

S A L E.

DIVISION I.

Sale of Heritage.

SECT. I.

Price conferred *in arbitrium*.—Sale of heritage when completed.—Where the buyer's faith is followed.

1639. March 13.

E. MONTROSE *against* SCOT.

THE E. of Montrose being in sundry conferences with James Scot, burgess in Montrose, for buying of a house in Montrose from the said James; at length, by a ticket subscribed to the said James, he refers the price of the land to the Earl's own appointing, who, according thereto, having determined a price therefor, and offering the same, he thereafter pursues the said James for disposing of the same heritably to him; and the other *excepting*, That his determination of the price, flowing from the party-buyer upon his alleged reference, committed to the Earl by the seller, ought not to bind him to that bargain, as if it were perfected; seeing it is lawful to him, and permissible of law, to resile from that reference and bargain before the alienation was perfected; and it is against law, and expressly prohibited in law, that any should be arbiter *in re sua*, as L. Pen. D. De receptis, &c. et L. Quod sæpe § Illud D. De contrahenda emptione: Dicit venditionem non valere quando quantitas pretii confertur in voluntatem, vel arbitrium emptoris. This allegiance was repelled,

No 1.

The price was referred to the buyer himself. He having determined it, the sale was found good.

No 1. and the price determined by the buyer, upon this reference made to him by the seller, was allowed as good, and found not disagreeable to the laws and practice of this kingdom.

Act. *Advocatus & Mowat.* Alt. *Nicolson & Sandilands.* Clerk, *Gibson.*
Fol. Dic. v. 2. p. 356. Durie, p. 883.

1758. August. DAVID BAIRD against JOHN JAP and his CREDITORS.

No 2.

A seller preferred to the creditors of the buyer, where he retained the disposition of the subject for security of the price.

IN November 1755, John Jap purchased from David Baird a house in Prestonpans, at the price of L. 115 Sterling. Jap granted bond for the price, and immediately entered to the possession of the house. But Baird retained possession of the disposition and writings, and only delivered to Jap an inventory, with a doquet, bearing, That it was an inventory of the progress of the house in Prestonpans, sold by him to Jap; and at the same time delivered a letter, reciting the bargain, and obliging himself to deliver up the progress and disposition upon Jap's making payment to him of the price for which he had granted bond.

Baird received payment of some annualrents upon the bond; and Jap's affairs having gone into disorder, Baird brought an action against him, to have it found and declared, That he ought either to pay up the price, or give up the possession of the house, and pay rent for the time he had enjoyed it, upon getting allowance of what he had paid of annualrents upon the bond.

Jap and his Creditors *insisted*, That this sale was completed, and could not be reduced for not payment of the price; for that here Jap's bond was taken for the money, and he immediately let into possession, and a disposition actually signed in his favour, and annualrent received upon his bond. Nor could it have any effect, that the disposition was retained as a security for the price. This could not afford any real lien on the subject, nor prevent the bargain from having its full effect.

Answered; 1st, Jap himself cannot keep possession of the house while he refuses to make payment of the price; and therefore Baird must prevail in his declarator in a question with him. 2dly, With respect to the Creditors of Jap, it is a principle of law, That, in a sale, the property is not transferred donec pretium solvatur, vel fides habita sit de pretio. In this case, the price was neither paid, nor did Baird rely for it upon the security of Jap; but, on the contrary, retained the disposition, and also the rights of the subject, as a farther security. This was a condition suspensive of the sale, which either prevented the property from being transferred, or was sufficient to resolve the contract upon failure; and though he had received not only annualrents on the bond, but the greatest part of the price; yet the conditions could not be fulfilled without payment of the whole.