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## BIDS AS ACCEPTANCES IN AUCTIONS "WITHOUT RESERVE"

BY HARVEY HOSHOUR\*

As an original problem in elementary contract law there would seem to be little difficulty in concluding that in those cases in which an auction sale has been announced to be without reserve the bids are acceptances, conditional on no higher bid being received. One who accepts as correct the objective theory as to mutual assent in the formation of contracts<sup>1</sup> will make the determinant of whether a given act is an offer largely the viewpoint of the person to whom the act is addressed, acting reasonably.<sup>2</sup> The interpretation suggested only makes articulate what is believed would be the reasonable conclusion of those who buy at auction.

However clear this may be on principle, the decided cases, particularly in this country, have generally held otherwise,<sup>3</sup> and eminent commentators have supported the opposite view.<sup>4</sup> It is the purpose of this article to show the development in the English and American law toward the conclusion that in this class of cases the bids are acceptances and create contracts of sale. It is believed that this conclusion is sound in theory; that it is not inconsistent with other well settled rules; and that the law has so evolved that it should be adopted by the courts in deciding cases of this type.

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<sup>1</sup>See Williston, *Mutual Assent in Formation of Contract*, (1919) 14 Ill. L. Rev. 85; Oliphant, *Duration and Termination of an Offer* (1920) 18 Mich. L. Rev. 201.

<sup>2</sup>See Corbin, *Offer and Acceptance*, (1917) 26 Yale L. J. 169, 182.

<sup>3</sup>The cases are discussed in detail *infra*. The problem is of special interest in Minnesota because the leading case in this country contra to the view here supported was decided by the Minnesota supreme court: *Anderson v. Wisconsin Cent. Ry. Co.*, (1909) 107 Minn. 296, 120 N. W. 39.

<sup>4</sup>Pollock, *Principles of Contract*, 9th ed., pp. 19, 20; 1 Williston, *Contracts* 41 to 43.

The meaning of an announcement that a sale is to be without reserve is not doubtful. Such meaning is two-fold: (1) that the vendor will not himself bid; and (2) that the goods will be sold to the highest bidder. Lord Mansfield aptly paraphrased these two meanings in a single clause: "that the goods shall go to the highest real bidder."<sup>5</sup> Although both meanings follow with equal certainty from the words themselves only that first stated has uniformly been made effective in the law. Indeed it is well settled that unless the sale be announced to be *with reserve* the vendor may not bid.<sup>6</sup> It is not that the cases hold that the words "without reserve" do not mean that the goods are to go to the highest bidder, but that, largely on the ground of consistency with another rule shortly to be considered, neither party at an auction may be held contractually bound until the fall of the hammer. Thus an obvious meaning of the words used in the announcement is made wholly ineffective. Since the argument of inconsistency has played so large a part in the matter it seems proper at the outset briefly to consider the rule that has been thought to be controlling or at least to be so inconsistent with the rule here supported as to justify a contrary conclusion.

The rule referred to is based on the decision in the leading case of *Payne v. Cave*.<sup>7</sup> In that case there was no announcement that the sale was to be without reserve.<sup>8</sup> There the bidder withdrew his bid when the auctioneer, after having stated that the distilling apparatus involved weighed a certain amount, refused to warrant the truth of his statement. Later the same bidder bought the article for a smaller sum, and suit was brought by the vendor for the difference between the amounts of the two bids. Plaintiff was held to have no cause of action on the ground that the bids were offers only and revocable until assented to by the vendor or the auctioneer. It has cogently been urged that the putting up of goods is an offer to sell to the highest bidder, and

<sup>5</sup>Bexwell v. Christie, (1776) 1 Cowper 395, 397.

<sup>6</sup>1 Williston, Sales, 2nd ed., sec. 298; section 58, English Sale of Goods Act; section 21, Uniform Sales Act.

<sup>7</sup>(1789) 3 Durn. & E. 148.

<sup>8</sup>In *Payne v. Cave*, (1789) 3 Durn. & E. 148 plaintiff pleaded that it was a usual condition in auction sales that the highest bidder should be the purchaser, but it was not claimed at the trial that there was an express provision in the announcement to that effect. Therefore *Payne v. Cave* has been rightly interpreted as holding only that the putting up of goods by the auctioneer is not an offer. See 1 Williston, Contracts, sec. 29; Leake, Contracts, 7th ed., p. 24; Pollock, Principles of Contract, 9th ed., p. 16; Langdell, Summary of the Law of Contracts, sec. 19.

that therefore *Payne v. Cave* was wrongly decided.<sup>9</sup> Whatever the merits of such argument, *Payne v. Cave* has been uniformly followed in cases factually similar,<sup>10</sup> and discussion of the propriety of the rule of that case is academic at this time. A number of the decided cases, as will appear more fully in the analysis thereof following, as well as several writers on the subject,<sup>11</sup> argue that, since it is settled that the bids are not acceptances in cases of the *Payne v. Cave* type, it is inconsistent with the rule of that case to hold that they are acceptances in cases of the sort here under discussion.

It is believed, however, that there is no inconsistency between the two rules. It is the very fact that the sale is announced to be without reserve by the person who is responsible therefor that justifies the bidders, acting reasonably, in understanding that the property involved will be sold to the highest bidder, and that in such case a sale will be completed by each bid, subject only to the condition that no higher bid be received. It is conceivable that bidders would understand without such statement or its equivalent that even the putting up of goods does not constitute an offer, but where the sale has been announced to be without reserve the proposition is so unequivocal that a reasonable bidder could, it is submitted, understand it as meaning only one thing. Consistency does not require that because bids in one class of auction cases are held offers they must be so held in all classes of auction cases. The fact that advertisements are not generally held to be offers does not condemn such cases as *Carlill v. Carbolic Smoke Ball Co.*<sup>12</sup> Even if the two rules were inconsistent it should make no difference if the rule here supported be right.<sup>13</sup> But when the reasons justifying this rule are considered there is no inconsistency. *Payne v.*

<sup>9</sup>Langdell, Summary of the Law of Contracts, sec. 19.

<sup>10</sup>See cases cited in 1 Williston, Sales, 2nd ed., sec. 296.

<sup>11</sup>The inconsistency argument is best stated in 1 Williston, Contracts, sec. 30, as follows:

"Indeed the contrary view is inconsistent with the numerous decisions holding that the sale of the property is not complete until the fall of the hammer; for if the announcement by the auctioneer that he is to sell goods without reserve amounts to an offer, and the advertised terms and conditions of the sale are also offers to contract, it seems impossible to deny that the actual putting up of the goods, a much stronger act than merely advertising that they are to be put up, is also an offer."

See also 1 Halsbury's Laws of England, 511 footnote (r) to sec. 1039.

<sup>12</sup>[1893] 1 Q. B. 256, 62 L. J. Q. B. 257.

<sup>13</sup>Cf. Holmes, The Common Law 36: "The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."

*Cave* may have been decided wrongly, but, rightly or wrongly, it is not controlling here, nor do the two rules seem essentially inconsistent.

The development in the law of the view here supported is interesting, and its tenacity, notwithstanding fairly general critical disapproval, alone would justify a more careful consideration thereof than has been given it. For convenience the relevant English cases and statutes will be first considered.

The first case in point of time that suggests the problem is *Bexwell v. Christie*.<sup>14</sup> There defendant auctioneer sold a horse formerly owned by plaintiff for an amount considerably less than that specified in plaintiff's directions. The announced conditions of the sale, apparently known to plaintiff, were that "the highest bidder shall be the purchaser." Plaintiff's theory of suit was that under his directions it was defendant's duty to employ puffers so as to protect plaintiff's price limit. In holding for defendant the precise point decided was that it would be a fraud on the bidders to permit the vendor, directly or indirectly, to bid, but the language of Lord Mansfield is almost equally applicable to the instant problem:

"The basis of all dealings ought to be in good faith; so, more especially in these transactions, where the public are brought together upon a confidence that the articles set up to sale will be disposed of to the highest real bidder; that such could never be the case if the owner might secretly and privately enhance the price by a person employed for that purpose; . . . What is the nature of a sale by auction? It is, that the goods shall go to the highest real bidder."<sup>15</sup>

So in the situation here under discussion, using Lord Mansfield's language, where the bidders are brought together upon a confidence that the goods will be sold to the highest bidder the law should protect that confidence. Only by the view here supported can this be done in line with contract law.

The leading English case in point is *Warlow v. Harrison*,<sup>16</sup> decided by the Court of Exchequer Chamber in 1859. Indeed the principle under consideration has been discussed largely with reference to this one case.<sup>17</sup> Here the sale was announced to be without reserve, and plaintiff, who was the highest real bidder,

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<sup>14</sup>(1776) 1 Cowper 395.

<sup>15</sup>*Bexwell v. Christie*, (1776) 1 Cowper 395, 396, 397.

<sup>16</sup>(1859) 1 E. & E. 309.

<sup>17</sup>See, Smith, *Sales Without Reserve*, (1915) 40 L. Mag. and Rev., 5th Ser. p. 173. Note in 57 L. R. A. 784.

sued the auctioneer (the principal not being disclosed) on the theory that defendant became the agent of plaintiff to complete the contract, which defendant failed to do. In the Court of Queen's Bench<sup>18</sup> counsel for plaintiff argued that "where the sale by the conditions is without reserve, the bidder is absolutely the purchaser unless there be a bona fide higher bidder." That court, however, was impressed with the thought that this argument was "wholly at variance with the case of *Payne v. Cave*"<sup>19</sup> and non-suited the plaintiff. In the Exchequer Chamber the court was of the opinion that the judgment should be affirmed on the pleadings as they stood, but thought that plaintiff had a cause of action on another theory. Accordingly the judgment was affirmed "unless the parties elect to enter a *stet processus*, or the plaintiff amend his declaration; in which latter case, a new trial to be had."<sup>20</sup> A *stet processus* was entered into and the case was not re-tried.<sup>21</sup> In connection with the proposed amendment the court used the following language:

"The name of the auctioneers, of whom the defendant was one, alone was published; and the sale was announced by them to be without reserve. This, according to all the cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not; *Thornett v. Haines*, 15 M. & W. 367. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him: *Denton v. Great Northern Railway Company*, 5 E. & B. 860. Upon the same principle, it seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the 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 bona fide bidder; and, in case of a breach of it, that he has a right of action against the auctioneer. The case is not at all affected by the 17th section of

<sup>18</sup>(1858) 1 E. & E. 295.

<sup>19</sup>(1858) 1 E. & E. 295, 307.

<sup>20</sup>(1859) 1 E. & E. 309, 318.

<sup>21</sup>The fact that a *stet processus* was entered into in *Warlow v. Harrison* (1859) 1 E. & E. 309 is stated in the opinion in *Mainprice v. Westley*, (1865) 6 B. & S. 420, 429.

the statute of frauds, which relates only to direct sales, and not to contracts relating to or connected with them."<sup>22</sup>

The quotation is from the opinion of the majority of the court. Two of the five judges, (all the judges concurring in the disposition of the case,) based their conclusion as to the amendment on the ground that defendant's announcement was in effect a warranty, and, there being evidence that he had no authority to sell without reserve, plaintiff's cause of action should be for a breach of such warranty.

The language quoted from the opinion of *Warlow v. Harrison* has been thought to be dictum.<sup>23</sup> This position, however, seems untenable, for, as the court pointed out in the opinion, "there is power given to the court to amend; and it has been held that this power extends to the Court of Appeal; and we think we ought to exercise it largely in order to carry out the object of the Common Law Procedure Acts, 1852 and 1854 viz., to determine the real question in controversy between the parties in the existing suit."<sup>24</sup>

A more difficult question is as to what the language referred to actually meant to hold. Pollock thinks that the case is a

"holding in effect (contrary to the general rule as to sales by auction) that where the sale is without reserve the contract is completed not by the acceptance of a bidding, but by the bidding itself, subject to the condition that no higher bona fide bidder appears."<sup>25</sup>

This conclusion is in line with the analogies referred to by the court. The reward and time table cases do seem indistinguishable from the situation here involved. If this interpretation be correct, *Warlow v. Harrison* is directly in point in favor of the proposition herein supported.

However, Pollock's interpretation, desirable though it is, does not seem justified by the opinion in *Warlow v. Harrison* taken as a whole. In the first place if the court had meant so to hold, there would have been no need for an amendment, for such in substance was plaintiff's theory in his original declaration. Again the last sentence quoted with reference to the statute of frauds shows clearly that what the court had in mind was some sort of collateral

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<sup>22</sup>(1859) 1 E. & E. 309, 316, 317.

<sup>23</sup>Smith, Sales Without Reserve, (1915) 40 L. Mag. and Rev., 5th Ser. 173; Mainprice v. Westley, (1865) 6 B. & S. 420.

<sup>24</sup>(1889) 1 E. & E. 309, 316.

<sup>25</sup>Pollock, Principles of Contract, 9th ed., p. 19. Substantially to the same effect is Anson, Contracts, Turck's Edition, pp. 77-78.

contract to sell to the highest bidder as distinct from a direct sale by the bid as an acceptance.<sup>26</sup>

In *Mainprice v. Westley*<sup>27</sup> similar facts to those in *Warlow v. Harrison* were involved except that defendant auctioneer's principal was disclosed; and the holding was that in such case no action lies against the auctioneer. *Warlow v. Harrison* was distinguished, with some suggestion that the discussion of the point in *Warlow v. Harrison* was dictum.<sup>28</sup> The court, however, was careful to point out that no decision was made as to whether or not plaintiff had a cause of action against the principal.<sup>29</sup>

In *Spencer v. Harding*,<sup>30</sup> the well known tender case, the language used in what was claimed to be the offer was held insufficient to support a finding that it was an offer in law, but the court added:

"If the circular had gone on, 'and we undertake to sell to the highest bidder,' the reward cases would have applied and there would have been a good contract with respect of the persons."<sup>31</sup> Obviously the dictum last quoted expresses the rule here supported, and it should be noted in this connection that suit in *Spencer v. Harding* was brought on a claimed contract of sale, not on a collateral contract.

In *Harris v. Nickerson*<sup>32</sup> plaintiff sued defendant auctioneer for expenses incurred in attending the sale, certain of the goods having been withdrawn. Judgment for defendant was ordered. *Warlow v. Harrison* was cited with apparent approval by two of the judges,<sup>33</sup> but since plaintiff did not claim to be the highest bidder it did not become necessary to apply the rule of that case.

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<sup>26</sup>1 Williston, Contracts, sec. 30, interprets the decision in *Warlow v. Harrison* thus: "In England it has been decided that a collateral contract is formed by the attendance of the bidders at the auction; that is, the auctioneer is held to offer to observe the advertised conditions (as to sell without reserve) in consideration of the bidders attendance and taking part in the auction." The last conclusion that the consideration is the attendance and taking part in the auction by the bidders seems questionable. Only the highest bidder, not all bidders, should have a cause of action, (see *Harris v. Nickerson*, (1873) 8 Q. B. 286) and it seems more correct to interpret *Warlow v. Harrison* as holding that a unilateral contract was formed with the highest bidder, such bid being the act bargained for. However that may be, the collateral contract interpretation of the decision in *Warlow v. Harrison* seems inescapable, notwithstanding Sir Frederick Pollock's view otherwise.

<sup>27</sup>(1865) 6 B. & S. 420.

<sup>28</sup>(1865) 6 B. & S. 420, 427.

<sup>29</sup>(1865) 6 B. & S. 420, 430.

<sup>30</sup>(1870) L. R. 5 C. P. 561.

<sup>31</sup>(1870) L. R. 5 C. P. 561, 563.

<sup>32</sup>(1873) L. R. 8 Q. B. 286.

<sup>33</sup>The following language from the opinion of Judge Blackburn, who in

In 1893 the English Sale of Goods Act was adopted, and section 58 (2) thereof is as follows:

"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."

Thus the rule of *Payne v. Cave* received legislative approval in England. There is in the English Sale of Goods Act no specific reference to the question here under discussion. The effect of the enactment of the rule of *Payne v. Cave* in the Sale of Goods Act has been urged definitely to preclude any contractual obligation before the fall of the hammer.<sup>34</sup> To this argument there are several answers. In the first place sec. 61 (2) of the English Act is as follows:

"The rules of the common law, including the law merchant, save in so far as that they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent . . . shall continue to apply to contracts for the sale of goods."

If the argument herein made be sound, there is no inconsistency between the rule of *Payne v. Cave* and that here urged. Furthermore, the English courts since the adoption of the Sale of Goods Act have continued to cite *Warlow v. Harrison* with approval.

*Johnston v. Boyes*<sup>35</sup> was an action against a vendor for not completing a sale of real estate to plaintiff, it having been announced in effect that the sale would be without reserve. The action was dismissed because plaintiff failed to make the payments required, but the court cites *Warlow v. Harrison* with apparent approval:

"In point of law I think such an action can be maintained. A vendor who offers property for sale by auction on the terms of printed conditions can be made liable to a member of the public who accepts the offer if those conditions be violated: See *Warlow v. Harrison* and the recent case of *Carlill v. Carbolic Smoke Ball Co.*"<sup>36</sup>

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Mainprice v. Westley indicated that he thought the language herein quoted from *Warlow v. Harrison* was dictum is interesting: "In the case of *Warlow v. Harrison* 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."

<sup>34</sup>Smith, *Sales Without Reserve*, (1915) 40 L. Mag. and Rev., 5th Ser. 173; Fenwick v. Macdonald, (1904) 6 Sess. Cas., 5th Ser. 850.

<sup>35</sup>[1899] 2 Ch. 73, 68 L. J. Ch. Div. 425.

<sup>36</sup>[1893] 1 Q. B. 256, 62 L. J. Q. B. 257.

In several still later English cases *Warlow v. Harrison* is cited.<sup>37</sup> Although the facts in these cases did not involve an application of the rule there stated, it seems clear therefrom that the English courts regard such rule as unaffected by the passage of the Sale of Goods Act.

So much for the English authorities. The passage of the Sale of Goods Act has had no effect other than to foreclose further discussion of the correctness of the rule of *Payne v. Cave*. The rule laid down in *Warlow v. Harrison* is still the law in England. In effect that rule is that where the sale is announced to be without reserve a collateral unilateral contract not within the statute of frauds is formed by making the highest bid, as Mr. Williston aptly puts it: "a collateral contract somewhat artificially created by the court in order to work out a just result."<sup>38</sup> In addition there are dicta in the English cases that in such situation a direct contract of sale is formed.

In America the rule under discussion has had an interesting development. At the time *Warlow v. Harrison* was decided the commissioners appointed under chapter 266 of the New York Laws of 1857 were preparing a Civil Code for New York. When in 1862 a draft of the proposed code was "submitted to the judges and others for examination" section 718 thereof was as follows:

*"Rights of buyer upon sale without reserve.*—If the auctioneer, having authority to do so, has publicly announced that the sale will be without reserve, or has made any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and upon such a sale, bids by the seller or any agent for him are void. *Warlow v. Harrison*, 6 Jur. (N.S.) 66, 29 L. J. (Q.B.) 14."

When the proposed code was submitted to the New York Legislature in 1879, section 900 thereof, except for verbal changes of no consequence, was identical with section 718 of the earlier draft. The language quoted indicates a third interpretation of *Warlow v. Harrison*. The collateral contract theory is not adhered to, nor is Pollock's interpretation of a contract of sale with the highest bidder. The highest bidder is given a direct right to enforce the purchase, but the vendor is given no corresponding right. Obviously this interpretation has less merit than either of those suggested

<sup>37</sup>*Rainbow v. Howkins*, [1904] 2 K. B. 322, 73 L. J. K. B. Div. 641; *McManus v. Fortesque*, [1907] 2 K. B. 1, 76 L. J. K. B. Div. 393.

<sup>38</sup>1 Williston, *Sales*, 2nd ed., sec. 297.

heretofore. It does not follow from the language of the court in the case relied on, and it violates the rule of contract law that if a promise of one party to a bilateral agreement is not binding, the return promise of the other party is not enforceable for insufficiency of consideration. However objectionable this interpretation may be it has been the corner stone of a series of statutes on the point which have been adopted in most of the American states.

Although the Field Code (as the proposed New York code came to be known because of its chief author) was not adopted in New York it was used as a model for the civil codes of several states. Thus section 1796 of the California Civil Code, enacted in 1872, is in substance precisely the same as the section of the Field Code quoted above, as are section 1026, Dakota Civil Code; section 5440, North Dakota Civil Code; section 1345, South Dakota Civil Code; section 2414, Montana Civil Code. Thus what may be termed the Field interpretation of *Warlow v. Harrison* came to be adopted as part of the statute law of the four states named.

The Uniform Sales Act, now adopted in some thirty American states and territories, inferentially follows the statutes last referred to. Section 21 (2) is the relevant portion thereof:

"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." While the language used in the Uniform Act is not so definite as in the statutes directly following the Field Code its effect seems quite the same so far as the instant point is concerned as if those statutes had been copied verbatim. The auctioneer may withdraw the goods at any time before the fall of the hammer "unless the auction has been announced to be without reserve." If so announced he may not withdraw the goods.<sup>39</sup> Since the auctioneer may not withdraw the highest bidder has the right to enforce the sale. But, until the fall of the hammer, he may "retract his bid." Thus the Field interpretation of *Warlow v. Harrison* is part of the statute law of those states, including substantially all the states of commercial importance, which have adopted the Uniform Sales Act.<sup>40</sup>

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<sup>39</sup>See *Forbes v. Hunter*, (1921) 223 Ill. App. 400.

<sup>40</sup>The Commissioners' note appended to section 21 of the Uniform Sales Act is as follows: "This follows section 58 of the English Act, and is believed to express the existing law." While most of the content of

Judicial approval of any of the three suggested interpretations of *Warlow v. Harrison* has been slow in America. It could hardly be expected that the courts, in the absence of a controlling statute, would hold the vendor bound upon the making of the bid and the vendee not then bound, and no case has been found so holding. Several cases, however, have considered the question in general and *Warlow v. Harrison* in particular.

In *Boyd v. Greene*<sup>41</sup> an auction sale of real estate was advertised to take place without reserve. Plaintiff was the highest bidder, and when the auctioneer refused to close plaintiff sued for breach of contract of sale. *Warlow v. Harrison* is cited, but the court held that the contract sued on was within the statute of frauds and that if there was such contract it was therefore not enforceable. The opinion contains no discussion of the correctness of the rule of *Warlow v. Harrison*.

In *Taylor v. Harnett*,<sup>42</sup> *Warlow v. Harrison* is cited with some indication of disapproval but the decision went off on another point and the court found it unnecessary to determine whether *Warlow v. Harrison* should be followed in New York.

In *McPherson v. Okanogan County*<sup>43</sup> defendant advertised property for sale at public auction to the highest and best bidder for cash. Plaintiff alleged that his was the highest and best bid and asked specific performance. Defendant demurred and an order of the trial court sustaining the demurrer was affirmed on the ground that until the fall of the hammer in a sale by auction neither party is bound. *Warlow v. Harrison* is not cited. *Payne v. Cave* and cases of that type are relied on as controlling and the distinguishing features between that kind of case and the decided case are not suggested in the opinion. Obviously this decision supports the inconsistency argument against the position herein supported, but its omission to consider the distinguishing

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section 21 follows that of Section 58 of the English Act the portion here under discussion: "and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve," is significantly absent from the English Act. And, if the interpretation herein made be sound that the American Act gives the bidder a direct right to enforce the purchase without giving the vendor a corresponding right, the American Act in respect to the point under consideration cannot be said rightly to express the existing law, except in those states whose statutes follow the Field Code.

<sup>41</sup>(1894) 162 Mass. 566, 39 N. E. 277.

<sup>42</sup>(1899) 37 App. Div. 253, 55 N. Y. S. 988.

<sup>43</sup>(1907) 45 Wash. 285, 88 Pac. 199, 9 L. R. A. (N.S.) 748.

features or even to cite *Warlow v. Harrison* tends to lessen its persuasiveness.

*Anderson v. Wisconsin Cent. Ry. Co.*<sup>44</sup> is the leading case on the point in this country. The announcement of the auction there contained neither the statement that the sale would be without reserve nor that the property would be sold to the highest bidder.<sup>45</sup> However, the court decided the case on the assumption, as claimed by counsel for the bidder, "that an advertisement or announcement of an auction sale which does not state limitations and conditions is equivalent to the announcement that the sale will be without reserve."<sup>46</sup> Plaintiff was the highest bidder but the auctioneer refused to consider his bid, whereupon he sued for breach of contract of sale. *Warlow v. Harrison* is referred to as "the source of all the uncertainty," is exhaustively analyzed,<sup>47</sup> and is expressly disapproved largely on the ground stated in a quotation from Benjamin on Sales<sup>48</sup> that the decision in *Warlow v. Harrison* is inconsistent with the English Sale of Goods Act, which ground has already been referred to herein. The American cases are then gone into at length and particular reliance is placed on the *McPherson Case* last above referred to. The following language of the court has been much quoted:

"Mutuality is an essential element of a contract. One party thereto cannot be bound, and the other remain free. If the announcement of an auction is an offer to sell to the highest good-faith bidder, and the contract is closed when the bid is made, both the vendor and the vendee must be bound thereby. But it is conceded by all the authorities that the bidder may withdraw his bid at any time before the hammer falls, and this means necessarily that the bid is a mere offer which is not binding until accepted."<sup>49</sup> While one may not entirely agree with the court's usage of the term "mutuality" in this connection,<sup>50</sup> there can be no question of the essential soundness of the thought expressed in the first three sentences of the language quoted, barring the collateral contract

<sup>44</sup>(1909) 107 Minn. 296, 120 N. W. 39, 20 L. R. A. (N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

<sup>45</sup>See plaintiff's Exhibit 1, ff. 119-122, Cases & Briefs Supreme Court of Minnesota, Oct. Term 1908, Cal. No. 197.

<sup>46</sup>(1909) 107 Minn. 296, 299, 120 N. W. 39, 30 L. R. A. (N.S.) 1133, 131 Am. St. Rep. 462, 16 Ann. Cas. 379.

<sup>47</sup>(1909) 107 Minn. 296, 301-03, 120 N. W. 39, 30 L. R. A. (N.S.) 1133, 131 Am. St. Rep. 462.

<sup>48</sup>Contained on page 306 of the opinion.

<sup>49</sup>(1909) 107 Minn. 296, 313, 120 N. W. 39, L. R. A. (N.S.) 1133, 131 Am. St. Rep. 462.

<sup>50</sup>See 1 Williston, Contracts, sec. 140.

theory of *Warlow v. Harrison*. But why should not both the vendor and vendee be bound? The court's answer is contained in the last sentence quoted, which sentence is supported by a number of cited cases from other jurisdictions. However when it is pointed out that all of these cases are of the *Payne v. Cave* type, and that in none of them was there an announcement that the sale would be without reserve, it is seen that the language quoted is but a restatement of the inconsistency rule, which it is believed has been shown to be of very little cogency. It is interesting that among the authorities cited by the court in support of the last sentence quoted are California, Civil Code, section 1794 and North Dakota, Code, section 5438. These sections contain statements of the rule of *Payne v. Cave*, but in both of these codes, as has already been pointed out herein, there are sections almost immediately following the sections referred to which give the vendee the remedy which the Minnesota court denied him in the *Anderson Case*.

In addition to the argument from authority the court in the *Anderson* opinion argues from analogy:<sup>50a</sup>

"A merchant advertises that on a certain day he will sell his goods at bargain prices; but no one imagines that the prospective purchaser, who visits the store and is denied the right to purchase has an action for damages against the merchant. He merely offers to purchase, and if his offer is refused, he has no remedy, although he may have lost a bargain, and have incurred expense and lost time in visiting the store. The analogy between such a transaction and an auction is at least close."

While ordinarily advertisements are not construed as offers there is no doubt that an advertisement can be so worded as to be an offer.<sup>51</sup> The ultimate determinant should be the reaction on the person addressed, acting reasonably. While no one would imagine that a prospective purchaser in the hypothetical case put by the court would have an action for damages if denied the right to buy, if, on the other hand, the merchant had stated in his advertisement that he had certain articles that he would sell to the first persons offering him the price stated, could it be doubted that such purchaser would have a cause of action if denied the goods? And is it not true that the latter type of case is vastly closer to

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<sup>50a</sup>(1909) 107 Minn. 296, 314, 120 N. W. 39, 30 L. R. A. (N.S.) 1133, 131 Am. St. Rep. 462.

<sup>51</sup>See *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q. B. 256, 62 L. J. Q. B. 257; *Seymour v. Armstrong*, (1901) 62 Kan. 720, 64 Pac. 612.

the instant problem than the type put by the court? It is submitted that the court's argument by analogy does not support the conclusion reached.

In *United States v. Meyer*<sup>52</sup> a statute provided for advertisement that certain vessels should be sold "to the person offering the highest price therefor." Pursuant to such advertisement relator's bid was made and was refused by the officer in charge. It was held that relator had no cause of action, by analogy with the auction cases. The only case cited, however, was *Blossom v. Railroad Co.*,<sup>53</sup> which case was of the *Payne v. Cave* type and was decided almost exclusively on the authority of *Payne v. Cave*. All of the comment herein made with reference to the *Anderson Case* is applicable to the decision in the *Meyer Case*. These cases seem to assume that it is not possible for a vendor to make an offer in an advertisement for an auction, a conclusion that is submitted to be untenable in theory and unfair in practice.

In *Freeman v. Poole*<sup>54</sup> the court discusses the cases on this question, including *Warlow v. Harrison*, but since the announcement of the sale there involved did not contain a statement that the sale would be without reserve or its equivalent the opinion does not directly bear on the question here under discussion. However the *McPherson* and *Anderson Cases* are cited with apparent approval.

In only one of the American cases—the *Anderson Case*—does the court go into the question exhaustively. But the factual situation in that case, as has already been pointed out, did not include an express announcement that the sale would be without reserve. In none of the American cases are the differentiating factors herein stated even referred to, and in each case the court bases its conclusion directly or indirectly on an assumed analogy with the cases of the *Payne v. Cave* type. All of the American cases are suits by the bidder, in which connection it is worthy of note that the legislatures of each of the states whose courts have considered this question, by adopting the Uniform Sales Act,<sup>55</sup>

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<sup>52</sup>(1911) 37 App. D. C. 282.

<sup>53</sup>(1865) 3 Wall. (U.S.) 196, 18 L. Ed. 43.

<sup>54</sup>(1915) 37 R. I. 489, 93 Atl. 786, 94 Atl. 152, L. R. A. 1917A 63, Ann. Cas. 1918A 841.

<sup>55</sup>Massachusetts, Gen. Laws 1921, ch. 106, secs. 3-65; New York, Consolidated Laws, Cahill 1923, ch. 42, secs. 82-158; Washington, Laws 1925, ch. 142; Minnesota, Mason's 1927 Stat. secs. 8376-8455; Rhode Island, Gen. Laws 1923, tit. 30, ch. 305-311, secs. 4427-4503.

have given the highest bidder a right of action to enforce the purchase if the sale be announced to be without reserve.

The situation in America then is this: the collateral contract theory has been adopted in no state; the direct contract theory, so far as the bidder's rights are concerned, has been adopted in those states whose codes have followed the Field Code as well as in those states that have enacted the Uniform Sales Act; while some cases disapprove the direct contract theory here urged they are based almost entirely on analogies which seem unfounded. Further, in so far as these cases indicate a social policy of no liability until the vendor assents their force is lessened by the legislative adoption of the rule giving the vendee the right to enforce the sale without such assent. Still further, the direct contract theory is in line with the elementary principle of contract law that a manifestation of intention is an offer when such as to lead the person addressed, acting reasonably, to believe that the power to create a contract is conferred upon him. Indeed it is believed that anyone reading an announcement of an auction without reserve could reasonably come to no other conclusion but that such power was conferred.

The American Law Institute's Restatement of the Law of Contracts supports the position herein urged, section 27 of the Official Draft thereof being as follows:

*"Auctions; Sales Without Reserve.*—At an auction, the auctioneer merely invites offers from successive bidders unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder."

While the language used in the Restatement reaches the point under discussion only inferentially, there can be no escape from the conclusion that the direct contract theory is approved therein. If further evidence be needed it is found in the explanatory note appended to section 27:

"It must be possible . . . for an auctioneer, if he uses appropriate language, to become the offeror. An announcement that goods will be sold to the highest bidder has this effect. Fairly interpreted the language means that the auctioneer promises that whoever makes the highest bid shall become owner of the subject matter of the sale."

In those states which have adopted either the Field Code or the Uniform Sales Act the conclusion here urged cannot be followed

in full, because of the provision therein contained that in all cases the bidder may withdraw until the hammer falls. As a matter of practical justice the statutory rule referred to takes care of most cases which require relief, notwithstanding the fact that its text in this connection is based in a misinterpretation of *Warlow v. Harrison* and involves a contractual impossibility. As a matter of contract law section 27 of the Restatement would be a vast improvement on section 21 (2) of the Uniform Sales Act and the corresponding section of the Field Code, and it is to be hoped that the time may come when the legislatures will substitute it or its equivalent for the sections referred to. Until that time the Field Code and its follower in this respect, the Uniform Sales Act, stand in the curious position of perpetuating in the law of a majority of American states the underlying policy of the rule here supported and at the same time preventing its complete adoption.

The problem under discussion also illustrates the utility of such a project as the American Law Institute's Restatement. Throughout the English and American cases and statutes the rule here supported has kept cropping out in one form or another, notwithstanding a good deal of critical disapproval. In addition it is theoretically sound, and not truly inconsistent with other well settled rules. Nor are there controlling and well reasoned cases to the contrary. These things being so, the inclusion of the rule here urged in the Restatement seems altogether proper. Perhaps in no other way, in view of the confusion in the cases on the point, could the matter be so effectively clarified.<sup>56</sup>

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<sup>56</sup>The Restatement of the Law of Contracts has already been cited with approval by many courts. Examples in Minnesota are: *Heins v. Byers*, (1928) 174 Minn. 350, 219 N. W. 287; *Peterson v. Parviainen*, (1928) 174 Minn. 297, 219 N. W. 180; *Cruickshank v. Ellis*, (1929) 178 Minn. 103, 226 N. W. 192.