

## DIVISION II.

## Sale of Moveables.

## SECT. I.

Sale, when completed.—Price not stipulated.—Where the Buyer's faith is followed.

1710. *January 10.*

DANIEL HAMILTON, Clerk to the High Court of Admiralty, *against* CHARLES GORDON, Writer in Aberdeen.

THERE being a warrant and commission granted by the High Court of Admiralty, for rousing, at Aberdeen, the sixteenth part of a ship belonging to Alexander Forbes of Craigie; and it being an article of the roup, that the highest offerer should be preferred, he giving furthwith bond and caution to pay the price offered, to Daniel Hamilton, clerk of the High Court of Admiralty, within twenty days after the roup, under the penalty of L. 200; and in case of his failing so to do, the immediate preceding offerer to be preferred, he always under the like penalty, granting bond and caution as above; Charles Gordon, who was preferred as highest offerer at the roup, shifting to give bond and caution in the terms of the article, Daniel Hamilton, in whose hands the price was appointed to be consigned, pursued Mr Gordon for payment thereof, and of the L. 200 of penalty; and offered to prove by his oath, that he was preferred as the highest bidder.

*Alleged* for the defender; Since he did not sign the offer, which is necessary to be done in all venditions of ships, there was *locus pœnitentiæ*, and he did resile.

*Replied* for the pursuer; *1mo*, There can be no *locus pœnitentiæ*, because, *1st*, Ships being *inter mobilia*, are often transmitted by verbal sale, and naked induction into possession, without writ; and even when the articles of roup are thought fit to be signed, that is ordinarily done when the roup is over, and the highest bidder takes instruments upon his being preferred; *2d*, It was the defender's own fault that he did not obtemper the article by giving bond and caution in the terms thereof; and it is absurd to let him go free from paying the price, when by interposing his offer, he debarred others who might have stood to the bargain; especially considering, that such an indulgence would render all roups elusory; *3d*, The article of roup obliging the

No 32.

Where an offerer at public auction for a ship, had not subscribed his offer, it was found he might resile, but would be liable for damages.

No 32.

person preferred to give bond and caution for the price under the pain of L. 200, being read immediately before the roup, the defender by his offering became bound in the terms of the article, *ex quasi contractu*; 4to, *et seperatim*, Albeit there were place for the defender to resile, he must be liable for the L. 200 of penalty; for in the civil law, *stipulatio inutilis* is effectual *quoad pœnam*, though not for performance of the obligation; and the LORDS have so decided, July 15. 1637, Skene *contra* ———, No 10. p. 8410.

*Duplied* for the defender; The loss of the benefit of the highest offer is all the penalty adjected by the above article of roup to the not abiding by the offer; whereas he only who adheres to it, grants bond for the price, and fails to make punctual payment, is liable for the penalty of L. 200; and if those concerned in the roup suffer any prejudice through the defender's using the privilege of resiling competent to him by law, the blame must lie upon the clerk of roup, who might have prevented it by taking hold of the immediate preceding offer. Again, if the highest offerer should incur the penalty for resiling, the next immediate offerer resiling is also liable for the same penalty, and so on to the rest; whereby perhaps a dozen of penalties might be recovered, and the price of the ship also from the 13th offerer; or if none adhered, all should pay penalties, and the ship continue with the owner to be roup'd over again. Yea, designing men might, at this rate, procure great sums by way of penalty for not adhering to offers for a ship, as belonging to a person who perhaps had no right to it.

*Triplid* for the pursuer; It is a mistake to allege, that many penalties would fall due in such a case. For when the highest bidder is put either to hold to his offer or pay the penalty, all the other offerers are *ipso facto* free; and in public roups, several persons cannot be *ejusdem rei emptores in solidum*. And no person should offer at a roup till he is satisfied as to the sufficiency of his right, in whose name the goods are to be exposed to sale.

THE LORDS found, That the defender might resile, and so be free from paying the price. But found it relevant for the pursuer to prove, by the defender's oath, That he was the highest offerer at the roup, to make him liable for the penalty, or so much thereof as the Ordinary should modify.

*Forbes, p. 389.*

1711. June 29.

DANIEL HAMILTON, Clerk of the High Court of Admiralty, *against* ALEXANDER PIPER of Newgrange.

No 33.  
Ship goods  
having been  
inventoried,  
and some  
months after  
roup'd, by

THE goods in the ship called the Happy Amady, that was wrecked near Inverness, having by warrant of the Admiral, been inventoried March 26th, and roup'd and sold the first of September 1702, to William Simpson, merchant in Aberdeen, the highest offerer, who conveyed his right to Alexan-