

irritancy committed after the defunct's death, and therefore found that the legatar had right, and found the heir liable to perform.

No 89.

*Fol. Dic. v. 1. p. 371. Stair, v. 2. p. 780.*

1683. November. FORBES against Mr JAMES —.

No 90.

UPON the death of a person who obliged himself, by contract, to dispone an apprising to another, who obliged himself to pay the price to the seller's heirs, executors, and assignees, the buyer pursued the seller's heir to dispone.

*Alleged* for the defender; That he cannot be obliged to dispone unless he get the price.

*Answered*, That the obligation for the price, by the conception of it, belonged not to the heir, but to executors, for whom there was compearance.

THE LORDS found the price, by the conception of the obligation, belonged to executors.

*Fol. Dic. v. 1. p. 371. Harcarse, (EXECUTRY.) No 456. p. 125.*

1704. December 22. CHIESLEY against His SISTERS.

No 91.

THOMAS CHIESLEY, heir to Major Chiesley late of Dalry, against his Sisters, executors to the said Major. Major Chiesley enters into a minute of agreement with Sir Alexander Brand, whereby he obliges himself to sell and dispone to him his lands of Dalry, being 48 chalders of victual; and Sir Alexander, on the other part, obliges himself to pay the price, being 3000 merks for each chalder, to the said Major, his heirs and assignees. Sir Alexander, having charged Thomas Chiesley, as heir to his brother, to dispone and denude; he *answers*, He cannot be forced to dispone till he get the remaining part of the price unlifted by his brother paid to him. *Replied* by Sir Alexander, Your Sisters, as executors to the Major, likewise claim it, and you must debate the competition; which resolved in this single point, Whether the price in this case was heritable, so as to fall to Thomas the heir; or moveable, so as to belong to the Sisters, as the Major's executors? It was *contended* for the heir, That though the price of lands, either in lying money, or due by a simple moveable bond, will belong to the executor, because in either of these cases the party to whom the price is due has declared his intention; as also if lands be sold by a perfect and complete disposition, containing procuratories and precepts of sasine, whereon the buyer may be instantly infeft, and an obligation for the price, though the seller's heir be liable in warrandice, yet he will have no claim to the price, but by the presumed will of the party it will fall to his executor; there is as little doubt, if an heritable security be taken for the price, either

A party who entered into a minute of sale, obliging himself to dispone lands, after uplifting part of the price, died intestate. Found that the price, yet lying in the purchaser's hands, was moveable, though the defunct had not granted a disposition of the lands.

No 91.

bearing an obligation to infest, or excluding executors, that in either of these cases the price will belong to the heir; and sicklike, where there is no actual present disposition, but only an obligation to dispoſe and make a right, and 'for the 'which cause' the buyer is to pay the price; if the seller die before perfecting the right, his heir, who only can perfect it, must also have the price, seeing, *in dubio*, he is presumed to prefer his heir more than his executors; otherwise he exposes his heir to ruin, who by serving becomes liable to all the debts, and yet gets not the price; and natural equity says, he who makes the right should get the price, it being only due *sub conditione* if the lands be disposed. *Answered* for the executors, That the distinction betwixt an obligation to dispoſe and actual disposing was too nice, for they are equiparate in law; and it is no strange thing that executors may obtain the price, and yet compel the heir to enter and implement, to the effect they may get the price; and though money consigned for redemption of a wadset remains heritable aye till declarator, yet there is no parity in the price of lands; for the debtor's consigning ought not to alter the creditor's succession; but if the wadsetter use requisition, then it is certainly moveable, though the heir must give the renunciation; both of them appealed to Lord Dirleton, in his Doubts and Questions, *voce* HEIR AND EXECUTOR. THE LORDS, by a narrow plurality, found the price of Dalry, yet lying in Sir Alexander Brand's hands, moveable, and due to the executors. See M'Intosh and Somerville against Primrose, No 16. p. 5087. where the price of land was found moveable, affectable by arrestment, to fall under single escheat, and not to be subject to inhibition. Some urged, *quid impedit* but the purchaser and the heir of the seller may agree betwixt themselves to cancel the minute? but there being a *jus quæsitum* to the executors, no such agreement as was contended, could prejudice them. But in the case where the price is found moveable, the heir must be kept *indemnitas*, and refunded of all the expense he is put to by serving heir, conveying and disposing the lands, or any debts he is by his service exposed to, whereof the executors who get the price ought to relieve him.

*Fol. Dic. v. 1. p. 371. Fountainhall, v. 2. p. 250.*

1714. July 7.

THOMAS KER, Goldsmith in Edinburgh, *against* JANET SCHAW, Relict of Mr James M'Micken, Minister of the Gospel at Hownam, and PATRICK HOME, of Fulshotlaw, now her Husband, for his interest.

No 92.

The Lords found the executor liable for the price of a

THOMAS KER and the deceased Mr James M'Micken having entered into a minute of sale, whereby Thomas sold to him a dwelling-house in the Parliament Close, and obliged himself to deliver to him, his heirs and assignees, an extended disposition betwixt and Whitsunday then next to come 1712, and Mr James obliged him, his heirs and successors, to pay to Thomas, his heirs or