RECENT ENGLISH DECISIONS.

In the Court of Queen's Bench.

MAINPRICE *v.* WESTLEY.[1]

The mortgagee of certain premises instructed an auctioneer to offer them on a specified day by public auction for peremptory sale. A handbill was thereupon issued by the auctioneer, announcing the sale "by direction of the mortgagee," and also stating that further particulars might be obtained "from Mr. Hustwick, solicitor, or the auctioneer." At the sale the plaintiff made the highest bid, with the exception of Hustwick, who, acting for the vendor, outbid the plaintiff and bought in the property.

In an action brought against the auctioneer for refusing to sell the premises peremptorily as advertised:

Held, that, under the circumstances above mentioned, he was not liable.

THIS was an action tried before BRAMWELL, B., at the Cambridgeshire Summer Assizes, 1864. The declaration stated that the defendant, being an auctioneer, was retained to sell by public auction a certain messuage, shop, and appurtenances, situated at Soham; and the defendant thereupon circulated certain handbills and other notices wherein it was stated and represented by him that he would offer the said messuage, &c., for *peremptory sale* on the 1st of April 1864. And the plaintiff accordingly attended the sale, and the said messuage, &c., was offered for sale in pursuance of the said handbills, &c.; and the plaintiff there and then bid the highest price for the said messuage, &c., except a certain price which was then and there, to the knowledge of the defendant, wrongfully and contrary to the terms whereon the said messuage, &c., were offered for sale, bid and offered by a certain agent on behalf of the vendor. Then followed the averment of performance of conditions precedent.

Breach—That the defendant, well knowing the premises, did not nor would sell the said messuage, &c., peremptorily, or accept the said offer and bid of the plaintiff, or declare the plaintiff to be the highest bidder and purchaser, whereby, &c.

The defendant pleaded not guilty, and traversed the various allegations of the declaration as to the circulation of the handbills, &c., and the breach. He also pleaded that "the said price bid and offered at the said sale by the said agent was not a price bid

[1] From 14 Weekly Reporter, p. 9.

and offered contrary to the terms on which it was stated by the defendant as alleged, that the said messuage, &c., would be offered for sale."

Upon the trial it appeared that in March 1864, the defendant caused certain handbills to be posted in Soham and its neighborhood, announcing a dwelling-house, grocer's shop, and beer-house at Soham, Cambridgeshire, for *peremptory* sale by auction, by direction of the mortgagee, on the 1st of April 1865, at the Crown Inn, Soham. At the foot of the handbills were printed the following words:—"For further particulars apply to Mr. Hustwick, solicitor, or the auctioneer."

On the evening of the sale the plaintiff attended the auction. At his request the conditions of sale were read by the agent of the vendor, and in them it was stated that the "highest bidder should be the purchaser." No right of bidding was reserved to the vendor. The biddings slowly increased from £130 to £187, which was offered by the plaintiff, and no higher sum being mentioned, the defendant, who acted as auctioneer, inquired of the agent of the vendor (Mr. Hustwick) whether there was any reserve. He was told there was, and that the sum was £195. There being no advance on this price, the property was accordingly knocked down to the vendor as unsold. The plaintiff almost immediately afterwards claimed the property of the defendant, but it was not delivered to him. He thereupon brought this action.

A verdict was entered for the plaintiff, subject to leave reserved to enter it for the defendant. A rule *nisi* was obtained accordingly in Michaelmas Term 1864, by *O'Malley*, Q. C., calling on the plaintiff to show cause why the verdict should not be entered for the defendant, on the grounds that the plaintiff made out no cause of action; that the allegations of the declaration were not proved; that the breach was not proved; that on the facts proved the verdict should have been for the defendant; that there was no contract in writing to bind the defendant; or why judgment should not be arrested, on the ground that the declaration disclosed no cause of action.

Lush, Q. C., *Douglas Brown*, and *Markby* showed cause, and contended that at a *peremptory* sale the highest bidder was of necessity the purchaser.

O'Malley, Q. C., and *Keane*, Q. C., in support of the rule, contended that although the sale was advertised as *peremptory*, yet the vendor had a right at the auction to place a reserve price on his property.

The following cases were cited:—*Franklyn* v. *Lomond*, 4 C. B. 637; *Dingwall* v. *Edwards*, 12 W. R. 597; *Warlow* v. *Harrison*, 7 Id. 133, 1 E. & E. 295; in error, 29 L. J. Q. B. 14; *Manser* v. *Back*, 6 Hare 443; *Hanson* v. *Roberdeau*, Peake N. P. Rep. 163.

The judgment of the court[1] was delivered by

BLACKBURN, J.—The declaration in this case contains averments that the defendant, being an auctioneer, retained to sell by public auction a house and shop, published and circulated handbills, in which it was stated and represented by the defendant that he, the defendant, would offer the said messuage and shop for peremptory sale by public auction on a day and at a place named; that the plaintiff, confiding in these statements and representations, attended at the time and place; and that the messuage was offered according to representations and statements, and the plaintiff then bid a price, which was the highest bid, except a sum which, to the knowledge of the defendant, was bidden by an agent on behalf of the vendor, contrary to the representation that the sale was peremptory; yet the defendant did not, nor would sell the messuage peremptorily or accept the offer of the plaintiff, or declare the plaintiff the highest bidder and purchaser. There were pleas, among others, of "not guilty," and a denial that the defendant caused the handbills to be published and circulated as alleged. If it had been alleged that any part of this representation was false to the knowledge of the defendant, and that the plaintiff was induced by such deceit to incur expense by going to the place of auction or the like, the count would have been good, and the plaintiff, on proof of the deceit, would have been entitled to such damages as he might have sustained by reason of expenses or loss of time occasioned by his attendance at the sale, or possibly to merely nominal damages. But intentional deceit is neither alleged nor was it attempted to be proved; what the plaintiff relied on was, that there was a contract on the part of the defend-

[1] COCKBURN, C. J., BLACKBURN, J., MELLOR, J., and SHEE, J.

ant that if the plaintiff was the highest bidder the premises should be knocked down to him, and if he had proved such a contract, the declaration would, probably after verdict, be understood as alleging it, or at all events might easily be made so to do by an amendment. But we think that no such contract was proved.

It appeared on the trial that the defendant was an auctioneer, and that he had circulated handbills in which it was stated that the premises, on the day in question, would be offered for peremptory sale by auction by Mr. J. Westley, the defendant, by direction of the mortgagee, with a power of sale subject to such conditions as would be then declared, and at the bottom of the bill was a statement in large capitals, "for further particulars apply to Mr. Hustwick, solicitor, or the auctioneer." There is no doubt that this was a representation by the defendant that he intended to put up the premises for peremptory sale, but it also contained a statement that he did so by direction of the mortgagee and as agent for him, and though the name of that mortgagee is not disclosed on the bill, the name of the solicitor, Mr. Hustwick, is disclosed, and he is referred to as being the party from whom further particulars were to be obtained. These parts of the handbills very materially qualify the representation stated in the declaration, and it appeared that they were true. Hustwick was the solicitor of the vendor, and the representations were made by his authority, and the plaintiff's complaint was that Hustwick bought in the premises. If there was a contract on the part of the defendant that the sale should be peremptory, it was truly enough said that the contract was broken by allowing the property to be bought in.

The plaintiff's counsel, in the argument before us, mainly relied on the authority of the case of *Warlow* v. *Harrison*, where in the Exchequer Chamber three learned judges gave their opinion that where an auctioneer advertised a sale without reserve, not disclosing in any way who his principal was, he personally contracted that there should be a sale without reserve. Two other learned judges did not agree in this view, and it appears that ultimately the Court of Exchequer Chamber pronounced no other judgment than that the pleadings should be amended to enable the parties to raise the question, unless they consented to a *stet processus*, which they did. We do not think, therefore, that we are precluded by this as a judgment of a court of error, and, if neces-

sary, we should be at liberty to consider the question whether even in a case where the name of a principal is not disclosed by an auctioneer, there is a contract by the latter such as is now insisted on. The Lord Chief Justice and my brother SHEE are of opinion that there is not, inasmuch as the character of an auctioneer as agent is unlike that of many other agents as to whom so long as the fact of their having a principal is undisclosed, it remains uncertain whether the contracting party is acting as principal or agent; while in the employment and duty of an auctioneer, the character of agent is necessarily implied, and the party bidding at the auction knowingly deals with him as such, and with the knowledge that his authority may at any moment be put an end to by the principal; I myself should pause before deciding upon this ground. I do not, however, wish to express dissent from the view thus expressed, and we are all of opinion that it is unnecessary to decide this point. The three judges who formed the majority of the court in *Warlow* v. *Harrison*, base their opinion entirely on the fact that the vendor was not disclosed: that he was a concealed principal; but in the present case the passages in the handbill (which are not set out in the declaration) showed that the defendant was acting for a principal, the mortgagee, who was described, and whose agent, Mr. Hustwick, was named. Now, as a general rule, where an agent acts for a named principal, the contract, if any, is *primâ facie* with the principal, not with the agent, and accordingly acting on this principle the Court of King's Bench, in *Evans* v. *Evans*, 3 A. & E. 132, decided that where premises were let by auction by the plaintiffs as actioneers, but at the foot of the written conditions was written "approved by David Jones," the contract of letting was not with the plaintiffs, as auctioneers, but with David Jones. PATTESON, J., saying: "On the document I can see no doubt; if the plaintiffs let for themselves, why is David Jones's name added?" We think this an express authority, that if there was any contract in this case it was with Hustwick, not with the defendant. We are not to be understood as deciding that the plaintiff could not have maintained this action against Hustwick, but merely that he has failed in proving any case against the defendant. The rule therefore must be absolute to enter the verdict for the defendant.

Rule absolute.

This case is of some importance, inasmuch as it modifies in some degree the decision of the Court of Exchequer Chamber in *Warlow* v. *Harrison*, 7 W. R. 133, s. c. in error, 29 L. J. Q. B. 14, and confines the liability of an auctioneer within narrower limits than those there indicated. There the defendant, who kept a repository for the sale of horses by auction, advertised three specified horses, "the property of a gentleman," to be sold "without reserve," on the 24th June 1858. In the printed conditions of sale there was a stipulation that the *highest bidder* should be the buyer. The plaintiff attended the sale and bid sixty guineas for one of the horses put up. Thereupon the owner bid sixty-one guineas, and the lot was knocked down to him. The plaintiff then went to the office of the defendant and claimed the horse as his property. The defendant, however, refused to deliver it, whereupon an action similar to that in the principal case was brought against him. It was contended on the part of the plaintiff that, according to the maxims both of the civil and of English law, he was absolutely entitled to the property, as the highest *bonâ fide* bidder. As soon as the plaintiff had bid for the horse, the defendant, it was urged, became his agent to complete the contract. "But," said Lord CAMPBELL, C. J., "*till the hammer goes down*, the auctioneer is exclusively the agent of the vendor." A bidding was, in point of fact, in the learned judge's view, a mere offer (*Payne* v. *Cave*, 3 T. R. 148), the vendor and bidder being free, and, *a fortiori* the auctioneer, until the hammer falls. Acting upon these principles, the Court of Queen's Bench decided that no action lay, at the same time throwing out a suggestion that there might be a remedy against the owner himself for violation of the publicly-announced condition that the horse should be sold without reserve.

The case was afterwards carried to the Exchequer Chamber, and although the judgment of the court below was affirmed as the pleadings stood, the court expressed dissent from the view of the auctioneer's position intimated by Lord CAMPBELL. "It seems to us," they observed, "that the highest *bonâ 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 *bonâ fide* bidder, and in case of a breach of it that he has a right of action against the auctioneer.

The decision in the principal case certainly seems at first sight inconsistent with the opinion above expressed, but BLACKBURN, J., in the considered judgment of the court read by him, draws an important distinction between the two cases. In *Warlow* v. *Harrison*, the principal was undisclosed; in the principal case he was disclosed. The handbill showed that the defendant was acting for a mortgagee. It described the sale as "by direction of the mortgagee." The contract to sell peremptorily, therefore, if with any one, was with Mr. Hustwick, the agent of the vendor, and not with the auctioneer. The principle was the same as that involved in *Evans* v. *Evans*, 3 A. & E. 132. There certain premises were let by auction by the plaintiffs as auctioneers, but at the foot of the written conditions of sale were these words, "approved by David Jones." The court held the contract of letting to be not with the plaintiffs but with Jones. "On the document," said PATTESON, J., "I can see no doubt. If the plaintiffs let for themselves, why is David Jones's name added?" So here the contract to sell without reserve was with Hustwick, and not with the defendant. If with the defendant, why, it may be asked, in the

words of PATTESON, J., was Hustwick's name added?

It may be taken, therefore, as now settled that where an auctioneer, whose principal is disclosed, advertises property for peremptory sale, and afterwards the vendor chooses to put a reserve price on such property, and buys it in, the auctioneer is not liable in an action for refusing to sell. Nor does this decision conflict with the judgment in *Warlow* v. *Harrison*, in the Exchequer Chamber, inasmuch as in that case the fact of the concealment of the principal was really the *ratio decidendi*, and was expressed to be so at the commencement of the judgment. The judgment, moreover, was only that the pleadings should be amended, unless a *stet processus* were agreed on. Accordingly, it cannot even be considered as a binding decision on an auctioneer's liability where the principal is not disclosed. This point still remains for future discussion. COCKBURN, C. J., and SHEE, J., are of opinion that the circumstance of disclosure or concealment makes no difference whatever. The character of an auctioneer they consider as sufficient notice that he is dealing as an agent, and not as a principal; but BLACKBURN, J., has a doubt as to the correctness of the view there expressed. However this may be, the judgment in the principal case relieves auctioneers definitely from all liability consequent on not selling without reserve, according to advertisement, in cases where they deal for disclosed principals who, at the auction, place a reserve price on their property.—*Solicitors' Journal.*

In the Court of Chancery.

MORTIMER *v.* BELL.[1]

At a sale of real estate by auction the vendors are not authorized in employing two persons to bid against each other, although there is a reserved price; and such persons do not, in fact, bid beyond that price.

Semble, the right to fix a reserved price ought to be stipulated for and expressly notified.

Per LORD CHANCELLOR.—The rule, said to exist in equity, allowing one puffer to be employed, without notice, to prevent a sale at an undervalue, is abstractly less sound than the rule at law, which declares such employment to be fraudulent; and rests only on the authority of decisions in lower branches of the court.

THIS was a suit by the vendors for the specific performance o an agreement to purchase an estate. The plaintiffs, who were executors and trustees, had offered the property for sale by auction and had instructed the auctioneer not to sell the property under £4000. A person named Webb was employed by the vendors to bid, and Webb started the biddings at £2600, and the auctioneer and Webb bid alternately against each other for ten biddings,

[1] From 14 Weekly Reporter, p. 68.

until £3600 was reached. The defendant then, for the first time, bid £3650, when the auctioneer, by the direction of one of the plaintiffs, who was present, declared that the property was now for open sale, and no other bidding being made, the property was knocked down to the defendant. On subsequently discovering the above facts, the defendant declined to complete his purchase, on the ground that there had been fraudulent puffing, and the plaintiffs consequently filed the present bill.

The case was heard by the Master of the Rolls, who decided that the auction was valid, and made a decree for specific performance of the contract. See 13 W. R. 569, where a full statement of the facts of the case will be found. From this decree the defendant appealed.

Baggallay, Q. C., and *Steere*, for the plaintiffs, contended that the sale was not vitiated by the puffing. Whatever might be the rule at law, a rule had been recognised by the courts of equity that a puffer might be employed to prevent a sale at an undervalue. Nothing more had been done here; for no bid had been made for the vendors in advance of the only bidding of the defendant. It was not necessary expressly to notify that there was a reserved price, which was always to be inferred when a sale was not expressed to be without reserve. Such was the common practice of auctioneers, and it was followed even in sales under the court: Sugd. Ven. & Pur. 9; *Smith* v. *Clarke*, 12 Ves. 477.

Hobhouse, Q. C., and *Busk*, for the defendant, contended that the sale was invalid. The employment of any person without notice to bid for the vendor was fraudulent at law: *Bexwell* v. *Christie*, 1 Cowp. 395; *Howard* v. *Castle*, 6 T. R. 642; *Thornett* v. *Haines*, 15 M. & W. 367; *Crowder* v. *Austin*, 2 Car. & P. 208, 3 Bing. 368; *Wheeler* v. *Collier*, 1 Moo. & M. 123; *Green* v. *Baverstock*, 14 C. B. N. S. 204; *Robinson* v. *Musgrove*, 8 Car. & P. 469; *Veazie* v. *Williams*, 8 How. U. S. 134; 2 Kent's Com. on American Law 757, 10th ed.; Bell's Principles of Scotch Law 51. The supposed rule in equity was not very firmly established, and at most only permitted the defensive practice of fixing a reserved bidding, and of employing one bidder to bid for the vendor, unless there was express notice, and would never permit a vendor to entrap a purchaser into a purchase at an over-value by stimulating him by fictitious biddings, or sanction the employ-

ment of two bidders: *Jervoise* v. *Clarke*, 1 Jac. & Wal. 389; *Shaw* v. *Simpson*, Id. 392 n.; *Bramley* v. *Alt*, 3 Ves. 619; *Conolly* v. *Parsons*, Id. 625 n.; *Woodward* v. *Miller*, 2 Coll. 279; *Flint* v. *Woodin*, 9 Hare 618; *Walker* v. *Gascoigne*, 2 Eq. Ca. Abr. 483; s. c., sub tit. *Walker* v. *Nightingale*, 4 Br. P C. 193; *Rex* v. *Marsh*, 3 Y. & S. 331; *Meadows* v. *Tanner*, 5 Madd. 34; *Robinson* v. *Wall*, 10 Beav. 61, 2 Ph. 372.

Baggallay, Q. C., in reply, said that the cases at law and in equity could not be reconciled, and in this court the latter mus prevail.

The Lord Chancellor asked whether Mr. *Baggallay* could adduce any instance, other than in cases of auction puffing, in which this Court had decreed specific performance of a contract which would have been declared void by courts of law.

Baggallay, Q. C., knew of no such instance.

Lord CRANWORTH, C., after stating the facts of the case, said that the conditions of sale contained the usual provision that the highest bidder should be the purchaser. Courts of law had held that such a condition prevented the vendor from interposing any reservation, and that the vendor had by that condition agreed that whoever offered the highest price should have the property. A bidding by the vendor or his agent was, it was said, no bidding, and so there was a contract that the highest bidder, other than the vendor or his agent, should be the purchaser. It was not disputed that the vendor might stipulate for the power of buying in the property if it were going at an under-value. But, in the absence of such stipulation, courts of law most certainly held that it was a fraud in a vendor to interpose any bidder to prevent the property from going to the person who offered the highest price. It was said that a different rule prevailed in courts of equity, viz., that without any express stipulation a vendor might always fix a reserved price, and authorize a person to bid for him, unless the sale was a property declared to be "without reserve," and it was argued that the present case came within that rule.

That such a rule to some extent was said to exist could not be doubted. Its existence had been recognised by many judges of the highest reputation. Sir W. GRANT, in *Smith* v. *Clarke*, 12

Ves. 481, not only recognised but apparently approved of the rule.

When such an agreement was stipulated for, there was no fraud nor deception, but it was said that even without express stipulation, such a right was understood to exist. His Lordship confessed that he thought that it was much better that such right should be notified, for if it were not notified, there was a difference between the language used and that which was said to be understood to be its import. The question in such cases might always arise whether persons bidding were aware of the rule. The usage of the Court of Chancery, in modern times at all events, was to stipulate expressly for the right not to sell under a fixed price; and so, by implication, to employ a person to bid up to that price. But, even if such a right might be assumed to be reserved in every sale by auction, still that did not seem to warrant what was done in this case. Here there were in effect two persons bidding for the vendors, viz., Webb and the auctioneer. The whole sale up to the bidding of 3600*l.* was a mere fiction. When the vendor retains, either by express stipulation or by implied usage, a right to bid by an agent up to a fixed price, no real bidder can be deceived by such bidding. If the real bidder bids 1000*l.*, and the auctioneer declares that a bidding of 100*l.* has been made in advance, thus raising the bidding to 1100*l.*, the real bidder knows that this may be a mere bidding by the vendor, and so, to whatever extent the bidding may go, every bidding may be treated as a statement made by the auctioneer, acting as agent for the vendor, that an advance has been offered to the amount of the sum bid. When there is a real bidding, and the advance has been made by the vendor's agent, pursuant to liberty expressly or impliedly reserved, the auctioneer might truly say of this latter bidding, as well as the others, that a further sum had been bid. It is true that it was a sum bid by the vendor himself, but he had reserved a right to bid, as was *ex hypothesi* known to the real bidder. But how did that apply to a case like the present, where there were two persons bidding for the vendors? When Webb bid 2500*l.* for the property, the object of the vendors to prevent a sale at a sum less than 4000*l.* would have been fully secured without any further bidding. The auctioneer had only, after waiting a reasonable time, to knock the property down to Mr. Webb as the only bidder. When the auctioneer took upon himself to

make an advance of 100*l.* on Webb's bidding, he must be considered as having said, "Mr. Webb has bid 2500*l.*; but A. B. has bid 2600*l.*;" and so on through all the biddings up to 3600*l.*

The whole proceeding was a fiction, calculated, if not intended, to deceive persons who thought of becoming purchasers. There was neither principle nor authority for holding that in such a case a vendor, who by this misrepresentation had induced a third person to bid, could enforce his contract.

In *Bromley* v. *Alt*, 3 Ves. 620, it was expressly found that there was only one bidder for the plaintiff, who bid only seventy-five guineas per acre, the price fixed by the vendors; all the other biddings were real biddings. In *Smith* v. *Clarke*, 12 Ves. 477, there was only one person employed, with express orders to allow the lot to be sold if a sum exceeding 750*l.* should be bid, but not under that price. It was accordingly knocked down to a purchaser at 760*l.*, and Sir W. GRANT held this to be a fair transaction. In *Flint* v. *Woodin*, 9 Hare 618, Lord Justice TURNER, then Vice-Chancellor, came to the same conclusion. The current of authorities had been so strong in favor of allowing a single bidder, that he (the Lord Chancellor) might have found it difficult to go against them, though agreeing with what was said by Lord Justice KNIGHT BRUCE, when Vice-Chancellor, in *Woodward* v. *Miller*, 2 Coll. 279, 282, that, abstractedly, the legal doctrine was the soundest; and the same was evidently the opinion of the Master of the Rolls. At the same time, the authorities in question included no decision of the Lord Chancellor or the Lords Justices.

Here, however, for the reasons indicated, the question did not arise because there were two bidders. The decree of the Master of the Rolls must be reversed, and the bill be dismissed with costs.