

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.

And, at any rate, the Creditors of Jap, who have not affected this subject by legal diligence, have no title to oppose this declarator. If they had a title, they could only proceed by calling Baird in an action for delivery of the writings; which he would be entitled to refuse till payment of the price for security of which he retained them; and this is exactly what Baird now insists for.

"THE LORDS found, That Baird, in respect he never delivered the disposition, is entitled to the house, or to the price."

Reporter, *Lord Nisbet.*

Act. Nairne.

Alt. Hew Dalrymple.

W. J.

Fol. Dic. v. 4. p. 248. Fac. Col. No 133. p. 246.

1767. June 13.

BLACKLOCK against HERON and Others, Tutors of ALEXANDER GOLDIE.

ROBERT BLACKLOCK purchased the lands of Over Clifton from Alexander Kincaid, and paid a part of the price; but, refusing to pay up the balance, upon account of incumbrances not purged, was charged for payment, and obtained a suspension.

During the dependence of the process, Blacklock disposed the lands to Mr Goldie his agent, upon the narrative of a certain sum of money paid, and under a declaration that he should, by his acceptance of the disposition, become bound to relieve him of the price. At the same time, Mr Goldie granted bond for the part of the price already paid by Blacklock, obliging himself to relieve him of the balance; and this bond, notwithstanding the narrative of the disposition, is declared to be the value given for it.

Some time after, Mr Goldie was cognosced lunatic; and a ranking and sale of his estate having been raised, Blacklock, who was pushed by Kincaid for the balance of the price, brought an action against Mr Goldie's tutors-dative, concluding, that the conditions of the bond and disposition should be implemented, or that the lands should be restored.

Argued for the pursuer; Though a *bona fide* purchaser from Mr Goldie would not have been liable to this ground of challenge, the present case is different where Mr Goldie himself is the party, and where the question is, Whether he can hold the subject without implementing his part of the transaction? The negative is implied in all mutual contracts. Where one party fails to implement, the other may either insist for damages, or bring a declarator to have the contract annulled; 13th July 1670, Raith *contra* Wolmet, No 21. p. 9154; 20th July 1675, Maitland *contra* Ld Gight, No 22. p. 9158.

In the case of excambion, if the one parcel of lands be evicted, the party suffering the eviction has regress to his own original lands; and the same principles apply to a contract of sale. Indeed, it has been found, that, where the

No 2.

No 3.

Where the buyer's faith is followed, the sale is good, altho' the price has not been paid.