

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-

der Piper, who granted bond for the price to the Admiral-Clerk, and his successors in office; and Daniel Hamilton, present Clerk, having charged Alexander Piper for payment, he suspended upon this ground, that the goods were sold by inventory, and betwixt the inventoring and the rouping of them, they enlaked and were embezzled, as also all that were rouped were not delivered, or were not delivered in so good condition as they were in at the roup.

THE LORDS found, That the goods are presumed to have been in the same condition, the time of the roup, in which they were the time of the inventory, unless the suspender prove intervening embezzlements; and found, That the goods are presumed to have been in the same condition the time of delivery, in which they were at the time of the roup: Albeit it was *alleged* for the suspender, That the *onus probandi*, that the whole goods contained in the act of sale were delivered, lies upon the seller, because in all mutual contracts, such as sale, the party demanding performance should first instruct that he hath fulfilled his part: In respect it was *replied* for the charger, That seeing the goods were exposed some days before the roup, to be seen to all who had a mind to offer for them, and the suspender who offered, did, after the roup, give a simple bond for the price without protestation or complaint, it is presumed, that he visited the goods, and found them to be such as the inventory mentioned; and no alteration in them betwixt the roup and delivery is to be presumed.

Forbes, p. 513.

1714: January 27.

JOHN LESLIE of Findrassie *against* JOHN and HUGH MILLERS in Rose-markie.

In a process at the instance of John Leslie, as executor confirmed to Adam Leslie of Findrassie, against John and Hugh Millers, for payment of 152 bolls 2 firlots of bear sold by the said Abraham Leslie to the defenders, conform to their receipt subjoined to a particular account bearing the tenants' names from whom the victual was received; the LORDS sustained the receipt as probative, though wanting writer's name and witnesses, being *in re mercatoria*; and found the defenders liable for the ordinary prices bear gave in that place of the country where the bargain was made; albeit it was *alleged* by the defenders, that the price should be regulated by the fiars as the only standard where a certain price is sanctioned; because, though the fiars might be the rule betwixt master and tenant, when their farm is not demanded in due time, yet merchants are presumed to contract according to the current prices of the country where the bargain is made.

Fol. Dic. v. 2. p. 356. Forbes, MS. p. 18.

No 33.
warrant of the Admiral, and the highest offerer having given bond for the price, the goods were presumed to have been in the same condition at the roup as at the inventoring, unless the contrary was proved, and to have been in the same condition when delivered to the buyer, as they were in when rouped.

No 34.
Parties who had bought grain, without fixing a price, found liable for the ordinary prices, without regard to the fiars.