

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 relictae*. *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.

No 553. death, which amounted to this, that the clerk and book-keeper of the East-India Company at London, deponed, That one Alexander Home was hired to go in their ship to their factories at Bengal in 1687, and that they had heard no more of him afterwards, but only find his name recorded in their books; and that Isabel Hogg, as his widow, applied to the managers of said Company, and got money from them as a part of his wages, and that the wardens and constables of Duke's Place in London, hearing of his design of going that voyage, arrested him, till he found caution that his wife and children left behind him, should not be a burden on the parish, and that he was commonly holden and reputed to be dead. *Answered*, The witnesses acknowledge that they did not know him, and so it might be another man, seeing their might be several Alexander Homes, and her application as relict was but her own assertion. THE LORDS thought, where one is alleged to have died on the other side of the equinoctial line, and after 19 years absence, there could no full probation be got, and therefore found it sufficient to this effect, to make Whitefield deponed, what was his brother's portion, and if it be in his hands, or if he intermeddled therewith? and assigned a day for him to compear and exhibit, if he had writs that belonged to his brother, for clearing what his patrimony was, and if he had any bond of provision settled on him by his father. For where persons die in places so remote, there cannot be got a demonstrative probation, but *probatio semiplena et conjecturalis*, upon holden and reputed; and such like presumptions must be taken, otherwise it can never be proved.

Fol. Dic. v. 2. p. 264. Fountainhall, v. 2. p. 335.

No 554. 1707. December 4. AITKEN against GUIDLETS.

THE LORDS presumed a son to be dead, from his father burthening a disposition of his estate with his other childrens' provisions, without mention of his, and from this, that the father in a pursuit against him for what belonged to the son, upon the pursuer referring to his oath, that he was dead, acknowledged that he feared the worst.

Fol. Dic. v. 2. p. 264. Forbes:

* * This case is No 110. p. 5553, *voce* HERITABLE and MOVEABLE.

1710. December 20.

WILLIAM HENDERSON, Merchant in London, and ELIZABETH INNES, his Spouse, *against* THOMAS MORTON in Rechlays, and JOHN SMITH, Writer in Cowper.

IN the action at the instance of William Henderson and his spouse against Thomas Morton and John Smith, as havers of the effects of Thomas Gourlay mariner, who had legated and assigned to the pursuers L. 150 Sterling, in case

No 555.
Affidavits as-
serting the
death of a
person, found
to afford pre-
sumptive
evidence.