

No 316. he had furnished a large quantity of lime; the LORDS found, in respect of the circumstances of the case, That no action lay upon the bill.

*Fol. Dic. v. 4. p. 129.*

\* \* This case is No 197. p. 1638. *voce* BILL of EXCHANGE.

1783. November 26. ALEXANDER, &C. WILSONS *against* WILLIAM WILSON.

No 317.

AN elder brother had intromitted with the whole effects of his father on his becoming superannuated, and incapable of attending to his affairs. Thirteen years afterward the representative of the elder brother was sued in an action, at the instance of the younger children, for rendering to them an equal distribution of those effects.

THE LORD ORDINARY having found the defender liable to account, he reclaimed to the Court; when it was

*Observed on the Bench:* To admit claims of this sort, especially among country people, at so great a distance of time from the predecessors death, would be the source of much injustice. The reasonable presumption is, that the funds have been properly applied by the elder brother.

Upon advising the petition for the defender, with answers for the pursuers, the LORDS altered the Lord Ordinary's judgment, and assoilzied.

Lord Ordinary, *Alva.* Act. *Ro. Craigie.* Alt. Lord Advocate *Erskine, Baillie.*  
Clerk, *Menzies.*

G. *Fol. Dic. v. 4. p. 129. Fac. Col. Na 129. p. 203.*

## DIVISION XV.

### *Levior Obligatio præsumitur.*

No 318. 1583. January. ELIZABETH ALLARDICE *against* ERSKINE & RAMSAY.

THERE being a contract made between Elizabeth Allardice and Margaret Erskine, her mother, with William Ramsay of Balemouth, Margaret's husband, in which they bound and obliged them to give to the said Elizabeth 600 merks, for all that she could crave for her bairn's part of gear; this contract was

sought to be registered against Margaret and William's heirs; but the LORDS would not do it against the heir, because the father was only bound *tanquam maritus*, and for his interest, and not *principaliter*, as was thought by them. No 318.

*Fol. Dic. v. 2. p. 164. Spottiswood, (HUSBAND and WIFE.) p. 154.*

\* \* \* Colvil reports this case :

THERE WAS a contract sought to be registered by Elizabeth Allardice, spouse to umquhile Captain Cullen, against Margaret Erskine, Lady Pittarrow, her mother, and Henry Ramsay of Banff, son and heir to umquhile Ramsay of Banff, and spouse to the said Margaret, her mother; in which contract the said Margaret, her mother, and the deceased Laird of Banff, her husband, were bound and obliged to pay to the said Elizabeth, for the renunciation of her bairn's part of gear, and all other things, the sum of 600 merks; and the words of the contract were, 'That we, the said Margaret and Henry Ramsays, bind and oblige us,' &c. It was *alleged* by Ramsay of Banff, That the contract ought not to be registered; because, his father was in no manner of way obliged in the said contract but *tanquam maritus*, and as for his interest, *et non principaliter*; so that now, after his decease, and the marriage being dissolved, his heir could not be, in any manner of way, astricted, nor yet ought the contract to be registered, in prejudice of him, but the contract ought to be registered only against his mother, who was living, and had sinceyne married another husband. It was *answered*, That the husband, the umquhile Laird of Banff, was obliged *principaliter, et non tantum jure mariti*, as appeared by the words of the contract; and because that he intromitted with the said Elizabeth's bairn's part of gear, intromitter made debtor, and now his heir, *qui eadem persona fictione juris fuit cum defuncto*, might be followed and convened for the same, and so registration ought to pass against the heir; and also of the daily practice of Scotland, he that marries a widow takes her *cum onere*, and all that may follow; and if she and he were bound all the time of her lifetime, the heir behoved to be bound after his decease, *saltem quatenus ad eum pervenit*. Altera ex parte ratiocinatus fuit, that the husband, who married a widow, could never be obliged but during the time of the marriage, and, after his decease, *Lex illa Cod. Ne uxor pro marito, vel maritus pro uxore habeat locum*; for a man might marry a widow who was debt-bound to —, and that if, after his decease, the widow living, his heir shall be debt-bound, *hoc esset contra omnem juris rationem*.—THE LORDS, after long reasoning and advising, found, by interlocutor, that the contract should not be registered contra mariti defuncti hæredem, licet nonnulli in contraria fuerunt opinione, quod hæres defuncti tenetur in quantum ad eum pervenit.