

PALMER v. BRAVO JONES

Supreme Court (McRoberts, Ag. C.J.): October 30th, 1931

- [1] Auction — particulars and conditions — conditions framed by auctioneer — irregularity cured if vendor or vendor's agent informed of terms before auction: Any irregularity caused by an auctioneer's framing of the conditions of a sale of real property is cured if the property owner or his agent is informed of the conditions before the sale takes place (page 284, line 34—page 285, line 1). 5
- [2] Auction — reserve price — notification — fact that sale subject to reserve price must be notified in conditions of sale: If a sale by public auction is to be subject to a reserve price this fact must be notified in the conditions of sale and it is otherwise the duty of the auctioneer to sell to the highest bidder even if he is a person to whom the vendor does not wish to sell the property (page 287, lines 26—41; page 288, lines 13—16). 10
- [3] Auction — reserve price — sale without reserve — auctioneer must sell to highest bidder in sale without reserve even if he is one to whom vendor does not wish to sell: See [2] above. 15
- [4] Contract — form — note or memorandum in writing — connected documents — sufficient note or memorandum may comprise several connected documents able to be read together: A note or memorandum may be sufficient to satisfy the Statute of Frauds although it comprises several documents, provided that these are so connected that they may be read together as one memorandum of the contract between the parties (page 287, lines 9—19). 20

The plaintiff brought an action against the defendant for specific performance of an agreement to sell certain land. 25

The defendant was the mortgagee of the property in question and decided to exercise his power of sale in respect of it. His solicitor asked a local auctioneer to arrange the sale, without specifying any conditions of sale. The auctioneer published a notice advertising the auction and setting out the conditions of sale, which did not include any reference to a reserve price. A copy of the notice was sent to the defendant's solicitor. 30

The plaintiff was the highest bidder at the sale and the property was knocked down to him. On the same day, in accordance with the conditions of sale, he paid half the purchase price to the auctioneer and was given a written receipt for it. 35

The defendant subsequently refused to complete the conveyance of the property to the plaintiff who then brought the present proceedings. He sought specific performance of the agreement on the basis that he was the highest bidder at a public auction which was not advertised as being subject to a reserve price. 40

In reply the defendant contended that an order for specific performance should not be made since — (i) there was not a sufficient written memorandum of the agreement to satisfy the Statute of Frauds; (ii) it was only as a result of a mistake that the conditions of sale contained no reference to a reserve price and the sale was in fact subject to a tacit reserve; (iii) the price offered by the plaintiff at the auction was inadequate; (iv) the sale had taken place on the assumption that the plaintiff would not be present since the defendant did not wish to sell the property to him; (v) it would be unfair not only to himself but also to the original mortgagor if the agreement were specifically enforced, and (vi) damages would be a sufficient remedy.

The court gave judgment for the plaintiff.

Cases referred to:

- (1) *Bexwell v. Christie* (1776), 1 Cowp. 395; 98 E.R. 1150, applied.
- (2) *Pike v. Wilson* (1854), 1 Jur. N.S. 59, followed.
- (3) *Webster v. Cecil* (1861), 30 Beav. 62; 54 E.R. 812, distinguished.

McROBERTS, Ag. C.J.:

This is an action by Arthur Emanuel Palmer of Fort Street, Freetown, the plaintiff, for the specific performance by Percival Hollingworth Bravo Jones of Wesley Street, the defendant, of an agreement to sell to him a certain property situate in Hill Street, Freetown.

It appears that the property in question had been mortgaged to the defendant who determined to exercise his power of sale in respect of it. Mr. Luke, a solicitor of this court, acted for him in the matter, and the business was initiated by his writing a letter to Sylvanus Turner, a local auctioneer on May 13th last in which he directed him to put the property up for sale by public auction at an early date. The form of the notice and, presumably, the conditions were left to Turner who had it printed.

I may here interpolate the query suggested by *Pike v. Wilson* (2) as to whether an auctioneer has authority to frame conditions of sale, but I am unable to find a full report of this case. The digest of it, to be found in Mews, ed., 1 *Digest of English Case Law*, 1st ed., at 910 (1898), seems to bear out the contention that any irregularity in this respect was cured by Mr. Luke having seen the notice before the sale took place, and I am prepared so

to hold. The notice advertised a sale by public auction of the Hill Street property and set out the conditions of the sale that —

“one-half of the purchase money shall be paid by the purchaser immediately after the sale and the balance not later than a week from the date of the sale; in default of complying with the conditions of sale the auctioneer will be at liberty to re-sell the property at the risk of the purchaser.”

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A copy of this notice was sent to Mr. Luke, but there was no reference to any reserve price in these conditions.

More than a month later Mr. Luke told the auctioneer to suspend the sale, but followed this up the following day with a letter in which he said he was to proceed with it on the following day. As this notice was too short, Turner decided to sell on the 19th, and he altered the notice accordingly and posted it as altered.

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On the day in question he sent round his bell-ringer, and a number of persons, variously estimated as from 15 to 30, assembled. Of these three bid, a Mr. Martin going to £80, Mr. Utamchand to £104 and the present plaintiff to £104.10s.0d. This being the highest bid, the property was knocked down to him.

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Turner, Palmer and Turner's clerk Williams, went immediately after the sale to Palmer's house where the latter gave Turner a cheque for £35. Williams denies this, but he admits that Palmer and Turner went into a neighbouring room without him, and it may well have been that the money was paid then. As the visit to the house was for the specific purpose of obtaining the deposit this assumption does not seem to be unreasonable.

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Later on the same day, the balance of the deposit (£17.5s.0d.) was paid. Here again Williams' story differs, for he says the cheque was not paid until the 22nd. Palmer says it would have been paid at the same time as the cheque but for the fact that as his nephew was out with his keys he could not get at his money at that time. This seems reasonable enough and I believe it and the receipt for the whole deposit (£52.5s.0d.) is dated the 19th, the date of the sale. Williams seems to me to be a man of straw and worthy of very little credence.

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The next day, the 20th, Turner reported the result of the sale to Luke, who seems to have been satisfied with the fact that he had sold to Palmer but not, apparently, with the price obtained nor indeed, with any other aspect of the transaction.

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On the 24th Palmer demanded the necessary documents from Turner who sent the letter on to Luke with a letter from himself and to this Luke replied on the 26th with another letter in which he complained for the first time of the inadequacy of the price, and demanded the return of the mortgage deed. Turner replied the same day saying that he had complied with his instructions and had never received a higher offer than that made at the auction, a statement which was never challenged during the hearing of the case.

Various other letters were written by and to the parties and their solicitors, but the defendant declined to receive the money, or to prepare a conveyance or to recognise the sale in any way. Later on he put the property up for auction again, but the plaintiff obtained an injunction, and the sale was not proceeded with.

The plaintiff was, I am satisfied, ready and able at all times to complete his part of the bargain, and it was only the refusal of the defendant which prevented the transaction from being completely carried out.

The defence (so far as the facts are concerned), which is offered by the defendant is that he had the place first appraised by Turner who valued it at £140 to £150, and that on that appraisal he directed a sale by auction. Turner denies this, and one would have thought that such a valuation would have been made in writing and be available as evidence; indeed, I am by no means certain that this is not impliedly required by s. 17 of the Auctioneers Ordinance (*cap.* 14). Bravo Jones also states that the sum of £130 was offered him by Palmer. This is denied, and it seems reasonable to suppose that had the defendant any hope of getting any such sum he would have placed a reserve price on the property.

The defendant said that he had stipulated that he should have been informed by Turner as to when the auction was to take place, so that he could be there. I think he must have known perfectly well when it was to occur, but in any event his only object in attending was apparently to see that no money was to be paid to Turner because he did not trust him, and not for the purpose of controlling the auction. In Exhibit P Mr. Luke refers to this transaction as a mock sale, but this is clearly untrue. The auction was held in the open and in the ordinary way. It was preceded by the publication of a notice and by the ringing of a bell. It was attended by a number of persons some of whom bid

and the property was knocked down to the highest bidder. There is no suggestion that either Mr. Utamchand or Mr. Martin were parties to any mock sale, and if they were genuine bidders, and Palmer outbid them, then how can there be said to have been collusion or fraud? I am quite satisfied that it was a genuine auction sale, conducted in complete accordance with such instructions as had been given to Turner by the defendant and his solicitor.

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I will now turn to the points of law raised: The first is that there is not sufficient memorandum in writing to satisfy the Statute of Frauds. It is, of course, well known that the terms of the contract need not all appear on the instrument signed by the parties to be charged but that they may be contained in several pieces of paper so long as these are so connected as to make it possible to read them together and thus form one memorandum of the contract between the parties. (*Benjamin on Sale*, 7th ed., at 257 *et seq.* (1931).) I consider that Exhibit D and the receipt dated the 19th constitute, when taken together, an amply sufficient memorandum to satisfy the Statute.

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The next point taken by Mr. Luke that a tacit reserve had been given to Turner, and that, had Turner called for the sale, Bravo Jones could have stopped it had he been there.

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Apart from the fact that both these objections appear to be matters between the defendants and the auctioneer, rather than between him and the plaintiff there is no substance in either of them. I do not understand what is meant by a "tacit reserve." The reserve should form part of the conditions of sale; indeed, under s. 13 of the Auctioneers Ordinance (*cap.* 14) it must form part of the conditions of sale, and it is only because I cannot allow the defendant, who wishes to set it aside, to take advantage of his own wrong, that I do not set it aside myself on these grounds. Mr. Luke saw the notice which contained the conditions, he was acting for the defendant and he could, and should, have seen that the reserve was dealt with and I am certain he would have done so had there been any reserve in contemplation, tacit or otherwise. Besides such a tacit reserve could not be enforced. This was a sale without a reserve having been properly proclaimed, and instructions by the vendor not to sell below a certain sum would be unlawful, for it is the duty of the auctioneer to sell to the highest bidder, even though that bid is less than the sum named or expected: see *Bexwell v. Christie* (1).

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The other point too is unimportant. Had the defendant been there he might have stopped the sale before the fall of the hammer, but as he was not, Turner had full authority, and the plaintiff cannot be made to suffer if in this regard the auctioneer neglected to carry out the arrangements, if any, made.

The next point is that plaintiff is said to have tricked the defendant by pretending not to go to the auction, but in going all the same. He says that Palmer had previously offered him £130 and that he had referred him to Turner, and he seems to think that for this reason Palmer was precluded from bidding. This is sheer nonsense. Even if Palmer had offered this sum (which I do not believe) it had not been accepted and he could then come into the open market, which he did. Turner had no instructions not to sell to Palmer, and even if he had had, Palmer, being the highest bidder at a public auction, would have been entitled to have the lot knocked down to him.

The last point is as to whether specific performance should be decreed, or damages only given. I have carefully reviewed the cases which deal with this choice and I can find no reason why, in this instance, I should not make the order asked for. The defendant has tried to show that the plaintiff took advantage of him: that he, like the plaintiff in the case of *Webster v. Cecil* (3) "snapped at an offer" which he must perfectly well have known to have been made by mistake, but he has been quite unable to establish this proposition. The defendant is a retired money-lender and is very wide awake; he had the help of counsel who seems to have conducted the arrangements for him, and I feel quite sure that there was no mistake. There was no legal "hardship" as this word has been interpreted in decided cases (See *Seaborne's Law of Vendors & Purchasers of Real Property*, 7th ed., at 384 (1908)), and no "unfairness" as that expression has been described. I might stay my hand if I thought that the original mortgagor would in any way suffer, but I do not see how he can do so. Mr. Utamchand was admittedly there for the purpose of buying in for the mortgagor's family and did not go beyond £104, and the only other bidder, besides, went to £80 only. Turner said the price given was adequate, and, though Bull said that 20 years ago when there was no financial depression he had sold this same property for £180, yet houses deteriorate a good deal in 20 years and it is doubtful if anything like that sum would be realised today. Palmer said that it had been sold to the mortgagor for £83 and

that the latter had offered it to him for £80 and so I think that there would be very little point in my declining to decree specific performance merely because there might be some hope that if auctioned again the property might fetch more. It might, indeed, fetch less.

I declare that the agreement to sell the property which is the subject of this suit ought to be specifically performed and I ordered and adjudge the same accordingly. I direct an enquiry by the Master for the ascertainment of the amounts, if any, for which the defendant is accountable in respect of rents and costs (which I give against him), and I direct the defendant to convey the said property to the plaintiff against payment by him of the unpaid purchase money after adjustment and set-off of the several amounts for which the parties respectively are accountable to one another in respect of purchase money, rents and costs.

Judgment for the plaintiff.

BANKOLE-BRIGHT v. BOSTON and TWO OTHERS

Supreme Court (McRoberts, Ag. J.): December 10th, 1931

[1] Courts — magistrates' courts — jurisdiction — law applicable — English Summary Jurisdiction Acts, 1848—1897 not applicable in Sierra Leone: The English Summary Jurisdiction Acts, 1848—1897 are purely municipal enactments confined in their operation to England and Wales and cannot therefore be statutes of general application in force in Sierra Leone (page 292, lines 7—24).

[2] Courts — magistrates' courts — preliminary investigation — committal for trial — normally no appeal against refusal to commit — prosecutor on charge of criminal libel may appeal as "person aggrieved" against magistrate's refusal to commit: Although there is a general principle that there can be no appeal against an acquittal, or a refusal to commit for trial, an appeal will lie whenever statutory authority is specifically given, and since the Appeals from Magistrates Ordinance (*cap.* 8), s. 2 confers a right of appeal upon anyone "aggrieved" by the decision of any magistrate, the prosecutor on a charge of criminal libel may appeal against the refusal of a magistrate to commit the defendant for trial (page 292, lines 25—29; page 294, lines 5—12; page 294, line 28—page 295, line 3; page 295, lines 18—26).

[3] Criminal Law — libel — elements of offence — essential element of criminal libel that it should tend to provoke breach of peace — no committal for trial if this element absent: It is an essential element of