

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.*

No 11. It is of no consequence, therefore, that the price was not named, in this case, by the arbiters, till after the death of one of the parties. The contract of sale was concluded by the nomination of these arbiters.

The authorities brought to shew, that submissions, are not binding on the heirs of the submitters, apply only to submissions, as separate deeds, unconnected with any other contract or transaction implying an obligation on heirs. But a reference, such as the present, is part of the contract of sale, and must go along with it. From the moment that contract is concluded, it is binding on the heirs of the contractors; and the parties having in view a transaction that is to affect their heirs, cannot be supposed to intend that these heirs should not be equally obliged to submit to this reference of the price, as to every other part of the contract.

The Court were of opinion, That the reference was binding on the heir, and that he was obliged to admit the price fixed on by the arbiters after the death of the referrer; therefore, found 'That there was sufficient evidence of a completed bargain.' (See SALE.)

Act. *Crosbie.*

Alt. *Craig.*

*Fol. Dic. v. 3. p. 36. Fac. Col. No 4. p. 9.*

1794. February 4.

WILLIAM WODDROP *against* JOHN FINLAY.

No 12.

Arbiters cannot be examined, in order to explain the meaning of an ambiguous expression in their decrees-arbitral. See No 3. p. 624.

JOHN FINLAY possessed a farm on a lease, in which it was stipulated, that he should lay a certain quantity of manure on the lands each year of his possession, and that the proprietor might remove him at any period of the lease, on giving him a year's premonition, and paying him 'for what manure he shall recently have laid on the said lands, in so far as he shall not have got the just benefit of it at his removal;' and that the sum to be allowed him on that account, should be ascertained by arbiters mutually chosen.

William Woddrop, the proprietor, having warned Finlay to remove, in terms of the lease, arbiters were named to fix the amount of his claim.

Finlay produced a claim not only for manure, but for other improvements on the farm, such as straightening ridges, summer fallowing, &c. for which no allowance was stipulated in the lease.

The arbiters, by their decree, modified to him a certain sum 'for meliorations made on the said farm, and manure laid thereon,' of which he had not got the full benefit at his removal.

In a suspension and reduction of this decree, as *ultra vires* of the arbiters, brought by Woddrop, he contended that they had taken into their consideration the other meliorations claimed by Finlay, besides the manure, for which alone he was entitled to deduction.

Finlay, on the other hand, asserted, that the arbiters meant only to give him an allowance for the meliorations occasioned by the manure; and craved that they might be examined, in order to ascertain this fact.