

## S E C T. XVI.

## Price of Heritable Subjects.

1628. February 7. HUME *against* L. RENTON.

IN an action betwixt Hume and L. Renton, wherein the pursuer, as executor confirmed to his father, pursues for payment of the sum of 1000 merks, for the price of some land sold by the pursuer's father to the defender's father, with the yearly annualrent thereof since the pursuer's decease; which pursuit, both for principal and annualrent, the LORDS sustained at the instance of the executor; albeit it was alleged, that if any annualrent should be paid, it was only competent to be sought by the heir of the defunct, and not by the executor, who could not have right to seek annualrent, but only the principal sum; and also alleged, that neither heir nor executor could seek annualrent for that sum, seeing by the contract the defunct was only obliged to pay the principal, and was not obliged in any annualrent; which allegiances were repelled, for the LORDS found, seeing the defender possessed the land, he ought also to pay the annualrent for the price thereof, so long as he retained it unpaid; and seeing the executor had right to the principal, the LORDS found, that no other could have right to the annualrent thereof, but that it was due to him.

Act. —.

Alt. *Belsbes.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 371. Durie, p. 340.*1680. July 7. WAUGH *against* JAMIESON and LERMONT.

EUPHEMIA MONEYPENNY being infest in an annualrent in the estate of Balmorie, she disposed the same to Mr John Smith, her husband, who was never infest. After his death, she and Mr John Smith, who was heir retoured to Mr John his father, entered in a contract with Mr Robert Lermont, whereby they disposed to him this annualrent, and he is obliged to pay therefor 4000 merks. Mr John, by his testament, leaves a legacy to Thomas Waugh's daughter, which being assigned to her father, he pursues Mr Robert Lermont for payment of the sum contained in the contract. Dr Jamieson having caused adjudge this annualrent from himself as apparent heir to Mr John Smith elder and younger, and having obtained right to the adjudication, compares for his interest, and *alleges* that the annualrent belongs to him, and in place thereof, the sum due by Mr Robert Lermont; and it cannot belong to an executor or legatar, be-

## No 88.

A bond given for the price of lands, falls to the executor; and the annualrent which the Lords allow therefor, tho' not expressly stipulated, belongs also to him, and not to the heir.

## No 89.

A party sold an infestment of annualrent, and the minute of sale contained a clause, that upon not payment of the annualrent for two years, the contract should be void. The price was found to belong to the seller's executor, and

No 89.  
 also that the  
 infestment of  
 annualrent  
 would return  
 to him, and  
 not to the  
 heir, in case  
 the irritancy  
 should be in-  
 curred after  
 the disponent's  
 death; for  
 heritable and  
 moveable are  
 considered as  
 after the dis-  
 ponent's death,  
 and no pos-  
 terior alter-  
 ation of cir-  
 cumstances  
 has any in-  
 fluence.

cause none can have right thereto but he who can renounce the annualrent, which is only the heir, or adjudger from him. *2d*, Albeit where heritable rights are disposed for liquid sums, moveably conceived, the executor may have right to the sums, though the heir must perform the disponent's part; yet here the contract with Mr Robert Lermont was no perfected contract, but depositated; or at least the contract bears a clause, 'That the rights of the annualrent should be put in the clerk's hands, to be depositated in the hands of ———, not to be given up to Mr Robert till he had paid the price; and in case he failed to pay the annualrent in the space of two years, the contract should be null, and the writs delivered back to the disponents;' whence there arise two defences, *1mo*, That the rights were but depositated, and so the contract was not perfect, but pendent and conditional till the price was paid; *2d*, Though the contract was once complete, it is become void by the resolute clause, by not payment of the annualrent for two years.—It was answered for Waugh, That this contract was delivered, and never depositated; and though it bear, That the original writs should be depositated till payment was made; yet that makes not the contract imperfect or pendent, seeing it bears not that if the price be not paid against such a day, the bargain should not proceed, or any suspensive clause, but only a resolute clause, upon not payment of the annualrent, which cannot be pretended to have been committed before the disponent's death; and though it were committed after, it cannot return the right to the disponent's heir, and dissolve the contract, because at the defunct's death the right was entire unresolved, and so did make the price belong to his executor, after which the heir hath no interest, and cannot found upon a subsequent incurring of irritancy, seeing the executor might have uplifted and discharged the sums before that failure; and no contract is annulled by an irritancy committed simply, but only in case the party in whose favour it is conceived is pleased to make use of it; which here the executor doth not, and will not suffer the heir to do it, seeing it was not committed before the defunct's death.

THE LORDS at first, when this cause was reported, having considered the case, as if the contract betwixt Smith and Lermont had borne a clause that the contract itself, and the ancient rights were both depositated, found that the depositation made the contract imperfect and pendent, and that the heir was not obliged to fulfil it, but that he might return to his right of the annualrent, and exclude the executor and legatar. But now having heard the cause in their own presence, and considered the contract before extracting, they found, That the contract itself was delivered and not depositated, but only the first contract constituting the annualrent, was to be depositated as a pledge for the price, but neither the disponent nor his heir could resile from the bargain; and found that the contract not having become null upon the irritancy committed before the disponent's death, the price belonged to the disponent's executor and legatar, and would not return to the heir, nor the right disposed by any

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.

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 unuplifted 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

No 91.

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.