

Eng. Rep.]

MAINPRICE v. WESTLEY.

[Eng. Rep.]

message, &c., peremptorily, or accept the said offer and bid of the plaintiff, or declare the plaintiff to be the highest bidder and purchaser, whereby, &c.

The defendant pleaded not guilty, and traversed the various allegations of the declaration as to the circulation of the handbills, &c., and the breach. He also pleaded that "the said price bid and offered at the said sale by the said agent was not a price bid and offered contrary to the terms on which it was stated by the defendant as alleged, that the said message, &c., would be offered for sale."

Upon the trial it appeared that in March, 1864, the defendant caused certain handbills to be posted in Soham and its neighbourhood, announcing a dwelling-house, grocer's-shop, and beer-house at Soham, Cambridgeshire, for *peremptory* sale by auction, by direction of the mortgagee, on the 1st of April, 1865, at the Crown Inn, Soham. At the foot of the handbills were printed the following words: "For further particulars apply to Mr. Hustwick, solicitor, or the auctioneer."

On the evening of the sale the plaintiff attended the auction. At his request the conditions of sale were read by the agent of the vendor, and in them it was stated that the "highest bidder should be the purchaser." No right of bidding was reserved to the vendor. The bid-dings slowly increased from £130 to £187, which was offered by the plaintiff, and no higher sum being mentioned, the defendant, who acted as auctioneer, inquired of the agent of the vendor (Mr. Hustwick) whether there was any reserve. He was told that there was, and that the sum was £195. There being no advance on this price, the property was accordingly knocked down to the vendor as unsold. The plaintiff almost immediately afterwards claimed the property of the defendant, but it was not delivered to him. He thereupon brought this action.

A verdict was entered for the plaintiff, subject to leave reserved to enter it for the defendant. A rule *nisi* was obtained accordingly in Michaelmas Term, 1864, by *O'Malley, Q.C.*, calling on the plaintiff to show cause why the verdict should not be entered for the defendant, on the grounds that the plaintiff made out no cause of action, that the allegations of the declaration were not proved; that the breach was not proved; that on the facts proved the verdict should have been for the defendant, that there was no contract in writing to bind the defendant; or why judgment should not be arrested, on the ground that the declaration disclosed no cause of action.

Lush, Q.C., Douglas Brown, and Markby showed cause, and contended that at a *peremptory* sale the highest bidder was of necessity the purchaser.

O'Malley, Q.C., and Keane, Q.C., in support of the rule, contended that although the sale was advertised as *peremptory*, yet the vendor had a right at the auction to place a reserve price on his property.

The following cases were cited:—*Franklyn v. Lomond*, 4 C. B. 637; *Dingwall v. Edwards*, 12 W. R. 597; *Warlow v. Harrison*, 7 W. R. 183, 1 E. & E. 295; in error, 29 L. J. Q. B. 14; *Manser v. Back*, 6 Hare, 443; *Hanson v. Roberdeau*, Peako N. P. Rep. 163.

The judgment of the Court* was delivered by

BLACKBURN, J.—The declaration in this case contains averments that the defendant, being an auctioneer, retained to sell by public auction a house and shop, published and circulated handbills, in which it was stated and represented by the defendant that he, the defendant, would offer the said message and shop for peremptory sale by public auction on a day and at a place named: that the plaintiff, confiding in these statements and representations, attended at the time and place; and that the message was offered according to representations and statements, and the plaintiff then bid a price, which was the highest bid, except a sum which, to the knowledge of the defendant, was bidden by an agent on behalf of the vendor, contrary to the representation that the sale was peremptory; yet the defendant did not, nor would sell the message peremptorily, or accept the offer of the plaintiff, or declare the plaintiff the highest bidder and purchaser. There were pleas, amongst others, of "not guilty," and a denial that the defendant caused the handbills to be published and circulated as alleged. If it had been alleged that any part of this representation was false to the knowledge of the defendant, and that the plaintiff was induced by such deceit to incur expense by going to the place of action or the like, the count would have been good, and the plaintiff on proof of the deceit would have been entitled to such damages as he might have sustained by reason of expenses or loss of time occasioned by his attendance at the sale, or possibly to merely nominal damages. But intentional deceit is neither alleged nor was it attempted to be proved; what the plaintiff relied on was, that there was a contract on the part of the defendant that if the plaintiff was the highest bidder the premises should be knocked down to him, and if he had proved such a contract, the declaration would, probably, after verdict, be understood as alleging it, or at all events might easily be made to do so by an amendment. But we think that no such contract was proved.

It appeared on the trial that the defendant was an auctioneer, and that he had circulated handbills in which it was stated that the premises, on the day in question, would be offered for peremptory sale by auction, by Mr. J. Westley, the defendant, by direction of the mortgagee, with a power of sale subject to such conditions as would then be declared, and at the bottom of the bill was a statement in large capitals "for further particulars apply to Mr. Hustwick, solicitor, or the auctioneer." There is no doubt that this was a representation by the defendant that he intended to put up the premises for peremptory sale, but it also contained a statement that he did so by direction of the mortgagee and as agent for him, and though the name of that mortgagee is not disclosed on the bill, the name of the solicitor, Mr. Hustwick, is disclosed, and he is referred to as being the party from whom further particulars were to be obtained. These parts of the hand-bills very materially qualify the representation stated in the declaration, and it appeared that they were true. Hustwick was the solicitor of the vendor, and the representations were made by his authority, and the plain-

* Cockburn, C. J., Blackburn, J., Mellor, J., and Shee, J.