abstracts of title, and these he got, together with the valuation of the timber on the estate on the 21st of August. The business then proceeded; but on the 29th, a summons was served upon the purchaser, to the effect that if all his costs should be paid, another person having offered, an advanced bidding should be substituted in his room. The Vice-Chancellor stating that the increase of price amounted to £300, granted the prayer, and made the order; whereupon the purchaser appealed. Now, there were some singular facts in this case. The agent for the person who had been so far successful in opening the biddings, had actually declared that he would bid no longer, since the biddings had gone far beyond the value of the property. The land, as valued, was worth £1,400, whereas, £2,270 were offered for it at the sale. Of course, according to the most ordinary rules of common sense, the appeal succeeded; but the L. J. Knight Bruce used these equivocal expressions—"Glad as he would have been to give the applicant relief on a substantial advance of price, he thought it would be dangerous to the general practice of the Court to grant the application. *The case however was not one for costs.*" (*a*) If I read this decision rightly, it holds that an individual who has offered £1,300 more than the value of an estate, and who has, to all intents, been declared the purchaser, and who has duly awaited the time prescribed by law for the ratification of his purchase, may be suddenly invaded by a new claimant, narrowly avoid the consequences of the claim, and be saddled with his own costs of a most righteous appeal. So closely pressed were the counsel against the purchaser, that they first objected to the counting of any part of the vacation in the eight days; and, secondly, they called this a case of great hardship, because the interests of infants were concerned.

This event occurred in 1856 Some months afterwards another case arose of equal hardship, if we regard the principle of the subject now under consideration. (*b*) A property had been put up for sale, but the reserved bidding was not reached. Upon this, it was settled that a sale with sealed tenders should be attempted. There were two candidates: one offered £36,500, the other £34,000. On the 8th of February, the chief clerk found in favour of the higher sum. On the 12th, the certificate was signed and approved by the Vice-Chancellor; but on the 11th the day previous, a summons had been taken out by the person who tendered the lowest sum, *i. e.* £34 000, and upon the hearing, he having then proposed to give £38,000 was declared the purchaser. It must be understood that he undertook to replace the stock which had been sold out for the purpose of fulfilling the contract for £36,500. From this decision, the original purchaser appealed. He did not dispute the power of the court to open the biddings, had the sale been carried on by auction, but he said that this was a sale by private contract. In fact an opportunity was afforded for the court to escape from the principle of destroying the good faith of an accomplished contract, by likening it, as it really was, to the matter of a private transaction. Not so was the opinion of the court. They did not even hear the counsel for the new claimant. They dwelt upon the condition of sale, that it was to take place with the sanction of the Vice-Chancellor, and they held that all the incidents of days must apply as in the case of an auction. Of course, there being one day short, there was, in their view, time to disturb the certificate. But Lord J. Knight Bruce, who had, on the former occasion declined to give costs, here said, "I concur with regret, Mr. Barlow's costs of the appeal ought to be provided for;" and they were immediately promised under an arrangement. (*c*) Now it seems rather strange that the Lord Justice who had previously withheld costs from a party who was truly and justly successful, should here have recommended the payment of them to one who was unsuccessful. The judge must have thought it inequitable that a purchaser who by, what was in reality a private contract, had offered more than £30,000 for an estate, should have been suddenly supplanted by a buyer who had deliberately sent, in writing, to the proper authority, the amount which he was prepared to give. It is presumed that the successful appellee in this case might, in his turn, have been deprived of his bargain by the tempting tender of £40,000 by another aspirant. Particular reference was made in *Osborne* v. *Foreman* to a decision of the Vice-Chancellor Wood, then recently delivered by that judge. Lord Justice Turner seemed anxious to avoid a collision between the authorities, or to establish a diversity of opinion between himself and the very eminent person just mentioned. "But," said the Lord Justice "this case, in the opinion of their lordships, turned on different grounds from those in that case." (*d*)

Now that case was *Millican* v. *Vanderplank*; (*e*) that was also a case of private contract, but there were no sealed tenders, and the ground upon which it was sought to be distinguished was, no doubt, because the purchaser had entered upon the property and expended money upon it, and had incurred liabilities in respect of it, not merely at his own instance, but with the approval and acquiescence of all the parties interested. Both vendor and purchaser had so agreed as to prevent their being again placed respectively in their original positions. So far their seems to be a fair distinction. But the Vice-Chancellor laid down the principle rather more broadly. For he said, that—"When the master has approved of a sale by contract in the presence of the parties, no stranger can intervene to prevent the confirmation of the report; nor will the sale be disturbed by the court on the mere ground that a larger price has been offered subsequently, and before such confirmation, unless there be some error or miscarriage in the proceedings, or the contract price be grossly inadequate." These remarks are of a very strong character. They point at a clear distinction between the sale by auction and by private contract, and can hardly be reconciled with the opinions expressed in *Osborne* v. *Foreman*, however ingeniously it was endeavoured upon that occasion to preserve the alliance. The only argument which has been advanced assumes a distinction between a sale with sealed tenders and one by private contract. It is not necessary to discuss the point here, because we pretend to higher ground, the absolute extinction of this equity custom.

Notwithstanding all these cases, you are not to suppose that the tide of judicial opinion has been uniform in favour of the custom. Lord Thurlow declared that he would not open at all after confirmation of the report. (*f*) Mr. Maddock in his chancery practice, asserts on the authority of an anonymous M. S., that "By some judges it has been thought that the permission to open biddings does more harm than good." (*g*) Still it is but fair to say that he adds; "by others, that the right to open biddings should not be so much restrained as it is," (*h*) and he cites Vice-Chancellor Leach as his authority, from an M.S. (*i*) But Lord Eldon, whatever his doubts, which have descended to posterity, may have been, was strong upon this point.

In 1809, his lordship remarked upon the bad effect of opening biddings in general, from the uncertainty attending purchasers in this court. (*j*) Again, in 1820, he said, "I believe that the rule of opening the biddings, which was intended to protect, has frequently been very pernicious to the interests of the suitors in this court, and that their estates have sometimes sold for next to nothing in consequence of it." (*k*)

"For many years," he said again in 1822, "that I have been here, I have heard the practice of opening biddings lamented, and I cannot therefore account for it having continued a rule of the court, except upon a notion which I believe to be

(*a*) 25 L. J Ch. 201. (*b*) *Osborne* v. *Foreman*, 25 L. J. Ch. 340.
(*c*) This case was confirmed by the House of Lords.

(*d*) 25 L J., 341. (*e*) 11 Hare, 136. (*f*) 3 Bro. Ch. c. 475, *Scott* v. *Nesbit*.
(*g*) Vol. 2, p. 655. (*h*) Ibid. (*i*) Vol. 2, p. 655.
(*j*) In *Preston* v. *Barker*, 16 Ves 160.
(*k*) In *Thornhill* v. *Thornhill*, 2 Jac. & W. 243.