

1788. July 15. WILLIAM HANNAY *against* JAMES STOTHERT and Others.

No 31.

Condition, that if the highest offerer at a sale do not find caution within thirty days, the purchase shall devolve on the immediately preceding offerer,—found to give this last a positive right, if the exposers had called on him for performance.

THE lands of Newlaw were exposed to sale in different lots, under the authority of the Court of Session.

It was provided by the articles of the roup, that by subscribing their respective offers, the different bidders should be obliged to pay the price, with a fifth part more by way of penalty.

It was further provided, That if the highest offerer failed to find security within thirty days, the purchase should devolve on the one whose offer was next to his; intimation being to be made to the latter within ten days after the devolution had taken place. But it was at the same time declared, that the exposers might still sue the highest offerer for the difference of the price, and for the penalty.

William Hannay was the higher bidder for all the different lots; but owing to some mistake, his sureties were not ready within the thirty days. Two days after that period, intimation was made by the common agent in the sale, to James Stothert, and the other offerers; but before any further proceedings were held, a bond was presented by Mr Hannay, subscribed by him and his cautioners.

A petition was afterwards preferred to the Court, in behalf of Mr Hannay, praying, that his bond should be received, and urging the severe consequences that would ensue from his being foreclosed, as he still continued liable for the difference of the price, and for a fifth part more, if the creditors chose to insist rigidly on their right. In this he was opposed by James Stothert and the other offerers.

The Court, in giving judgment against Mr Hannay, were principally moved by the intimation that had been made to the immediately preceding offerers. It was observed, that although the readiness which Mr Hannay had shown to rectify the error into which he had fallen might have the effect, in a question with the exposers, to relieve him from the penal consequences above mentioned, those whose offers were next to his, by being called on to perform their part of the agreement, had thus acquired a right to demand reciprocal performance, which no equitable considerations in favour of third parties could take away.

After advising the petition for Mr Hannay, which was followed with answers, replies, and duplies,

“THE LORDS preferred James Stothert,” &c.

A reclaiming petition, afterwards presented for Mr Hannay, was refused.

Lord Ordinary, *Swinton*.

For Mr Hannay, *Lord Advocate*.

For Mr Stothert and Others, *Geo. Fergusson, Honyman, Armstrong, Douglas*.

Clerk, *Home*.

C.

*Fol. Dic. v. 4. p. 254. Fac. Col. No 35. p. 58.*