APPELLATE CIVIL.

Before Mr. Justice Coutts Trotter and
Mr. Justice Ramesam.

JORAVARMULL CHAMPALAL (AUCTION PURCHASER), APPELLANT,

1922, March 27.

v.

JEYGOPALDAS GHANSHAMDAS BY HIS AGENT MUGDUTH AND TWO OTHERS (PLAINTIFF AND DEFENDANTS 1 AND 2), RESPONDENTS.*

Auction—Bid—Bid withdrawn before fall of hammer—Bid an offer—Whether it can be withdrawn before acceptance.

A bid at a Court auction sale is merely an offer which can be withdrawn at any time before it is accepted, and the lot knocked down to the bidder.

ON APPEAL from the Order of Mr. JUSTICE KUMARASWAMI SASTRI made in an application by plaintiff for declaring the appellant herein an auction purchaser at the sale held in execution of the decree in Civil Suit No. 1108 of 1917, on the file of the High Court of Judicature at Bombay and transferred to this Court for execution.

The facts are set out in the Judgment.

T. R. Ramachandra Ayyar and *V. Radhakrishnayya* for appellant.

A. Krishnaswami Ayyar and *N. Rama Ayyar* for respondents.

The JUDGMENT of the Court was delivered by

COUTTS TROTTER, J.

COUTTS TROTTER, J.—This case gives rise to a point of law which has been considered from various aspects both in England and in this country. The facts are these: The appellant in this Court went to an auction and made a bid

* Original Side Appeal No. 67 of 1921.

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of Rs. 29,200, which turned out to be the highest bid that was made, but before the property was knocked down he seems to have discovered that there was a mortgage on the property subject to which the sale was being conducted. It is not suggested that there had been a concealment about this, but merely that in point of fact it did come to the knowledge of the appellant only a few minutes after he made this bid and before the hammer fell. As soon as it did come to his knowledge he attempted—I say "attempted" because it was not given effect to—to retract his bid, but the auctioneer would not have it and knocked the property down to him for the figure that he had bid, and it is now sought, on behalf of the owner of the property, to enforce that bid against him and the learned Judge has found in favour of that contention.

There is a good deal of authority on this matter and there is authority which, on the face of it, appears to be quite clear. The first case I propose to refer to is the case of *Payne* v. *Cave*(1), where the auction was one with the usual condition that the highest bidder should be the purchaser. There exactly the same thing happened; a bid was made but before the hammer fell it was retracted and the Court in giving judgment expressed itself as follows:

"The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller by knocking down the hammer which was not done here till the defendant had retracted. An auction is not unaptly called a *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

(1) (1789) 3 Term Rep., 148.

After that was decided, Lord St. Leonards in his Treatise on Vendors and Purchasers writing in the light of that case says this :

"A condition that no person shall retract his bidding was originally suggested to me by the case of *Payne* v. *Cave*(1), and it has now become a common condition. But I always thought it one that could not be enforced."

Of course Lord St. Leonards at the time he wrote these words was not Lord St. Leonards but Sir Edward Sugden, and no doubt numberless particulars and conditions of sale were settled by him, and what he says amounts to this—when I have put in a condition against a bidder being allowed to withdraw his bid, I have always been of opinion myself that it was waste paper.

The next case in which the matter is referred to is *Jones* v. *Nanney*(2). There is very little to say about the actual decision, but it is relied upon by the respondent in this case because of an interpolation on page 99 of some observations made by WOOD, B., on the first argument ; he threw out the suggestion that the solution of the whole matter might be sought not in the ordinary rules as to offer and acceptance but in the doctrine embodied in section 17 of the Statute of Frauds.

The next case which I wish to refer to is *Freer* v. *Rimmer*(3), which was before SHADWELL, V.C. There an estate was put up for sale under a decree and the estate was subject to a mortgage and the mortgagee through his solicitor consented to the sale. When the sale took place the solicitor of that very mortgagee attended the sale and made what turned out to be the highest bid. He then purported to withdraw it before the hammer fell but it was sought to hold him

(1) (1789) 3 Term Rep., 148. (2) (1824) 13 Price, 76.
(3) (1844) 14 Sim., 391.

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on behalf of his client to the contract. The report is very meagre and it is very difficult to make out exactly on what ground the case proceeded. There was a condition there that no bidding should be retracted, so that the very situation Sir Edward Sugden had sought to emphasise had arisen. But all that we are told is this: "The Vice-Chancellor refused the motion with costs," that was a motion to declare that the sale was not binding on the mortgagee—

> "on the ground that, as the estate had been sold with the mortgagee's consent, his solicitor ought not to be allowed to defeat the sale."

I feel very great difficulty in grasping what precisely is meant by this. I do not for a moment presume to say that the decision was wrong, but it seems to me that it hinted at some kind of doctrine, whether of estoppel or refusing a person approbation and reprobation in the same breath, which is not clearly outlined in the report and I see that most of the Judges who dealt with this case have felt a difficulty about it. In no event can it be, as appeared to be suggested by the learned trial Judge, an authority for the proposition that in such a matter as this there is a difference between a Court sale and a private sale. Apparently, in one passage the learned Judge seems to think that this case establishes such a distinction. The matter is a question of the law of contract and nothing else, and it cannot matter whether the sale is by a Court or by a private auctioneer.

I now come to the case which, if I may say so, has given rise to all these difficulties and that is the very well-known and admittedly very unsatisfactory case of *Warlow* v. *Harrison*(1). It was unsatisfactory for many

(1) [1859] 1 El. and El., 309.

reasons. In the first place, it ended in nothing, because the plaintiff was given an opportunity to amend his plaint which he in the end never did, and the three learned Judges, MARTIN, B., BYLES, J., and WATSON, B., gave a decision based on one ground, whereas WILLES, J., and BRAMWELL, B., two of the greatest masters of the common law preferred to rest their judgment on a totally different ground, although they did not go the length of dissenting from the ground taken by the other learned Judges. The facts in that case were these: A mare was put up for sale and advertised to be sold "without reserve." The plaintiff bid for the horse and was the highest bidder of the lay public, as I may call it. But the owner of the horse, to save the horse from going at that price, made a bid and the horse was knocked down to him for 61 guineas which was one guinea more than the plaintiff's bid and thereupon the latter brought his action against the auctioneer. The three learned Judges I have referred to, MARTIN, B., BYLES, J., and WATSON, B., came to the conclusion that they could found themselves upon what they supposed to have been decided in *Denton* v. *Great Northern Railway Co.*(1). It is to be observed that, whether Denton's case was rightly decided or not (and a very great number of eminent members of the profession have held very strong opinions that it was not) even taking it as it is, it turned out in the end to be a decision founded by the learned Judges not on contract but on tort. The Court in *Warlow* v. *Harrison*(2) basing itself on that found that, owing to the contract that the horse should be sold "without reserve," there was a binding contract when the last open bid was given; that is to say, they held that a

(1) [1858] 5 E. & B., 860. (2) [1859] 1 El. and El., 309.

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bid at an auction is not a mere offer which can be revoked before acceptance but really clinched the bargain owing to the clause that the highest bidder should get the property. The other two learned Judges preferred to put it on a much narrower ground, one which we are not concerned with in this case at all, namely, that by putting up the horse "without reserve," the defendant, the auctioneer, held himself out as having authority to conduct the sale on those terms, namely, "without reserve." That, obviously, he had failed to do and it was a matter which might well sound in damages to the plaintiff, but it would not make him as upon the other view the actual purchaser and owner of the horse.

After *Warlow* v. *Harrison*(1) there is a series of cases which discuss the problem raised by it. In *Harris* v. *Nickerson*(2) a gentleman went off to Bury St. Edmunds to attend a sale of certain brewing materials, plant and office furniture. He went to buy the furniture, if he could get it, and when he got to the auction the things he wanted to buy were not put up to auction at all and were withdrawn, and he brought a suit to recover damages for his loss of time and his travelling expenses. The Court held that no such action would lie because the suit was such as might lie in the case of everybody who attended the sale for cab hire and travelling expenses; and Lord Blackburn—and that is the real interest in the case—says this:

"As to the cases cited: In the case of *Warlow* v. *Harrison*(1) the opinion of the majority of the Judges in the Exchequer Chamber appears to have been that an action would lie for not knocking down the lot to the highest bona fide bidder when the sale was advertised as without reserve: in such a case it may be that there is a contract to sell to the highest bidder, and that if

(1) [1859] 1 El. and El., 309. (2) [1873] L.R., 8 Q.B., 286.

the owner bids there is a breach of the contract; there is very plausible ground at all events for saying, as the majority of the Court thought, that the auctioneer warrants that he has power to sell without reserve. In the present case unless every declaration of intention to do a thing creates a binding contract with those who act upon it, and in all cases after advertising a sale the auctioneer must give notice of any articles that are withdrawn or be liable to an action, we cannot hold the defendant liable."

I feel the interest of that passage is as being a very clear indication that that very learned and eminent judge, Lord BLACKBURN, was not by any means satisfied that the first ground of decision in *Warlow* v. *Harrison*(1) was rightly decided but preferred to rest himself on the ground taken by BRAMWELL, B., and WILLES, J.

I now come to more recent cases and the first I propose to refer to is *Johnston* v. *Boyes*(2), a decision of COZENS-HARDY, J., sitting alone. That was a case which came to nothing, because the plaintiff's case failed on the ground that he was not a bona fide bidder at all, as he was a pauper from whom no auctioneer would accept a cheque in payment of the deposit. But the learned judge was prepared to deal with the case on the footing that if a property is to be sold on the terms contained in a printed form then the person who makes a bid may be taken to have accepted the offer in terms of those conditions, and in coming to that conclusion he based himself on *Warlow* v. *Harrison*(1), and also on *Carlill* v. *Carbolic Smoke Ball Co.*(3). With the greatest respect to so eminent a judge, I do not think that Carlill's case has really any bearing on a matter of this kind because, notwithstanding that there was an offer on the part of the defendant Company, the only matter under discussion was whether what the plaintiff in that case, Mr. Carlill,

(1) [1859] 1 El. and El., 309. (2) [1899] 2 Ch., 73.
(3) [1892] 2 Q.B., 484.

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did, amounted or did not amount to an acceptance of that offer, and there was no question as to which was offer and which acceptance, which is the whole point in this case. The point is, is the person who bids at such an auction making an offer or is he accepting an offer which is outstanding before him?

The next case is *McManus* v. *Fortescue*(1), decided by COLLINS, M.R., COZENS-HARDY, L.J., who had been a party to the judgment in *Johnston* v. *Boyes*(2), which I have just referred to, and FLETCHER MOULTON, L.J. That was a case of sale by auction subject to reserve, and by a slip the auctioneer knocked down the property to the plaintiff at a figure lower than the reserve price. The court held that everything that happened was subject to the condition that the reserve price should be reached and that as the purported sale took place before the reserve price was reached it conferred no rights upon the purchaser; and the Master of the Rolls alluded to an earlier case, *Rainbow* v. *Howkins*(3). That was another case of a slip by an auctioneer putting up a pony on which a reserve price had been put and stating by mistake that the sale was without reserve: and a suit was brought for delivery of the pony or for damages for breach of warranty of authority to sell without reserve. The learned judges held that no case could possibly lie on the sale, because there was no memorandum of the purchase that would satisfy the requirements of the Statute of Frauds. As regards the claim for damages for breach of warranty, they held that there was no breach of warranty because the principal would have been bound by the action of his agent, the auctioneer, in knocking down the hammer; and that even had the

(1) [1907] 2 K.B., 1. (2) [1899] 2 Ch., 73.
(3) [1904] 2 K.B., 322.

principal been sued, the same difficulty would have arisen, namely, the mistake of the agent, but as the principal would have been bound, there was no breach of warranty of authority. But in referring to that case, COLLINS, M.R., says this :

"With regard to the case of *Rainbow* v. *Howkins*(1), which has been cited in support of the plaintiff's case, in my opinion it does not conflict with anything that I have said. I do not think the decision is an authority in support of the plaintiff's case, but if it could be so treated I should desire to consider further whether it can be supported. In the view I take of this matter the decision of the learned Judge was right and the appeal should be dismissed."

Then COZENS-HARDY, L.J., points out the distinction between *Warlow* v. *Harrison*(2) on the lines of which *McManus* v. *Fortescue*(3), the case before them, was launched and the latter and says that in the latter case the contract was subject to the reserve and that contract had never been broken and that consequently the plaintiff could have no cause of action.

I now desire to refer to two decisions of this Court. One of them is *Agra Bank* v. *Hamlin*(4). That was again a case of a withdrawn bid and the learned Judges decided that the buyer had a *locus pœnitentiæ* until the actual fall of the hammer. It is quite true that MUTTUSWAMI AYYAR, J., alluded to the fact that there was no condition provided in the conditions of sale, that the bidders should not withdraw their bids, but the other learned Judge, BEST, J., does not put it on that ground ; and the decision proceeded on the broad principle that a bidding at an auction is merely an offer which can be retracted until it is accepted. Then finally, there is a recent decision, *Raja of*

(1) [1904] 2 K.B., 322.
(2) (1859) 1 El. and El., 309.
(3) [1907] 2 K.B., 1.
(4) (1891) I.L.R., 14 Mad., 235.

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Bobbili v. *Suryanarayana Rao*(1), a decision of OLDFIELD and SESHAGIRI AYYAR, JJ., which emphatically repeats the proposition derivable from the earlier cases that a bid at an auction is merely a proposal which is not binding until it is accepted. In that case the auction was adjourned and the person who made the bid died before the auction was resumed; and it was held that the last bid he had made was not one which was binding upon his estate because it had not been accepted.

Mr. A. Krishnaswami Ayyar in the course of his interesting argument craved in aid the cases which relate to the exercise of options, of which the most familiar are *Denton* v. *Great Northern Railway Co.*(2) and *Burton* v. *Great Northern Railway Co.*(3). But we do not think that the analogy is sufficiently close to give us very much assistance. What was really decided in those cases is this, that a person who undertakes to supply a Railway with goods as ordered during a certain period is really making a continuous offer; the moment the Railway gives an order for the supply of goods at the specified rate, *pro tanto* there is a fixed and definite enforceable contract, but until such a specification is made the thing merely remains an offer which can be withdrawn by the person who makes it. In any event, the Railway Company could always write and say: "We do not intend to give any further orders under this document," and against such action there could be no remedy at all. It appears to us that it only introduces confusion into matters of this kind to talk about a unilateral contract. Take the option cases. They do not mean that one person is bound and not the other and that

(1) (1919) I.L.R., 42 Mad., 776. (2) (1856) 5 El. & Bl., 860.
(3) (1854) 9 Exch., 507.

consideration has passed or is expected to pass from one side only to the other, for that would be like the case of *Cooke* v. *Oxley*(1). It is perfectly true that if a person agrees to keep an offer open and is paid for doing so, it is a perfectly valid agreement to keep the offer open. On the other hand, in the option cases, there is no consideration to prevent the person who made the offer from withdrawing it. In such cases there are really two contracts; there is the main contract if it comes to birth, and there is the preliminary collateral contract to ensure, in return for additional consideration, that the offer to enter into the main contract shall remain open and that the door shall not be closed for the time delimited in the agreement. In *Cooke* v. *Oxley*(1) there was no consideration. The contract was proposed; the person to whom it was proposed promised that he would keep his offer open to a certain hour of the day, and before that he sold to somebody else; there was no independent consideration whatever which could be referred to a promise to keep the contract open. In the case of the latter kind of option it will be seen that part of the consideration for the option must be supposed to be the entry into the original contract. It is very clearly put by the House of Lords in the well-known case of *Helby* v. *Matthews*(2). That was a case of a hire purchase agreement. The point on which the case turned was the applicability of section 9 of the Factors Act, 1889, which gave the power of conferring title into the hands of a person who satisfied the definition of the Act of being "a person having agreed to buy goods." The person in question, one Brewster, took a piano on a hire purchase agreement, which has become so familiar since that date, on

(1) (1790) 3 Term Rep., 653. (2) [1895] A.C., 471.

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the terms that he paid so much a month, that he could terminate the hiring by delivering up the piano at any time, but that when and if he had paid a specified number of instalments within a certain period of time, as from that date it would become his absolute property. What happened was that before he became the owner he pledged it with a pawn broker as security for an advance. The question was whether the hirers were entitled to take the piano away from the pawn broker or the pawn broker could set up a right to be protected under section 9 of the Factors Act. It was held that the pawn broker was not protected because the pledgor was not a person who had "agreed to buy goods." All he had done was to enter into a contract whereby it was within his power to buy the piano if he liked to buy it but which did not bind him to do so. Lord HERSCHELL says this:

> "I cannot think that an agreement to buy, 'if he does not change his mind,' is any agreement to buy at all in the eye of the law. If it rests with me to do or not to do a certain thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it. It appears to me that the contract in question was in reality a contract of hiring and not in name or pretence only."

But the analogy of the option cases is very faint and its only value is as showing this: that you can have the legal right to get something done for you, or given to you, or handed over to you, at your option at a future date, and that such an agreement can be so drawn up as to be perfectly valid and binding. All we are concerned with in this case is to determine whether the bid in auction is to be regarded as the acceptance of the general offer made by the auctioneer, as Mr. Krishnaswami Ayyar would have it, or whether it is merely an offer which it is for the auctioneer as the agent of the vendor, to accept by knocking the property

down. It seems to us that the very word "bid" or "bidder" is indicative of a person who is making an offer rather than concluding an arrangement. But apart from that, we think it is quite clear that to take any other view leads to such a complexity of artificial reasoning that it is clearly indicative that the conclusion is not sound. Mr. Krishnaswami Ayyar was faced with this difficulty, that if I bid Rs. 20 and that is called an acceptance and a contract and if another man bids Rs. 25 the next moment it is another acceptance and another contract, and he had to admit that on this tortuous reasoning it is a contract subject to the condition that what is a good contract at one moment becomes entirely void immediately after. Taking what is to our mind, the plain common-sense view, we think that a person who bids at an auction thereby does not conclude a contract but states an offer by which, until he withdraws it himself, he may be liable for the amount of his bid. But on the other hand we think that like all other offers it is subject to the ordinary incidents of law that, until it is accepted it is open to the offeror to withdraw it and render it as if it had not been made.

We think that the conclusion come to by the learned Judge is not warranted by the authorities or on principle, and we must allow the Appeal with taxed costs throughout.

M.H H.