No 91. bearing an obligement to infeft, 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 obligement to dispone 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 disponed. *Answered* for the executors, That the distinction betwixt an obligement to dispone and actual disponing 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 prejudge them. But in the case where the price is found moveable, the heir must be kept *indemnis*, and refunded of all the expense he is put to by serving heir, conveying and disponing 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

No 92.
house sold to the defunct, conform to a minute of sale unperfected, tho' the heir might claim the disposition to the house to be extended in his favour.

assignees, the sum of 4000 merks as the price: Mr James died before the said term of Whitsunday; whereupon Thomas Ker raised a process against the said Janet Schaw his relict, and Patrick Home, her present husband for his interest, for payment of the price, as representing the defunct, upon this ground, that she, the said Janet Schaw, had, after the minute of sale, accepted of a general disposition from him for love and favour, of all goods, gear, houshold plenishing, debts, sums, and others whatsoever pertaining to him, with a special assignation to several debts, by virtue whereof she *de facto* had put to her hand and intromitted, in regard the pursuer had consigned a formal disposition of the house, with absolute warrandice, and all clauses necessary, to be given up to the heir, who is called *pro interesse* in this process, that he might see the disposition is rightly done, and take it up, which is implement of the minute upon the pursuer's part.

Alleged for Janet Schaw, 1*mo*, Her acceptance of the foresaid disposition from her husband, could not make her liable for his debt, the same not being granted with the burden of debt, though it might be reduced upon the act 18th Parliament 1621, as in prejudice of the granter's creditors; seeing a man's being owing some debt cannot otherwise have the effect of an inhibition, to hinder a friend from accepting a donative from him without danger of incurring a passive title. 2*do*, Suppose she were liable to make the subject of the disposition furthcoming to any creditor, yet the same being only moveable, could not be affected with the pursuer's debt; because that ariseth only from the performance or offer to perform a deed to be granted in favour of the heir, who, therefore can only be liable for the debt thence arising, viz. the price of the house disponed, or offered to be disponed to him.

Answered for the pursuer, 1*mo*, By the minute, the defunct's heirs and successors being obliged to pay the price, the representatives, whether heirs, executors, or others, whom the law reckons such, as having a gratuitous disposition *omnium bonorum*, are liable in the option of the creditor; and the disposition *omnium bonorum* states the relict in the same case as if she had been executrix, the same being of a testamentary nature, which she could not enjoy without paying the debts; for there is a great difference betwixt this universal conveyance, which being *donatio mortis causa*, of a testamentary nature, subjects the user to debts at least *in valorem*, and a special right which might more properly afford reduction upon the act of Parliament 1621, if in the terms thereof prejudicial to anterior creditors. 2*do*, The obligement to pay the price is a proper debt, upon the executry, whereof the heir might crave relief, and at the same time take the benefit of the sale, and seek the disposition to be extended in his favour. For, as in the case of Major Chiesley, No 91. p. 5531. the price was found to belong to the executors of the deceased seller, though the heir was bound to implement and dispone; so *a paritate*, executors of a defunct purchaser are bound to pay the price, as was decided Baillie *contra* Henderson, No 14. p. 3564. So that Janet Schaw is the proper person to have been called in this process.

No 92.

THE LORDS repelled the defences proponed for Janet Schaw, and found her liable, *in valorem*, of the subject disponed to her by Mr. M'Micken her first husband.

Fol. Dic. v. 1. *p.* 372. *Forbes, MS. p.* 75.

No 93.

1737. *November* 11. SMITH *against* SMITH.

A DEBTOR *oberatus* having disponed his estate to certain trustees for the use and behoof of his creditors, with power to them to sell and dispose upon the same, and to divide the price among the creditors; the trustees accordingly entered upon the management with consent of the whole creditors, were infeft, and found a purchaser for the lands. After the purchaser was infeft, but before the price was distributed, one of the creditors dying, the question occurred betwixt the heir and executor, which of them had right to his debt, which was a personal bond bearing interest. It was doubted whether infeftment granted to trustees, though accepted of by the creditors, had the same operation as if granted to the creditors directly. But the LORDS took it upon a ground less disputable: They found the price moveable, the same having been with the creditor's consent; after which there remained nothing but a personal obligation upon the purchaser to pay the price in the same manner as if the estate had been disponed directly to the creditors, and they had sold the same. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 372.

1796. *December* 14.

ROBERT HENDERSON *against* WILLIAM STEWART and THOMAS HENDERSON.

No 94.
The production of a personal ground of debt, in a ranking and sale, does not make the debt heritable, nor liable to be affected by an inhibition.

IN the ranking of Thornywhat and Castlemains, John Ferguson, a personal creditor, produced his grounds of debt, and was ranked accordingly in the scheme of division.

After the estate was sold, but before the price was paid by the purchaser, or a decree of ranking pronounced, Robert Henderson, one of Ferguson's creditors, executed an inhibition against him, and also an arrestment in the hands of the purchaser, upon the idea of his being debtor to Ferguson.

Ferguson afterwards assigned his grounds of debt and interest in the price of Thornywhat and Castlemains, to William Stewart and Thomas Henderson, two of his creditors, who led an adjudication in his right; and a multiplepoinding having been raised in name of the purchaser, in order to ascertain the interests of Ferguson's creditors, the Lord Ordinary preferred the assignees. Upon advising a reclaiming petition, the Court adhered to his interlocutor, in