

known to be dead, without probation whereof she could not be compelled to confirm. THE LORDS advocated the matter, and ordained the woman to find caution to make the gear furthcoming, and in as good case as they were the time of the edict, in case it be proved, that her goodman was dead; because it was affirmed, that her husband being a merchant, and having made sail three years ago, neither ship nor men were returned, but were reputed perished, and many of the rest of the merchant's testaments were confirmed.

No 547.

*Fol. Dic. v. 2. p. 263. Haddington, MS. No 2496.*

1615. *January 18.* LAIRD OF LEE *against* TENANTS OF CARSTAIRS.

IN an action betwixt the Laird of Lee and the Tenants of Carstairs; the LORDS found a reply founded upon the decease of James Hamilton of Abendale, proved by their own knowledge, *tanquam notorium.*

No 548.

*Kerse, MS. fol. 254.*

1622. *June 27.* ERSKINE *against* STEVEN.

VITA præsumitur nisi mors probetur, ordinarie, yet a pregnant presumption to death, viz. that the person alleged to be dead embarked in a ship to make a voyage to Norway at All-hollowmas 1620, and that the ship nor none in her ever returned, nor was heard of, and so behoved to have perished in the ship, will be found relevant.

No 549.

*Fol. Dic. v. 2. p. 263. Haddington. Durie.*

\* \* \* This case is No 323. p. 11656, *voce* PRESUMPTION.

1670. *February 18.* WILLIAM LAURIE *against* SIR JOHN DRUMMOND.

UMQUHILE Sir Robert Drummond of Meidup having disposed the lands of Scotstoun to Sir John Drummond of Burnbank, Mr John Drummond, writer in Edinburgh, his grand nephew, intending to reduce that disposition as on death-bed, grants a bond to William Laurie of 12000 merks, who thereupon having charged the said Mr John to enter heir in special to the lands of Scotstoun, to the said Sir Robert his granduncle, apprises from him all the right of the lands, that might be competent to him, if he were entered heir, and thereupon raises reduction of Sir John's right, as being granted by Sir Robert on death-bed, in prejudice of his nearest heirs, in whose place the pursuer now is by the apprising. It was *alleged* for the defender, No process upon any charge to enter heir against Mr John Drummond, because he is not the nearest

No 550.

Death of a person instructed by 18 years absence, and a letter from a person who was a witness of his death.

No 550.

apparent heir, but has an elder brother living. The pursuer *answered*, That the said elder brother had gone out of the country 18 years ago, and was commonly holden and reputed dead, likeas he produced a missive of one Creighton his comerade in the war abroad, bearing the circumstances of his sickness, death and burial, dated July 6th 1667. It was *answered*, That *semel vivus semper præsimitur vivus nisi contrarium probetur*, and what was alleged could be no probation, but some probabilities of death. The pursuer *answered*, That brokard is but *præsumptio juris*, and not *præsumptio juris et de jure*, and therefor only *transfert onus probandi*, which probation may be valid without witnesses, by such adminicles as the LORDS shall find sufficient, which are here sufficiently alleged, viz. long absence, common fame, and a missive letter.

THE LORDS found, That 18 years absence, and being holden and reputed dead, was sufficient probation to take off the presumption of life, unless a stronger probation for the parties being on life were shown, than the naked presumption thereof.

*Fol. Dic. v. 2. p. 263. Stair, v. 1. p. 671.*

\*.\* A similar decision was pronounced, 19th June 1663, Hay against Corstorphine, No 159. p. 5956, *voce* HUSBAND and WIFE.

No 551.

What evidence required site of death?

1667. July 25. FRENCH *against* The EARL of WEMYSS.

SARAH FRENCH, as executrix confirmed to John Wemyss her husband pursues the Earl of Wemyss for payment of 1000 merks due to her umquhile husband, who alleged no process till it were notour and known, that her husband was dead, he having lately gone abroad as a soldier to France. It was *answered*, That the confirmation was a standing decret, bearing the husband to be dead, and the defender would be secured by the Lords' sentence, likeas *ex abundante* the pursuer will find caution to warrant him; and if executors be put to prove that defuncts are dead, it will be a common pretence for delay. It was *replied*, That when the death is notour, as it is of persons having died within the country, an edict served at the parish kirk where they dwell, is a sufficient probation, if the contrary be not proved; but this holds not in those who die out of the country, and therefore edicts and confirmations passing of course, do not instruct their death, likeas in this case John Wemyss went abroad but within these six or seven years.

THE LORDS found the defence relevant, unless the pursuer offered to prove, that her husband having gone abroad as a soldier, hath not been heard of these several years, and is commonly reputed by the neighbourhood as dead; because in a flagrant war, where the death of soldiers cannot be particularly known, their not appearing for several years presumes their death, unless the contrary be proved.