

No 323.

Action for the price of goods consigned by one foreign merchant to another, is not cut off by the triennial prescription.

1795. *January 24.* JOHN HAMILTON and Company *against* JOHN MARTIN.

IN 1774, John Hamilton and Company, then merchants in Virginia, consigned to John Martin, then also merchant there, 700 bushels of pease, and 30 barrels of beef, to be sold by him in the West Indies.

Both parties having returned to this country, Hamilton and Company, in 1793, brought an action against Martin, for payment of these articles, who stated in defence, that he had reason to believe, that the debt had been long since settled; and, at any rate, that in consequence of the lapse of the triennial prescription, its subsistence could be only established by his own writ or oath. That the statute 1579, c. 83. extended to every species of open account; July 1731, Crawford against Simson, No 306. p. 11102.; 16th December 1675, Sommerville against the Executors of Muirhead, No 285. p. 11087.; 22d July 1755, Farquharson against King's Advocate, No 313. p. 11108.; and in particular, to cases similar to the present; 15th February 1630, Orr against Duffs, No 279. p. 11083.

The Lord Ordinary sustained the defence.

But on advising a reclaiming petition, and answers, the Court were of opinion, that the chief object of the act 1579, was to prevent the hardship which might arise from losing the old discharged accounts of shopkeepers and other retailers, and that it was not meant to cut off claims arising from considerable mercantile transactions, like the present, which, at the date of the act, were very rare in this country; and further, that it did not extend to actions arising upon the contract of mandate.

THE LORDS unanimously repelled the defence of the triennial prescription.

Lord Ordinary, *Stonefield.* Act. *Arch. Campbell.* Alt. *Geo. Fergusson.* Clerk, *Sinclair.*
R. D. *Fol. Dic. v. 4. p. 105.* *Fac. Col. No 150. p. 343.*

No 324.

A citation, where the witnesses subscribing the execution were not present, found insufficient to interrupt the triennial prescription, although it was admitted by the defender, that he received a copy of the summons from the messenger.

1799. *January 18.* COLIN and DUNCAN CAMPBELLS *against* JOHN MACNEIL.

ALEXANDER MACCORQUODALE had been much employed by John Macneil as a messenger, and his estate having been sequestrated, it appeared to Colin and Duncan Campbells, the trustees on it, that a balance of an account was due by Mr Macneil to the bankrupt.

The last article in the account was dated 30th October 1788. About the middle of October 1791, one of the Trustees wrote to Mr Macneil, that a summons for payment of the balance was to be immediately executed against him to interrupt the triennial prescription. This was accordingly done on the 19th of that month.

The action came before the Sheriff of Argyle, and the defender proponed improbation against the execution of the summons, in respect that the witness-