

No 15.

James for re-delivery thereof, and refers the summons, being of this tenor above written, to his oath. This summons was not found relevant by the LORDS, notwithstanding of the whole particular circumstances and points above written therein contained, seeing it was not libelled therein, that the foresaid letter of alienation was either delivered to the pursuer's self, or to the said Mr Francis Hay, to be delivered by him to the pursuer; albeit it bore, that the bond was subscribed by the defender, and delivered to the writer, to the behoof of the pursuer, and to form charters thereupon in his favours, and thereafter borrowed out to confer with the charters, upon promise to render the same back again. And albeit the summons bore promise made by the defender diverse times since, to re-deliver the same and to fulfil it, yet all this was not relevant, except the same bore the bond to have become the pursuer's evident, by delivery thereof to himself, or to some other to be delivered to him; which not being libelled, nor yet replied, the LORDS found, that the defender might resile from the bargain, and that he was not obliged to stand to the same, seeing it was not perfected by tradition, as was necessary to the perfection thereof, and the promise since to perfect was sicklike not obligatory, seeing the defender had place to repent; for as the pursuer might upon his part resile from the bargain if he pleased, there being nothing extant which could compel him to pay the price thereof, seeing the letter of alienation granted the receipt of the money and price thereof from the pursuer, albeit in effect the same was not paid, but granted paid on trust, so the like liberty ought to be permitted to the defender to resile. This is conform to the civil law, where *licet pœnitere, nec est emptio ante confectionem scripturæ, ubi in scriptis facienda est*, yet it appears, that if the money had been delivered, *non erat locus pœnitentiæ*. See PROOF.—WRIT.

Act. — — .

Alt. *Hope et Belshes.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 561. Durie, p. 247.*

No 16.

1627. *February 9.*M'DUFF *against* M'CULLOCH.

IN a suspension betwixt M'Duff *contra* M'Culloch, against a contract registered in the books of an inferior Judge, by the consent of a procurator, for one of the parties contractors, the other party neither having subscribed the contract, nor yet being registered for him;—the LORDS nevertheless sustained the registration, and charges raised against him, for whom consent was given, the other party comparing instantly in this judgment before the Lords, and subscribing the contract, and consenting that execution be granted against him, sicklike as if it had been also registered against him *ab initio*.

Act. *Nicolson.*Alt. *Belshes.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 561. Durie, p. 270.*