No 2.

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.

No 3.
Where the buyer's faith is followed, the sale is good, altho' the price has not been paid.

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 disponed 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 3. disponer becomes insolvent, process lies for stopping his infeftment, and drawing back the disposition; December 1721, Selkrig *contra* Selkrig, No 28. p. 9167.

Answered; Where the sale remains *in nudis finibus contractus*, there is no more than a personal obligation; and neither party can demand implement, unless he be ready and able to give it. But here the transaction did not remain upon the footing of a minute of sale. The lands were delivered on the one hand, and the price secured on the other: And this is equivalent to payment; "si is qui vendidit fidem emptoris sequutus fuerit, dicendum est, statim rem emptoris fieri," § 41. Inst. De R. D. Indeed, the *pactum legis commissoriæ* was introduced for the very purpose of preventing the immediate transference of property upon delivery; and, since no paction intervened in the present case, the seller must be understood to have betaken himself to the personal security of the purchaser.

Excambion stands upon different principles from sale. Each party is *debitor speciei*, and the contract is not completed without an effectual transference upon both sides, which cannot take place, if one of the parties was not the real proprietor of the species which he took upon him to convey. But, in sales, the seller only is *debitor speciei*, and the purchaser is *debitor nominis;* there is no *ipsum corpus* to be delivered by him; and, therefore, his obligation may be satisfied by equivalents, by giving security, as well as by actual payment.

"The Lords repelled the reasons of reduction, and assoilzied."

Act. *Macqueen.* Alt. *Crosbie.*

G. F. *Fol. Dic. v. 4. p. 248.* *Fac. Col. No 55. p. 290.*

1778. *January* 17. Earl of Selkirk *against* Nasmith.

No 4.

A reference of the price in a contract of sale to arbiters was found to be binding on the heirs of the referee, and to be sufficient evidence of the bargain.

Fac. Col.

*** This case is No 11. p. 627. *voce* Arbitration.