

1627. February 20.

BISSET *against* BISSET.

No 28.

Action was sustained at the instance of an universal legatee, against an intromitter with the defunct's effects, the executor being called in the process.

IN an action of Bisset against Bisset, the LORDS sustained the pursuit at the instance of an universal legatar, nominate in the defunct's testament, against the intromitter with the defunct's goods, which were specially acclaimed, as coming under the legacy; and repelled the exception proponed for the said intromitter, whereby he alleged that no action could be sustained against him as intromitter, seeing there were executors confirmed to the defunct before the intending of this pursuit, against whom the legatar had only properly action competent to him, and which executors had only properly action against the intromitters, and not the legatars; for he *alleged*, That albeit of the law, legatars had *rei vindicationem*, yet this is not *vindicatio rei legatæ*, for *vindicatio est corporis alicujus certi*, for the which this pursuit is not made, being for sums of money, which are sought, not *vindicatio*, *sed condictione*. Which allegiance was repelled, seeing in this pursuit, albeit the intromitter was convened to make payment, yet the executor confirmed was also called; and because in this same process, the pursuer desired a contract, made betwixt the executor and intromitter, to be reduced; because thereby they had divided the defunct's goods betwixt them, and so had prejudged the universal legatar, who thereby had the only right thereto. This action for reduction of that contract was not sustained, thereby to elide the strength thereof, that each one of the two parties should not remain obliged to others, conform to the tenor thereof, they being majors the time of the contracting; but the LORDS sustained that part of the summons whereby the pursuer desired it to be declared, that the pursuer, who was a third party, should not be prejudged in his right by any deed done betwixt them.

Act. Nicolson.

Alt. Mowat.

Clerk, Hay.

Fol. Dic. v. 1. p. 274. Durie, p. 279.

1628. December 2.

POOL *against* MORISON.

No 29.

THERE being a *legatum nominis* left, with power to the legatee to pursue for it himself; and the executor not having confirmed, but omitted it; the LORDS found the executor ought to confirm, and add it to the inventory, and make the legatee assignee thereto, or lend his name to pursue for it and that the legatee should have the expense of the pursuit paid him by the executor, out of the first free goods.

Fol. Dic. v. 1. p. 274.

* * See This case by Durie, No 26. p. 3493.