

Wednesday, June 29.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

FENWICK v. MACDONALD, FRASER,  
& COMPANY, LIMITED.

*Sale—Sale by Auction—Conditions of Sale—Lot Exposed for Unreserved Sale—Power Reserved to Exposer to Make One Bid—Sale not Complete till Fall of Hammer—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 58 (2).*

A herd of cattle was exposed for sale by auction along with drafts from other herds. The catalogue of the sale contained a condition that the exposer reserved power to make one offer for each animal, and a note annexed stated that the herd in question was now offered "for unreserved sale." The highest bid made at the sale for a bull of the herd was 42 guineas, and the auctioneer withdrew it, intimating that the exposer had a reserve of 150 guineas on it.

In an action brought by the highest bidder against the auctioneer and the owner of the herd for declarator that he ought to have been declared the purchaser of the bull, and for decree for its delivery to him or for damages, The Court *assozied* the defenders, on the ground that in terms of the Sale of Goods Act 1893, sec. 58 (2), no sale by action was complete until the auctioneer announced its completion by the fall of the hammer or other customary manner, and that until such announcement the exposer or the auctioneer on his behalf was entitled to withdraw the subject.

The Sale of Goods Act 1893, sec. 58, enacts—  
"In the case of a sale by auction. . . .  
(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made any bidder may retract his bid."

In December 1903 Herbert George Fenwick raised an action against (1) Macdonald, Fraser, & Company, Limited, Perth, and (2) Claude Hamilton, of Sundrum, Ayrshire. The conclusions of the action were—(1) for declarator "That the sale by public roup of the Sundrum herd of Aberdeen Angus cattle belonging to the defender Claude Hamilton, which took place within the Perth Auction Market, Perth, on 19th September 1903, conducted by the defenders Macdonald, Fraser, & Company, Limited, as auctioneers, being unreserved, the highest *bona fide* bidder for each lot composing said herd was entitled to be preferred as purchaser; and (2) that the pursuer being the highest *bona fide* bidder for the bull 'Margrave of Ballindalloch,' being lot 50 of the catalogue applicable to the sale, was and ought to have been declared by the defenders Macdonald, Fraser, & Company, Limited, to be the purchaser of said lot at

the price of £44, 2s. offered by him; (2) that the defenders should be ordained to deliver to the pursuer the said bull upon payment to them of the said sum of £44, 2s., and the defenders should be ordained, conjunctly and severally or otherwise severally, to make payment to the pursuer of the sum of £30, and in the event of their failing to give delivery to the pursuer of the said bull within such time as the Court might appoint of the further sum of £100."

The pursuer averred—" (Cond. 1) On 19th September 1903 the Sundrum herd of Aberdeen Angus cattle belonging to the defender Claude Hamilton, was by said defender exposed for sale by public auction in the Perth Auction Market, Perth. In terms of the catalogue under which the sale was conducted by the defenders Macdonald, Fraser, & Company, Limited, said Sundrum herd was offered for unreserved sale. A copy of said catalogue is herewith produced. (Cond. 2) The pursuer attended said sale and was an offerer for lot 50 of the catalogue, *i.e.*, the bull 'Margrave of Ballindalloch.' His offer, 42 guineas, was the highest bid made at the sale for said lot, and accordingly he was the purchaser in terms of the conditions of sale, and ought to have been preferred by the auctioneer to said lot. The auctioneer who was conducting the sale was John Maclaren Fraser, a director of the defenders Macdonald, Fraser, & Company, Limited. Instead, however, of declaring the pursuer to be the purchaser, as he was bound to do in terms of the conditions under which the said lot was exposed, the said John Maclaren Fraser withdrew the lot, intimating that the exposer had a reserve of 150 guineas on it. No intimation of a reserve was made by either of the defenders before said lot was exposed for sale. (Cond. 3) The pursuer attended said sale for the purpose of purchasing said bull, and made the offer to buy the animal upon the footing that the sale was, as it professed to be, without reserve. Accordingly he protested at the time that Mr Fraser, the auctioneer, had no right to withdraw the said bull. . . . As both defenders have refused to hand over the bull, as they are bound to do, the pursuer has been compelled to bring the present action. (Cond. 4) The pursuer has suffered loss and damage by the wrongful act of both defenders. He incurred considerable expense in going to the bid at the said auction market, and has been deprived of the bull. His loss so suffered is not less than £30. If the defenders fail to deliver the bull to the pursuer he will suffer loss in addition to said sum to the extent of £100."

The catalogue of sale produced contained, *inter alia*, the following conditions of sale:—  
"(a) *Conditions of Sale*.—(1) The cattle will be exposed separately according to the numbers in the following catalogue, and the highest offerer on each lot will be preferred to the purchase—each offer exceeding the former by at least one guinea. . . . (3) The exposers reserve the usual power to make one offer for each animal. (4) All purchases must be settled for immediately

after the sale in cash to Macdonald, Fraser, & Company, Limited, auctioneers. . . .

(7) The auctioneer is appointed judge of the sale, to whom are hereby submitted all disputes and differences of every kind which may arise in relation to the sale, either between exposers and offerers or among offerers themselves, and his decision shall be final and binding on all parties. (b) *Note.*—The Sundrum herd, which was founded a few years ago on the very best strains of blood, is now offered for unreserved sale. . . . The drafts from Pitpointie and Auchnager are well worthy of attention from breeders. . . . The drafts are offered because both herds are considerably overstocked.” . . .

The pursuer pleaded—“(1) The sale of the Sundrum herd being a sale by public auction, *et separatim*, being in terms of the catalogue under which it was conducted an unreserved sale, decree in terms of the declaratory conclusions of the summons ought to be pronounced. (2) No notice that the sale was subject to a reserve having been made by either of the defenders to the members of the public bidding at said sale, the pursuer is entitled to decree in terms of the declaratory conclusions of the summons. (3) The pursuer being the highest *bona fide* offerer for lot 50 under said catalogue is entitled to delivery of the bull ‘Margrave of Ballindalloch’ upon payment of £44, 2s. as concluded for. (4) The defenders having by their wrongful actings deprived the pursuer of the possession of said bull are liable to him in damages. (5) The pursuer having suffered loss and damage to the extent sued for, decree ought to be pronounced therefor, with expenses. (6) In the event of the defenders failing to deliver the bull to the pursuer they ought to be found liable to him in the further sum concluded for in that event.”

The defenders Macdonald, Fraser, & Company, Limited, pleaded—“(1) No title to sue. (2) The action is incompetent. (3) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons. (4) The pursuer’s statements so far as material being unfounded in fact, the defenders should be assoilzied. (5) The pursuer not having sustained any loss or damage through the fault of these defenders, they are entitled to absolvitor.”

The defender Claude Hamilton pleaded—“(1) The pursuer’s statements are irrelevant and insufficient to support the conclusions of the summons. (2) There having been no sale to the pursuer this defender should be assoilzied. (3) The bull in question having been exposed for sale subject to a right of a reserved bid to this defender as set forth in the signed conditions of sale, the claim made by the pursuer is not well founded. (4) The pursuer’s averments so far as material being unfounded in fact, this defender should be assoilzied. (5) In respect of the reference constituted under the conditions of sale, the action should be resisted until the determination of the arbiter has been obtained on the questions mentioned in ans. 3. (6) *Esto* that the

auctioneer exposed the said bull for sale unconditionally as alleged by the pursuer, this defender is not bound by any contract made with the pursuer on this footing, in respect that the auctioneer in so acting exceeded the scope of his authority as the defender’s agent.”

On 12th March 1904 the Lord Ordinary (KYLACHY) assoilzied the defenders from the conclusions of the action.

*Note.*—“In this case I am of opinion, as against the defenders Macdonald, Fraser, & Company, Limited, the action is excluded by the fact, which is not disputed, that they acted in the matter in question as agents of a disclosed principal, and that the pursuer does not allege that they exceeded their authority. The case falls I think clearly within the principle of the case of *Mainprize v. Westley*, 1865, 34 L.J., Q.B. 229. It is not I think possible to represent the pursuer’s case as founded on conspiracy to defraud or other delict. On his own statement the question is only at most one of breach of contract.

“But I think the pursuer’s case fails also, and as against both defenders, upon its merits. The pursuer’s first complaint is, that although the conditions of sale provided that ‘the exposor reserves the usual power to make one offer for each animal,’ there was a note which followed prefixed to the particulars of the animals advertised to be sold—a note which described the defender Mr Hamilton’s herd as being to be ‘offered for unreserved sale.’ But the announcement thus made in the said note must if possible receive a construction consistent with the express terms of the conditions of sale, and it appears to me to be quite reasonable to read the reference to ‘unreserved sale’ as meaning only as regards the Sundrum herd the sale was to be of the whole ‘herd’ without exception, and not merely a ‘draft’ from the herd as in the other lots belonging to other exposors after described. That meaning, quite, I think, satisfies the language, and on the whole I think it is the true meaning.

“The pursuer’s second complaint is, that assuming the exposor’s right to a reserved bid, the auctioneer in fact withdrew the animal in question from the sale, merely mentioning the owner’s reserved bid and its amount, but not formally announcing the bid and calling for any further advance. I must say I think this question is hypercritical, and raises a question of form and not of substance. If the amount of the exposor’s bid had not been announced it would have been different; but the amount being duly stated, it was of course quite open to the pursuer, if he desired to bid higher, to do so and secure the purchase. I see no reason to think that if he had done so there would have been any difficulty.

“I may say further that I greatly doubt whether both this point and the other point as to the construction of the note are not both matters which properly fall within the clause of reference to the auctioneer as judge of the roup. But the pursuer does not plead upon the reference, and the

defenders succeeding upon the merits do not, I assume, desire to do so.

“On the whole I think the defenders fall to be assoilzied with expenses.”

The pursuer reclaimed, and argued—The Sundrum herd was offered for sale “without reserve.” This negatived the condition in the catalogue that the exposers were entitled to make one bid for each animal. “Without reserve” barred all bidding on behalf of the exposer, and meant that the property exposed was to be sold to the highest bidder. All auction sales were without reserve unless otherwise stated. If there was a sale by auction without reserve and the lot was exposed and was bought in by the owner or the auctioneer on his behalf, or was bid up by a white bonnet, the *bona fide* bidder who made the last bid was entitled to insist on being preferred as the highest bidder—Bell’s Prin., sec. 131 (1); Ersk. iii. 3, 2, note 97 by Lord Ivory; Benjamin on Sales (4th ed.), 462 to 465; Cree v. Davie, December 1, 1810, F.C.; Grey v. Stewart, July 7, 1753, M. 9560; Beavell v. Christie, 1776, 1 Cowper 395, opinion of Lord Mansfield, 396; Faulds v. Corbet, February 25, 1859, 21 D. 587; Anderson v. Croall & Sons, Limited, November 27, 1903, 6 F. 153, 41 S.L.R. 95. Sections 58 (3) and (4) of the Sale of Goods Act 1893 showed that the Act contemplated three situations in a sale by auction, viz. (a) with a reserve, (b) without reserve, and (c) where one bid by exposer was allowed. The Act had not altered the former law on the subject. Both the owner and the auctioneer were necessary parties to the contract, and were therefore liable—Woolfe v. Horne, 1877, 2 Q.B.D. 355; Levy & Co. v. Thomsons, July 12, 1883, 10 R. 1134, 20 S.L.R. 753. Condition 7 of the catalogue did not apply. There was no clear bargain that the auctioneer was to be the judge as to whether he had performed his own duty. His office was simply to see that both sides got fairplay during the sale—Strachan v. Auld, March 19, 1884, 11 R. 756, 21 S.L.R. 747.

Argued for the defenders Macdonald, Fraser, & Company, Limited—An agent was not responsible if he acted for a disclosed principal. In this case the principal was disclosed, and the auctioneers were therefore not liable—Hanson v. Roberdeau, 1792, Peake’s Cases 120; Story on Agency, 9th ed. 321. A buyer was not entitled to sue both the principal and the auctioneer. If he did so he must be held to have elected to sue the principal—Ferrer v. Dods, February 23, 1865, 3 Macph. 561. The case fell within the principle of *Mainprice v. Westley*, *supra*. On the other points he agreed with the argument for the defender Hamilton.

Argued for the defender Hamilton—There was no completed sale here, as in terms of section 58 (2) of the Sale of Goods Act 1893 there was no contract of sale by auction till the hammer fell. The pursuer had never purchased the bull, and had no claim as purchaser—Warlow v. Harrison, 1858, 28 L.J., Q.B. 18; 1859, 29 L.J., Q.B. 14. The note to the conditions of sale did not

interfere with the conditions. A sale might be “without reserve” and yet the owner might have a right to bid.—*Dimmack v. Hallett*, 1886, L.R., 2 Ch. App. 21. The pursuer must choose to sue either the auctioneer or the owner. He could not sue them concurrently. If the auctioneer was independent and liable *qua* auctioneer, the owner was not liable, as he did not act at the sale. Condition 7 applied, as the dispute arose at the sale, and it was no objection that the auctioneer was mixed up with the question—*Buchan v. Melville*, February 28, 1902, 4 F. 620, 39 S.L.R. 398.

LORD JUSTICE-CLERK—We have heard a very elaborate debate in this case. It is a case, in some aspects, of considerable importance, for it raises a question of difficulty, but I have come to the conclusion that we can dispose of it upon a very simple ground. Whatever might have been the law formerly, the law of Scotland is now that “a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid.” In this case the question is whether a party who puts up an article for sale is entitled to the same privilege,—that is to say, whether there is no sale till the fall of the hammer, and whether he is equally entitled to withdraw before the fall of the hammer takes place. I think there is a simple answer to that question, and that it is properly answered by the Lord Ordinary’s interlocutor, in which he assoilzies the defenders. It will be therefore unnecessary to go into any further question, but I would say that when this question was raised with regard to the conditions of sale, stress was laid upon the note to the conditions of sale, which says that it is to be an unreserved sale. I do not think that it is inconsistent with anything contained in the other conditions that it is an express condition of sale that the owner is entitled to one bid. But in deciding the case upon the grounds I have stated we do not require to decide that.

LORD YOUNG—I also am of the opinion that the Lord Ordinary’s interlocutor is right and ought to be affirmed. I concur in the views which your Lordship has expressed about the import of the Sale of Goods Act and its application to this case. I think there is no sale until the fall of the hammer, and that until then any competitor is entitled to withdraw his bid. Of course it follows that any proprietor is entitled to withdraw the article he is selling. One party is not bound while the other is free. I think, further, that there is no good ground of action against the auctioneer. He was employed by Mr Hamilton, the owner of this stud animal, to sell the animal with others or separately, as seemed to him fit, and if his employer told him not to sell, he was entitled to act upon that order which the seller was

entitled to give him. I think it perfectly clear that the pursuer of this action was not the purchaser, and that there was no acceptance of his offer, no knock-down of the hammer, and he never was under any obligation and was due nobody anything because he had made the offer. I think, further, as your Lordship has said, although it is not necessary for the decision of this case to say, that in my opinion it was the intention of the seller, that is, of the owner, and that intention was sufficiently intimated to all who followed the catalogue, that there should be a reservation in his favour—in short, that he was at liberty to fix a sum at any period of the sale below which the subject should not be sold. That was done, and it is singular in my experience, for I have never seen a reservation of a right to make one bid. But the plain object of that, and the meaning of it to everybody who read it, was that it was in the owner's power to determine the amount below which the animal should not be sold. I think that anyone with this catalogue in his hand would see that that was the intention; and it was acted upon in the ordinary way. He intimated to the auctioneer in the course of the sale "You are not to let this go at the price which has been offered," and he named £150 as the amount below which it was not to go. He might have named the amount of the National Debt, or anything he pleased, which is just reserving the right to prevent the article going away at a price less than he thought it was worth. This action at the instance of the present pursuer proceeds upon the footing that the article was sold to him, and that he is entitled to damages because his right as a purchaser has not been fulfilled. For the reasons which your Lordship has explained, and in which I concur, and to which I add these observations, I am of opinion, and that without any doubt whatever, that there was no sale whatever to the pursuer, and if there was no sale whatever to him, it is clear that there is no damages due—his right as a purchaser by a completed sale having been fulfilled is plainly untenable. I think, therefore, that the judgment of the Lord Ordinary is well founded and ought to be affirmed.

**LORD TRAYNER**—I think it was the law of Scotland prior to 1893 that a subject exposed for sale by public auction and for which a single bid had been made could not be withdrawn from the sale, and the person who had made the offer was entitled to call upon the auctioneer to knock it down to him at the amount he had offered. I think that is the import of the case of *Cree v. Durie*. But that case proceeded upon a view which is to be found stated in the successful argument in the report, to the effect that "in the circumstances an offerer was bound when he gave his offer and could not withdraw it," and it bound the exposor, because there was thus a contract made between

them. But that is not the law now, for by the Act of 1893 it is provided that a sale by auction is completed by the auctioneer announcing its completion by the fall of the hammer or in any other customary manner, and until such an announcement is made any offerer may retract his bid. If it is in the power of any competitor at an auction sale to retract his bid before the fall of the hammer, it follows that the offerer is equally entitled to withdraw his subject, because if the competitor is not bound the exposor is not bound either. If that is the law, I think there was nothing done here to subject Mr Hamilton in any damages, because he was merely exercising the right which by implication the statute confers upon him. If the owner, Mr Hamilton, was entitled to withdraw the subject, then the auctioneer did no wrong in withdrawing it in obedience to Mr Hamilton's instructions.

**LORD MONCREIFF** was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Campbell, K.C.—Hunter. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders and Respondents Macdonald, Fraser, & Company, Limited—Chree—W. Æ. Mackintosh. Agents—Guild & Guild, W.S.

Counsel for the Defender and Respondent Hamilton—C. N. Johnston, K.C.—Cullen. Agents—Ronald & Ritchie, S.S.C.

Friday, July 1.

## SECOND DIVISION.

[Exchequer Cause.]

### CALIFORNIAN COPPER SYNDICATE (LIMITED AND REDUCED) v. INLAND REVENUE.

*Revenue—Income-Tax—Profits or Gains—Purchase and Re-sale of Property—Property and Income-Tax Act 1842 (5 and 6 Vict. cap. 35), Schedule D.*

A company was formed for the purpose of acquiring certain mineral fields, and these were purchased at a price which left the company with a share capital quite inadequate for the working of the minerals. During the two years succeeding the formation of the company the mineral fields referred to were sold at a large profit, in exercise of powers conferred by the company's articles of association, the company taking payment of the purchase price in fully paid-up shares of another company, which shares were not converted into cash. *Held* that the profits arising from the purchase and re-sales of mineral fields, whether received in cash or in shares of another company, were assessable to income-tax.

The Californian Copper Syndicate (Limited and Reduced), 188 St Vincent Street, Glas-