

1709. December 20.

ALEXANDER MACKENZIE of Frazerdale *against* Lord ELIBANK and his SISTERS.

No 165.

A bag of money lying by a person at his death, being given up in inventory by one of his two daughters, his executrix, it was found irrelevant for her executor to discharge her of the said money, in a count and reckoning with her sister's representatives, by offering to prove by witnesses, that the said money was, before confirmation, equally divided betwixt the two sisters of consent, and each got her own share.

ALEXANDER MACKENZIE of Frazerdale, as representing Mary Burnet, second daughter to Alexander late Archbishop of St Andrews, who was executrix nominate to her father, pursued a count and reckoning, and exoneration, against the Lord Elibank and his Sisters, as representing Anna Burnet, the Bishop's eldest daughter, their mother; and in order to discharge himself of an article of L. 4866 : 13 : 4 Scots, stated in the inventory as money lying by the Bishop at his death, offered to prove by witnesses, that L. 866 : 13 : 4 thereof, in a separate bag, was at the desire of the defender's mother equally divided betwixt her and her sister the pursuer's mother.

Alleged for the defenders; Their mother's intromission with money is not probable by witnesses.

Replied for the pursuer; This money being a *corpus* lying by the defunct, exposed to the senses of witnesses, intromitting with it is probable *prout de jure*; December 13. 1671, Moffat *contra* Finn, No 163. p. 12369.; February 4. 1671, Wishart *contra* Arthur, No 3. p. 9978.; December 2. 1675, Thomson *contra* Moubray and Alexander, No 164 p. 12370. Albeit witnesses by our law cannot prove the borrowing of money, for that there is more in the contract of *mutuum*, than can be exposed to the view of witnesses, viz. the cause for which the money was delivered.

Duplied for the defender; Probation by witnesses is not receivable, where writ useth to be exhibited: And the decisions adduced concern the extinction of rights of their own nature extinguishable by possession, as apprisings and other redeemable rights, and do not quadrate with the present case, where an executor's representative pretends to take off the effect of inventory given up by herself judically upon oath.

THE LORDS found the division of L. 866 : 13 : 4, lying money betwixt the executrix and Lady Elibank before confirming of the Bishop's testament, is not relevant to be proved by witnesses, to exoner the executrix from counting for the said sum confirmed.

Fol. Dic. v. 2. p. 225. Forbes, p. 368.

* * * Fountainhall reports this case :

I REPORTED my Lord Prestonhall and Frazerdale his son against my Lord Elibank, in the count and reckoning betwixt them for the Archbishop of St Andrews's executry. Frazerdale craved allowance of L. 430 Scots given to my Lord Elibank's mother in this manner; the Ladies, after their father's death, were present at the searching of his cabinet and trunks, where was found L. 4000 Scots of cash in one place, and L. 866 in another; and the two sis-

ters having occasion to take off mournings and other furniture to the burial, they agreed to divide the said L. 866 betwixt them, which was offered to be proved by the witnesses present who counted the money, and gave every one of them their equal half of it. *Answered* for Elibank, That you must count conform to the inventory of the testament given up by yourself; but *ita est*, you have confirmed the L. 866, and if you allowed your sister the half of it, you should have taken a receipt for it, as you have done for other lesser sums, and now, after twenty-four years, to offer a probation by witnesses, were a very dangerous and singular practick. *Replied*, It is confessed, intromission with money, to extinguish a debt proved *scripto*, offered to be instructed by witnesses, is contrary to the principles of law; but here it is two executors and nearest of kin dividing the sum lying beside their father before confirmation, what hinders it to be proved by witnesses? For money is a *corpus*, and intromission is a fact *cadens sub sensu*, and may be as well proved by witnesses as the intromitting with bolls of victual, or other moveable goods, and was so found, 13th December 1671, Moffat *contra* Phin, No 163. p. 12369. where Biggar having died, and nobody to claim his money which was found upon him, about L. 150 Scots, and the minister of the parish taking it for the use of the poor, the LORDS found both the intromission and quantity probable by witnesses. And as to the giving up of the whole in the confirmed testament, it was just and necessary for eviting perjury, the inventory being given up upon oath. THE LORDS, by a plurality of six against five, found the intromission and division of the money in this case not probable by witnesses.

Fountainhall, v. 2. p. 543.

S E C T. VI.

What Proof relevant in an Exhibition of Writs.

1621. December 18. DUNIPACE *against* BUTASKEN.

IN an action of improbation, where litiscontestation was made, by taking a day to produce, the LORDS found an exception relevant to be proved by witnesses, viz. that the writs called for were delivered to the pursuer since litiscontestation.

Fol. Dic. v. 2. p. 226. Kerse, MS. fol. 207.