months, and that the climate of Scotland has by no means the effect, which the pursuer would ascribe to it, of protracting the time of child-bearing to eleven months from the time of conception, or at all beyond the time of nine months. The rule laid down by our lawyers is founded upon nature itself, and it would be absurd to suppose it derived its only authority from the civil law. No 334.

Neither will the Court enter into the fanciful distinctions which the pursuer endeavours to make between questions of succession and questions concerning the maintenance of bastard children. The defender can observe no ground, either in reason or law, for supposing that a pregnancy may last eleven months in the one case, and not in the other.

The case quoted from Sandes is nothing to the purpose. This foreign decision, attended with so many particular circumstances, and so clearly against every principle, can have no weight with this Court in the present case.

Lastly, The pursuer's character is a circumstance which ought to have some degree of weight in the cause. It was averred, in the inferior court, that she was a woman of loose character, and was well known to have connections with others. The defender is ready to prove this, if necessary; and that, even since this cause came into Court, she has had a bastard child, of which she will not pretend to say the defender is the father.

Nota. The last-mentioned circumstance was admitted to be true at advising, of which a minute was ordered to be taken down.

The Lords 'assoilzied the defender.'

Act. *Crosbie.* Alt. *Ilay Campbell.* Clerk, *Tait.*

Fol. Dic. v. 4. *p.* 135. *Fac. Col. No* 132. *p.* 349.

1753. *January* 2.

Mary Burns *against* Alexander Ogilvie, Merchant in Dundee, and his Children.

No 335.
A person pursuing as executor, for payment of a sum due to one said to be dead, must prove the death. The decree-dative is not sufficient evidence.

A legacy of 4000 merks was left to John, James, Alexander, Mary, and Jean Burns, children of John Burns of Middle-mill. John, the eldest of the legatees, uplifted the legacy for himself, and as factor for his brothers and sisters. James and Alexander went to sea; and James, before he went abroad, executed a testament, nominating John his executor and universal legatar.

John made a will in favour of his sister Jean, and died in 1734; Jean was married to Alexander Ogilvie, and died in 1743, leaving children.

In 1744, Mary Burns was decerned executrix to her two brothers James and Alexander. She had set forth in the edict, that James died at Bombay in April 1743, and that Alexander died upon the coast of Spain in July said year. Upon this title she brought an action against Alexander Ogilvie and his children, as representing the deceased Jean Burns, to make payment to her of

No 335. James and Alexander Burns' share of the above mentioned legacy; and she produced some letters from people in this country, all dated after the decreet-dative, and some of them after the commencement of this process, bearing, that it was reported James had died in Persia in 1744, and that Alexander had, together with the whole crew of the ship, been murdered by the Spaniards in the bay of Campeachy in 1744 or 1745.

Pleaded for the defenders: That before the pursuer can draw any sums of money from them, in right of her said brothers, she must prove that her said brothers are dead. The decreet-dative is no evidence of the deaths, for such decreets pass of course without any proof; and as James and Alexander are said to have died abroad, and as their deaths are not notour, it is incumbent on the pursuer to bring evidence thereof, the rather that this is not the case of a debtor, who has no other interest than to pay safely, but of defenders who may have a joint interest in the effects; and, therefore,

2*dly*, The pursuer must also prove the time of their deaths; for, if James died before his brother John, the pursuer can have no share of any thing which belonged to James, because of his will in favour John; and, if Alexander predeceased John, the pursuer can only have a third of what belonged to him; and, if James and Alexander survived John, but died before their sister Jean, the pursuer can only claim one half of their share of the legacy; for such part of it as would have belonged to John and Jean, as nearest of kin to their deceased brothers, was vested in them, and transmitted without confirmation, because John, by uplifting the 4000 merks, and afterwards Jean, by being executrix to him, were debtors to their said brothers for their respective shares, and, on the death of their brothers, became both debtor and creditor in such share as fell to themselves, which therefore needed not to be confirmed. And, as to the letters produced as evidence of the death, alleged that they could have no weight, as they were impetrate during the dependence of this process, contained nothing but hearsay, and even contradicted the account of the deaths given in the edict; and if any thing material were contained in the letters, the writers of them ought to be examined as witnesses in the cause.

Answered for the pursuer: That the decreet-dative is sufficient presumptive evidence of the deaths, unless the defenders will undertake to prove that James and Alexander are alive; and it would be extremely hard, if an executor, in every process he had against the debtors of the defunct, were obliged to prove the death. And, with respect to the time of the death, it surely is incumbent on the defenders to prove, if they aver it, that James or Alexander predeceased John or Jean; for the defenders are actors in that exception, and therefore must prove their allegeance. Also the pursuer referred to the letters as evidence of the deaths, and time thereof.

"The Lords found that the pursuer must prove the death of James and Alexander Burns, or that they were habit and repute dead. And found that the letters produced were not sufficient evidence thereof."

N. B. The Lords waved determining on whom the proof of the time of the deaths would lie, till after the proof of the deaths should be reported. See Title to Pursue. No 335.

Act. *H. Home.* Alt. *Lockhart.* Clerk, *Gibson.*

B. *Fol. Dic. v.* 4. *p.* 134. *Fac. Col. No* 56. *p.* 82.

*** Lord Kames reports this case:

A legacy of 4000 merks being left to the five children of John Burn of Middle-mill, viz. John, James, Alexander, Mary and Jean; the eldest son John, by a factory from his two brothers, uplifted their shares, or part of their shares. John died in the 1734, after making a will in favour of his sister Jean, who died afterwards in the year 1743, leaving issue. And Mary, supposing her two brothers, James and Alexander, who had gone abroad to push their fortunes, to be also dead, took out an edict *anno* 1744, bearing, that James died in the East Indies, and Alexander on the coast of Spain, both in year 1743, and obtained a sentence of the Commissaries, decerning her executrix *qua* nearest of kin to her said two brothers. Upon this title she insisted against the children of Jean, as representing by progress their uncle John, to account for his intromissions with the effects of his said two brothers by virtue of the factory from them. The defences were, 1*mo*, With regard to James's share, that there was no evidence of his death. 2*do*, Supposing him to be dead, yet if he died before his brother John, the pursuer could take nothing, because he made a testament in John's favours. 3*tio*, Supposing him to have survived John, yet if he died before his sister Jean, the pursuer can only take the half of his effects, the other half remaining with Jean, which she could transmit without confirmation, which can only be necessary for an active title, or to found a process. The same defences, with little variation, apply to Alexander's share; and the whole defences collected together, resolve into this general proposition, That the pursuer was not entitled to draw any sum from the defenders, till she should not only prove that her two brothers were dead, but also prove the time of their death.

With regard to the *first* point, the pursuer did not controvert that it was incumbent upon her to bring evidence of the death of her two brothers, but insisted that the decreet-dative was legal evidence of this fact. The defenders denied that it afforded any evidence whatever, not even supposing a confirmation had been expede. They urged that the very form of procedure is sufficient to show that a confirmation is not so much as a presumptive evidence. The person, who applies for the confirmation, obtains of course an edict, in which is set forth the death of the ancestor; and the applier also of course, without any cognition, is decerned executor, if none appear to compete with him. In this decerniture, the judge interposes as little as taking out the edict; it is not so much as signed by the judge, but only by the clerk. It is then

No 335. evident, that a decreet-dative, as far as it narrates the death of the predecessor, is merely an assertion of the executor; and therefore cannot bear the least faith in any question, where the death of a person, or the time of his death is of importance, It is very true, that a confirmation is a good title against a debtor, for he has no interest, but to pay safely. Yet even there, were there any suspicion of the persons being alive, it is believed the Court would put the executor to a proof of death, notwithstanding his confirmation. But be that as it may, the present is a very different case. The defenders have a much greater interest than to pay safely. The present process resolves into a competition, and it depends upon the time of the death of the two brothers, whether the pursuer or defender is preferable. In this case, the pursuer's decreet-dative will avail her nothing; if she claim the whole shares of her two brothers, she must say that they survived both John and Jean, and if she say so, she must prove it.

To explain the effect of a confirmation a little more at large, it must be observed with regard to marriages, births and burials, happening within this country, that the same are in law understood to be notorious, so as not to require proof, unless the opposite party controverts the fact, in which case a proof must be brought. Thus, in an exhibition *ad deliberandum*, the pursuer needs not bring a proof of his apparency. And where an adjudication is led on a trust-bond, granted by an apparent heir, it is no objection to the adjudication that the apparency is not proved. The same principle applies to a confirmation; if the person, whose moveables are sought to be confirmed, died within this country, the executor needs bring no proof, unless the fact be controverted. But it is a very different case, if it be set forth in the edict, that the person died abroad, especially if he is said to have died in the West or East Indies. Such a fact cannot be notorious, and therefore it is incumbent on the person who applied for the confirmation, to bring a proof of the fact. And it is even doubted whether a debtor would be in safety to pay upon a confirmation, where that proof is wanting.

With regard to the *second* point, touching the time of the death of James and Alexander; it was *pleaded* for the pursuer, That if she prove the death of her brothers, that proof is sufficient to support her claim, because the presumption lies in favour of life, unless the contrary be proved; and it will be presumed, that James and Alexander survived both John and Jean, the time of whose deaths are known. In answer to this argument, it was *observed* for the defenders, That it is far from holding in general, that life is presumed. This is a maxim unwarily adopted by some lawyers, for which there is no foundation, when considered as a general maxim. For the matter stands thus; when one brings a libel founding upon the death of another, in order to support his conclusion, in that case life is presumed, for a very plain reason, that *actori incumbit probatio*; but, for the very same reason, if a libel be founded upon the life of a third party, it is incumbent on the pursuer to prove his libel, that is, to prove that the third party is alive. Upon the very same principle, if the

present pursuer say in her libel, that her two brothers, who are now dead, survived both John and Jean, which she must allege in order to support her conclusion, it is incumbent upon her to prove her libel. No 335.

"The Lords found it incumbent upon the pursuer to prove the death of James and Alexander her two brothers, and it was thought sufficient for her to prove that they were habite and repute to be dead. But as to the other point about the time of their death, they were not clear, that it was incumbent upon her to prove the same. And therefore they superseded this point till a proof should be brought of the first point.'

Sel. Dec. No 34. *p.* 37.

1755. *February* 28.

James Macpherson *against* James Grant, Deputy-Factor on the estate of Lovat.

No 336.
The person in whose possession a stolen horse was found, who had taken burgh and hamehald, when he bought him, not liable to the owner of the horse in the expense of recovering him, as the taking burgh and hamehald afforded no presumption that he was accessory to the theft.

The defender's wife purchased a horse from one Clerk, tenant in Urquhart, but as she did not know him, she demanded burgh and hamehald; and Macdonald, also a tenant in Urquhart, became his burgh or cautioner.

Some time after, the pursuer having claimed the horse, as his property, stolen from him, the defender sent for Clerk and Macdonald, they denied that the horse was stolen, and they accompanied the pursuer to the bailie of Urquhart, who ordered restitution of the horse to the pursuer. Soon afterwards the pursuer brought action against the defender for the damages incurred in recovering the horse.

Pleaded for the defender; That his character and his wife's put them above any suspicion of being accessory to theft; in this case, no circumstances are against them; as soon as the horse was claimed, he delivered up the thief to the pursuer, and therefore, as nothing could be laid to his door, nothing could be demanded of him more than the restitution of the horse, which he had made accordingly.

Replied for the pursuer; That he had a like right to his damages as to his horse; that the person, in whose custody the horse was found, was liable to him *primo loco*. The taking of burgh and hamehald, showed that the defender suspected the horse was stolen; it was optional for him to have bought the horse or not, and it was not unreasonable he should be put to seek relief from the person on whose faith or caution he had relied. This was further supported by reasons of public utility, for discouraging the receipt of theft.

The Court was of opinion, that the taking of burgh and hamehald was no presumption against the defender, that he was accessory to the theft, or was a resetter of theft.

"The Lords assoilzied the defender."

Act. *Ch. Hamilton Gordon.* Alt. *Alex. Boswel.* Clerk, *Forbes.*

S. *Fol. Dic. v.* 4. *p.* 132. *Fac. Col. No* 143. *p.* 214.