

1678. December 7. SANDS against Her TENANTS.

ELIZABETH SANDS being infeft in some tenements in liferent, pursues the tenants for mails and duties. It was *alleged*, That her infeftment could give her no title till her husband's death were instructed, for instructing whereof several witnesses were examined, and missive letters produced, and the woman herself examined, the import of all which was, that her husband Robert Christie had gone to Barbadoes, where he made a considerable stock, and became a privateer upon the coasts of Jamaica, and that the report was in Barbadoes that he was dead, and having been absent eleven years; the pursuer produced a letter about three years since, before the report of his death, containing affectionate expressions, and promising in a short time to come to Scotland; she did also depone, that she received no letters from him since that letter, nor knew any thing of his being alive.

THE LORDS found the evidences sufficient to instruct his death, it being positively proved that he was as a privateer, and it being reported at Barbadoes, where he resided, that he was dead, and not having returned thither where he had a considerable estate, and it being thereby evident *quod versabatur in periculo*, and that he had been eleven years from his wife, and three since he wrote to her.

*Fol. Dic. v. 2. p. 263. Stair, v. 2 p. 655.*

1706. June 19.

ISABEL HOGG, Relict of Alexander Home, against GEORGE HOME of Whitefield.

ISABEL HOGG, relict of Alexander Home chirurgion, pursues George Home of Whitefield, his brother, as intromitter with his means and patrimony, to make forthcoming to her, the terce and third of it due to her by law, and offered to prove, by his oath, that he had his bond of provision given him by his father, in his custody and keeping, and craved he might exhibit the same, and pay what was due to her *jure relictæ*. *Alleged* for Whitefield defender, She had no right title nor interest to pursue this action; *imo*, He denied the marriage; and, *2do*, *Esto* that were proved, he denied that he was dead; and in law *presumitur vivere nisi contrarium probetur*; and she offering to prove both; and the marriage having been consummated at London, and he dying in the East Indies, a commission was granted her to London, to prove both points; and, *first*, she produced affidavits taken before the Lord Mayor of London, but they not being by virtue of any warrant from the Lords, they were not regarded as probative. So the commission being executed by Sir David Nairn, secretary-depute, and the testimonies being this day advised, the LORDS found, on the disposition of Mr Cranston the minister, and other witnesses, that their marriage was sufficiently proved; but the difficulty arose on the probation of

No 552.

Evidence sufficient to instruct a person's death.

No 553.

Where no positive evidence can be got of a person's death, resort must be had to presumptions.