

claim of defence in the process of exhibition of the verdict of a jury, where-
in your wife, Janet Stevenson, is found fatuous, so I hereby promise to give
you no opposition in any respect in the reduction and exhibition of the said
verdict, or any other in my name, or for my behoof, by either word or writ,
from me, in any manner of way ;” and, upon the successful issue of the pro-
cess of reduction therein mentioned, the present action for payment of the sti-
pulated sum of L. 155 was brought, and, *prima instantia*, a decree passed for it ;
which the Court reversed.

No 98.

Act. *W. Nairne.*Alt. *Rae.*Clerk, *Campbell.**Fol. Dic. v. 4. p. 26. Fac. Col. No 41. p. 111.*

1783. February 28.

AITCHISON *against* ———

THE LORDS found it was unlawful for a person intending to bid at a roup, to
give money to others that they might refrain from bidding. See APPENDIX.

No 99.

Fol. Dic. v. 4. p. 35.

1783. March 1.

MURRAY *against* MACKWHAN.

A tenement situated in the town of Kirkcudbright was exposed to judicial
sale at Edinburgh. The only persons who intended to purchase this subject
were Mackwhan, together with William Johnston and John Hutton, all of
whom were commissioned by other people for that purpose.

No 100.
Combination
of intended
offerers at a
sale.

These men, desirous to take advantage of their situation, by acting in con-
cert, formed the following scheme. One of them, for their common benefit,
was to purchase the subject at the upset price. Each man was then to mark
secretly on a slip of paper the highest offer which he had been commissioned
to make, and he whose offer was found on comparison to exceed the rest, was
to be preferred to the purchase ; whilst the excess of that highest offer beyond
the upset price was to be distributed among the associates to the amount to
which their several offers should have concurred. The tenement being sold
for L. 300, the upset price, the result accordingly was, that as Hutton's com-
mission exceeded that sum in L. 98, that of Johnston in L. 210, and that of
Mackwhan in 300 ; so to the extent of L. 98, all their offers thus far concur-
ring, there fell to be an equal division among them ; and two of them, Johnston
and Mackwhan, likewise uniting in the offer of L. 210, the excess of that sum
above the former offer came to be shared between them ; but here the distri-
bution ended ; the concurrence reached no farther. Mackwhan being of course
preferred to the purchase, granted bills to his associates for those respective
sums.

No 100.

Of those proceedings, as being grossly fraudulent, Mr Murray, the pursuer of the action of sale, complained to the Court by a petition, in which he prayed that the sale might be declared void, and the subjects exposed to roup of new; and, in support of his application, he

Pleaded, The just price of subjects exposed to sale is that which is produced by the highest offer of purchasers, in competition. It is in reference to that probable contingent amount, that the upset price is calculated and adjusted, not as being itself the true value of such subjects. Any interference then of interested persons to prevent the effect of a public and fair sale in producing competition, is a wrong; the magnitude of which will be influenced by the degree of the *mala fides* or fraud from which it arises. In the present case, the fraudulent design of the combination is apparent, and the loss thence resulting great; the subjects having been sold for a price far below what they are worth. Were practices of this kind to be permitted, it is evident how pernicious they would prove in all cases like the present, in which subjects situated in remote parts of the country, are in this manner brought to sale in a place where so few persons are acquainted with their real value.

Answered, The articles of roup, which declare the upset price, as that for which, if no higher be offered, the subjects exposed are to be sold, form the contract between the seller and any purchaser. When therefore that price is offered, and thus one part of the contract is fulfilled, performance of the counterpart cannot but be just. Nor is there any illegal thing in such a combination as that in question, which is not to be distinguished from a co-partnership formed for the purpose of making a purchase. Nothing surely can be more lawful than this, and yet it is a natural effect of such a contract, to prevent competition, which consists in the mutual opposition of individuals. Combinations of purchasers too at excise and customhouse sales occur daily; and no attempt has ever been made to prevent them, because there is no law on which it could be founded.

Observed on the Bench, What the subject would have brought on a fair sale is its just value; a considerable part of which, instead of passing into the hands of the creditors, has been wrongfully pocketed by these associates; the effect of whose combination is the same, as if force or deception had been employed by some of them to debar the rest from coming to offer.

The judgment of the Court was as follows: "THE LORDS find, That the combination entered into between Mackwhan and the other persons above named was illegal; therefore find, That the said sale is void and null, and that the subjects must be exposed to sale of new: Find, That Mackwhan is liable in payment to Mr Murray, not only of the expense of this application, of which allow an account to be given in, but also of the expense of the new letters of publication, and whole other expense to be incurred in carrying the sale into execution."

Mr Murray afterwards preferred another petition, setting forth, there being reason to apprehend that the influence of the same persons would in another shape be still exerted to prevent the success of a new sale; and therefore praying, That Mackwhan might be found liable to pay a price to the full extent of his commission, *i. e.* L. 500 above the upset one.

The Court were of opinion, That it was just, besides annulling the sale, to grant reparation of any other damage which could be qualified as arising from the combination; and as Mackwhan, in terms of the articles of roup, on exceeding, by L. 5, the highest offer of Johnston, whose *maximum* was L. 210 above the upset price, must have been preferred to the purchase;

THE LORDS therefore found Mackwhan liable in payment of L. 515.

For the petitioner, Rolland.

Act. Hay Campbell.

Clerk, Home.

Fol. Dic. v. 4. p. 35. Fac. Col. No 104. p. 164.

1784. February 3.

PALMER against HUTTON.

A French privateer having captured a ship, of which Hutton was master, he, together with his crew, were kept prisoners aboard the privateer, and his vessel was sent into port. Meanwhile the privateer made prize of another ship, which had been abandoned by those on board of her, and which belonged to Palmer. It seems, that now the French Captain, unwilling to spare hands for the manning of the second prize, which was but of small value, at first determined to sink the vessel; but afterwards it was agreed between him and Hutton, that the latter should purchase her at the rate of 150 guineas. One of Hutton's crew was retained as a hostage in security of the price, while with the rest he himself returned home in the ship; bringing along with him, in the hand-writing of the French Captain, a sort of certificate of the bargain, specifying the particulars above-mentioned. Having in this whole transaction considered himself to have made a lawful purchase for his own behoof alone, Hutton, without acknowledging any interest in Palmer, employed the ship as his absolute property. Palmer, on the other hand, as soon as he got notice of the affair, reclaimed her, by an action in the High Court of Admiralty, which afterwards came by suspension before the Court of Session.

Pleaded for the pursuer, The defender is bound to deliver up, without any recompence or gratuity, a ship of which the pursuer is the only lawful owner. The defender could not acquire a right to the vessel by any contract with the captors. All states deem war unjust on the part of their antagonists; for every state asserts the justice of its own cause. Hence a capture by the enemy is always a wrongful act, from which no right can spring, and by which no property can be transferred; *Vid. Bynkershoek, lib. 1. cap. 3, de statu belli inter hostes.* Thus, in respect of our country and its laws, the capture in

No 100.

No 101.

A British subject prisoner on board of a French privateer while she captured a British ship, having purchased the prize *bona fide* on his own account, was found to have not thus acquired the property; but that the original owner was entitled to reclaim it upon payment of the legal salvage.