

probatur: but it is not founded in law. And there are even additional words in this case, "leaving no issue behind him;" which necessarily import that the testator meant at the time of his son's death. The subsequent parts of the will also convey the same idea; for the deviser mentions this event as likely to happen in the lifetime of his widow, or of his younger son or daughters. Therefore I have not the least doubt but that this is a good executory devise, to take place within the time allowed by law, which is borrowed by analogy from legal formal limitations, namely, for a life or lives in being, with a remainder in tail to unborn children, who cannot bar it till twenty-one. With respect to the other point, the shape of the question must be altered (c) before we certify to the Lord Chancellor; for, as it stands now, we cannot take cognizance of the question in a [147] Court of Law. But if we were to consider this as a limitation of real property, instead of land, to be converted into money, this may be supported as a contingency with a double aspect. And I should have no difficulty in saying that, in the event of Philip Dobin dying without leaving issue at his death, the widow, if she were alive, might take; if not, the second son, or the daughters of the deviser.

Ashhurst, J. and Grose, J.—thought this was not to be distinguished in principle from the case of *Pells v. Brown*.

The following certificate was afterwards sent to the Court of Chancery:

Having heard counsel on the case above referred to us, we are of opinion that P. Dobin took an estate in fee-simple in the premises above devised to him: but, as Philip died without issue living at the time of his death, we are of opinion that the further disposition made by the testator in that event is good by way of executory devise.

KENYON.

W. H. ASHHURST.

N. GROSE.(a)

CLARK *against* KING AND OTHERS. Friday, May 1st, 1789. A plea of prescription for common in a que estate is good after verdict, though it be not in express terms alleged that the owners of the estate have used it from time immemorial.

This was an action of replevin for taking cattle at Otmoor, Oxford. The defendants made cognizance as bailiffs of Lord Abingdon, whose soil and freehold Otmoor was; and they justified taking the cattle as doing damage on the moor. The plea in bar set forth that long before, and at the time when, &c. A. Croke was seised in his demesne as of fee of and in a certain messuage and 150 acres of land with the appurtenances, in Studley, Bucks, "And that the said A. Croke and all those whose estate he then had, and now has, of and in the said messuage and land with the appurtenances, have had and used, and been accustomed to have and use, and of right ought, &c. for themselves and their farmers and tenants, occupiers of the said messuage and land with the appurtenances for the time, common of pasture on Otmoor for commonable cattle, &c." The replication traversed the right as stated in the plea in bar; and on the trial the plaintiff had a verdict.

[148] Lane now moved in arrest of judgment, because the plea in bar did not state that A. Croke, and those whose estate he had, had been immemorially entitled to the right of common: that it could not be supported as a prescriptive right, as not being claimed time out of mind; and that, though the evidence might prove the right as laid, it could not enlarge it. But

Per Curiam. Although this is not accurately stated, yet at any rate it is sufficient after verdict. It states a right of common in all those who have held that estate: and unless a prescriptive right had been proved, the plaintiff could not have obtained a verdict.

Rule refused.

PAYNE *against* CAVE. Saturday, May 2d, 1789. A bidder at an auction, under the usual conditions that the highest bidder shall be the purchaser, may retract his bidding any time before the hammer is down.

This was an action tried at the sittings after last term at Guildhall before Lord Kenyon, wherein the declaration stated, that the plaintiff, on 22d September 1788,

(c) See *Sabbarton v. Sabbarton*, Rep. t. Talb. 245; and *Doe v. Brabant*, post, 4 vol.

(a) Mr. J. Buller was sitting for the Lord Chancellor when this case was argued.

was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M. the agent of the plaintiff in that behalf; the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c. of all which premises the defendant afterwards, to wit, &c. had notice; and thereupon the defendant in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake and promise to perform the conditions of the said sale, to be performed by the plaintiff as seller, &c. undertook, and then and there promised the plaintiff to perform the conditions of the sale, to be performed on the part of the buyer, &c. And the plaintiff avers that the conditions of sale, herein-after mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days time, it should be put up again and resold, &c. [stating all the conditions]. It then stated, that the defendant became the purchaser of the lot in question for 40l. and was requested to pay the usual deposit, which he refused, &c. At the trial, the plaintiff's counsel opened the case thus:—The goods were put up in one lot at an auction; there were several bidders, of whom the defendant [149] was the last, who bid 40l.; the auctioneer dwelt on the bidding, on which the defendant said, "Why do you dwell? you will not get more." The auctioneer said that he was informed the worm weighed at least 1300 cwt. and was worth more than 40l.; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was re-sold on a subsequent day's sale for 30l. to the defendant, against whom the action was brought for the difference. Lord Kenyon being of opinion, on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding, and could not retract. By the act of bidding, he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller: in the mean time the person who bid last is a conditional purchaser, if nobody bids more. Otherwise it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last; and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last out-bid would have given for them. The case of *Simon v. Metivier* (a), which was mentioned at the trial, does not apply; that turned on the Statute of Frauds.

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

Rule refused.

[150] THE KING *against* THE JUSTICES OF THE NORTH RIDING OF YORKSHIRE. Saturday, May 2d, 1789. The Quarter Sessions are not bound to receive, and adjourn the hearing of, an appeal against an order of removal at the next sessions, if they think the appellants had sufficient time to come prepared to try it, and to give notice to the respondents.

[Referred to, *R. v. Surrey J.J.*, 1880, 6 Q. B. D. 104.]

This was a rule calling on the defendants to shew cause why a mandamus should not issue, directing them to receive, hear, and determine, an appeal of the inhabitants of the township of Gate Helmsley, against an order of two justices for the removal of