

and, from these authorities and decisions, the defender pleaded that the taciturnity alone was sufficient to cut down the bill. No 201.

He acknowledged, that, in 1739, he borrowed L. 25 Sterling from Sir Charles Erskine of Cambo, and gave a bill for that sum to Sir Charles and his brother Thomas, then Sir Charles's factor, and from Thomas he received the money, and to him the bill was delivered; but, he alleged, that, when the bill fell due, he repaid the money to Sir Charles upon a receipt, but which receipt was not produced. And he farther *contended*, that he had been always in easy circumstances, and no demand ever had been made for payment of this bill, although Mr Erskine, the drawer, lived in the neighbourhood, and was in very straitened circumstances.

' On report of Lord Pitfour, the LORDS find no action lies on the bill in question; and therefore *affoilzie* and *decern*.'

And refused a reclaiming petition for Weemy's without answers, referring to him to insist for M'Naughton's oath, if he thought proper.

Reporter, Lord Pitfour.
Elphinstone.

For Weemy's, *And. Crosbie.*

For M'Naughton, *Jo. Monro.*
Fac. Col. No 37. p. 62.

1767. January 21.

JOHN MAXWELL *against* JAMES MAXWELL of Kirkconnell.

In February 1734, James Maxwell of Kirkconnell accepted a bill to William Maxwell of Crafwadda for L. 38 Sterling, payable 1st May thereafter. This bill was allowed to lie over, without being protested or registered, or any diligence done on it, till summer 1765; when an action for payment was brought, at the instance of Crafwadda's executor, against James Maxwell, then of Kirkconnell, as representing his father James Maxwell, the acceptor of the foresaid bill. The Lord Ordinary decerned for payment; the defenders reclaimed to the whole Lords.

Pleaded for the defender: In all commercial countries bills are limited by very short prescriptions. In France they prescribe in five, and in England in six years; and although in Scotland there is no express law limiting the endurance of bills to any particular period, yet, from the uniform tract of the decisions of the Court, as well as the opinion of our lawyers, a sort of prescription seems to be established, not indeed fixed to any particular period, the time differing according to circumstances, but considerably within the period which this bill has lain over; Lord Stair, b. 4. tit. 42. § 6.; Lord Bankton, vol. 1. p. 367. § 31.; Erskine, b. 3. tit. 2. § 37.; Lady Forrester *contra* Lord Elphinston, 13th November 1742; C. Home, p. 346. *voce* QUALIFIED OATH; Wallace *contra* Lees, 31st January 1749, No 189. p. 1613.; Moncrieff *contra* Sir Wil-

No 202.

Action sustained on a bill which had lain over 31 years. The acceptor was dead.

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 presumable, 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.*

Elphinston.

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; 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,