## RECENT ENGLISH DECISIONS.

### *In the Court of Queen's Bench.*

BROWN AND OTHERS *vs.* THE ROYAL INSURANCE SOCIETY.[1]

1. Declaration on a policy of insurance against fire, which contained a condition reserving to the company the right of reinstating the premises in preference to the payment of claims. Plea, that defendants elected to reinstate the insured premises, and were proceeding in the reinstating them, until the Commissioners of Sewers caused them to be taken down as a structure in a dangerous condition; that such condition was not caused by the fire; and that if the Commissioners had not caused the premises to be taken down, defendants would have restored them to the condition they were in before the fire. On demurrer: Held, by Lord Campbell, C. J. Crompton and Hill, JJ. (Erle, J., dissentient), that defendants, having elected to reinstate the premises, were bound by such election; and the plea showing performance to be impossible was no answer.

The first count of the declaration was upon a policy of insurance, by which the defendants insured from loss or damage by fire a house, No 27 Aldgate street, in the city of London, then in the occupation of the plaintiff Brown, from the 24th June, 1853, to the 24th June, 1854, subject to certain conditions. The material condition, which was the twelfth, was as follows: "Persons insured by this company, and who may suffer loss, will receive their indemnity without deduction or discount; but in every case of loss the company will reserve to itself the right of reinstatement, in preference to the payment of claims, if it shall judge the former course to be most expedient." Averment, that after the making of the policy the said insured premises were partly burnt down, and consumed and destroyed by fire, and the residue of the said insured premises was damaged by fire, and rendered unsafe and dangerous, and by reason thereof the same were obliged to be and were pulled down. Breach, that the defendants had not paid the amount of the damage and loss, nor reinstated the said premises. The second count was on the same policy, and alleged that after the plaintiffs had become entitled to be paid by the defendants the amount of the said loss and damage, or to have the said premises reinstated by the said defendants, the defendants, having notice of the premises, elected to reinstate the said insured premises under the said policy, in preference to the payment of the plaintiffs' claim for the loss and damage aforesaid,

[1] Jurist, Dec. 10, 1859, p. 1255.

and gave notice of such election to the plaintiffs; and the said defendants thereupon began and proceeded to reinstate and restore the said insured premises; yet the defendants did not complete or finish the reinstatement of the said premises, or proceed with due care, skill, dispatch, or diligence in such reinstatement, although a reasonable time for such purposes had long since elapsed, but therein failed and made default; and by reason thereof the remains of the said premises not so destroyed by fire as aforesaid afterwards settled, sank, cracked, and gave way, and became dangerous and ruinous, and were thereby afterwards obliged to be and were taken and pulled down, and have never been reinstated by the defendants. Averment of special damage incurred by the plaintiff Brown in and about certain proceedings taken by the Commissioners of Sewers of London for the pulling down the said premises, whereby the said plaintiff was deprived of the use and occupation of the said premises, and hindered from carrying on his business, &c. Second plea, as to so much of the first count as alleges that the said insured premises were partly burnt down, and consumed and destroyed by fire, and the residue of the said premises was damaged by fire, whereby the plaintiffs sustained loss and damage; that within a reasonable time after the happening of the loss and damage in the introductory part of that plea mentioned, the defendants, in pursuance of the said condition on the said policy indorsed, judged it expedient and elected to reinstate the said insured premises, in preference to the payment of the plaintiffs' claim for the said loss and damage, of which the plaintiffs then had notice; that within a reasonable time after the happening of the said loss and damage, they proceeded to reinstate the said insured premises as aforesaid, and did proceed, and were proceeding with all reasonable dispatch, in the reinstating of the same as aforesaid, until the Commissioners of Sewers of the city of London, duly acting under the authority and in pursuance of the provisions of the Metropolitan Building Act, 1855, and having jurisdiction in that behalf, caused the said insured premises to be taken down as a structure in a dangerous condition, whereby the defendants were prevented from further proceeding with or completing the reinstatement of the said insured premises as aforesaid; and that the dan-

gerous condition of the said insured premises at the time of their being so caused to be taken down, and for which they were so caused to be taken down, as aforesaid, was not caused by the burning down, consuming, destruction, or damaging by fire of the said insured premises in the said first count mentioned respectively; and that if the said commissioners had not caused the said premises to be taken down as aforesaid, the defendants might, and could, and would have reinstated the said premises in, and restored them to, the same state and condition as they were in before and at the time of the happening of the said loss and damage by fire. Third plea, as to the second count, that after the happening of the loss and damage by fire in that count mentioned, the defendants did proceed, and were proceeding, with due care, skill, dispatch, and diligence, in the said reinstatement of the said insured premises, until the Commissioners of Sewers of the city of London, duly acting under the authority and in pursuance of the Metropolitan Building Act, 1855, and having jurisdiction in that behalf, caused the said insured premises to be taken down as a structure in dangerous condition, and which is the taking and pulling down in the said second count mentioned, whereby the defendants were prevented from further proceeding with, or completing or finishing, the reinstatement of the said insured premises; that the dangerous condition of the said insured premises at the time of their being so caused to be taken down, and for which they were so caused to be taken down as aforesaid, was not caused by the burning, consuming, destruction, or damaging by fire of the said insured premises in the second count mentioned respectively, or by any want of due care, skill, dispatch, or diligence of the defendants in proceeding with the reinstatement of the said insured premises as aforesaid; and that if the said commissioners had not caused the said premises to be taken down as aforesaid, the defendants might, could, and would have reinstated the said premises in and restored them to, the same state and condition as they were in before and at the time of the happening of the said loss and damage by fire. Demurrer, and joinder therein.

*Joseph Brown*, (with him was *Grove*), for the plaintiffs. The defendants made their election to reinstate the premises, and they now say that they are excused from so doing because the Commis-

sioners of Sewers have pulled down the premises. In *Hadley* vs. *Clarke*, 8 T. R. 259, 267, LAURENCE, J. cites *Paradine* vs. *Jane*, Al. 27, as laying down this distinction. "Where the law creates a a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." He also cited *Bullock* vs. *Dommitt*, 6 T. R. 650, and *The Brecknock Canal Navigation Company* vs. *Pritchard*, Id. 750. This is like a simple covenant by a tenant to repair the demised premises.

*Lush*, (with him was *Kingdon*,) contra. The defendants contracted to indemnify the plaintiffs against loss by fire, reserving to themselves the option of the mode in which they would indemnify them. The defendants are not in the position of lessees who have covenanted to keep a house in repair, and who are liable under all circumstances. If the house falls down from decay, the defendants are not bound to rebuild or pay the indemnity. In this instance the law has interposed, and rendered it imposible for them to reinstate the premises. The defendants are willing to perform their contract as soon as the premises are in a condition for them to do so. They have a right to revoke their election now that it has become impossible to perform it. The defendants are willing to pay such damages as would reinstate the premises in the condition they were in before the fire. If the election cannot be revoked, the contract is to reinstate the premises; that is, to place them in the condition they were in before the fire; and if that has become impossible by the act of the law, the case is within the law as to conditions laid down in Co. Litt. 206.

*Joseph Brown*, in reply. There is a difference between impossible conditions and conditions improbable and out of the party's power. In Com. Dig. "Condition," D. 2, it is said: "If a condition be to do a thing which by no means can be done, it shall be said to be an impossible condition: as to go from London to Rome in three hours. . . . . But if the condition be improbable,

and out of his power to do, yet it shall not be said to be impossible: as if a condition be, that a married man shall marry such a woman; for it is possible that his present wife may die before him and the other woman." The defendants contend that if the plaintiffs should not be able to rebuild the outer walls, they are not to be called upon to reinstate the premises; and so seek to get rid of their liability altogether. A party is to pay damages for not being able to do the act which he has covenanted to do. *Hall* vs. *Wright*, 5 Jur. N. S. 62.

LORD CAMPBELL, C. J.—I am of opinion that this plea cannot be supported, and that our judgment ought to be for the plaintiffs. The defendants undertook what was lawful to be done, and whether it can be done in point of fact, is immaterial. They must do it, or pay damages. They are in the same situation as if the policy had been absolute to reinstate the insured premises in case of fire. Where an election is given by a contract, and the election is made, it is the same as if there had been no election, and the party making the election is absolutely bound to do that which he has elected to do. Then the question is, if there is a contract by an insurance company to reinstate premises in case of fire, and they are damaged by fire, whether, in an action against the company for not reinstating, it is a defence to plead such an answer as is set up by these pleas. I think it is not. The company undertook to do what is lawful, and what continues to be lawful, and whether it can be done or not seems to me to be quite immaterial; they must either do that which they have undertaken to do, or pay damages for not doing it. That is the doctrine laid down in *Paradine* vs. *Jane*, Al. 27, and I adopted it in *Hall* vs. *Wright*, 5 Jur. N. S. 62, which is now before the Exchequer Chamber. If a party undertake to do what is lawful, and does not do it, it is no defence for him to say that he cannot do it, unless the law, has rendered it unlawful for him to do the act. In this case the thing is not unlawful; if it has become impossible, damages must be paid. There was a lawful contract, and the defendants are liable in damages for a breach of it.

As to the principle on which the damages should be assessed, I give no opinion.

ERLE, J.—I cannot concur in the judgment which has just been delivered, because it seems to me to follow, as a consequence of that judgment, that the plaintiffs would be entitled to damages unless the defendants reinstated the premises, and that could not be without rebuilding the house. The defendants may have been willing to repair the damage done by the fire, but the outer walls were in such a state that they were taken down by order of the Metropolitan Commissioners for Sewers, and so it became impossible for the defendants to perform their contract. What is the contract? It is a contract to reinstate the premises in case of damage by fire; and it is not to be construed in the same manner as a covenant by a tenant to repair the demised premises. The excuse put forward by the pleas is, either that performance of the contract by the defendants was unlawful, because the premises were in so dangerous a state that the Metropolitan Commissioners of Sewers commanded them not to reinstate them, and it would have been a violation of the law to do so; or that it was the fault of the plaintiffs themselves that the contract was not performed, inasmuch as they allowed their premises to get into a dangerous state. It is a principle of law that parties cannot avail themselves of their own fault. It was the duty of the plaintiffs not to leave the outer walls in so dangerous a state. Both parties profess themselves willing, the defendants to pay, and the plaintiffs to receive, a fair amount of damages. The judgment of the court will, in my mind, give the right to the plaintiffs to have an entirely new house.

CROMPTON, J.—We have nothing now to do with the question of damages. We are called upon to say whether these pleas are a bar to the action. I think not. The old doctrine in Co. Litt. 146, a, is, "Quod semel placuit in electionibus, amplius displicere non potest." The defendants have made their election, and cannot now change their mind. There is nothing illegal disclosed by this plea, nor anything in the course selected by the defendants which renders it impossible for them to perform their contract, though the course which they have selected is perhaps disadvantageous to them. I rather think this case comes within the class of cases in which a party has contracted to do that which he cannot do, and therefore must pay damages for not doing it. What damages he should pay

is another matter; probably they should be restricted to the real amount required for reinstating the premises; but that question is not before us.

HILL, J.—I am of the same opinion. The pleas are no answer to the action. If they were, the consequence would be that the insurance company would not be liable to do anything. The defendants have made their election, and according to the doctrine in Co. Litt. 146 a, that election is obligatory. It is admitted that the insurance company are bound to do something; but the plea says that they are bound to do nothing. It is perfectly possible to reinstate the premises by rebuilding new walls. There is nothing in this case to exonerate the insuranec company from the obligation either to reinstate the premises, or, if they cannot do so, to pay such damages as may be required for that purpose.

Judgment for plaintiffs.

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## *In the Exchequer Chamber.*

### WARLOW vs. HARRISON.

1. A sale by auction "without reserve," means that neither the vendor, nor any person on his behalf, shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid is equivalent to the real value or not.
2. The highest bona fide bidder at such an auction may sue the auctioneer, as upon a contract that the sale shall be without reserve, if he knocks down the hammer to the subsequent bidding of the owner; and it is not material whether the owner, or a person on his behalf bids with the knowledge or privity of the auctioneer.
3. The owner may, at any time before the contract is legally completed, interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified.
4. Semble, that a bidding by the owner, after the last genuine bidding, is not a revocation of the auctioneer's authority.

This was an appeal by the plaintiff against the decision of the Court of Queen's Bench.

Declaration, that before and at the time of the committing the grievances hereinafter mentioned, the defendant exercised and car-

ried on the trade and business of an auctioneer, and as such auctioneer had been and was retained and employed to sell and dispose of by public auction divers horses, and that the defendant before and at the time of the committing of the said grievances, had caused and procured to be printed and published, and circulated divers advertisements and publications advertising and publishing the said intended sale by auction, and that the same would take place on Thursday, the 24th June, 1858, at No. 1, Cheapside, Birmingham, and by divers advertisements the defendant advertised and published that there would be sold by auction (amongst other horses) a certain horse, as follows, that is to say: "The property of a gentleman, without reserve, Janet Pride, a brown mare without white, five years old, by Jago, out of Stormy Petrel. For performances see *Racing Calendar*." And the plaintiff says, that on the day and year aforesaid, he attended at the said sale by auction, and became and was the highest bidder for the said mare so advertised to be sold without reserve as aforesaid, and thereupon and thereby the defendant became and was the agent of plaintiff to complete the contract on behalf of the said plaintiff for the purchase of the said mare; yet the defendant, not regarding his duty in that behalf, did not, nor would complete the said contract on behalf of the plaintiff for the purchase of the said mare, but wholly omitted and refused so to do, whereby the plaintiff was deprived of the benefit of this contract, and unable to obtain the said mare, as he otherwise would have done, and was put to and incurred divers expenses in traveling with his groom and servants to the said sale, and in and about employing a veterinary surgeon to examine the said mare.

Pleas:—1. Not guilty. 2. That the plaintiff was not the highest bidder. 3. That the defendant did not become the plaintiff's agent, as alleged.

Issues joined.

At the trial, which took place before COCKBURN, C. J., at the Warwickshire summer assizes, 1858, the material facts appeared to be these: The defendant and a Mr. Bretherton, are auctioneers in partnership, at Birmingham, where they have a repository for the sale of horses. In June 1858, they advertised a sale by auction at

the repository. The advertisement contained, among other entries of horses to be sold, as follows: "The three following horses, the property of a gentleman, *without reserve*" one of these was a mare called Janet Pride. The plaintiff attended the sale and bid sixty guineas for her: another person immediately bid sixty-one guineas. This person was Mr. Henderson, the owner of the mare. The plaintiff having been informed that the last bidder was the owner, declined to bid further, and thereupon the defendant knocked down the mare to Mr. Henderson for sixty-one guineas, and entered his name as purchaser in the sale-book, which contained the names of the animals to be sold at the sale in the name of the proprietor. The plaintiff went at once into the auctioneer's office, and saw Mr. Bretherton and Mr. Henderson, and claimed the mare from Mr. Bretherton as being the highest *bona fide* bidder, and the mare being advertised to be sold without reserve' Mr. Henderson said: "I bought her in, and you shall not have her; I gave 130*l.* for her, and it is not likely I am going to sell her for 63*l.*" On the same day the plaintiff tendered to the defendant 63*l.* in sovereigns as the price of the mare, and demanded her. The defendant refused to receive the money or deliver the mare, stating that he had knocked her down to the highest bidder, and he could not interfere in the matter. There was evidence that the plaintiff had notice that the following were amongst the conditions of sale: "The highest bidder to be the buyer; and if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer shall declare the purchaser. Third, the purchaser being declared, must immediately give in his name and address with (if required) a deposit of 5*s.* in the pound on account of his purchase, and pay the remainder before such lot or lots are delivered. Eighth, any lot ordered for this sale, sold by private contract by the owner, or advertised without reserve and bought by the owner, to be liable to the usual commission of 2 per cent." At the trial a verdict was entered for the plaintiff for 5*l.* 5*s.* damages, and leave was given to amend the declaration if the court should think fit. Leave was also given to the defendant to move to enter a nonsuit. The Court of Queen's Bench made the rule

absolute to enter a nonsuit, and this was an appeal from their judgment.

*Macaulay*, Q. C. (*Isaac Spooner*, with him) for the plaintiff. The plaintiff was the highest *bona fide* bidder at the sale, and it was the defendant's duty to have declared him the purchaser of the mare. No doubt this is an action of the first impression, but upon principle it is maintainable. In *Thornett* vs. *Haines*, 15 M. & W. 367, it was held, that where a sale by auction is advertised, or stated by the auctioneer to be "without reserve," the employment by the vendor of a puffer to bid for him without notice, renders the sale void, and entitles the purchaser to recover back his deposit from the auctioneer. The same doctrine was laid down by Lord Chancellor Cottenham, in *Robinson* vs. *Wall*, 2 Phill. 372; and in *Bexwell* vs. *Christie*, Cowp. 395, Lord Mansfield treated a private bidding by or on behalf of the vendor, as a fraud. If that is so, it follows that the expense the party has been put to, as here, the expenses of a veterinary surgeon to examine the mare, may be recovered. The thing done by the owner at the auction was in the nature of deceit, to which the defendant, the auctioneer, was a party. The auctioneer treated the bidding by the owner as a genuine bidding, and not as a countermand of his authority to sell "without reserve." MARTIN, B. The declaration is not founded on that view. It contains no allegation of fraud, but it supposes that there is a duty on the part of the auctioneer to knock down the hammer at the bidding of the last *bona fide* bidder. Therefore, on the pleadings, the court has a right to suppose that the owner was a genuine bidder. It strikes me that the declaration is misconceived. The owner directed the defendant to sell without reserve, that is, to sell to the highest *bona fide* bidder; therefore it was the defendant's duty to have done so, and the declaration is founded upon a breach of that duty. If the auctioneeer had disregarded the owner's bidding, the owner could not have held him liable, according to the principles laid down in *Bexwell* vs. *Christie*. MARTIN, B. How can it be the duty of the auctioneer, as agent of the plaintiff, to complete under these circumstances? Surely the owner may come and stop the sale at any moment, and the auctioneer could not then make a contract to bind

him. Here he ought not to have taken the owner's bidding; that was not a revocation of his authority. MARTIN, B. But if he does not know the owner, what is the auctioneer to do? *Payne* vs. *Cave*, 3 T. R. 148, on which the Court of Queen's Bench proceeded, was a different case to the present; that was an ordinary sale by auction, and not one without reserve. The agency on which the plaintiff relies, arises from the special nature of the auctioneer's instructions to sell without reserve.

*Field* (*Mellor* with him) for the defendant. It is submitted that the judgment of the Court of Queen's Bench, ought to be affirmed. It is clear from *Payne* vs. *Cave*, that a bidding is but an offer, and that, until it is assented to by the fall of the hammer, no contract is created, and it may be retracted before acceptance: *Cooke* vs. *Oxley*, 3 T. R. 653. Perhaps the advertisement might have amounted to a promise to the public: *Denton* vs. *Great Northern Railway Company*, 5 E. & B. 860, 25 L. J. 129, Q. B. The cases of *Jones* vs. *Nanney*, 13 Price, 76; *Warwick* vs. *Slade*, 3 Camp. 127; and *Gerrard* vs. *Bates*, 2 El. & Bl. 476, were then cited. The plaintiff is bound to make out there was a contract; and where is the evidence that the defendant ever undertook the smallest obligation to the plaintiff? As the case stands, the owner had a right to bid; and the hammer having fallen to his bidding, the auctioneer cannot be liable to the plaintiff.* Again, looking at the plaintiff's declaration, can it be said that he has made out the allegations in it? The alleged contract is based on the relationship existing between principal and agent; but there never was any such between the plaintiff and defendant; the breach is, that the defendant would not complete the contract; but he was never plaintiff's agent for that purpose. The defendant was employed to sell, and he was instructed to sell without reserve, and he, for his employer, announces that he is authorized to submit certain horses for sale without reserve. MARTIN, B.—What is the meaning, do you say, of a sale without reserve? The auctioneer is only an agent, and he states that he is authorized to sell on those terms. BRAMWELL, B.—Suppose the owner withdrew his authority, and said he should not sell, could a third party maintain an action for the non-sale? Clearly not.

There is no contract till the hammer is down: *Payne* vs. *Cave*, 3 T. R. 148. If there was a contract here, at what moment of time was it broken? MARTIN, B.—At the moment when the owner made his bid. It seems to me that is a fraud on the contract. WILLES, J.—Suppose the auctioneer was the owner, and he got his clerk to bid the sixty-one guineas, he is then his own principal. What would then be the position of the parties? The auctioneer would not be liable: *Cooke* vs. *Oxley*, 3 T. R. 653; Chitt. on Cont. pp. 9 and 10. An action cannot lie on the contract, because the parties had never agreed together. WILLES, J.—In the case of advertising to pay a reward on the recovery of any article, the advertiser is answerable to any one who finds it; but there is no direct contract between the parties. BYLES, J.—If a man offers goods without reserve, are not those terms accepted as soon as the auction commences? No. A man may attend the auction for a totally different purpose; there is no assenting mind. The real distinction is, fraud or no fraud. Here no fraud is alleged or proved, and the owner had a right to retract his authority, and then the auctioneer had no power to contract with any one: *Simon* vs. *Motivos*, 3 Burr. 1921. BYLES, J.—Here the defendant accepted the plaintiff's bid, and that acceptance by the auctioneer distinguishes the case from *Cooke* vs. *Oxley*. It is as if the auctioneer had repeated at everybid, "I am selling without reserve." It cannot be contended that there was any rescision of the authority till after the plaintiff's bid was accepted.

*Macaulay*, Q. C., in reply. There is no rule of law to remove responsibility from the auctioneer. (He read the declaration.) WILLES, J.—This is an appeal; is the declaration proved? The defendant moves to enter a verdict or non-suit; there can be no non-suit if the declaration is proved. If, upon the facts stated, there is a breach, the plaintiff is entitled to recover. BYLES, J.—The highest bidder means bidder intending to become purchaser; here the bidder was the owner. The defendant depends on *Payne's* case; but the distinction is this; this was an auction without reserve. The plaintiff bids, the auctioneer accepts, and a good contract is made, all but the memorandum in writing required by the statute

of frauds; then another bid is made by the vendor, but that does not alter the case; when the plaintiff bid, the auctioneer closed with the offer, unless there should be a *bona fide* higher bid, and the sale was then and there at an end. BRAMWELL, B.—There is no bargain till the hammer is down. In ordinary cases, but in a sale without reserve it is not necessary to knock down; the refusing to knock down would be a cause of action. The plaintiff was the highest bidder; the bid of the owner was a nullity; if the defendant had knocked down the lot to the plaintiff, there could have been no action against him by the owner. BRAMWELL, B.—Looking at the facts of this case, why should not the parties be subject to an indictment for conspiracy? The plaintiff bids, and then the owner bids, and then the auctioooneer looks to the plaintiff for another bid. The auctioneer, when the owner bid, ought to have said, "This is a revocation of my authority; I can no longer sell without reserve." Instead of which he professed to act within his authority, and every action of his was a reiteration of the assertion that he was authorized to sell without reserve. *Seymour* vs. *Maddox*, 16 Q. B. 326; *Robinson* vs. *Wall*, 2 Phill. 372; *Thornett* vs. *Haines*, 15 M. & W. 367; *Bextall* vs. *Christie*, Cowp. 395; *Emmerson* vs. *Heelis*, 2 Taunt. 38, were referred to. *Cur. adv. vult.*

MARTIN, B.—This is an appeal from the judgment of the Court of Queen's Bench, reported in 28 L. J. 18, Q. B. This judgment is that of my brothers Watson, Byles and myself. My brother Bramwell does not, I believe, entirely concur. He does not differ materially from us, but my brother Willes will state his view of the matter. After stating the facts as *supra*, he proceeded as follows: Upon the pleadings, as they stand, we think the judgment of the Court of Queen's Bench is right, and that the defendant is entitled to the verdict upon the issue upon the third plea. But there is a power given to the court to amend, and it has been held that the power extends to the Court of Appeal, and we think we ought to exercise it largely in order to carry out the object of the C. L. P. A. 1852 and 1854, namely, to determine the real question in controversy between the parties in the existing suit. Upon the facts of the case, it seems to us that the plaintiff is entitled to recover. In

a sale by auction there are three parties, namely, the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sale by auction, the owner's name was not disclosed: he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be "without reserve." This, according to all the cases, both at law and in equity, means that neither the vendor nor any person on his behalf may bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. For this position see the case of *Thornett* vs. *Haines*, 15 M. & W. 367. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time-table stating the times when and the places to which the trains run. It has been decided that the person giving information advertised for, or a passenger taking a ticket may sue as upon a contract with him. *Denton* vs. *The Great Northern Railway Company*, 5 Ell. & Bl. 860. Upon the same principle, it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think that the auctioneer who puts property up for sale upon such a condition, pledges himself that the sale shall be without reserve, or, in other words, contracts that it shall be so, and that this contract is made with the highest *bona fide* bidder, and in case of a breach of it, that he has a right of action against the auctioneer. The case is not at all affected by the 17th section of the statute of frauds, which relates only to direct sales, and not to contracts relating to or connected with them; neither does it seem to us material whether the owner, or a person upon his behalf, bids with the knowledge or privity of the auctioneer. We think the auctioneer has contracted that the sale shall be without reserve, and that the contract is broken upon a bid being made by or on behalf of the owner, whether it be during the time when the property is under the hammer, or whether it be the last bid on which the property is knocked down. In either case

the sale is not "without reserve," and the contract of the auctioneer is broken. We entertain no doubt that the owner may at any time before the contract is legally complete interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment, and the subsequent revocation or conduct of the owner, he is entitled to be indemnified. We do not think the conditions of sale stated in the case (assuming the plaintiff to be taken to have had notice of them) affect it. As to the first, Mr. Henderson could not be the buyer. He was the owner, and, if that were material, there is ample evidence that the defendant knew him to be such. Indeed, we think he ought not to have taken his bid, but to have refused it, stating as his reason that the sale was without reserve. We feel inclined to differ from the view of the Court of Queen's Bench in this, that we rather think the bid of Mr. Henderson was not a revocation of the defendant's authority as auctioneer. The third condition has nothing to do with the case, and the eighth condition only provides, that, if on a sale without reserve the owner act contrary to the conditions, he must pay the usual commission to the auctioneer. For these reasons, if the plaintiff think fit to amend his declaration, he, in our opinion, is entitled to the judgment of the court.

WILLES, J.—I have to state that Bramwell, B. and myself, do not express any dissent from the judgment which has just been delivered by Martin, B., but we prefer putting our judgment upon the ground that the conduct of the parties is strong evidence to show that the auctioneer had not authority to sell without reserve; that he was, without such authority, *ab initio*, and that his conduct is evidence that that was so. If that be so, and if that view be correct, there ought to be a count added in the amendment, stating an undertaking by the auctioneer that he had authority to sell without reserve, and a breach of that undertaking. Suffice it to say, the result is the same, but my brother Bramwell and I prefer putting our judgment on that ground. We do not express any dissent from what my brother Martin has said, but we see our way more clearly in coming to the same conclusion upon the ground I have stated.