No 202. liam Moncrieff, No 7. p. 478. and No 31. p. 1428.; Lookup *contra* Crombie, 20th February 1754, No 193. p. 1635.; Wallace *contra* Murray, 9th January 1759, No 195. p. 1637.; Stewart *contra* Houſton, 15th July 1760, No 197. p. 1638. All which caſes, the defender *contended*, had been determined by the Court, upon the principle, that bills ought not to be ſuſtained as permanent ſecurities, or action ſuſtained upon them after the lapſe of a number of years.

Answered for the purſuer: Bills, by the law of Scotland, are probative writings. They have always been conſidered as legal vouchers and grounds of debt, and, as ſuch, have been relied on by the lieges; and no preſcription is known in the law of Scotland, except what is introduced by poſitive ſtatute; and, as there is no ſtatute limiting the preſcription of bills, it neceſſarily follows, that no preſcription can take place againſt them, except the general preſcription of 40 years: That, in all the caſes mentioned by the defenders, in which action had been denied upon bills, although not cut down by the long preſcription, various particular circumſtances occurred which differenced them from the preſent caſe, and rendered it highly preſumeable, that theſe bills had been extinguiſhed by payment, which was not the caſe in the preſent queſtion.

'THE LORDS adhered to the Lord Ordinary's interlocutor.'

For John Maxwell, *Ro. M'Queen.* For James Maxwell, *William M'Kenzie.*
Elphingston. *Fac. Col. No 52. p. 92.*

No 203. Action refuſed on a bill which had lain over 39 years. The acceptor was dead.

1767. *January* 21. WALTER COLQUHOUN *againſt* DUKE of ARGYLE.

JOHN CAMPBELL of Mamore, in November 1722, accepted a bill to Humphrey Colquhoun, maltman in Dumbarton, for L. 79: 7: 6 Scots, payable a Candlemas 1723.

Mamore died in 1730, and his ſon, now Duke of Argyle, was ſerved heir to him *cum beneficio inventarii.*

In ſummer 1762, Walter Colquhoun, as repreſenting his deceaſed father Humphrey Colquhoun, brought an action againſt the Duke of Argyle, as repreſenting his father Mamore, for payment of the above-mentioned bill.

Two defences were pleaded for the Duke againſt this action. *1mo*, His ſervice upon the inventory, which he alleged was exhauſted[1]; and, *2do*, The antiquity of the bill, which, he contended, preſumed payment, and excluded any action upon it.

And, in ſupport of the firſt of theſe defences, it was *pleaded*, That the law does not oblige an heir, who enters *cum beneficio*, to value or ſell his eſtate; it is enough that he gives it up in inventory; and he will be ſafe if he can ſhow, by rational evidence, that this inventory is exhauſted by payments; and if any creditor, at a diſtant period, diſputes the fact, he ought to prove his allegation; as it would be hard to oblige an heir, after a long lapſe of time, to enter into a regular proceſs for valuing his predeceſſor's eſtate, or to aſſign the inventory,

No 203.

which, it appears, was long ago exhauſted, and no proof of the contrary offered; and, in this caſe, there were produced vouchers to ſhow that the Duke had paid debts of his father's to the extent of 30 years purchaſe of the rental of the eſtate; which, it was contended, was full evidence that the inventory was exhauſted.

In ſupport of the other defence, it was *pleaded*, That, although there was no ſtatutory preſcription of bills in this country, yet in many queſtions which have occurred, action has been refuſed upon bills after long taciturnity; and no caſe can be pointed out, where ever action was ſuſtained upon a bill after it had lain over for ſo long a period as that now ſued on, within a few months of the long preſcription; more eſpecially, when ſuch queſtions occur between heirs after the death of the original parties, as is the caſe here; and a number of deciſions were mentioned, in which the Court had refuſed action on bills of much more recent dates.

Answered for Colquhoun the purſuer: To the *first* point, The law does not allow an heir of inventory to hold his predeceſſor's eſtate at the value put upon it by himſelf. It is true, ſuch heir may bring an action againſt the creditors of his predeceſſor for valuing the ſubject of his inventory; and, in that caſe, he would be no farther liable than the extent of the proved value, as was found in the caſes, Gray *contra* M'Call, 6th July 1733, (*voce* HEIR CUM BENEFICIO.); and Murray *contra* Creditors of Pilmuire, 17th February 1736, (IBIDEM.) But the creditors may, if they inſiſt, bring the eſtate to a ſale, as was found, 12th July 1738, Heirs of Strachan of Glenkindy *contra* his Creditors, (IBIDEM.); and therefore, an heir of inventory, who holds his predeceſſor's ſubjects without properly aſcertaining the value of them, muſt be bound, either to pay his predeceſſor's debts, or aſſign the inventory to any creditor who demands his payment.

Upon the *other* point, it was *pleaded* for the purſuer, That the lapſe of time was, at any rate, a very unfavourable defence; but, as bills were obligatory writs acknowledged by the law, and limited by no ſhort preſcription, they muſt of courſe be effectual for 40 years; and that all the deciſions founded upon by the defender proceeded upon circumſtances which gave reaſon to preſume payment, which is not alleged in the preſent caſe; and, therefore, decree ought to go againſt the defender.

THE LORDS found, 'That, *post tantum temporis*, no action lies upon the bill in queſtion; and therefore aſſoilzied, and decerned.'

A reclaiming petition for Colquhoun was refuſed, without anſwers.

For the Duke of Argyle, *Ilay Campbell.* For Colquhoun, *Cosmo Gordon.*
Elphingston. *Fac. Col. No 53. p. 93.*