

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.

* * * Spottiswood reports the same case :

No 29.

JOHN POOL convened Christian Morison, relict and executrix of umquhile John Pool in Dumfries, for a legacy left to him by her defunct husband, of 240 franks, and 1200 ells of Galloway cairsie, and 300 sheep skins, as the surplus of an account resting owing to the defunct by certain factors and merchants in Dieppe.—*Alleged*, She being convened as executrix, can be liable no further than the goods contained in the inventory, but the sum and goods libelled were not confirmed in the testament.—*Replied*, That if she had *dolose* omitted to give the goods in inventory, and confirm them, her omission should not prejudice the legatar.—*Duplied*, That she was not holden to give them up in inventory, because it was not only a legacy, but in a manner an assignation, since it bore, 'with power to the legatar to call and convene them who were obliged to the defunct *in bonis legatis*,' so there was no necessity for her to confirm the goods, especially they not being certain by bond or decret.—*Triplied*, That power to call and convene executors, was no other than what the law gave him, by which he had *duplicem actionem*, either against the executor or the debtor. As for the debtor, he had no action competent against him, unless the goods legate had been confirmed; so that of necessity he behoved to take himself to the executor.—THE LORDS, for the reasons alleged, (and because there had intervned 16 years from the death of the testator to the intending of the cause,) found the exception relevant to liberate the executrix, from payment of the legacy craved, the same being added to the testament by her, and thereafter cession and assignation of all action competent to her for the same being made to the legatar, who should pursue therefor upon his own charges, if he pleased.

Spottiswood, (EXECUTORS.) p. 118.

* * * This case is also reported by Auchinleck :

JOHN POOL merchant in Dumfries, leaves in legacy to John Pool in Edinburgh, certain franks, cairsie cloth, and sheep skins, owing to him by some factor in Dieppe, with power to him to pursue for the said legacy. The said John Pool legatar, about 16 years after the defunct's decease, pursues the relict, Christian Morison, executrix-testamentar, for the said legacy.—It was *excepted* for the executrix, That she cannot be holden to make payment of the said legacy, because the said goods left in legacy were not given up in the confirmed testament, but were left out, that John Pool legatar might pursue for them himself, according to the power left to him by the defunct.—THE LORDS ordained the executrix to make assignation of the right competent to her to the said John Pool, that he may pursue for the goods and gear on his own expenses.

Auchinleck, MS. p. 119.