

1630. February 11. Ross against ELLIOT of Stobbs.

No 162.

IN an action of pointing of the ground, for a yearly ground rent of 400 merks, at the instance of James Ross, the defence against his sasine being that it was null, being base and not clad with possession, against him who was infest publicly, and a singular successor to the author of the pursuer's right; this exception being elided by a *reply*. That the pursuer was in possession of receiving of the annualrent foresaid, conform to his sasine, which supplied the baseness of the right; and this reply being admitted at the term of probation, the LORDS found, That this possession might be proved by witnesses, for albeit it tended to burden the land with that annualrent, which, the defender *alleged*, could not be done by witnesses, yet it was repelled, seeing it tended to corroborate the right, which was constituted by writ.

Act. *Belshes.*

Alt. ———.

Clerk, *Gibson.*

Fol. Dic. v. 4. p. 225. Durie, p. 491.

1671. December 13. MOFFAT against PHIN.

No 163.

MATTHEW MOFFAT, as executor dative to William Moffat, pursues Mr George Phin, to make payment of L. 150, which William Moffat had upon him the time of his death, and was intromitted with by Mr George Phin; who *alleged*, that the defunct being a beggar, and none of his relations known, and dying at St Lawrence, where the defender was minister, he represented the case to the Usurper's Council of State, who gave warrant to intromit with the beggar's money, and to bestow it upon the poor of the parish, which he did accordingly, and that the pursuer can shew no contingency of blood to the defunct; *2do*, He denied the quantity, and being libelled to be above L. 100, the same is not probable by witnesses, not being goods, but a liquid clear sum of money. It was *answered*, That the warrant of no council could take away the right of the defunct, or any representing him, and that it was impetrated by the defender, and so was on his own peril;— and as to the manner of probation, albeit witnesses cannot be admitted to prove the borrowing or delivery by paction, of a sum exceeding L. 100, because it was the fault and negligence of lender, in omitting to take writ, but intromission with the money of a defunct, being unwarrantable by way of paction, or without paction, it is probable by witnesses, where writ uses not, nor could be adhibited.

Witnesses were admitted to prove intromission with a sum of money that was about a defunct at the time of his death.

THE LORDS found the intromission and quantity probable by witnesses, but ordained to pursuer to condescend, and instruct any contingency of blood to the defunct, and if none could instruct relation of blood to him, the money

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would belong to the King, and he would ordain the distribution thereof to the poor.

Fol. Dic. v. 2. p. 225. Stair, v. 2. p. 22.

* * * Gosford reports this case :

IN a pursuit at Moffat's instance against the minister and elders, as intromitters with the species of money, extending to L. 158, which William Moffat had by him when he died, it was *alleged*, That intromission with money above L. 100 was not probable by witnesses, seeing it constituted the defenders debtors. It was *replied*, That albeit by our law, no persons can be constituted debtors, either by paction or promise for a sum above L. 100, yet intromission with the species of money being *factum quod cadit sub sensum* is probable, as is intromission with any other goods or gear. THE LORDS did find the intromission probable by witnesses.

Gosford, MS. p. 212.

No 164.

An heir being served, and possessing by infestment, to continue till a sum was paid, his intromissions were found to extinguish his infestment.

1675. December 2. THOMSON against MOUBRAY and ALEXANDER.

JAMES FRANK having borrowed 3000 merks from James Porteous, gave him an infestment for security thereof, in some tenements in Edinburgh, and having married his daughter, who is his only child, to John Moubray, by contract of marriage with him, he disposed the said tenements and others; and by contract Moubray became obliged to pay all his debts; upon which obligation, Porteous as creditor to Frank incarcerates Moubray, and for obtaining his liberation, he granted a bond of corroboration to Porteous, relating the contract of marriage, and his obligation to pay Frank's debts, with this reservation, that he might impugn the validity of the debt, or that it was not resting unsatisfied, except Porteous's infestment, which he obliged him never to quarrel, till it were satisfied at two terms exprest in the bond. Porteous died in possession of Frank's tenements, and there succeeded to him, one Porteous who is served heir in general, and continued to possess. John Alexander, writer, having apprised Frank's right, pursued a count and reckoning against the apparent heir of the second Porteous, and obtained decret upon probation by witnesses, that James Porteous in his own time was satisfied of the whole sum, except 300 merks, and that his heir had intromitted with more than 3000 merks, and therefore the security was declared satisfied and extinct. James Thomson, one of the clerks of the Exchequer, obtained a gift of bastardy of James Porteous's whole rights, as falling in the King's hands through his bastardy, dying without lawful children, and upon the gift was infest in the tenements of the said James Frank; whereupon he did reduce the service of the said Porteous, as heir to James Porteous, and obtained decret of mails and duties against John Moubray, son-in-law to Frank, who possessed the tene-