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## Three Types of Auction Sales

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THE THREE TYPES OF AUCTION SALES—The wide use of auction sales prevalent in the modern business world justifies a study of them, both as to their development and their present status. It is the aim of this paper to deal generally with the growth of auction sales, and more specifically with the familiar types now existing. For this purpose this note is divided into two parts: (1) a short history of auction sales; and (2) the three types of auction sales.

### (1) A Short History of Auction Sales

An auction is a public sale of property, either land or goods, to the highest bidder.<sup>1</sup> The obvious advantages of such a type of sale were recognized as far back as the time of the Babylonians. Herodotus speaks of a Babylonian custom by means of which, at an annual assembly held for the purpose, young maidens were disposed of in marriage by delivering them to the highest bidders.<sup>2</sup>

It is, however, with the Romans that the real origin of the auction sale is found. Among them, auctions, both public and private, undoubtedly had a definite place, and this despite the fact the *Corpus Iuris Civilis* does not clearly enumerate the rules governing such sales. Auctions were held either in an open public place, or in particular rooms or halls termed *atria auctionaria*.<sup>3</sup> A spear or *hasta* was set up therein as the legal sign of the sale, much as some communities today display a red flag. Since the sale was held under the spear and *hasta*, the familiar term "sub *hasta*", often incorrectly stated to be "sub *hastio*", originated. The crier (*praeco*) called out the prices and the article was adjudged to the highest bidder by the magistrate who was present, a money broker (*argentarius*) meanwhile noting

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<sup>1</sup>Hibler v. Hoag, 1 W. & S. 552 (1841). For similar definitions see 64 L. R. A. 190; 2 R. C. L. 1116; Crandall v. Ohio, 28 Ohio 479 (1876).

<sup>2</sup>Herodotus, Book 1, 196; Anderson v. Wisconsin Cent. Ry., 120 N. W. 39 (Minn. 1909); and 6 C. J. p. 821, note b.

<sup>3</sup>Juv. 7, 7.

down the price and receiving the money or security for the article sold.<sup>4</sup>

Military spoils and prisoners of war were commonly auctioned off by the Romans, and when they conquered part of England the best portions of the land were in many instances sold to the highest bidder. What perhaps may be rightly called the most famous and far reaching auction sale in all history is recorded by the historian Gibbon. After the Roman Emperor Pertinax had been atrociously murdered and Sulpicianus was treating with the famous Praetorian Guard for the Emperorship, the leaders of the Guard realized that the sum which Sulpicianus offered them was not equal to the amount other wealthy Romans could offer them. At this period it must be remembered that the Praetorian Guard was the most powerful single factor in Roman politics and military strategy. Thus, desiring to bargain with others, the Guard from their ramparts outside of the city proclaimed that the emperorship of Rome and the entire Roman world was to be disposed of to the highest bidder. News of this having reached Rome, among others, one Didius Julianus, an extremely rich Roman senator attended the sale. By offering six thousand two hundred fifty drachms (upwards of \$1000.00) to each soldier, Julianus purchased the emperorship of the mighty Roman Empire, and soon afterwards the Praetorian Guard supervised his installation as Emperor, the Senate silently acquiescing to this unusual proceeding.<sup>5</sup>

Between the time of the downfall of Rome and the decision in *Payne v. Cave*,<sup>6</sup> there grew up two odd types of auction sales. The first, a type originating in Holland, was peculiar in that the usual process was inverted. At the beginning of the sale the price was put up above the value of the property and then as the sale proceeded the price of

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<sup>4</sup>For a list of the Latin terms used in auctions see Harper's Ed. of Freund's Latin Dict. (1907) at p. 198.

<sup>5</sup>1 Gibbon: *Decline & Fall of Roman Empire*, ch: V, p. 119 et seq. Also see Rostovtzeff: *Social & Economic History of the Roman Empire* (1926-Oxford Press), p. 351.

<sup>6</sup>3 Term Reports, (1789).

the article was gradually lowered until someone became a purchaser.<sup>7</sup>

The second type had its origin in the custom of certain English localities. In these communities an inch of lighted candle would be set up at the auctions and the persons making the last bid before the fall of the wick became the purchasers.<sup>8</sup> This method is obsolete, although the Dutch auction still may be occasionally found.

## (2) The Three Types of Auction Sales

There are three general types of auction sales: first, the ordinary auction governed by the rules of *Payne v. Cave, supra*, and *Fisher v. Seltzer*;<sup>9</sup> secondly, a sale without reserve which is provided for by the Uniform Sales Act but which had previously existed; and thirdly, a type, rather infrequent, which for want of a better name may be designated as a sale with reserve or a sale with a set up price.

### (a) The First Type of Auction Sales

An approach to the first type is best obtained by studying the parent case of *Payne v. Cave, supra*. It is in this case that for the first time all the essential elements of the ordinary auction sale are gathered, and in such an excellent manner that it has become the basis of the modern law of auctions. The plaintiff in this celebrated case offered a distilling apparatus for sale, at public auction on the usual conditions that the highest bidder should become the purchaser. Cave, having bid up to forty pounds, retracted his bid before the fall of the auctioneer's hammer. Then later the goods were sold to another person for thirty pounds, and the plaintiff brought suit against Cave for the difference. Lord Kenyon non-suited the plaintiff. The court ruled in deciding the plaintiff's appeal to have the non-suit

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<sup>7</sup>Crandall v. State, 28 Ohio 479 at 482 (1876); Black's Law Dict. 104; Anderson v. Wisconsin Cent. Ry., *supra*.

<sup>8</sup>Anderson v. Wisconsin Cent. Ry., *supra*.

<sup>9</sup>23 Pa. 308, (1854).

set aside that

"The auctioneer is the agent of the vendor,<sup>10</sup> 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 until the defendant had retracted. An auction is not inaptly called *locus poenitentiae*. Every bidding is nothing more than an offer to one side which is not binding on either side until 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".

Despite this clear cut decision, based on the theory that putting up property for sale is an invitation to those present to make offers which they do by making bids, one of which is ultimately accepted by the knocking down of the hammer, thus completing a valid contract, a new theory was advanced seventy years later. In the English case of *Warlow v. Harrison*,<sup>11</sup> the court based its decision on the view that an offer to sell property at auction is indistinguishable from the case of the offer of a reward to the general public, such as a reward for lost property. The auctioneer is treated as impliedly making an offer by putting up the property for sale. This offer ripens into a contract when the ultimate purchaser by making the highest bid accepts the auctioneer's offer. A whole line of

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<sup>10</sup>Not nicely correct. Although the auctioneer is primarily the agent of the seller, *Payne v. Cave*, supra; 2 R. C. L. 1119; and 6 C. J. No. 10, p. 824: it is a well settled principle that he becomes for certain purposes the agent of both parties (e. g., in accepting the buyer's bid and entering his name on the memorandum of the sale the auctioneer becomes the buyer's agent). See to this effect: *O'Donnell v. Leeman*, 43 Me. 158, (1857); 1 Williston on Sales No. 115, p. 227; 1 Mechem on Agency No. 72, p. 44. For the necessity of agent's authority in writing see: "Agent's Need of Written Authority", 34 Dick. L. R. 105 at 112, 113. This article discusses all leading Pennsylvania cases on this point.

<sup>11</sup>1 El. & El. 309, (1859). But as to doubt whether this view was generally acquiesced to in England see *Halsbury's Laws of Eng.*, Vol. 1, p. 511, footnote r.

English decisions follows this view,<sup>12</sup> Langdell being the only American writer to favor it.<sup>13</sup>

There is really no reason why the view advocated by this line of English cases and by Langdell should be adopted in the ordinary type of auction. From the very facts themselves, the auctioneer may be accurately stated to invite offers rather than himself be the offeror. The view that the auctioneer merely makes an invitation to treat for offers is the one adopted by the law.<sup>14</sup> This is the law in Pennsylvania and all the states that have adopted the Uniform Sales Act. Section 21 (2) of the Act provides:

"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; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve".

In the United States the leading case is *Fisher v. Seltzer*,<sup>15</sup> a case dealing with the auction of real estate. This case follows the leading principles expounded in *Payne v. Cave*, *supra*. It may be safely said that an auction sale in the absence of any and all announcements is governed by the doctrine of *Fisher v. Seltzer* and *Payne v. Cave*, and that the great weight of authority is to the effect that until the bid is accepted by the fall of the hammer or customary announcement by the auctioneer, there is no complete con-

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<sup>12</sup>Dicta in *Harris v. Nicholson*, L. R., 8 Q. B. 288 (1873); *Johnson v. Boyes*, 2 Ch. 73 (1899); *Carlill v. Carbolic Smokeball Co.*, 1 Q. B. 256; *Spencer v. Harding*, L. R., 5 C. P. 563 (1870).

<sup>13</sup>Langdell, *Summary of Contracts*, No. 19, at p. 24; note 57 L. R. A. 784 at 789.

<sup>14</sup>See Eng. Sale of Goods Act, 56 & 57 Vict., c. 71, S. 58 (2), (1893); with some changes the Pa. Sales Act (1915, P. L. 543 at 550) follows in general the British statute; *Contracts Restatement*, Sec. 27, "at an auction, the auctioneer merely invites offers from successive bidders. . . ." also explanatory notes to Sec. 27 in *Restatement App*; 1 *Williston Sales*, No. 296, p. 683.

<sup>15</sup>23 Pa. 308 (1854).

tract and either the bidder or auctioneer may withdraw.<sup>16</sup>

Since a great number of auction sales are of the type governed by the *Payne* and *Fisher* cases, it is proper that the external conditions surrounding such sales be examined. "Chilling" or collusive abstention from bidding as a result of an agreement made for the purpose of preventing competition and procuring the property to be sold below its fair value is contrary to public policy and the sale voidable.<sup>17</sup> Not only is chilling illegal, but its antithesis or "puffing" is also illegal.<sup>18</sup> As may be gathered from its name, puffing is the running up of the price by the making of spurious bids with no intention on the part of the puffer to buy the property. It is the duty of the auctioneer to conduct the sale in an open and aboveboard manner with the result that if he employs a puffer, such an act is a fraud for which the sale may be avoided.

Usually the most interested party is the owner of the property offered for sale, and it is to be expected that he has the right to prescribe the manner, conditions, and terms of the sale.<sup>19</sup> If there are no prescribed conditions, the duty devolves upon the auctioneer to use his discretion reason-

<sup>16</sup>*Fisher v. Seltzer*, supra; *Payne v. Cave*, supra; 30 Yale L. R. 414; note No. 15, supra.

<sup>17</sup>*Barton v. Benson*, 126 Pa. 431 (1889); *Hay's Est.*, 159 Pa. 381 (1893); *Eisenberg v. Mifflin*, 12 D. & C. 162 (1929). Also see 2 R. C. L. 1129-1133; 20 L. R. A. 545; 1 Williston on Sales 689. However, there is a line of English cases that hold that an agreement between two or more persons not to bid against each other at an auction, even if it amount to what in England is termed as a "knock-out", is not illegal and does not invalidate a sale. *Doolubdass v. Ramboll*, 15 Jur. 257 (1850) and *Heffer v. Martyn*, 36 L. J. (Ch) 372 (1867). But to an opposite effect cf. dictum in *Levi v. Levi*, 6 C. & P. 239 (1833), suggesting that such an agreement is an unlawful conspiracy.

<sup>18</sup>*Freeman v. Poole*, 93 Atl. 786 (R. I. 1915), L. R. A. 1917A 63, rehearing denied 94 Atl. 152 (1915); *Staines v. Shore*, 16 Pa. 200 (1851); *Flannery v. Jones*, 180 Pa. 338 (1897). See annotation 46 A. L. R. 122; 20 L. R. A. 503; 2 R. C. L. 1128. The employment by an auctioneer of a puffer invalidates the sale irrespective of knowledge thereof by the owner of the goods, *Cerrata v. Costello*; 209 N. Y. S. 257 (1925).

<sup>19</sup>6 C. J. No. 18, p. 827.

ably in order to effect a proper disposal of the property offered for sale to the highest bidder. But *Fisher v. Seltzer*, *supra*, brings out the fact that the auctioneer cannot prescribe conditions that would do away with the mutuality of obligation. In that case the sheriff attempted to lay down the condition that "no person shall retract his or her bid". The court held that such a condition was invalid, and rightfully so.<sup>20</sup> However, it is well to note that a right to bid may be expressly reserved on behalf of the seller.<sup>21</sup>

The printed conditions issued before the auction sale control the proceedings of the sale and bind both the buyer and seller. Ordinarily they may not be varied.<sup>22</sup> Although it may be natural to think of advertisements as part of the conditions of the sale, such is not the law.<sup>23</sup> Only when advertisements are expressly so made a part of the conditions are they effective as such. The function of advertising is best stated in Chief Justice Gibson's own words:

"(The object of an advertisement for a public sale) is to give notice of the fact that a sale is intended to attract bidders, leaving the terms to be settled on the ground . . . The conditions of sale are superadded as a distinct matter by the auctioneer, and published by parol or writing", and will control the advertisement.<sup>24</sup>

Whether the purchaser knows of the conditions of the public sale as announced by the auctioneer or not, he is bound by them. Where it is the custom to post conditions in the room and the auctioneer so announces, the pur-

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<sup>20</sup>See 24 L. R. A. (NS) 488 for case note on binding effect of conditions announced by the auctioneer; 22 Ann. Cas. 1912 A 1127; *Keske v. Boeder*, 168 Wis. 369, 170 N. W. 247 (1919).

<sup>21</sup>"A right to bid may be reserved expressly by or on behalf of the seller". Uniform Sales Act, Sec. 21 (3); *Yerkes v. Wilson*, 81\* Pa. 9 (1870).

<sup>22</sup>6 C. J. No. 19, 827, and cases cited under notes 65, 66, and 67.

<sup>23</sup>*Aschom v. Smith*, 2 Penrose and Watts 211 (1830); *Harrison v. Nickerson*, *supra*. In re: effect of advertisements in general see, 28 A. L. R. 1001; 2 R. C. L. 1122. In re: catalogue statements see 28 A. L. R. 1003.

<sup>24</sup>*Aschom v. Smith*, *supra*, at p. 218.

chaser is bound whether he saw them or not.<sup>25</sup> The terms of the sale may be changed or goods not listed sold on different terms from those announced, if due public announcement is made at the sale, and a bidder who does not hear it is none the less bound by his bid.<sup>26</sup>

Sales of goods over five hundred dollars<sup>27</sup> and land sales<sup>28</sup> must satisfy the statutes of frauds as to the necessity for a writing. Under the Sales Act<sup>29</sup> each lot of goods put up for sale is the subject of a separate contract of sale, although before the Act the Pennsylvania law was to the opposite effect.<sup>30</sup>

It is stated, *supra*, that the contract is complete with the fall of the hammer. This is the moment the title passes, but until the goods are paid for possession may be retained by the seller.<sup>31</sup> The Pennsylvania cases prior to the Sales Act on the passing of title were all contrary to this view,<sup>32</sup> however, they are now in accord with the New York view.

### (b) The Second Type of Auction Sales

The second type of auction is the sale without reserve. In Pennsylvania this is sanctioned by Section 21 (2) of the Sales Act, which of course applies only to personal property. In this type it is the auctioneer who, by announcing that the sale is one without reserve, makes an offer to sell a specific chattel to the highest bona fide bidder. The auctioneer cannot withdraw the article or refuse the highest bid after the second bid. Thus the auctioneer is continually

<sup>25</sup>"Notice of Conditions", 6 C. J. No. 20 p. 828.

<sup>26</sup>*Burlin v. Brinn*, 116 Misc. 130, 189 N. Y. S. 707 (1921).

<sup>27</sup>Pa. Sales Act, *supra*, Sec. 4 (1); 28 Dick. L. R. 175 at 179.

<sup>28</sup>Act Mar. 21, 1772, 1 Sm. 389, 2 Stewart's Purdon 1753.

<sup>29</sup>Pa. Sales Act, *supra*, Sec. 21 (1).

<sup>30</sup>*Coffman v. Hampton*, 2 W. & S. 377 (1841).

<sup>31</sup>*Jawitz v. Reitman*, 128 Misc. 20, 217 N. Y. S. 480 (1926); *Forbes v. Hunter*, 223 Ill. App. 400 (1921). The loss of goods sold at auction, but retained temporarily by the seller under engagement with the buyer, falls upon the buyer, the seller being a mere bailee and the sale being complete. *Stanhope Bank v. Paterson*, 205 Ia. 578, 218 N. W. 262 (1928).

<sup>32</sup>See 26 Dick. L. R. 151 at p.p. 158, 159.

bound to a succession of bidders, although ultimately only to the final bidder. Each successive bidder is discharged from his contract by the making of a higher bid.<sup>33</sup>

It is in a sale without reserve that the view advanced by Langdell and the English cases as to the underlying theory of an auction sale finds its best exposition. For in a sale without reserve, it is the auctioneer who makes an offer, namely to sell a specific chattel to the person and at the highest price fixed by the bid, the highest bidder being the acceptor of the offer and the contract thus consummated without any need for assent on the auctioneer's part by knocking down a hammer. Prior to the bidding the auctioneer may withdraw goods even though the sale has been advertised to be without reserve.<sup>34</sup>

This type of auction is a novelty in Pennsylvania and the courts have not as yet defined the exact position of a bidder at such a sale.<sup>35</sup> When they do, there is nothing to prevent adoption of the English view, since it appears to be the logical theory upon which to view a sale without reserve.

### (c) The Third Type of Auction Sales

There is a much quoted English case that deals with what may be termed, for want of a better name, a sale with reserve, or a sale with a set up price. This case<sup>36</sup> affirms the right of an auctioneer to set up a price for each article and to refuse to sell if this price is not reached. The origin of this type is probably in the so called "dumb bidding" prevalent at one time in certain English localities.<sup>37</sup> In

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<sup>33</sup>Sales Act, Sec. 21 (2); Sec. 27, Restatement of Contracts provides that "... by announcing that the sale is without reserve . . . , he (the auctioneer) indicates that he is making an offer to sell at any price bid by the highest bidder". See example No. 4 same section and appendix notes on Sec. 27.

<sup>34</sup>Harris v. Nickerson, *supra*.

<sup>35</sup>"Effect of Uniform Sales Act on Pre-existing Law in Pa.", 26 Dick L. R. 151 at 160.

<sup>36</sup>McManus v. Fortescue, 2 K. B. 1, (1907).

<sup>37</sup>Encyc. Brit., Vol. 2, p. 672 (14th Ed.).

these communities it was the custom for the owner to put a price under a candlestick and then to announce a stipulation that no bidding should avail if not equal to it. It is readily seen that the effect of an announcement that a sale is to be subject to a reserved or set up price is, that unless that price is reached, the property will not be considered as sold. Thus knocking down the hammer to the highest bidder is of no effect legally until the bidding has reached the set up price. In effect such a sale is subject to a condition precedent that the bidding must attain the reserved price.<sup>38</sup> Although this is a very plausible type of case, yet the fact of a set up price appears to be contrary to our general notions concerning auction sales. It is not an auction in the true sense: yet if the parties do not intend that the fall of the hammer shall signify acceptance unless the set up price is reached, there can be no valid objection to giving the transaction the legal effect the parties desire. In this type, the final bid, providing it at least equals the price reserved, marks the acceptance of the auctioneer's offer and a contract is then complete. The hammer may fall, but the auctioneer must first investigate and see whether or not the bid price reaches the set up price before he may accept the highest bid. In this sense,

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<sup>38</sup>Where a reserve has been fixed by the vendor, there is no implied authority to sell without reserve even though the auctioneer has ostensibly so sold; and if, in breach of his instructions, the auctioneer sells without reserve, a sale below the reserve price will not give the purchaser any right to enforce the contract against the vendor, *McManus v. Fortescue*, 2 K. B. 1 (1907); overruling *Rainbow v. Hawkins*, 2 K. B. 322 (1904). If however, the vendor's instructions are to carry out a sale subject to a secret reserve and so to act as agent in effecting a fraud, the auctioneer will not be liable to the vendor for disregarding such instructions, *Bexwell v. Christie*, 1 Cowp. 395 (1776). But note that where the sale is not subject to a reserve price and the property has been withdrawn during the auction, some English cases allow an action for damages against the vendor or auctioneer, if the latter has not disclosed his principal, on an implied undertaking that the sale shall be without reserve, *Warlow v. Harrison*, *supra*; *Johnson v. Boyes*, *supra*. However, cf. *Fenwick v. McDonald Co.*, 6 F. (Ct. of Sess.) 850 and *Halsbury's Laws of Eng.* Vol. 1, p. 511,

the parties are not completely bound until there is the definite ascertainment by the auctioneer that the reserved price has been attained.

This third type, like the second, is used but little in the United States, at least not to the extent that it has been developed in England. Taking into consideration the particular circumstances surrounding the second and third types of auction sales, it may be said that as a general rule many of the external conditions of sale applying to the ordinary type of auction apply also to these two.

There are then three types of auction sales each with its own peculiar characteristics. The first, or ordinary auction, based upon two different theories; the second, or sale without reserve, in which the auctioneer makes the offer, that in turn is accepted by the highest bidder; and the third, or the sale with a reserve price, in which there is a condition precedent that a certain price must be reached by the bidding before the highest bid can be accepted.

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