

No 339.

*Pleaded* for the Crown, The evidence arising from the extract of the sasine, is sufficient to prove, that the wadset-right did exist in the terms above mentioned. The like evidence of a wadset-right, the Court lately sustained in favour of a claimant on the estate of Lovat, Mactavish of North Migovy. See APPENDIX.

*2do*, Was any more evidence of the existence of the wadset necessary, the acknowledgment of the claimant put it beyond doubt. The quality added can have no effect, as there was no reference to his oath or acknowledgment. The queries were put in terms of the vesting-act, by which claimants are obliged to answer, upon oath or otherwise, such interrogatories as are put to them by the Court, or the counsel for his Majesty. Every article of their answers, even though upon oath, may be redargued by contrary evidence; the Crown therefore cannot be foreclosed by such oaths or acknowledgments, whether they contain intrinsic qualities or not. But the quality adjected to this acknowledgment is extrinsic, as the method of extinction of the wadset condescended upon, is not a habile one. By the infestment taken on the wadset-right, it is made real; and the lands affected by it, cannot be disincumbered of it, except by a registered renunciation and discharge, or by a resignation *ad remanentiam*. It cannot be done, as in personal rights, by cancelling or retiring the contract of wadset. The right of superiority and reversion remaining with the reverser, is separated entirely from the right of the wadsetter; and they cannot be consolidated, but *habili modo*.

*3tio*, If the Court is convinced, by the evidence produced, that such a wadset-right did exist, it may hold the tenor of the wadset as proved, without putting the parties to the trouble and expense of a proving of the tenor. This was the practice of the Court of Inquiry in the 1716, and of this Court, in the case of Mactavish above mentioned. The *casus amissionis* need not be condescended on, and proved, in this case, as the deed amissing is not of a nature to be extinguished by cancelling or retiring.

“THE LORDS adhered to Lord Bankton’s interlocutor, finding it presumed, that the wadset-right in favour of Donald Macdonell, the attainted person, did subsist at the time of the attainder; and therefore dismissing the claim to the property.”

Act. Dav. Gramt.

Alt. The King’s Counsel.

J. C.

Fol. Dic. v. 4. p. 131. Fac. Col. No 163. p. 291.

No 340.

A person presumed to be dead, upon a proof of common fame and belief.

1760. February 12. JOHN FORRESTER *against* JAMES BOUTCHER and Others.

IN a reduction of a decret of adjudication, led in the 1740, against David Yule, as lawfully charged in 1739 to enter heir to his father, among other reasons it was *alleged*, That David Yule had been dead ever since the year 1732;

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

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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

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