

No 316. see that the debt was founded on writ, and that the plea of the triennial prescription could not be received. But here, although there be a letter of commission, the debt is not constituted by it, but entirely left upon the open account. The pursuer mistakes the meaning of the act of Parliament, when he supposes, that letters commissioning the goods are sufficient to exclude the triennial prescription: That prescription was introduced upon a presumption, that open accounts, such as the present, if not pursued for within three years, have been satisfied and paid, and the act allows no evidence to the contrary but the writ or oath of the party. And, accordingly, the uniform style of a reference to oath in a case where the defender's oath can be obtained, is not whether the goods were delivered, but whether they are not resting owing. Surely the letter produced by the pursuer does in no shape prove resting owing; on the contrary, from the whole circumstances of this case, there is the greatest reason to presume the contrary. It is therefore hoped, that, as Mr Mitchel's oath cannot be now obtained, and nothing has been produced under his hand to shew the justice of this debt, which is now, at so great a distance of time, attempted to be reared up against his representatives, the Court will see good cause for assoilzieing them from it.

“THE LORDS found that no action lay for payment.”

In this case, the shipmaster's receipt was not produced.—The Court did not determine upon the statute, but upon the letter, bearing a bill to be sent;—which presumed payment.

Act. *M'Laurin.*

Alt. *Cha. Hay.*

Clerk, *Robertson.*

*Fac. Col. No 201. p. 141*

No 317.

1776. December 17. *MACGHIE against TINKLER.*

TINKLER, quarter-master to a regiment, was charged before the bailies of Dumfries by Macghie, for payment of L. 10 Scots, as the value of a boll of beans bought from the latter, and 1s. 6d. for drying and breaking another boll; and decret being given in terms of the libel, the defender, in a suspension, pleaded the triennial prescription; against which it was *urged*, That the defender having left the country with his regiment, and gone to England, the pursuer became *non valens agere*; for it would have been absurd to bring an action in a foreign country for such a trifle. THE LORDS sustained the plea of prescription. See APPENDIX.

*Fol. Dic. v. 4. p. 105.*