

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.