

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.