, neither falls under the words nor intendment of the law ; action would have been good against Lord Lovat himself ; for it was found in the case of Gabriel Napier, (See APPENDIX) that a clerk to a submission can pursue for his fee, though the arbiters cannot ; action, therefore, will be likewise good against the Crown.

*2do*, This case falls under the exception of the statute ; the debt is proved by writ, *viz.* by the decret-arbitral produced, which bears to be written by the claimant's clerk ; and this is not only proof by writ of the claimant's having been employed, all that the law requires, but also of the performance of the work.

*Answered* for the Crown ; The words of the act, ' merchants' accounts, and ' other like debts,' are sufficiently extensive to comprehend this claim : By repeated decisions, writers' and agents' accounts have been found to be comprehended under this law ; 16th December 1675, Somervell, No 285. p. 11087. ; 29th November 1709, Mason, No 298. p. 11094. And the true reason of the act, which is, that no man is presumed to let his accounts lie over unpaid for three years after the date of the last article, applies with greater force to this account than to any other ; debts of this kind do not enter into an account ; they are commonly paid when the decret-arbitral is pronounced, and no receipts or discharges are taken for such payment ; the legal presumption, therefore, is, that this *honorarium* was paid by Lord Lovat ; and that presumption can only be taken away by writ or oath of party.

*Answered* to the *second* ; This case falls not under the exception of the act ; for that no proof arises from the decret-arbitral, that the work was performed by the claimant ; it proves no more than that the decret was written by such a person. Besides, the presumption of payment, established by the act, still re-

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

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"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.

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

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The defence of triennial prescription sustained, although the accounts were attested by an institor, and a decree obtained against him for the amount.