"THE LORDS repelled the defences, and decerned in the removing," No 29.

Lord Reporter, *Monboddo.* Act. *Blair.* Alt. *H. Erskine.* Clerk, *Home.*

C. *Fac. Col. No 207. p. 324.*

1787. *February* 10. ALEXANDER WALKER *against* JAMES GAVIN.

No 30.
Condition, that if the highest offerer at the sale do not find caution within a limited time the purchase should devolve on the next offerer, found not to give the next offerer a right to claim the purchase, where the exposers are satisfied with the first offerer, although he has not strictly complied with the coadition.

BY the articles of roup of the lands of Mainsneil, which were sold judicially, it was provided in the usual manner, "That on the highest offerer failing to give security for the price within thirty days after the sale, the one next to him should be preferred, on his finding security within thirty days after; intimation being at the same time to be made to him of the devolution in his favour within ten days after it had taken place."

The highest offerer was Mr Gavin, who, by some oversight, allowed the thirty days to elapse. The day after, however, he offered a bond, signed by proper cautioners; but not before Mr Walker, whose offer was next to his, had insisted on being preferred in pursuance of the above condition. Minutes of debate were made out, in which Mr Walker

Pleaded; Articles of roup form a mutual contract between the exposers and offerers, by which all the parties are equally bound. Since, therefore, Mr Walker was here unquestionably obliged, on the failure of his competitor, to fulfil the offer he himself had made; so the exposers must be under a similar obligation to perform their part of the agreement This indeed is clearly implied in the words here used; the bidder next to the highest being to have the preference on the failure of this offerer, in the same way as, before, he was to be preferred on his performing the conditions required from him. It is true, that the person who carries on the sale is obliged to make intimation, within a limited time, to the offerer on whom the purchase has thus devolved; but this was intended for the accommodation of the latter, and not to give to the former an arbitrary power of preferring one offerer to another.

Answered for Mr Gavin; The clause which gives rise to the present question has been inserted in judicial sales, the expense of which is very great, in order to provide against the necessity of a second roup, in case the highest offerer should be found unable to pay the stipulated price. It is solely intended for the benefit of the exposers; and hence, if they do not, within a short period, notify to the preceding offerer, that they mean to avail themselves of it, it is held to be of no consequence. If, therefore, they chuse, even after the day fixed for that purpose, to accept of the security proffered by the highest bidder, or if they think it unnecessary to demand security of any sort, no other person has any right to interfere.

"THE LORDS preferred Mr Gavin the highest bidder."

Reporter, *Lord Swinton.* For Mr Walker, *J. Erskine.* For Mr Gavin, *C. Hay.*

Clerk, *Colquhoun.*

C. *Fol. Dic. v. 4. p. 254. Fac. Col. No 312. p. 481.*