

utum canonem has in the case of a feu. Further, that the value of the subjects in 1861 was considerably less than the amount of arrears due, and that in 1825 £19, 19s. was the value of the subjects let, while in 1860 there were no additional buildings, and the whole were in worse repair than in 1825.

The pursuer pleaded—“(1) The decree sought to be reduced having been taken by the defenders against the pursuer when he was only nine years of age, and when he was known by them to be in pupillarity, it is null and void, and reducible. (2) The said decree having been pronounced, to the pursuer's great lesion, when he was a pupil and unable to defend himself thereagainst, the pursuer is entitled now to challenge the same, and to be restored thereagainst. (3) The pursuer, as heir of his great-grandfather and great-grandmother, the lessees in the tack, is entitled to have his right thereto declared, and to obtain decree of removing, as concluded for. (4) The pursuer is also entitled to count and reckoning, and decree for payment, in terms of the conclusions of the summons.

The defenders pleaded—“(1) The pursuer has not set forth, and does not possess, any right or title to sue or insist in the present action. (2) The statements of the pursuer are not relevant or sufficient to support the conclusions of the summons. (3) The arrears of rent at the date of the said decree having exceeded the value of the subjects let, and the said decree being in all respects regular and formal, and the defenders having entered into and continued in possession under the same, it cannot be set aside. (4) The statements of the pursuer being unfounded in fact, the defenders should be assolizied.”

The Lord Ordinary (GIFFORD) pronounced the following interlocutor. — “The Lord Ordinary having heard parties' procurators, before answer, and under reservation of all questions, allows them a proof of their averments in the closed record under ‘The Evidence (Scotland) Act, 1866,’ on Thursday the 16th of July next, at half-past ten o'clock forenoon; and grants diligence for citing witnesses accordingly.”

Against this judgment the defenders reclaimed, and argued—this case falls under the Act 16 and 17 Vict., cap. 80, sec. 32. The decree was not *funditus* null—*Sinclair*, 15th January 1828, 6 S. 336. The pursuer (respondent) maintained that sec. 32 of the Act referred to merely extended the jurisdiction of the Sheriff. The decree against the pupil is either null and void, or there is redress against it. *Bannatyne*, Dec. 14, 1814, F.C.; *Dick*, 6 S. 798, and 7 S. 364.

The Court pronounced the following interlocutor:—

“Refuse the note: Adhere to the interlocutor reclaimed against: Find expenses due by the claimer since the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax and report, and remit the cause to the Lord Ordinary with power to decern for the expenses when taxed.”

Counsel for the Pursuer—Burnet. Agent—R. A. Veitch, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark), Q.C., and Asher. Agents—Webster & Will, S.S.C.

Friday, June 26.

FIRST DIVISION.

[Lord Shand, Ordinary.

JOHN SHIELL *v.* GUTHRIE'S TRUSTEES and GUTHRIES.

Sale by Roup—Beneficial Interest—Idem Venditor et Emptor—Heritage—Writ.

In a case where two out of ten beneficiaries under a trust deed employed an agent to bid for and buy the trust property at a public roup—held that the sale was not reducible on the ground of their beneficial interest in the subject sold, it not being a case of *idem venditor et emptor*. Held that one of the public, who called upon the trustees for conveyance to him of the subject (which was heritable property) at his first bode above the upset price, had no title to sue, in respect that his offer was not in writing.

The late Alexander Guthrie, surgeon in Brechin, conveyed his estate to trustees, defenders of this action, for the benefit of his ten children, of whom two, Misses Clementina and Eliza Guthrie, were also defenders, their interest in the trust estate amounting to one-tenth each. The trustees in the course of realizing the trust estate exposed to public sale a house which formed part of it, at an upset price of £2000, the articles of roup providing that biddings were to advance by not less than £2 at a time. The pursuer, Mr Shiell, offered verbally £2002, and after a competition the subject was knocked down (for £2510) to Mr Lamb, banker, who thereupon declared that he had bought for the defenders, the Misses Guthrie. The pursuer then raised this action for the reduction of the sale to the Misses Guthrie, and for declarator that he was entitled to get the subject at his first bode of £2002, on the ground that the Misses Guthrie were disqualified by their beneficial interest in the subject from bidding at all.

The Lord Ordinary pronounced the following interlocutor:—

“*Edinburgh*, 10th March 1874.—The Lord Ordinary having considered the cause, Finds that the pursuer's averments are not relevant or sufficient to support the conclusions of the action; assolizies the defenders from the conclusions thereof, and decerns: Finds them entitled to expenses: Allows an account thereof to be given in; and remits the same, when lodged, to the Auditor to tax and to report.

“*Note.*—The defenders, Miss Clementina Guthrie and Miss Eliza Guthrie, are daughters of the late Alexander Guthrie, surgeon in Brechin, who died in August 1869, leaving estate, real and personal, the residue of which, amounting to about £30,000, is divisible under his trust-disposition and settlement amongst his ten children in equal shares.

“On 30th July 1873 the other defenders, the late Mr Guthrie's trustees, exposed the house at Townhead of Brechin, in which Mr Guthrie and his family had long resided, to public sale, their purpose being to realise the whole estate of Mr Guthrie for division amongst his children, as directed by his settlement. The defenders, the two Misses Guthrie above named, having become desirous of acquiring the house as their own pro-

party, had instructed Mr Lamb, banker in Brechin, to purchase it for them. The upset price was £2000, and Mr Lamb had the defenders' instructions to bid up to £2700 if necessary; but having in the competition bid £2510, and no higher offer having been made, Mr Lamb became the purchaser, and, as the Minute of Enactment bears, he having thereupon declared that he made the purchase for the defenders, the judge of the roup preferred the defenders to the purchase.

"Neither the trustees, nor any of the beneficiaries under Mr Guthrie's trust-disposition and deed of settlement have taken any objections to the sale. On the contrary, they desire to hold the defenders, the Misses Guthrie, to the offer made on their behalf, to whom they are ready to convey the property at the price of £2510, and these ladies are on their part desirous to complete their purchase, and obtain a title to the property.

The pursuer, however, claims to have the property conveyed to him at the price of £2002, and his claim is resisted not only by the defenders, Misses Clementina and Eliza Guthrie, but by the trustees under Mr Alexander Guthrie's settlement, on behalf of the other beneficiaries in the estate, who desire to have the benefit of the higher price at which they maintain that the property was sold.

"The ground of the pursuer's claim is an alleged bid by him of £2002, being £2 above the upset price, and the statement that no other lawful offer was made for the property. He states that he and the defenders, Misses Guthrie, were the only competitors at the sale, that the offers made by these ladies were 'wholly illegal,' and must be disregarded, and that he is therefore entitled to have the property at his alleged first offer of £2002. There is no record in writing in the articles of roup or otherwise of any offer by the pursuer of £2002. The only offer recorded is one of £2500, which is followed by Mr Lamb's offer already mentioned, of £2510, and the declaration by the judge of the roup following on this; but the pursuer states that a number of verbal offers were made, running the price up from £2000, at which the property was exposed, and that the first of these was his offer of £2002, at which he seeks to acquire the property.

"The pursuer's case is founded on the case of *Faulds v. Corbet*, 25th February 1859, 21 D. 587, and authorities there cited. The Lord Ordinary is of opinion that the pursuer is not entitled to succeed in the action, and that the authorities to which the pursuer has referred do not warrant his claim.

"1. Assuming in the meantime that the pursuer is entitled to found on his alleged offer of £2002, although there is no writing to establish it, the defenders dispute the pursuer's right to challenge the bidding of £2510 by the Misses Guthrie, and the sale which followed on it. It is conceded, indeed settled, by the case of *Faulds*, and older cases, that where a property is put up to sale by auction at a fixed upset price, the proprietor or person beneficially interested in the sale is not entitled to bid for it by himself or another on his behalf, and that if he do so the bidding on his behalf will not be effectual in a competition, so that a purchaser competing with such a proprietor or beneficiary only in such a case will be entitled to take the property at the lowest bidding recorded by him. The only authorities referred to by the pur-

suer were cases in which the competitor was the person wholly interested in the sale; but it was maintained that the same principle must apply in a case in which the competitor has, as in the present, a partial interest in the result of the sale, being one of several beneficiaries interested in the property sold. The Lord Ordinary is not prepared to give effect to this contention.

"A distinction must be drawn between the right of a party in the position of the pursuer, who claims the property as having been purchased by him in the competition, and that of the beneficiaries under a trust, having an interest to obtain the largest price that can be got for the property, to challenge such a sale as here took place. There are many cases in which beneficiaries, or persons similarly situated, in respect of their interest as sellers, may have right to challenge the sale, and have it set aside, where a competing purchaser has no such right. The case of *Aberdeen v. Straiton's Trustees*, 29th March 1867, 5 Macph. 726, is an illustration of this. In that case it was alleged that a trustee had purchased part of the trust-estate exposed for sale; and although it was assumed that the beneficiaries under the trust interested in the sale could have challenged the sale, and set it aside, it was held that a competing purchaser had no such right. The principle to which effect has been given in questions between the sellers or others who had a material interest in the sale, and the purchaser of a property, who had been also interested in the sale, or had a duty towards the other sellers, in respect of his holding a trust relation, or other confidential relation towards them, may be stated to be, that as between parties in the position now stated, the purchaser is precluded from buying because of the duty which he owes to the sellers or seller of procuring the highest possible price for the subject. The law will not permit a party to become a purchaser where his individual interest to acquire the subject at a low price may possibly conflict with his duty to the sellers generally to do his best to procure a high price. In the first place, however, a purchase made by any one in such a position is not void, but merely voidable. The beneficiaries under a trust, or other sellers, may find it for their advantage to hold the purchaser to the transaction, and in that case it stands. And, in the next place, the objection is entirely personal to the beneficiaries or other sellers in the case supposed. It is *jus tertii* to a competing purchaser to take the same objection, because his competitor in the purchase is under no such duty or obligation towards him as he lies under towards the sellers. The case of *Aberdeen* is a clear illustration of this. The same thing may be said of a purchase by one of several partners of copartnership property sold by public roup on dissolution of the company, by one of several owners of *pro indiviso* property, or by one of several beneficiaries interested in the sale of a trust-property. The purchase may be objected to by the other sellers or parties interested in the sale, on the ground that the purchaser's interest to obtain the subject for himself at a low price might conflict with his duty in common with the other persons interested in the sale to procure the highest price. But, certainly, the same principle does not hold as between competing purchasers in the position of the pursuer and the defenders Misses Guthrie, for the reason that the Misses

Guthrie were not under the same duty or obligation to the pursuer as to the other members of their own family as beneficiaries in the trust. In deciding the present case it may be assumed, therefore, for the sake of argument, that the other beneficiaries might have objected to the purchase by the Misses Guthrie, although this depends on facts and circumstances which are not fully before the Court, for it may be that it was quite understood and approved of by the family that any of them might become purchasers of the property. However this may be, it does not, in the Lord Ordinary's view, give the pursuer a right to challenge the sale. The fact founded on in Condescendence 9, that the settlement of the late Mr Guthrie 'did not confer upon any of the beneficiaries the right to offer for the said property,' is *ius tertii* to the pursuer. The Lord Ordinary has farther come to the conclusion that it was not necessary, in a question with parties other than the remaining beneficiaries, that a power to bid should be reserved in order to make the sale effectual, for the case is not one in which the Misses Guthrie were the expositors, either as having the sole beneficial right in the property or as having even the largest beneficial interest in it.

"In the cases which have hitherto occurred with a competing purchaser who has successfully claimed the property, the bidding by the proprietor or sole beneficiary having right to the property was entirely a fictitious proceeding, which could lead to nothing except to run up the price improperly, for it could create no contract of sale. The real seller could not sell his property to himself, for the right to it was already his. The competition was apparent only. It could not be real when it was conceded or proved that the competitor was already the owner of the property. The ground of decision in these cases was that the bidding was fictitious, and meant only to run up the price, not that the competitor bidding was under a duty or obligation of the kind lying on a trustee or joint-proprietor to the other parties interested in the estate.

"To the Lord Ordinary it appears to be quite otherwise in a case like the present, and he is not prepared to carry the principle of *Fauld's* case the great length which the pursuer here asks. There is this clear distinction in the present case, that the Misses Guthrie by their offer, accepted or acquiesced in by the other beneficiaries, become bound in a question with them to take the property at the sum offered. The offer was therefore not fictitious. Indeed it is not said that the Misses Guthrie offered otherwise than in *bona fide*, and with a true desire to get the property. The trustees and other beneficiaries are materially interested by the contract also. The circumstance that there is a new contract to which the buyers are bound, if the sellers insist on it, completely distinguishes the case from one in which the bidding creates and can create no new contract, and in which therefore the apparent competition is wholly fictitious, and must be regarded as meant only for the purpose of improperly running up the price; and it would work great injustice towards the other beneficiaries interested in the sale of the property if the sale should be set aside, with the effect of compelling them to lose the higher price which the Misses Guthrie offered. The pursuer's argument really comes to this, that if a beneficiary, or person jointly interested, even to a small extent in the property sold, should without the knowledge of the

persons interested come into the field as a competitor willing to give, and actually offering, a much larger price than any one else, the sale to him at that price is bad, and the other beneficiaries must accept a much lower offer. The Lord Ordinary cannot adopt this view, nor can he see that there is any hardship to persons in the position of the pursuer in competing with others who are honestly anxious to acquire the property for themselves, even although the persons so competing have also some interest in the sale. It is quite a different case where the competing purchaser is truly the expositor, or is substantially in that position, by having the sole interest, or it may be the greatly preponderating interest, in the sale. In that case it may be said with truth that the competing offers had been made merely for the purpose of running up the property, and were thus fictitious, and not made in *bona fide* with the view of acquiring the property which already belonged to the proposed purchaser or competitor.

"2. The Lord Ordinary is further of opinion, with reference to the grounds of decision in the case of *Aberdein*, above referred to, that the present action cannot be successfully maintained to the effect of enabling the pursuer to acquire the property at the price of £2002, which is the only claim made, because there is no writing on which this claim can be founded. It would be necessary, if the action were entertained to this effect, to allow a proof by parole of what occurred at the roup, and the Lord Ordinary is of opinion that such evidence is incompetent to create a contract regarding heritage which can be enforced. Even if the defenders, under a reference to oath, should admit the pursuer's statements as to the offer of £2002, it appears to the Lord Ordinary that it would still be open to them to maintain that there was *locus penitentiae*, or that they were not bound until writing intervened. A verbal contract or undertaking followed by *rei interventus*, will found an action of damages for non-implementation, but the Lord Ordinary is not aware of any case in which it has been held that such a contract, even when followed by *rei interventus*, is sufficient ground for an action of implementation. Even, therefore, if any *rei interventus* followed on the pursuer's alleged verbal offer of £2002, which the Lord Ordinary greatly doubts, he is nevertheless of opinion that an action like the present to enforce the contract cannot be maintained. The argument to an opposite effect conflicts with the rule, that writing, however imperfect, is necessary to constitute a binding and effectual contract regarding heritage."

The pursuer reclaimed, and pleaded *inter alia*—
"(1) The offers and enactment of sale libelled on are reducible, in terms of the conclusions thereanent, in respect (1st) that the defenders, Miss Clementina Guthrie and Miss Eliza Guthrie, were personally disqualified for being purchasers of the said estate. (2d) That the acceptance of their offers by the defenders, the trustees, was contrary to good faith and in *fraudem* of the contract of sale; and (3d) that the pursuer, being the only legally qualified offerer, was entitled to be preferred to the purchase at the lowest offer made by him, in terms of the articles of roup. (2) The pursuer having purchased the said property at the price of £2002, and having implemented his part of the contract of sale, is entitled to obtain from the defenders a conveyance, in terms of the conclusions of the libel."

Argued for him—The defenders, the Misses Guthrie, were disqualified from bidding by their beneficial interest in the subject of sale, which put them in the position of exposers, and it is no objection to the pursuer's claim that his first offer was not recorded. By the case of *Faulds v. Corbet* it is settled that in all sales by auction there is an implied contract (1) that whoever bids the upset price shall obtain the subject unless a higher bid is made; and (2) that the exposer shall not take any part in the bidding. The whole ground of Lord Wood's opinion in that case was implied contract. Does the fact that the Misses Guthrie are beneficiaries to the extent of one-fifth instead of being sole beneficiaries alter the principle laid down in *Faulds v. Corbet*? Take the case of two *pro indiviso* proprietors—would one of them be held entitled to run up the price for their mutual benefit as against the public? The only way in which the implied contract could have been overcome would have been by the insertion in the articles of roup of a provision that one or more of the beneficiaries should be entitled to bid.

Authorities—*Faulds v. Corbet*, Feb. 25, 1859, 21 D. 587; *More's Stair*, p. 91; *Ivory's Ersk.* iii. 3, 2; *Cree v. Durie*, Dec. 1, 1810, Fac. Coll.; *Grey v. Stewart*, M. 9560; *Aberdein v. Straiton's Trs.*, Mar. 29, 1867, 5 Macph. 726.

The defenders (the trustees) pleaded—“(1) No title to sue. (2) The pursuer's statements are not relevant or sufficient in law to support any of the conclusions of the summons. (3) The offers of the Misses Guthrie having been made and accepted in the most perfect *bona fides*, the sale to them is not reducible, but is, on the contrary, effectual. (4) In no view is the pursuer entitled to obtain the said property at the price of £2002, in respect that no offer of that sum stands recorded in writing, or signed by him or the exposers. (5) The pursuer's whole material statements being unfounded in fact, the defenders ought to be assozied with expenses.”

The defenders (the Misses Guthrie) pleaded—“(1) No title to sue. (2) The averments of the pursuer are irrelevant and insufficient to support the conclusions of the summons. (3) The interest of the defenders in the residue of the trust-estate being only to the extent of one-tenth each, did not disqualify them from purchasing the subjects, which were sold on account of the express directions of the truster. (4) The defenders having offered with the *bona fide* intention of purchasing the subjects, and not in concert with the sellers, or to enhance the price, and having been preferred to the purchase, are entitled to *absolvitor*. (5) The defenders having purchased the subjects at a price above that offered by the pursuer, he has suffered no legitimate damage, and the defenders are entitled to *absolvitor*.”

At advising—

LORD PRESIDENT—The trustees of the late Mr Alexander Guthrie on July 30, 1873, exposed by public sale a certain house property under articles of roup in the usual terms, at the upset price of £2000. The pursuer avers that—“Mr John Lamb, banker, Brechin, at this sale offered the upset price of £2000. The judge of the roup, after consulting with the agent for the trustees, intimated that each offer must exceed the preceding one by not less than £2. The pursuer accordingly offered £2002. A competition then took place

between the pursuer and the said Mr John Lamb, in the course of which the pursuer offered £2500, whereupon Mr Lamb offered £2510, the increased offer of £10 per bode having been voluntarily made in the course of the competition. The pursuer did not make any higher offer, and there being no other offerers the property was accordingly knocked down to Mr Lamb at the price of £2510.” He further avers that—“Mr Lamb made the said purchase for and on behalf of Miss Clementina Guthrie and Miss Eliza Guthrie, under their direct or indirect instructions, and he so signed the minute of sale, and bound and obliged the said Misses Guthrie to implement the whole of the articles and conditions of roup and sale, so far as incumbent on the purchaser.” And again, that—“The said Misses Clementina Guthrie and Eliza Guthrie are two of the children of the said Alexander Guthrie, and are, with his other children, equally interested in the residue of his estate, which he directed to be divided equally among his children, share and share alike.” Mr Guthrie had ten children, so that these ladies are only two out of ten beneficiaries. Mr Shiell contends that the sale is bad, that the ladies were not entitled to purchase, and that the offer made on their behalf was a bad offer, and the ground of that contention is, that it is not competent for any beneficiary under a trust to buy the trust-property in competition with the public. The remedy, however, which Mr Shiell seeks, is not the reduction of the sale, but only of “the said minute of offers, in so far as it embraces or contains any offer or offers by the said Miss Clementina Guthrie and Miss Eliza Guthrie, or any one for them, or on their behalf, for the said lands, dwelling-house, and others, and any offer or offers by the pursuer for the same, beyond the first offer, being the offer of £2002 made by the pursuer; and the said minute of enactment and sale, in so far as it can be held to bind the pursuer in payment of any sum, or the performance of any act beyond what he would have been bound to pay or perform if there had been no offers for the said lands, dwelling house, and others, beyond the said first offer made by the pursuer of £2002.” His object is to sweep away all that followed on his first offer of £2002, and then he concludes for declarator, “that the said lands, dwelling-house, and others hereinafter described, were, by the said surviving and accepting trustees, exposed to sale by public roup at Brechin, on the 30th day of July 1873 years, at the upset price of £2000 sterling, under the foresaid articles and conditions of roup and sale and minutes of exposure, and were then effectually sold to the pursuer by the said trustees, defenders, at the price of £2002.” Now, even supposing his objection to be well founded against two out of ten beneficiaries buying the trust-property at a public sale, I should doubt the competency of the remedy asked, for its effect would be to entail considerable hardship both on the trustees and on the other beneficiaries.

Then, again, there is another difficulty in his way which seems to me rather a formidable one. The pursuer asks for conveyance to him of this heritable property at the price of £2002. Now that means that there is a valid contract of sale averred between him and the trustees, but if so, where is the contract? The difficulty at once occurs that there is no written contract at all of a sale at that price, or at any other price; but I am less disposed to attach importance to either of

these objections, because I think the objection taken to the purchase is bad in law. I think these ladies were quite entitled to buy this property, and that the law which prevents people from bidding in certain circumstances does not apply. No one can be buyer and seller in one; in other words, unless there are two parties there can be no sale, and so when the exposor becomes the purchaser the sale is void. Again, if the exposor employs some one else to bid for him under a disguise—puts forward what is called “a white bonnet,” with the object of running up the price—that is fraud, and such a sale cannot of course be sustained, and either the sale will be reduced altogether, or the party competing will be preferred. There is a third class of cases, where the objection of *idem venditor et emptor* does not apply; that is the case where the trustee on an estate buys the trust-property. That is an improper proceeding, and may be set aside by any one having an interest to do so, but it is requisite that the person setting it aside should have an interest in the estate. Now it appears to me that the present case does not fall under any of these heads. It is quite clear that in order to justify the reduction of this sale it must have been so objectionable that it could not have been carried through even as a private sale, for whoever may lawfully purchase at a private sale may do so at a public sale also. But can it be doubted for one moment that these ladies might have purchased this property by private bargain? If they could, there is no reason why they should not bid at a public roup. There is no authority, and I can see no principle, for sustaining the objection, and therefore I think the defenders should be assolizied.

LORD DEAS—I agree with your Lordship that there are at least three difficulties in the way of the pursuer's claim. The remedy which he claims is to be found to be entitled to be purchaser of this house at his first bode of £2002. The property exposed for sale was held by the trustees under the deed of settlement of the deceased Mr Guthrie, and his ten children were the beneficiaries. The title was vested in the trustees, and it is not here alleged that they were subject to interference or control as to the sale by any or by all of the beneficiaries; the deceased trustor gave them full power, and they were the sole exposors. Now if anything had been done by them contrary to law—if one of them had become a purchaser, or committed any other breach of duty—it may be that an offerer at the sale might be entitled to the benefit of the law; but nothing wrong is alleged, not even that they knew that any of the beneficiaries were offering at all, until the agent of the Misses Guthrie declared that he had bought for them. In short, no fault on their part is alleged at all. Now in a case of that kind, where there is nothing wrong, fraudulent, or illegal on the part of the exposor, a bidder can only ask for total reduction of the sale, and it is conclusive of the case that that is not the remedy asked here. In the second place, there is the objection that the pursuer does not produce any written evidence of his offer. This again would be conclusive, even if the first were not. If there is anything settled in our law it is that a bargain as to heritable property must be proved by writ, except in special cases where there may be a reference to the oath of the seller, and *rei interventus*. It is quite plain that this is not a case for reference to oath, and there is nothing

that could be called *rei interventus*, so that unless the sale can be proved by writ there is no foundation for the pursuer's case. If the offers had been all signed, a question might perhaps have been raised whether a testing clause was necessary for each, but there is no room for such a question here. It may be that often offers may not be taken down in writing, but if that is not done the offerer must take the consequences. If he means to stand on his legal rights, it can do him no great harm to ask him to record his offer. I know no law which binds one party and leaves the other free. This objection is conclusive against the pursuer's demand to get the estate at £2002. If anything like fraud had been alleged, I do not say that this might not have made an exception to the law, but there is nothing of that kind here; the objection is based not on fraud, but on the law which forbids trustees to offer,—a legal disqualification to purchase. I am not sure that I have not said too much already; where one reason is conclusive it is of no use to give more. As to the third objection—the disqualification of the beneficiaries to purchase,—it may be a little more difficult, and I am not quite satisfied about it. If it had been declared in the articles of roup that the beneficiaries were to be entitled to bid, the case would have been quite clear, but as that was not done I am not quite certain about it. However, it is not necessary to rest anything upon that, for the other grounds are quite sufficient.

LORD ARDMILLAN—The late Mr Alexander Guthrie of Brechin died in 1869, leaving ten children. By his trust-disposition and settlement he conveyed to trustees his whole estates, heritable and moveable, and directed these trustees to sell and dispose, *inter alia*, of certain house property at Townhead by public roup or private bargain. The residue of his estate he directed to be divided among his children. The accepting trustees exposed to auction in July 1873 the house in which the trustor had resided. The upset price was £2000. It appears from the minute of enactment annexed to the articles of roup that Mr Lamb, banker in Brechin, offered the upset price,—that after sundry offers, the pursuer, Mr Shiell, offered £2500, and subscribed that offer—but not before witnesses,—that Mr Lamb then offered £2510, and subscribed the minute before attesting witnesses, Mr George Anderson, the judge of the roup, also subscribing. Mr Lamb then and there declared that he made the purchase for Miss Clementina Guthrie and Miss Eliza Guthrie, daughters of the trustor Alexander Guthrie, being two out of the ten beneficiaries. The judge of the roup preferred these ladies accordingly to the purchase.

The pursuer has alleged that he offered £2002 at the sale, and he has brought this action of reduction of the sale, not that the subjects may be exposed anew,—not that he may be declared the purchaser at the price of £2500, that being the only offer made by him of which there is any record or evidence, but that the subjects should be declared to have been sold to him at the price of £2002.

Of the pursuer's offer of this sum of £2002 there is no evidence whatever. It is not mentioned in the minutes; it is not admitted on the record; there is no written evidence in process, and none has been tendered or suggested. Yet on this offer the whole case of the pursuer rests. Parole proof of it is accordingly proposed.

The first question is—Can parole evidence of the

avertment of purchase of a heritable subject be admitted in this case?

It is not necessary to consider the case of an informal offer, or of a verbal offer admitted on record, or of a verbal offer followed by *rei interventus*. There is nothing of the kind here. In the case of *Faulds v. Corbet*, 25th February 1859, the offer of the pursuer, on which he there founded, and in respect of which he succeeded, was entered in the minute of procedure which he signed, and the fact of the offer being made was instructed by his signature, and admitted by the defender. It is not so here. Unless parole evidence of a verbal offer can be received to instruct the purchase of heritage, the pursuer cannot succeed in this action.

I am of opinion that where there is no writing and no *rei interventus*, and no judicial admission, there is no sufficient proof of the purchase of Scottish heritage. The law on the point is, I think, settled by all our Scottish authorities, with this important qualification and exception, that relevant averment of fraud may open the door for enquiry in order that justice may be done. There is no fraud here. It is not even suggested. If the exposers had been enforcing the sale against the pursuer, alleging that he was the purchaser, there is no proof here of any offer which could be enforced against him. But if he was not bound to the sellers they could not be bound to him. To admit parole evidence of purchase of heritage in such a case as the present would, in my opinion, be contrary to the rule of law settled by the highest authorities, and recognised by the practice of many years. I may refer to *Stair*, 1, 10, 9; *Erskine*, 3, 2, 2, and 4, 2, 20; *Bell's Com.*, vol. i, 328; *Dickson on Evidence*, par. 546; and the case of *Gowans v. Carstairs*, 18th July 1862, with the previous decisions there mentioned. If I am right in this view it is sufficient for disposal of the case. Yet it is not necessary for its decision, which may well rest on the grounds stated by your Lordship in the chair.

The next question which arises is,—Has the pursuer sought the proper remedy, by concluding for reduction of the sale only to the effect of handing over the property to himself as the purchaser? Is this a fit and appropriate proceeding under the circumstances? Are the trustees of Mr Guthrie, who were entitled to sell by auction, and did sell, bound to subject the trust-estate to a loss of above £500 in order that this house may become the property of the pursuer at a price below its ascertained value? Are the other beneficiaries bound to submit to the loss of that sum? I think they are not. The equity of the case appears to me to be clearly against the pursuer's demand. Even if there were here an irregularity in the bidding, which I do not admit, and which I shall proceed to consider, the remedy sought by the pursuer is not just or appropriate. The trustees are not to blame. No fraud, no deception, no fault, is suggested in regard to them; and the eight beneficiaries who are not defenders, but whose interests are seriously involved, are altogether free from fault, or even irregularity. Why should they suffer? The case is quite different from that of *Faulds v. Corbet*, where the property was unlawfully bid up by what the Court regarded as unreal and fictitious competition, and was left on the pursuer's hands at a price increased to him by the illegal bidding of a party who was truly the exposor, who could not purchase, and who was therefore not a *bona fide* bidder. These special circumstances in the case

of *Faulds* are absent here. The pursuer does not seek to annul the sale, but seeks only to be declared the purchaser at a price which must cause great loss to innocent parties. This is not, in my opinion, just redress. It is not the proper remedy, and the action as laid ought not to succeed, even if irregularity in the bidding were assumed.

But, in the third place, I am of opinion that the bidding for their father's house by these ladies, through the medium of Mr Lamb, was not illegal.

I admit to the fullest extent the importance and necessity of entire good faith in the conducting of a public auction. In the remarks frequently made on that subject I entirely concur. But no bad faith, and no want of good faith, is here alleged. The trustees did not purchase or bid, nor did any one bid in concert with them, and there is no objection in respect of fiduciary relation. There was no fraudulent device, and no leaving of the subject in the hands of a purchaser at a price unfairly augmented. The ladies were entitled to purchase, and they through a friend, who was not a trustee, purchased at the highest price that could be obtained. The only remaining objection is, that the two ladies, daughters of the trustor, were exposers, and could not purchase; for *idem emptor et venditor* cannot be permitted, and where the same party is seller and purchaser there can be no sale or purchase. But these ladies are only two out of ten beneficiaries. They certainly were not the exposers, and they did not, and could not, represent the trust-estate. There might have been a private sale by the trustees to the Misses Guthrie, and it would have been valid. In the offer and purchase at the auction they had not the same interest as the exposers; they had indeed an interest opposed to the other eight beneficiaries, and accordingly they might have been purchasers, while the others were sellers. It was their interest to buy cheap. It was the interest of the trustees and of the other beneficiaries to sell dear. There was no identity of person or interest. The offers made by or for these ladies at the sale were real and in *bona fide*, not as in the case of *Faulds*, fictitious and deceptive. The pursuer was not led on by unreal bidding, not drawn into the semblance of a competition where there was no competitor. There is no room here for the application of the rules of equity recognised as protections against fraud in regard to competition in sales by auction. Everything here was fair and real, and the issue of the competition of parties who wished to purchase terminated naturally and properly in the success of the highest *bona fide* offerer.

I have therefore arrived at the conclusion that, even if the pursuer's own offer were sufficiently proved, and even if the action which he has raised were appropriate, still, in the absence of fraud or deception, which is not alleged, there are no relevant grounds to support the conclusion for reduction.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the reclaiming-note for John Shiell against Lord Shand's interlocutor of 10th March 1874, Adhere to the said interlocutor, and refuse the reclaiming-note; find the defenders entitled to additional expenses, and remit to the

Auditor to tax the amount thereof and to report."

Counsel for Pursuer — Watson and M'Laren.
Agents—Henry & Shiress, S.S.C.

Counsel for Trustees—Dean of Faculty (Clark),
Q.C., and Balfour. Agents—Webster & Will,
S.S.C.

Counsel for Misses Guthrie—Birnie. Agents—
W. & J. Burness, W.S.

Friday, June 26.

FIRST DIVISION.

[Lord Young, Ordinary.

NELSON V. GORDON AND LOFTY.

Lis alibi pendens.

Held that an extrajudicial letter by the agent of the pursuer in an action was not sufficient to meet a plea of *lis alibi pendens*.

Property—Meliorations—Assignment in Security.

Held that a person holding under a disposition *ex facie* absolute, but in reality in security, is entitled to be reimbursed for any expenditure by which he can show that the owner was *lucratus*, and a proof allowed of such expenditure.

The pursuer, James Nelson, youngest brother and heir-at-law of the late William Nelson, brought this action for the purpose of obtaining reconveyance of a long lease assigned in 1855 by William Nelson to the late Robert Gordon, grocer, Cambusnethan, husband of the defender Mrs Gordon, in consideration of a loan of £50. The assignation was *ex facie* absolute, but at the same time there was executed a minute of agreement between Nelson and Gordon, whereby the latter agreed to reassign the lease to Nelson on payment of the £50 and interest, and "all reasonable and necessary expenses and disbursements that may have been incurred by the said Robert Gordon or his forefathers anent the premises." Nelson continued to reside on the premises until his death, which occurred about six weeks after the loan. After his death his widow, Maria Percy or Nelson, as liferentrix, continued to reside there until her marriage with Frank Lofty, father of the other defenders. On 20th December 1859 Lofty obtained from Gordon an assignation of the lease on payment of £50 and interest, under the conditions and with the rights and powers mentioned in the minute of agreement. After receiving this assignation in his favour, the said Francis Lofty appears to have allowed the subjects to remain in the same position in which he acquired them down to the year 1871, when he expended a sum of about £70 in making meliorations, additions, and alterations thereon, which materially increased the value of the property. A part of the subjects became dangerous through decay, and repairs and alterations thereon were necessary for their maintenance.

After the death of Francis Lofty and his wife, his daughters, the defenders, authorised the subjects to be exposed for sale by public roup on the 22d day of December last; and upon this being done, the whole of the defenders were served with an action at the instance of the pursuer, the

summons being signeted on the 11th and executed on the 16th days of December last. On receiving the service copy of the summons in this action, the defender Mrs Gordon instructed her agents to communicate with the pursuer's agent, which they accordingly did. The pursuer's agent, however, not finding it convenient to meet the defender's agent, on the 20th of the same month intimated that the first action had been withdrawn, and a new one raised, containing letters of inhibition. The second summons was signeted the 19th, and executed on the 20th of December. The first action had, however, never been judicially withdrawn, and was said to be still in dependence.

The Lord Ordinary pronounced the following interlocutor:—

"Edinburgh, 17th March 1874.—The Lord Ordinary having heard counsel for the parties, Repels the defenders' preliminary pleas; assoilzies the whole defenders from the reductive conclusions of the summons; dismisses the action so far as laid against the defender Mrs Marion Biggar or Gordon; finds the pursuer James Nelson entitled to an assignation by the defenders Jane Lofty or Gilfillan, John Gilfillan, Janet Lofty, and Elizabeth Lofty of the lease libelled in the summons, on payment to them of the sum of £50 sterling, with interest thereon from the date of the death of Mrs Maria Percy Nelson or Lofty, the pursuer's entry to the subjects contained in the said lease being as at the same date; and accordingly decerns and ordains the said defenders, on payment as aforesaid, to grant an assignation to the said effect: Finds the defenders, Jane Lofty or Gilfillan, John Gilfillan, Janet Lofty, and Elizabeth Lofty, liable to the pursuer in expenses, subject to modification; of consent, modifies the same to £20 sterling, for which decerns against the said defenders."

The defenders reclaimed, and pleaded — "(1) *Lis alibi pendens*. (2) The pursuer has no title to sue the present action, in respect he has not been served heir-at-law to the late William Nelson. (3) At least process should be sisted till the pursuer produces an extract decree of service. (4) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (5) The defender Mrs Gordon is entitled to absolvitor, with expenses, in respect her late husband was entitled to assign, and did assign, the lease in question by a deed *inter vivos*, so that no right thereto or interest therein was conveyed to her by his *mortis causa* settlement. (6) On a sound construction of the minute of agreement, the other defenders are entitled to retain the said subjects until they have received payment of the said sum of £62, 10s., with interest, and also the expenses of the meliorations, alterations, and additions made by them or their predecessors on the property. (7) The said expenses having been disbursed *in bona fide*, the said defenders are entitled to reimbursement thereof. (8) The late Robert Gordon having validly and without fraud transferred the lease to the late Francis Lofty, the defenders are entitled to be assoilzied from the reductive conclusion of the summons."

Authorities—*M'Aulay v. Cowe*, Dec. 13, 1873, 1 Ret. 307; *Campbell's Trs. v. Campbell*, July 3, 1863, 1 Macph. 1016; *Aitken v. Dick*, July 7, 1863, 1 Macph. 1038; Court of Session Act, 1868, sec. 29 *Sinclair v. Campbell*, June 21, 1832, 4 Jur. 520