

No 553. death, which amounted to this, that the clerk and book-keeper of the East-India Company at London, deponed, That one Alexander Home was hired to go in their ship to their factories at Bengal in 1687, and that they had heard no more of him afterwards, but only find his name recorded in their books; and that Isabel Hogg, as his widow, applied to the managers of said Company, and got money from them as a part of his wages, and that the wardens and constables of Duke's Place in London, hearing of his design of going that voyage, arrested him, till he found caution that his wife and children left behind him, should not be a burden on the parish, and that he was commonly holden and reputed to be dead. *Answered*, The witnesses acknowledge that they did not know him, and so it might be another man, seeing their might be several Alexander Homes, and her application as relict was but her own assertion. THE LORDS thought, where one is alleged to have died on the other side of the equinoctial line, and after 19 years absence, there could no full probation be got, and therefore found it sufficient to this effect, to make Whitefield deponed, what was his brother's portion, and if it be in his hands, or if he intermeddled therewith? and assigned a day for him to compear and exhibit, if he had writs that belonged to his brother, for clearing what his patrimony was, and if he had any bond of provision settled on him by his father. For where persons die in places so remote, there cannot be got a demonstrative probation, but *probatio semiplena et conjecturalis*, upon holden and reputed; and such like presumptions must be taken, otherwise it can never be proved.

Fol. Dic. v. 2. p. 264. Fountainhall, v. 2. p. 335.

No 554. 1707. December 4. AITKEN against GUIDLETS.

THE LORDS presumed a son to be dead, from his father burthening a disposition of his estate with his other childrens' provisions, without mention of his, and from this, that the father in a pursuit against him for what belonged to the son, upon the pursuer referring to his oath, that he was dead, acknowledged that he feared the worst.

Fol. Dic. v. 2. p. 264. Forbes:

* * This case is No 110. p. 5553, *voce* HERITABLE and MOVEABLE.

1710. December 20.

WILLIAM HENDERSON, Merchant in London, and ELIZABETH INNES, his Spouse, *against* THOMAS MORTON in Rechlays, and JOHN SMITH, Writer in Cowper.

IN the action at the instance of William Henderson and his spouse against Thomas Morton and John Smith, as havers of the effects of Thomas Gourlay mariner, who had legated and assigned to the pursuers L. 150 Sterling, in case

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Affidavits as-
serting the
death of a
person, found
to afford pre-
sumptive
evidence.

he died in his intended voyage to the East Indies, in the ship the *Cæsar*, John Clerk commander, which departed from England in March 1704, the pursuers produced two affidavits by Ambrose Fox, carpenter, and Nathaniel Cooper, chaplain in the ship the *Howland*, made at Kane-sessions in London, that one Captain Thomas Gourlay died on board the said ship, lying in Bellisore road, near Bengal, in September 1707, for instructing Thomas Gourlay's death, and purifying the condition of the legacy.

Alleged for the defenders, Affidavits taken abroad without warrant or commission from the Lords, and without calling any person interested to object against their hability, or cross interrogate them, are not probative in our law. The affidavits do not specify or describe Captain Gourlay who died aboard the *Howland*, to have been the same person that went to the East Indies in the *Cæsar*. *3tio*, *Esto* he died aboard the *Howland* in the 1707, yet the condition of the legacy cannot be understood to be purified, seeing it is not proved that he died in his voyage to the Indies aboard the *Cæsar*, but several years after he had settled and was trading there.

Réplied for the pursuer, The death of Thomas Gourlay is as fully made out as the nature of the thing will bear, and such affidavits are generally sustained as probative in all trading nations, in cases extraordinary, 25th July 1677, French *contra* the Earl of Wemyss, No 551. p. 12644, as oldier's death was presumed from his not appearing several years in time of war, unless the contrary were proved. *2do*, The condition, in case he died in his voyage to the East Indies, is a general comprehending the whole space from his entering upon that voyage till he should return; and as the *Cæsar* was mentioned only *designative*, as the ship he was then designed to prosecute the voyage in, so his being called Captain Gourlay in the affidavits, doth not alter the case, that being only an additional character acquired by him during his stay in the Indies; and sufficiently *constat de persona*, so long as the defenders cannot condescend upon another Captain Gourlay who died aboard the *Howland* at that time.

THE LORDS sustained the affidavits as a presumptive probation, that it was the same Thomas Gourlay who went abroad in the ship the *Cæsar*, and left the legacy, and repelled the defences and decerned; the pursuers finding caution before extracting to refund the principal sum, and annualrents thereof, in case the said Thomas Gourlay should ever appear.

Fol. Dic. v. 2. p. 264. Forbes, p. 458.

. Fountainhall reports this case:

1710. December 21.—THOMAS GOURLAY, portioner of Balchristy in Fife, being bred a seaman, he engages in an East India voyage in 1703, and at his parting, he gives one William Henderson, his landlord, a bond for L 150 Sterling to be paid out of his estate, heritable or moveable in Scotland, bearing he had lodged several months with him, and had been kindly entertained, and

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was now going in a ship called the Cæsar to the East Indies, and obliged his heirs to pay the foresaid sum in case of his decease in the foresaid voyage. Henderson being informed in 1708, that he died near Bengal, or Malabar in the Indies, and finding providentially two of the ship's crew at London, viz. Ambrose Fox carpenter, and Nathaniel Cooper chaplain, he cites them before the Judge of the Kane-sessions at London, who deponed, that one Captain Thomas Gourlay died aboard the ship Howland in September 1707, at the road of Bellisore, near Bengal in the East Indies, and that they saw him die, and Cooper said the prayers when he was thrown overboard into the sea. Upon these affidavits, Henderson raises a pursuit before the Lords against Morton and Smith, the two trustees whom Gourlay left in Scotland as his factors to intromit with his rents; who *objected*, 1^{mo}, that his deed was only a *donatio mortis causa et intuitu*, and so his nearest of kin ought to be called. 2^{do}, The condition was not purified, seeing he died not in his voyage going to the Indies. 3^{tio}, *Non constat* it is the same person, for he went in the Cæsar, and this man died in the Howland, neither do they design him Scotsman, or of Balchristy in Fife, as he is in the writ, and so it may very probably be another man. Besides, they have deponed ultroneously, and so as most suspected ought to be rejected, and the landlords at London elicit such gifts from their lodgers in defraud of their nearest of kin. *Answered*, They opposed the deed, being an act *in vivos*, save only that his death is made the term of payment, which alone will never make it a donation *mortis causa*; likeas, this is *jus tertii* to them, who have his means and effects in their hands. Next, *satis constat de persona*, though he had left the first ship the Cæsar in which he sailed, and by his merit was advanced to be Captain of another ship, and they cannot condescend on any other man who went to the Indies at that time called Thomas Gourlay, and the English are not in use to design men by their lands; and the LORDS had sustained less on the 25th July 1677, French and the Earl of Wemyss, No 551. p. 12644, that a soldier going abroad, his not appearing, nor writing for several years, presumed his death; and the letters of factors and merchants abroad joined with common fame, have been sustained as a presumptive probation of their death; and when one goes to remote places, what better evidence can be got of their death, than the crew that sailed in the ship with him? and if this be not admitted, you shall never prove one going such far voyages to be dead, the nature and circumstances of the thing allowing no other possible way of probation. And the affidavits cannot be called ultroneous, being taken by a competent Judge, signing them with the witnesses; and it was a singular piece of providence that so distinct a proof was got. Some moved to re-examine them, if a Scotsman, or born in Fife; but it was *answered*, They were gone back again to the Indies. Others would have had a commission to the English East India Company, to know what proof they required in such cases, but it was told that the Lords never directed commissions but to a court of record. It was remembered, that within these few years Isabel Hogg pursuing Home of

Whitfield, No 553. p. 12645, on such affidavits, the LORDS did not regard them, but renewed the commission, but that was to prove a marriage celebrated at London, which was an easy case to this. THE LORDS at last agreed to find that the affidavits made a presumptive probation of his death, but ordained Henderson the pursuer to find caution to restore, in case it should afterwards appear he was alive, or that it was another man. Some started that it was hard to lay him under a perpetual caution, but that it might expire if nothing appeared after seven years; but the LORDS would not restrict to any time.

Fol. Dic. v. 2. p. 264. Fountainhall, v. 2. p. 611.

S E C T. III.

Forgery.—Bribery.

1541. *March 14.* JANET SCOT *against* ROBERT BLAIR.

No 556.

GIF twa witnessis be insert in ane instrument under the note and subscription of a Notar-publict, and ane of thame passis fra the samin, albeit the uther witness, with the Notar, affirm the samin to be of veritie, nevertheles the said instrument sall mak na faith; because in all publict instrumentis, at the leist twa witnessis, with the Notar, ar necessarlie requirit.

Fol. Dic. v. 2. p. 264. Balfour, (OF IMPROBATION.) No 13. p. 384.

* * Sinclair reports this case :

IN Janet Scot's cause against Mr Robert Blair, the instrument produced by Mr Robert Blair bearing, that the resignation of two chalders of victual, alleged pertaining to him in heritage, and that pertained to umquhile Robert Down, was made in the Laird of Tullibardine's hands, superior thereof, by virtue of two procuratories of the said Robert Down, one in paper, and the other in parchment, *sub forma instrumenti publici*, was decerned by the Lords improved sufficiently, because there were but two witnesses therein inserted, and one of them deponed that the said resignation was made by the procuratory in paper, and that he saw the same, and that there was no other procuratory then shown in parchment; and so he was direct contrary to the instrument. The other witness was conform, except he said there was no procuratory in parchment then shown, as he remembered; and because *ad substantiam instrumenti publici requiruntur ad minus duo testes, cum notario; et sic uno eorum contradicente instrumentum directe, manet instrumentum sine solennitate illa testium substantiale, et non remanebat justa probatio; ideo, non valet instrumentum.*

Sinclair, MS. p. 17.