

' Brodie, and subscribed with my hand, at Edinburgh, the 18th of November 1682, before these witnesses,' &c. This deed is signed by both parties. No 315.

On this obligation Dunbar of Boath pursued Sir Harry Innes for payment of the L. 1103 : 13s. Scots.

Objected by the defender, The testing clause does apply particularly to neither of the parties' subscription, therefore the obligation is improbative, void and null; and supposing it might be applied to the subscription of one of the parties, if it cannot apply to the other party's subscription, it can have no effect; for, as the deed is a mutual contract, if both parties are not bound, neither is bound.

Answered, It was usual, in mutual contracts, to execute two deeds of the same tenor, each whereof was completed by the subscription of one of the parties. The deed produced was the one completed by the subscription of Innes, and was properly found in the custody of Dunbar the creditor. *2do*, The testing clause does apply to each of the parties subscriptions taken separately.

THE LORD ORDINARY repelled the objection.

Pleaded, That the obligation was prescribed; and that, from the nature of the obligation, it being for the delivery of a quantity of victual within a certain time, under a high penalty of L. 8 for every boll undelivered, the presumption was, that it was performed within the time, as it did not appear that any demand was made on this obligation, either for the victual or the penalty, for thirty-nine years after the parties contractors were dead.

THE LORD ORDINARY, on account of an obligation granted to Dunbar's successor in the 1722, passing from the defence of prescription, but reserving the defence of payment, repelled that plea likewise; but found it presumed, that the victual was paid in terms of the obligation.

" On advising a reclaiming petition and answers, the LORDS found it presumed, That the obligation in the contract, in the year 1682, was implemented, and therefor they adhered to the Lord Ordinary's interlocutor. See WITNESS.

Act. *Hamilton Gordon*.

Alt. *Lockhart*.

J. C.

Fol. Dic. v. 4. p. 129. Fac. Col. No 165. p. 294.

1760. July 15. STEWART *against* TRUSTEES OF HOUSTON.

IN an action for payment of a bill, which had lain over for twenty-seven years, without diligence done on it, or interest paid, it appearing that the debtor, who had frequently borrowed small sums from the charger, was in use to pay him by furnishing lime to his farm, and that after the date of the bill

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 præsimitur.

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