

and therefore, that the charge to enter heir, and the adjudication thereon, must be null and void, as having proceeded against a person dead.

No 340.

David Yule's death being denied by the defenders, a proof before answer was allowed, and taken in the year 1754.

Several witnesses concurred, that there was a current report that David Yule had gone aboard a ship at Philadelphia, bound for the West Indies, and that this ship had never after been heard of. One witness said, He was at Philadelphia when that ship sailed with David Yule on board; and before he left Philadelphia she was amissing, other ships having come from her destined port, after the time she ought to have arrived there, and brought no account of her: He further said, that he had been frequently at Philadelphia since that time, and heard the same report; and had also been informed there, that the wife of the master of the ship had married another husband.

This proof was advised *ex parte*. The pursuer's counsel *alleged*, That though it amounted to no more than common fame and belief, yet that was sufficient to presume David Yule dead, unless a contrary proof should be brought that he was alive: That the degree of common fame the Court had proceeded upon in like cases would appear from the following decisions; Spottiswood, *voce SUMMONS*, 29th February 1628, Ruthven, *voce PROOF*; 18th February 1670, Laurie, *IBIDEM*; 25th July 1677, French, *IBIDEM*; 2d January 1752, Burns *contra* Ogilvie, No 335. p. 11667.

"THE LORDS, on advising the proof, found the facts proved sufficient to presume, that David Yule was dead before he was charged to enter heir; and therefore sustained the objection, that he was dead before he was charged to enter heir; and reduced, decerned, and declared accordingly; and remitted to the Lord Ordinary to proceed on the other points in the cause."

Act. Dav. Dalrymple.

Clerk, Gibson.

J. C.

Fol. Dic. v. 4. p. 133. Fac. Col. No 268. p. 503.

1760. July.

STEWART against HAY.

CHARLES HAY assigned to Alexander Blair, for a valuable consideration, a bond of annuity granted to Hay by his father, of which Blair, by legal diligence against the granter's representatives, obtained some few years payment. Hay in the meantime went abroad, and for several years was never heard of. Blair, in 1752, brought a process against the Representatives of Hay's father, for payment of arrears of the annuity since Martinmas 1735, and in time coming. To this it was *objected*, That Hay the cedent was long since dead; which fact being ordained to be proved by the defender, the evidence rested on the following adminicles; *imo*, A copy of an indenture, in 1739, between Hay and Macintosh a merchant in Edinburgh, in which Hay binds himself to serve

No 341.

Circumstances adduced to counteract the presumption of life. See No 344. p. 11679.

No 341.

him as an apprentice in Jamaica for four years; *2do*, a certificate by one of the bailies in Edinburgh, whereby Hay is said to have certified before him, that he was thirty-four years of age at subscribing the said indenture, which he did voluntarily; *3tio*, The copy of an affidavit emitted by Cornelius Obrien, overseer of a plantation in Jamaica, certifying, that in 1739 one Charles Hay arrived at his plantation, and died some time between 28th December 1742 and 28th March 1743, to the best of his memory; *4to*, The attestation of a notary in Jamaica, certifying, that the above were true copies of the original indenture and of Obrien's affidavit; *5to*, A letter, bearing date, Kingston, July 1741, (which however appeared to be altered by erasure from "1739") from Charles Hay himself to Blair the pursuer, desiring him to direct for him at the plantation above mentioned. It was questioned, how far the presumption arising from these adminicles was not so strong as to defeat the legal presumption of life, and sufficient to throw on the pursuer the *onus probandi*, that Charles Hay was still alive. Several objections were made for the pursuer, viz. That neither the indenture itself, nor Obrien's affidavit being produced, a certified copy of both, which is nowise authenticated, and depends solely on the credit of the person employed by the defender's agents to attest it, can never be held as probative in this country; That by the copy of the indenture, it appears, that neither the writer's name nor designation have been inserted, which is by our law a statutory nullity. And it was further urged for the pursuer, That as he was to be considered as *in possessorio*, having drawn some years payment of this annuity, a presumption of this kind, which might have had force to have barred his claim, had he only been *in petitorio*, must, in the present case, be held as quite insufficient to cut down the legal presumption of life. THE LORDS, in respect that the pursuer refused to undertake any proof of Charles Hay's being in life, found, that the presumption of his having died before the 28th March 1743, was more pregnant than the legal presumption for life; and remitted to the Ordinary to proceed accordingly. See APPENDIX.

Fol. Dic. v. 4. p. 134.

1765. June 19.

JAMES BUCHANAN of Tilliecheun and his Factor *against* JOHN BUCHANAN of Lardrismore.

No 342.
Tutor acquiring debts due by the pupil, whether it is presumed that they are acquired with the pupil's funds?

MUNGO BUCHANAN of Tilliecheun died in the year 1708, leaving behind him two infant children, Robert and Elisabeth, mother to the pursuer, James Buchanan.

George Buchanan of Lardrismore, grandfather to these children, took upon him the administration of their affairs, and acted as their tutor; but he neglected, during the whole course of his administration, to make tutorial inventories of the effects belonging to his pupils; and his son William, who succeed-