

## DIVISION XVI.

## Other Presumptions.

1622. June 25. Sir JAMES ERSKINE *against* STEVEN.

No 323.

*Præsumitur de vita, nisi probetur mors.*

IN an action pursued by Sir James Erskine *contra* Steven, for removing from the lands of Tillibody, the defender *alleged*, That he should not remove, because he bruiked by tolerance of John Steven, who had a tack of the lands libelled, during all the days of his lifetime, set to him by the pursuer's author, and which John Steven, tacksman, is not warned. To which it was *answered* by the pursuer, That it was not necessary to warn the alleged tacksman, except the defender would allege that he were on life, seeing the tack being set only for his lifetime, he ought to allege and prove that he was living the time of the warning; and so much the rather he ought to allege the same, seeing it is so long since the tack was set, viz. *in anno* 1559; and the tacksman is out of the country, and hath been so these many years, and since hath never returned. It was *duplied*, That he had no necessity to prove that he was in life the time of the warning, because he being once in life, *præsumitur de vita nisi probetur mors*. THE LORDS found no necessity to the defender to prove that the tacksman was in life, seeing the presumption of the law proved the same, (he being once living); and therefore found the exception relevant without that astriction, except the pursuer would allege that he were dead at the time of the warning *positive*.

Act. Hope &amp; Rollo.

Alt. Paip.

Clerk, Gibson.

*Durie, p. 26.*

\* \* Haddington reports this case :

IN the action betwixt Sir James Erskine and a tenant of Tillibody, the LORDS found an exception relevant proponed by the defender, That he was tenant to a man not warned, who had a liferent tack of the lands libelled, and was not burdened to prove that he was in life, but thought it was presumed, unless the pursuer would offer to prove that he was dead. Thereafter, the pursuer *Replying*, That he offered to prove that the defender's master embarked in a ship called the Haukehead, to make a voyage towards Norway, at Hallowe'en

1620, that the ship nor any in her ever returned, nor were heard of, and so behoved to be reputed dead, and to have perished in the said ship, with all the rest; which was found relevant.

No 323.

Haddington, MS. No 2639.

1628. July 8. DUNBAR against LESLY.

No 324.

SEMEL baro, semper baro, is only a presumption nisi contrarium probetur.

Fol. Dic. v. 2. p. 164. Durie.

\*\*\* This case is No 15. p. 5392. *voce* HEIRSHIP MOVEABLES.

\*\*\* See a similar decision, 26th February 1663, Cuthbert against Monro, No 24. p. 9666. *voce* PASSIVE TITLE.

1663. February 14. ROBERTSON against BUCHANNAN.

No 325.

ROBERTSON pursues Buchanan to repay to him a sum of money; who *alleged*, That his bond bearing to pay this charger, or to Arthur Buchanan, his brother, it is *alternative, et electio est debitoris*, and he has compensation against Arthur, which is equivalent as if he had paid him.

THE LORDS repelled this allegiance; and found, that the charger being deliverer of the money, and now haver of the bond, it could import no more but that the other brother was adjected for the charger's behoof, and that there is no option to the debtor in such cases.

Stair, v. I. p. 179.

1665. February 15. PATRICK MILNE against ALEXANDER MURRAY.

No 326.

ALEXANDER MURRAY having subscribed a bond at Lubbin, in sole obligation to pay the sum of 155 polls Florence, at the Feast of St Simon, under pain of doubling the sum, Patrick Milne pursues for payment of the debt. THE LORDS found, in regard of the designation of Alexander Murray being general, and that there are more persons of that name, The pursuer behoved to prove this Alexander Murray, defender, to be the subscriber of the bond; which he always denied.

One, of the name in a deed, not presumed to be the subscriber, unless designed.