

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.