Privy Council Appeal No. 124 of 1916.

The Demerara Turf Club (Limited) (In Liquidation) - - - - - - *Appellants,*

v.

Percy Claude Wight - - - - - *Respondent.*

FROM

THE SUPREME COURT OF BRITISH GUIANA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH APRIL, 1918.

Present at the Hearing:

LORD BUCKMASTER.
LORD PARMOOR.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* SIR WALTER PHILLIMORE.]

The plaintiff in this case, the present respondent, brought an action to enforce specific performance of an alleged contract of sale whereby he contended that he became the purchaser of certain real estate in the colony of British Guiana which was the property of the defendant Company.

The Chief Justice of British Guiana, Sir Charles Major, gave judgment for the defendant Company, dismissing the action with costs.

On appeal the Supreme Court, Berkeley and Hill, JJ., reversed the decision of the Chief Justice, and ordered the defendant Company to transport and deliver to the plaintiff the property in dispute on payment of the sum of 16,005 dollars and one-half the costs of transport, and ordered the defendant Company to pay the plaintiff's costs in both Courts.

The Company appeals from this decision.

The story is a short one. Some matters were controverted in the evidence; but the facts as found by the Chief Justice and not disputed in the Court of Appeal or before their Lordships are as follows :—

The Company was in liquidation, and one Cannon, the liquidator, who was also a licensed auctioneer, obtained leave

from the Court to sell the real property of the Company, 55 acres of land known as Bel Air Park with the buildings thereon. Cannon was to be the auctioneer, making no charge for his services.

The sale was advertised as a sale at public auction by the liquidator in the grand stand of the club.

On the appointed day, the 4th December, 1914, the auctioneer began the proceedings by reading out the conditions of sale, which were as follows :—

"Conditions on which the undersigned will offer for sale at public auction on Friday, the 4th December, 1914, at 1 o'clock P.M., on the premises (in the grand stand), by order of Mr. N. Cannon (as liquidator of the Demerara Turf Club, Limited), 55 acres of land known as Bel Air Park, with all the buildings, erections, fixtures, and fittings thereon :—

"ARTICLE 1.

"The purchaser or purchasers shall provide good and sufficient securities to the satisfaction of the auctioneer, who shall sign these conditions of sale along with the said purchaser or purchasers, and shall be bound as they do hereby bind and oblige themselves jointly and severally with such purchaser or purchasers to pay the purchase money.

"ARTICLE 2.

"Payment of the purchase money shall be paid to the auctioneer as follows : 10 per cent. in cash on the knock of the hammer, and the balance on the passing of the transport.

"ARTICLE 3.

"The purchaser or purchasers shall pay to the auctioneer in cash on the knock of the hammer the church and poor money payable on the sale.

"ARTICLE 4.

"Possession will be given on the passing of the transport, the cost, including the revenue stamp, to be divided between the seller and the purchaser.

"ARTICLE 5.

"Two or more persons bidding at the same time, or any dispute arising, the auctioneer reserves to himself the right of deciding and settling the same in such manner as he may think fit."

A bid of 15,000 dollars was made, and a second bid of 15,005 dollars. Then came a third bid of 16,000 dollars, and then the plaintiff bid 16,005 dollars. No further bid was made.

Cannon then said, "I am sorry, gentlemen, but I cannot sell at that price." The plaintiff says that he said, "The Turf Club is mine," using consciously or unconsciously a phrase common at Dutch auctions by way of a descending scale. If he did say so Cannon did not hear him; and without more being said the company dispersed.

There was some correspondence afterwards, and then the plaintiff brought his action on the 23rd March, 1915.

It is to be noted that there was, on the one hand, no

intimation either beforehand or at the auction that there was a reserved price, or that the vendor reserved the right to bid ; nor, on the other hand, was there any intimation that the sale was to be without reserve, or that the property would be knocked down to the highest bidder.

In these circumstances their Lordships have to determine what was the nature of the business which was entered upon when this property was put up for sale.

It is contended on behalf of the plaintiff that this matter is concluded by law ; that by the Roman-Dutch law which rules, or at the time ruled, in British Guiana, the auctioneer who puts up property for sale thereby makes an offer, that each bidder is an acceptor, that by each bid a provisional contract is made, one liable to be displaced or superseded by a higher bid, but forming unless so displaced or superseded a contract binding on both parties.

Alternatively the contention is expressed in this way : that the auctioneer when he puts up property for auction tacitly promises to accept the highest bid, and is bound to accept it, and that his verbal or physical acceptance is a mere formality which he is bound to give.

Hill, J., apparently decided for the plaintiff on both grounds ; Berkeley, J., probably on the second only.

It is to be observed that this is not an action for damages for not accepting a bid or for withdrawing the property from sale. It is an action which proceeds upon the assumption that there was a sale.

For the plaintiff therefore to succeed, either the bidder must be an acceptor, or the auctioneer's acceptance of the last bid must be a mere formality.

It is contended on behalf of the defendant Company that there is no settled rule of Roman-Dutch law to the effect asserted by the plaintiff, and no rules of Roman-Dutch law which apply to such auctions as this was, and that in any case this being a voluntary sale the auctioneer could make his own arrangements, and that the nature of the business for which he was arranging was sufficiently indicated by the use of the phrase "knock of the hammer" in the second and third of the conditions of sale, which showed that the bidder was to be deemed the offerer and the auctioneer, if he so willed, the acceptor.

It is no doubt true that the auctioneer could make his own terms on which he proposed to conduct the sale ; but it is also true that if there was a silence as to any term or a doubt what the term was, it is material to know what is the underlying law, or the law which would prevail in the absence of any special term.

Their Lordships therefore proceed to examine whether there is any rule of Roman-Dutch law applying to auctions of this nature, and if so what its effect is.

All the Judges in the Courts below seem to have thought

that there is a rule of Roman-Dutch law upon this point, but they have differed in their view of its effect.

There are no decided cases which can be quoted as authorities, and there is no Code, statute, or ordinance. The law has to be extracted from the works of writers of authority. These start by referring to the Roman law.

In the Roman law itself, though sales by auction and the letting of tolls by auction were well known, there is no direct guidance to be found. There are references to auctions, but no rules of law, to be found in the Digest. In the Code there are two passages [Lib. 10, Tit. 3, § 4; Lib. 11, Tit. 31, § 1]; but these relate to necessary or judicial sales, and, moreover, have no bearing on the point in question.

The writers on Roman-Dutch law endeavour to help themselves out by the analogy of the Roman law as to sales by *addictio in diem.* This analogy is noticed in the judgments of the Judges in the Court below; but, as it was agreed at the Bar before their Lordships, it is a misleading analogy. It is unnecessary, as there was this agreement, to explain at length why no assistance can be got from the analogy, and why, indeed, confusion will arise if it is attempted to bring sales by auction under the law as to sales by *addictio in diem.*

The writers on Roman-Dutch law also avail themselves of the writings of commentators of other European nations, such as Bartolus, who was an Italian, and Choppinus, who was a Frenchman from Anjou. How far they can be used as authorities on Roman-Dutch law may be doubted. They, too, found themselves on the law as to sales by *addictio in diem.*

The authority principally relied upon in the Courts below and before their Lordships is Matthaeus, an author of much learning and repute, and quoted as an authority by later writers who are accepted authorities on Roman-Dutch law. He wrote a treatise on auctions. His book, "De Auctionibus," was published at Utrecht in 1653.

His work is founded on the Roman law and the European commentators upon it from Bartolus onwards. He also makes frequent reference to local ordinances as precedents.

Unfortunately, however, for its value as a guide in the present case, the principal scope of the work is to treat of public (so called) or necessary sales; that is, sales made under the authority of a Court of Justice, either of confiscated property or of property taken in execution of a civil judgment. Private or voluntary sales are matters of subsidiary treatment only. This is stated on the title page, and in Book I, Chap 4, *ad finem.*

And there is another reason. Voluntary sales by auction, using the word "auction" for a sale by increasing bids and "reduction" (as it will be convenient to do) for sales by decreasing bids, were, and apparently still are, unknown in Holland, except as tentative or provisional transactions.

Two classes of competitive sales are known in Holland. Necessary sales are in the ordinary form of auction sales, but at the close of the day no contract binding the vendor is created between him and the highest bidder; for all the authorities, including Matthaeus, are agreed that further offers may be, and, indeed, must be, taken till the last moment when the decree of the Court is made, till the seal of the Court has been lifted from the wax, as it is picturesquely expressed.

As to voluntary sales, those at any rate of land, they take two days. The first day there is an auction, and the highest bidder receives a "treckgelt" or "strijckgelt," "premium quod datur augenti pretium," as Matthaeus calls it [Lib. 1, cap. 1, § 6, and cap. 9, § 11]. In consideration of this "premium" the bidder is provisionally bound, but the vendor is not bound.

On the second day the vendor makes a starting price, usually one-third higher than the highest bid of the previous day, and then descends (the process being called "afstach") till some bidder calls out "Mine." [See "Matthaeus," Lib. 1, cap. 12, § 1.] This process is so prevalent that a verb has been coined, "mijnen" "to mine," meaning to bid, and bidders of all sorts are called "mijnders" [Lib. 2, cap. 2, § 5]. Hence, too, comes the English phrase a "Dutch auction." The vendor is apparently not bound to keep reducing, but can withdraw at any stage. If, however, he chooses he can descend to the level reached by the highest bid at the first day's sale, and if no one else bids, compel the bidder of the first day to complete his bargain.

Though Matthaeus refers but slightly and allusively to this practice, he certainly knew of it. But the difficulty is to fit those observations of his, on which the plaintiff and the Judges in the Supreme Court rely, to either form of competitive sale.

Necessary sales are by way of auction, but it is clear that the highest bidder at the auction cannot claim to have bought the property, though he may be bound to complete his purchase.

In voluntary sales the first step is by way of auction, but the highest bidder cannot claim to have bought the property, though he may in a certain event be bound to complete his purchase.

During the second stage of reduction it may be that the vendor offers the property at every price which he names.

If the observations of Matthaeus on which reliance is placed are intended for a sale by reduction, they have no application to the case before their Lordships. If they contemplate a sale by auction they are theoretical merely.

These observations are to be found in Book 1, chap. x, "De Licitationibus," §§ 40–48.

In § 40 he is drawing the distinction between necessary and voluntary sales, and insisting as against other authorities that in necessary sales there is no concluded bargain till the seal of the Court has been attached.

Contrariwise in voluntary sales, the matter is completed.

"Simul augendi seu adjiciendi facultas præcisa sit."

But this passage leaves it an open question when the "facultas" is "præcisa." It may be by the last bid, or it may be by acceptance of the last bid.

In § 41 he appears to admit of the prolongation of the auction from day to day till the vendor is satisfied. In § 43 he discusses the question whether a bidder can withdraw his bid, and concludes, in contradiction to other authorities, which he quotes, that he cannot. But whether this means that he cannot withdraw when once the words are out of his mouth, or that he cannot withdraw when his bid has been accepted, or has been taken as a bid so that a further bid is made upon it, does not appear.

Lastly, in § 48 he puts the question whether, after bids have been made, but there has been no acceptance by the vendor, "post licitationes factas ante tamen addictionem," the vendor can withdraw. He states, and states correctly, that the authority of Bartolus and of Damhouder is against him; but he concludes, and this is the passage mainly relied upon, that the vendor cannot withdraw.

His reasons are that it would be absurd that the bidder should be bound and not the vendor, and that he who proclaims that he is going to hold a sale by auction tacitly promises that the property shall be sold to the winning bidder "ei qui vicerit licitatione."

As to the first reason, it may be observed that there are cases where it will happen that the bidder is bound while the vendor is not: as to the second reason, that, pushed to its logical conclusion, it would extend to prevent the vendor from withdrawing the property before any bid was made as it would disappoint the company, or from announcing that there is a reserve, or from stating any conditions of sale which he has not previously advertised, unless indeed they be in common form.

It is further to be noticed, as the Chief Justice points out in his judgment, that Matthaeus does not take the view that the auctioneer offers and the bidder accepts. There are Continental writers on jurisprudence who take this view; for instance, Puchta Pandekten (6th edition, by Rudolph, Leipzig, 1852, § 252). Voet also is claimed for it; and it is certainly the view of his translator and editor, Berwick; and it is the view to which Hill, J., expressly gives his assent. But it is not that of Matthaeus. He takes the more common view that the bidder offers and the auctioneer accepts; but he thinks, for the reason which he gives, that the auctioneer has tacitly promised to accept.

Remembering that there were in the Dutch usage of his time no conclusive auctions with rising bids, their Lordships think that Matthaeus, if he was writing of such auctions, was

writing as a professor of jurisprudence and not as a witness bearing testimony to the existing Roman-Dutch law.

As to other writers, Bartolus, so far as he is an authority to be quoted on Roman-Dutch law, takes, as Matthaeus admits, the contrary view. So does Damhouder, a practising lawyer and writer in Holland.

Grotius is quoted on other points by Matthaeus, but has made apparently no statement on this point.

Voet, it is suggested, favours Matthaeus' view; but it is not clear that he does, and he has very much involved himself with *addictio in diem*.

Van Leeuwen and Van der Linden are apparently silent on the point.

Sir Andries Maasdorp, in his Institutes of Cape Law (vol. 3, p. 130), certainly expresses himself to the effect that the sale is not completed till the fall of the hammer.

On the other hand, Burge in his Foreign and Colonial Law (vol. 2, p. 576), and Nathan in his Common Law of South Africa (vol. 2, p. 718), translate and accept Matthaeus.

The industry of counsel has furnished their Lordships with quotations from several other writers not mentioned in the judgments of the Courts below; but they are chiefly interesting for their full statements as to Dutch usage and for their silence on the point in question.

One modern author, S. J. Fockema Andrae, in a work published at Haarlem in 1896, speaking of the usage of lighting a candle for the period of the auction, says that the last bidder before the candle burnt out is the purchaser, if his offer be accepted (vol. 2, p. 28).

On the whole, their Lordships are of opinion that there is no rule of Roman-Dutch law which prescribes that at sales by auction the bidder is the acceptor. In sales by reduction it may be otherwise. Neither is there any rule that the highest bidder can insist that the property shall not be withdrawn from sale and claim to have bought it.

This being so, the matter is governed by the provisions in the conditions of sale, and they indicate with sufficient clearness that the offer will come from the bidder, and that there is no bargain till it has been accepted by the auctioneer, and they do not indicate that the auctioneer is bound to accept the highest bid.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, that the judgment of the Supreme Court should be reversed and that of the Chief Justice restored, and that the Appellant Company should have its costs in the Court below and of this appeal.

the Privy Council.

THE DEMERARA TURF CLUB (LIMITED) (IN LIQUIDATION).

v.

PERCY CLAUDE WIGHT.

DELIVERED BY

SIR WALTER PHILLIMORE.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1918.