

1741. July 10.

Captain JOHN GAIRDNER of Northtary, *against* BROWN of Cairnton and COLVIL of Burnton.

No 10.

WHERE an arbiter had decerned for a penalty besides performance, without warrant in the submission, the decret-arbitral was found only so far null.

*Fol. Dic. v. 3. p. 35. Kilkerran, (ARBITRATION.) No 4. p. 34.*

1778. January 17. EARL of SELKIRK *against* ROBERT NASMITH.

No 11.

ROBERT NASMITH, proprietor of the lands of Glenlee, agreed to dispose of these lands to the Earl of Selkirk.

A reference of the price, in a contract of sale, to arbiters, found to be binding on the heirs of the referer.

The terms of the bargain were evinced by the missives of both parties. It was established, That they had agreed to refer the price to two arbiters, one to be chosen by each: That payments had been made by Lord Selkirk, to account of the price: That afterwards, the arbiters had been named and accepted. But, before the arbiters had fixed on the price, Nasmith died.

Lord Selkirk brought a declarator against Robert Nasmith, heir apparent of the defunct, for having it found that this was a concluded bargain. Robert Nasmith renounced to be heir. But James Nasmith having adjudged the lands, as creditor to the defunct, appeared as a party in the declarator; and insisted that there was no concluded sale of the subject to Lord Selkirk; and, therefore, that it was carried by his decret of adjudication. In the course of the process, a price for the subject was fixed on by the arbiters, in consequence of a remit from the Court. On the merits,

*Pleaded* for the adjudger: It is essential to the contract of sale, that the price be fixed; without which, the contract, though parties are agreed in other respects, is not concluded; § 1. *Inst. de Emp. Vend.* Bankton, v. 1. p. 408. § 3. In the bargain betwixt Lord Selkirk and Nasmith, for the sale of these lands, the price was not fixed by the parties: It was only referred to arbiters. Nasmith having died before the arbiters had fixed the price, the arbiters had no power to name any price thereafter, as submissions fall by the death of any of the referers, unless heirs are specially mentioned; l. 27. § 1. and l. 49. § 2. *de Rec. Arb.*; Bankton, v. 1. p. 455; Erskine, p. 697. There was, therefore, no concluded sale.

*Answered*: While the price is only matter of communing betwixt the parties, the contract of sale is not concluded. But, when the parties are fixed by mutual agreement, it makes no difference whether they agree to specify a particular sum as the price, or name certain persons to specify the sum. After fixing on such persons, the parties can no more go back on the price, than if they had fixed on the price itself. Accordingly, in law, that price is said to be certain which is referred to certain persons; § 1. *Inst. de Emp. Vend. l. ult. c. de Contrab. emp.*