

Sale by auction—Immovable Property—Sale without reserve—Employment of puffer—Fraud—Contract Law, Cap. 192, sec. 17(1)—Buyer's consent—Sale voidable at buyer's option.

Practice—Consent judgment—Fraud—Setting aside judgment—Prayer in same action with claim for declaration that sale void—Amendment of statement of claim—Leave to amend prejudicial and irregular if given only when delivering final judgment.

Plaintiff sought a declaration that the sale by auction to him of defendant's property was void on account of fraud, as, although it was declared by the defendant that the sale would be without reserve, he nevertheless employed puffers to bid for him without notice, and that, consequently, the plaintiff was entitled to recover the money paid by him against the purchase price.

The sale was advertised as without reserve but, prior to the auction which took place on the 26th September, 1954, the seller (defendant) had made an agreement with one L. the effect of which was that the auction was not in fact a sale without reserve; and the said L. and a certain A. in fact attended the auction and acted as puffers. The property was knocked down to the plaintiff for £49,000, and he paid the sum of £8,103 towards the purchase price, but was unable to pay the balance.

The seller was about to sell the property again when the buyer on the 13th November, 1954 instituted an action (No. 3655/54) claiming specific performance and damages for breach of contract. This action was settled by a consent order made on the 19th November, and, when the plaintiff was unable to complete the purchase, another consent order was substituted for the first on the 11th December, whereby the property was to be sold by auction on the 19th December with a reserve price of £41,000, and if the reserve price were not reached the seller was to accept and keep the property in satisfaction of the balance of his claim against the buyer for the purchase price.

On account of riots which took place in Nicosia on the 19th December the sale never took place, and in the beginning of February, 1955, the plaintiff, as alleged by him, discovered that the auction of the 26th September, 1954, had not been without reserve and that puffers had been employed, and he, consequently, instituted these proceedings.

The defendant in his defence pleaded that the plaintiff was estopped from proving the alleged fraud by the consent order made on the 11th December in action No. 3655/54. No reply was delivered by the plaintiff, but at the close of his case the plaintiff applied to the Court to amend the statement of claim by including therein a prayer that the consent order of the 11th December be set aside. At the end of defendant's case heard counsel on both sides in argument as to whether this amendment should be allowed. Even after amendment, the plaintiff's pleadings did not state the ground for setting aside the consent judgment; and the Court did not grant leave to amend during the hearing but only in the course of its judgment.

On the issue of fraud, it was argued on defendant's behalf that puffing did not materially affect the plaintiff's consent because there was considerable evidence that he considered the property was worth even more than he did for it, and that this fact showed that his consent was not induced by fraud.

The Full District Court of Nicosia,

Held: (1) that the plaintiff was entitled to pray to have the consent order set aside in the same action in which he sought a declaration that the sale by auction be declared void on account of fraud; and the plaintiff was, consequently, allowed to amend his statement of claim by including therein a prayer to that effect;

(2) that the employment of a puffer or puffers at a sale by auction, stipulated to be a sale without reserve, was a fraud on the purchaser within the meaning of section 17 (1) of the Contract Law, Cap. 192, and the sale was voidable at the option of the purchaser;

(3) the real value of the property put up to auction was immaterial, as a bidding announced to be without reserve was a representation that there would be no interference, direct or indirect, by the vendor, and that the highest bidder, other than himself, would get the property; the employment of a bidder by the vendor amounted to a violation of his contract with the public;

(4) that the consent order should be set aside as having been obtained before a plaintiff had knowledge of the fraud now proved; and

(5) that the plaintiff was entitled to a declaration that the sale of the aforesaid property was void on account of fraud, and that he was, consequently, entitled to recover the money paid by him against the purchase price.

Upon appeal,

Held: (1) The determination of the trial Court in paragraphs (2) and (3) above was correct.

(2) There had been two errors in the procedure followed when amending the plaintiff's pleadings with regard to the consent judgment:

(a) the plaintiff's amended statement of claim did not

1956
January 7
DEMETRIOS
STYLIANOU

r.
ANDREAS
PHOTIADES

contain an allegation of the ground on which the consent judgment should be set aside. (For reasons stated in the Supreme Court's judgment, this alone would probably not be fatal); and

(b) since leave to amend was only given in the judgment of the District Court, the defendant had no opportunity of pleading to the amendment and of calling or recalling witnesses.

The order setting aside the consent judgment should be vacated and the case remitted to the trial Court to determine afresh the issue whether the consent judgment was obtained by fraud.

The judgment of the Full District Court of Nicosia (consisting of Zenon, P.D.C., and Josephides, D.J.) was delivered by:

ZENON, P.D.C.: Plaintiff seeks a declaration that the sale by auction to him of defendant's property known as "Paradisos" café, which took place on the 26th September, 1954, is void on account of fraud, as although it was declared by the defendant that the sale would be without reserve, he nevertheless employed puffers to bid for him without notice, and that, consequently, the plaintiff is entitled to recover back the sum paid by him against the purchase price, viz. £8,803.

The plaintiff is an architect, and the defendant is the owner of an open air café in Nicosia known as "Paradisos". It is common ground that the defendant on the 26th September, 1954, put up to public auction the aforesaid property and the plaintiff attended the auction and was the highest bidder. The property was, in fact, knocked down to him for the sum of £49,000. The plaintiff paid against the purchase price the following sums: £7,900 to the defendant or his agent Pandelis Petrides, £103 to one S. Pissarides for and on behalf of the defendant (see exhibit 11), and he signed at defendant's request a bill of exchange for £100 in favour of one Phoevos Constantinides who was a creditor of the defendant. The plaintiff further agreed to waive the claim of his firm Th. Photiades & Son for £700 for professional services rendered to defendant.

The plaintiff admitted that he did not have sufficient money to pay off the purchase price and that he could not find the money in Cyprus. In buying this property he hoped to find other persons to join him as partners in paying for the said property and developing it. He was unable to find such persons in Cyprus and he accordingly, on the 23rd October, 1954 proceeded to the U. K. and from there to U. S. A. in search of such partners who would bring in the capital. He was away from Cyprus for a period of about two months, that is, up to the 18th December, 1954.

As plaintiff was unable to pay the purchase price within a short time after the date of sale, the defendant was not prepared to allow him more time for payment of the balance of £41,000 and he advertised that he intended selling the property by public auction on Sunday the 14th November, 1954. Plaintiff's legal advisers in an attempt to safeguard his interests in his absence from Cyprus on the eve of the advertised sale, that is, on the 13th November, 1954, instituted action No. 3655/54 against the present defendant and his agent Pandelis Petrides claiming:

(a) Specific performance of the agreement between the parties to purchase the property known as "Paradisos", concluded on the 26th September, 1954;

(b) payment by defendants jointly and severally of the sum of £11,000 damages for breach of the said agreement to purchase the above property.

On the same day (13.11.54) they obtained an interim order *ex parte* restraining the defendants from alienating or disposing of the said property, returnable on the 19th November, 1954. On the return day of the interim order, without any pleadings being filed or delivered, the action was settled as follows, still in the absence of the plaintiff:

"By consent:

1. Judgment against defendant to transfer the property on payment by plaintiff of £41,000, on any day up to the 4.12.1954, the plaintiff will pay the said sum to defendants.

2. In case plaintiff fails to pay the said sum within the above-mentioned date the defendants to sell the property on the 5.12.1954 by public auction for the account and under the responsibility of plaintiff.

3. Defendants to advertise the sale in the following newspapers: "Eleftheria". "Ethnos", "Cyprus Mail".

4. All expenses incidental to the sale will be borne by plaintiff.

5. No order as to costs in this action."

(See exhibit 12).

As, by the 4th December, 1954, the plaintiff failed to pay the sum of £41,000 as stipulated in para. (1) of the aforesaid judgment, the defendant applied to the Court for directions as to the way in which the property was to be sold, etc., and on the 11th December, 1954, the following order was made by consent while the plaintiff was still absent from Cyprus.

"By consent:

Mr. Sotirios Hj. Minas (plaintiff's advocate), advocate, of Nicosia, is hereby appointed to sell the property in question on the following conditions:

1. Sale to take place on the 19th December, 1954, with a reserve price of £41,000 and to be knocked down to the highest bidder at 1 p.m.

2. Defendant 1 hereby agrees that if the reserve price is not reached to accept to keep the property in satisfaction of his claim against plaintiff for the balance of the purchase price.

3. All costs of the sale to be borne by plaintiff".
(Exhibit 12 (a).)

The sale which was fixed for the 19th December, 1954, could not take place on account of the riotous incidents which took place on that day in Nicosia, following which the police dispersed the people who had come to attend the sale. The plaintiff returned to Cyprus on the 18th December, 1954, as already stated, and, apparently, nothing material took place for about a month and a half.

In the beginning of February, 1955, the plaintiff, as alleged by him, discovered that the defendant had on the 25th September, 1954, i.e. on the eve of the original sale by auction, entered into an agreement in writing with one Christakis Loizides of Nicosia, whereby the latter undertook to bid at the auction up to £49,700 on the following conditions:

(a) If the property was knocked down to him at any price exceeding £45,000 he would pay only £45,000 with the obligation on the part of Christakis Loizides in case the property was subsequently sold by the efforts of both of them for over £45,000 any sum over and above that sum would be shared by them equally;

(b) If the property was knocked down to a third person at a price exceeding £49,700 the defendant would pay Christakis Loizides £500 for his bidding at the auction;

(c) If within two years no purchaser could be found to buy the property at a price exceeding £45,000 the said Christakis Loizides would become the absolute and unconditional owner of the property for £45,000;

(d) During the said period of two years Christakis Loizides would be entitled to let the said property and in case the rent to be collected would cover the interest on the £45,000 at the rate of 8 per cent and leave any surplus such surplus would be shared equally between defendant and the said Christakis Loizides.

The plaintiff's case is that in compliance with that agreement the said Christakis Loizides bid at the auction, his highest bidding being £48,000. Plaintiff accordingly

issued the writ in the present action on the 15th February, 1955, claiming the above declaration and refund of the money paid by him.

1956
January 7
DIMITRIOS
STYLIANOU
v.
ANDREAS
PHOTIADES

In his Statement of Claim the plaintiff further contended that the defendant had made arrangements with one G. Apostolides whereby it had been agreed that the latter would bid at the said auction, and that he did in fact bid as a puffer at the said auction.

The defendant in his defence took the preliminary objection that as the plaintiff had instituted Action No. 3655/54 whereby he sought the specific performance of the agreement to buy the said property and judgment had been issued in that case by consent decreeing specific performance, the plaintiff could not proceed with the present action and/or he was estopped from proceeding and/or the matter in issue in the present action is *res judicata* between the parties unless that judgment is set aside.

In his defence the defendant further denied the existence of the alleged agreement with Christakis Loizides and the employment of any other puffer by him. He further contended that by the conditions of the sale by auction as advertised he reserved full power to himself to sell or not to sell the property and that the plaintiff was aware of these conditions.

On the second day of the hearing, viz. on the 20th May, 1955, plaintiff's counsel filed an application (and gave notice to the other side) asking for the amendment of the Statement of Claim, para 8 (a), to the effect that the consent judgment given on the sale in action No. 3655/54 be declared a nullity and set aside. The facts relied upon were that the amendment applied for was a consequential one, as the Statement of Claim alleged that fraud was practised by defendant at the sale by auction and it should, therefore, be declared void. Consequently, it was contended, the judgment given on such sale before the discovery of the fraud was a nullity and should be set aside.

The defendant opposed this application and we accordingly heard argument at the close of the evidence for both sides. In support of his application, Mr. Clerides for the plaintiff quoted the following paragraph from *Kerr on Fraud* (See 7th edition, page 416):

“A judgment or decree obtained by fraud upon a Court does not bind such Court or any other, and its nullity upon this ground, though it has not been set aside or reversed, before the Judicature Acts could be alleged in a collateral proceedings. ‘Fraud’ said De Grey, C. J., is an intrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical and temporal. In applying this rule . . . in all cases

alike it is competent for every Court . . . to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud, discovered after the judgment."

He further cited the case of *Bandon, v. Henry Becher*, 6 English Reports 1517 at page 1529; and *Reg. v. Saddlers' Co.*, 11 English Reports 1083 (H.L.) at pages 1093-94; and he finally contended that it was not necessary to include this claim in his prayer but that he was doing so *ex abundanti cautela*.

Defendant's counsel opposed the application on the ground that, if the plaintiff were successful in proving his allegations, the contract of sale would be voidable and not void. He further contended that the necessity of such an amendment was abundantly clear months ago and that, in accordance with the English authorities on this point, the application came too late to be granted: See Annual Practice, 1955, page 456; note "At the hearing".

Although, with respect to Mr. Clerides's submission, we do not consider that the authorities cited by him are strictly to the point under consideration, we are prepared to accept the general proposition that fraud vitiates all proceedings. It is quite obvious that, if we accept the plaintiff's case, puffing at a sale without reservation renders it at least voidable at the option of the purchaser and we are, therefore, of opinion that, so long as the evidence before us, which we accept, is that the plaintiff was on the date of the consent judgment unaware of the alleged agreement with Loizides and the other puffer, he cannot be bound by that judgment. Having discovered this fraud after the judgment in Action 3655/54, plaintiff brought the present action. If we accept plaintiff's submission, then surely we are entitled in one and the same action, having heard all the evidence on this matter, to set aside the consent judgment given on the 19th November, 1954, as that judgment was given at a time when plaintiff was unaware of the alleged fraud practised on him. Furthermore, as the main issue is the same, that is, whether there was puffing or not at the sale, we consider that the defendant is not prejudiced by the addition of this further head of claim for the setting aside of the consent judgment, even if we allow such amendment at this stage. We accordingly allow the amendment of the Statement of Claim as applied for, but we direct that the plaintiff should pay the costs of this application.

We now turn to the facts of this case. The defendant admits having appointed and authorized one P. Petrides (witness 1 for the plaintiff), an estate agent, to be his agent for the purpose of selling the aforesaid "Paradisos" café. The said agent advertised the sale in various newspapers, one of which is the "Eleftheria" dated the 21st September, 1954. (exhibit 4). In that advertisement

it is stated that the property will be delivered to the highest bidder if the price is to the vendor's interest, which means that the sale as advertised was a sale reserving the absolute right to the defendant to deliver or not in his discretion, a sale commonly known as a "sale with reserve". In spite of this advertisement, the auction bill, as drafted by the defendant's agent and signed by the defendant himself, stipulated expressly that the property would be delivered to the highest bidder, and that the highest bidding, irrespective of the amount, would be binding both on the vendor and the highest bidder; with the result that the property was actually put up to auction without reserve.

The auction bill (exhibit 1) shows the following biddings:

1. Chr. Loizides £40,000
2. G. Apostolides £41,000
3. A. Photiades (plaintiff) £42,000
4. G. Apostolides £43,000
5. A. Photiades (plaintiff) £44,000
6. G. Apostolides £45,000
7. A. Photiades (plaintiff) £46,000
8. G. Apostolides £47,000
9. Chr. Loizides £48,000
10. G. Apostolides £48,500
11. A. Photiades (plaintiff) £49,000

This list of bidders at the sale shows that, apart from the alleged two puffers viz. Chr. Loizides and G. Apostolides, there was no other bidder besides the plaintiff.

Although in his defence the defendant denied the alleged agreement between himself and Chr. Loizides, dated the 25th September, 1954, (exhibit 2) nevertheless at the hearing both he (the defendant) and Chr. Loizides in their evidence admitted having signed the said contract but alleged that a few minutes after its signing they changed their mind and tore it up with the result that, according to their allegation, Chr. Loizides in bidding at the auction on the 26th September, 1954, he was bidding on his own behalf, and not in consequence of any agreement with the defendant or as a puffer.

The circumstances under which exhibit 2 came to be drafted and signed are the following: The defendant and Christakis Loizides went to Petrides's office on 25th September where the document exhibit 2 was typed while they were waiting in Petrides's private office. Petrides, who gave evidence, stated that this document was brought to him in draft form by the defendant, that he (Petrides) did not read the contents and that he passed it on to his typist to have it typed. The defendant, on the other hand, stated that this document (exhibit 2) was drafted by Petrides himself who dictated it in his presence to his (Petrides's) typist, and that it was after very great

1956

January 7

DEMETRIOS
STYLIANOU

v.

ANDREAS
PHOTIADES

pressure had been brought to bear on him by Petrides that he eventually reluctantly signed this document. Christakis Loizides in his evidence stated that he went to Petrides's office after a telephone call from him and that on going there and after waiting for the document to be prepared he was pressed by Petrides to sign Exhibit 2, he refused at first but he eventually gave in and signed it. Although it is not material for the purposes of this case as to who instigated or drafted exhibit 2, we find that it was Petrides's idea right from the very beginning, and that it was he who drafted that document. Nevertheless the fact remains that both defendant and Christakis Loizides admit having signed the document.

The last two lines of exhibit 2 read as follows:—
"... The present (document) was drawn up in original which has been kept by Mr. Christakis Loizides and a copy thereof given to Mr. Demetrakis Stylianou". Exhibit 2 is obviously a carbon copy but it bears the signature of both the defendant and Christakis Loizides as the contracting parties and the signature of Petrides and one D. Constantinides as witnesses. Loizides admits having taken the original, on which there was affixed 1p. stamp, and the defendant admits having taken a copy; but they say that soon after signing, they tore up both the original and the copy, as they had changed their mind. Petrides, on the other hand, stated that the defendant handed to him his copy of the document for safe keeping, in accordance with his usual practice of giving him (Petrides) all documents connected with the sale for safe keeping; and, according to Petrides's version, it was this document which he produced to the Court, which was marked exhibit 2.

As against this version the defendant denied having given his copy to Petrides and alleged that he tore it up, and that the copy produced to Court (exh. 2) is a third copy which was kept by Petrides. But if that were so why should that third copy kept by Petrides bear the actual signature of both Loizides and the defendant? Both the defendant and Loizides alleged in their evidence that exhibit 2 was prepared in triplicate and that they signed all three copies, but soon after they tore up the original and a copy. Nevertheless, in spite of this, the auction bill, exhibit 1, was prepared there and then and Loizides signed as the first bidder for £40,000. It seems to us inconceivable for people who have waited there for a document like exhibit 2 to be drawn up and typed, to sign it and then in ten minutes' time, as they said, to tear it up, just because they thought that this was not a straightforward deal (defendant's evidence) and that they did not want to defraud other people by this agreement (Loizides's evidence). Both the defendant and Loizides are grown up and experienced people, and they had ample time to ponder over what they were doing

before they affixed their signature on the document, and we feel unable to accept their version that after signing the document they changed their mind in a few minutes and tore it up. The defendant and Loizides were the two persons who actually entered into an agreement which would be a fraud on the public and, once they admit having signed that agreement, we are not prepared, on their evidence alone, to accept their word that they tore up that agreement.

It has been submitted by defendant's counsel that the fact that Loizides did not bid up to the agreed sum of £49,700 but only up to £48,000 was a strong indication that the alleged agreement had been cancelled; but one explanation of Loizides's failure to bid up to the agreed £49,700 may be that he became rather suspicious of the other two bidders, viz. Apostolides and the plaintiff, and that he was afraid lest he was falling in some trap. The following extract from his evidence (p. 23 of the notes) shows such suspicion in his mind:

"I left for about 20 minutes and then returned. When I returned the highest bidding was £47,000. Then I made a bid for £48,000, then another one bid £48,500 and then plaintiff £49,000. Petrides then came and asked me to make a higher bid. I asked him if the other bidders were *solvent* or *not*. He said, 'Why are you interested whether they are *solvent* or *not*?' I was not satisfied with his reply and I left."

On the other hand, it is possible that defendant may have thought that it would be risky to let Loizides overbid plaintiff's bid of £49,000, fearing that plaintiff would drop out of the bidding altogether, with a consequent loss of £4,000 to defendant, as the property would have to be knocked down to Loizides for £45,000 as stipulated in exhibit 2.

In the result we find that exhibit 2 was signed by the defendant and Loizides and that it was not torn up or cancelled by them, and that Loizides actually bid at the sale in consequence of and/or in compliance with that agreement.

We now have to consider the plaintiff's allegation that the defendant had made arrangements with one G. Apostolides to bid at the said auction and that the said person, in fact, bid at the auction as a puffer. Apostolides is a café keeper on a small scale and a clerk at a garage in Nicosia. He owns a house and he is married and has children. On the evidence before us we are satisfied that it was impossible for him to buy this property even at £1,000, let alone at £48,000, which was his highest bidding. This person made five bids at the sale; beginning at £41,000 after the first bid of Christakis Loizides of £40,000, and following with a bid after the plaintiff on three occasions, increasing the price by £1,000 each time,

and eventually bidding £48,500 after Loizides's last bidding of £48,000 which was the highest bid but one before the property was knocked down to the plaintiff at £49,000. After the sale, defendant's agent, Petrides, paid to Apostolides £20.0.0 by cheque, for his services in bidding at the sale.

On the evidence before us we find that Apostolides was employed by or on behalf of the defendant and that he bid on the part of defendant at the sale, and that he did not bid on his own account.

Having made our findings of fact we now turn to the law applicable to this case. According to *Pollock on Contracts*, 13th edition, page 453,

"The application of the doctrine of fraud to sales by auction is peculiar. The courts of law held the employment of a puffer to bid on behalf of the vendor to be evidence of fraud in the absence of any express condition fixing a reserve price or reserving a right of bidding; for such a practice is inconsistent with the terms on which a sale by auction is assumed to proceed, namely, that the highest bidder is to be the purchaser, and is a device to put an artificial value on the thing offered for sale (*Green v. Baverstock* (1863) 14 C.B.N.S. 204). There existed, or was supposed to exist (doubt was thrown upon it in *Mortimer v. Bell* (1865) L.R. 1 Ch. 10, 16), in courts of equity the different rule that the employment of one puffer to prevent a sale at an under-value was justifiable, with the extraordinary result that in this particular case a contract might be valid in equity which a court of law would treat as voidable on the ground of fraud."

The decision in the case of *Mortimer v. Bell* (above-mentioned) led to the passing of the Sale of Land by Auction Act, 1867, which assimilated the rule of equity to that of law. The English Sale of Goods Act, 1893, section 58 (2) has a similar provision with respect to sale by auction of goods, and the Indian Sale of Goods Act, 1930, section 64 (6) adopts the rule of the Common Law which has now been enacted in our Sale of Goods Law, 1953, section 64; but there is no express statutory provision in Cyprus with regard to the sale of immovable property by auction, and consequently our general law of Contract, Cap. 192, is applicable.

Even in the absence of any declaration that the sale is without reserve, the employment of two or more persons as puffers has in all Courts in England been considered fraudulent, inasmuch as only one person can be necessary to protect the property, and the employment of more can only be to enhance the price, and therefore renders the sale void: Per *Parke B* (who later became Lord

Wensleydale) in *Thornett v. Haines* (1846) 15 M. & W. 367 at 372; 71 R.R. 714 at p. 717-8.

Stress was laid by defendant's counsel on the provision in exhibit 2 that Loizides would under certain conditions become the purchaser for the sum of £45,000; and it was alleged that this was not puffing within the meaning of the law and not a fraud. In support of this submission counsel referred to the following extract from *Thornett v. Haines*, at page 718 of the Revised Reports:

"It is unnecessary, in the present case, to say whether a sale would be valid if the vendor, without notice, employs a person to buy the property in".

In that case it was held that where a sale by auction is advertised or stated by the auctioneer to be "without reserve", the employment by the vendor of a puffer to bid for him, without notice, renders the sale void, and entitles the purchaser to recover back his deposit from the auctioneer.

We feel unable to accept counsel's argument, because, first, the above quoted extract decides nothing, but simply leaves the question of "buying in" property open, and, secondly, the expression "buy in" means according to the Concise Oxford Dictionary: "to withdraw at auction by naming higher price than highest offered", which was not the arrangement between the defendant and Loizides (exhibit 2). In addition to this there is direct authority against counsel's submission on the question of "buying in" and similar arrangements: That is the case of *Robinson v. Wall* (1847) 2 Ph. 372; 41 E.R. 986, decided a year after *Thornett v. Haines*. In the *Robinson* case it was held that where property is advertised to be sold "without reserve", such advertisement is understood to exclude any interference by the vendor, either direct or indirect, which can, under any possible circumstances, affect the right of the highest bidder, whatever may be the amount of his bidding, to be declared the purchaser; and any evasion of that engagement on the part of the vendor, being a violation of his contract with the public, will disentitle him to the aid of a Court of Equity to enforce the sale. Therefore, where previously to a sale of a life interest which was advertised to be "without reserve", the vendor entered into a private agreement with another person, that the latter should bid a certain sum at the auction, and be the purchaser at that sum unless a higher sum were bid, a bill by the vendor for specific performance against a third party who had been declared the purchaser at the auction, though for a much higher price, was dismissed. The following is an extract from that case (see page 988 of English Reports):

"For it is quite immaterial what are the precise terms of the arrangement between the vendor and

1856
January 7

DEMETRIOS
STYLIANOU

C.
ANDREAS
PHOTIADES

1956

January 7

DEMETRIOS
STYLIANOU

v.

ANDREAS
PHOTIADES

any other person, that being only the machinery by which the effect is produced. We must look to see what is the effect of what took place as regards the public—as regards those who attended the sale. Now, the result of the arrangement between the vendor and Lord Mostyn was that there should not, in fact, be any sale by auction at all, unless the price exceeded £35,000. Therefore it was a mere mockery of a sale under that price. Any person going into the auction-room and intending to bid for this property, had no chance whatever of purchasing it, unless he went beyond £35,000. Now, whether the vendor instructed the auctioneer not to knock it down to any bidder under £35,000—that is, to buy it in as it is called—or to knock it down to a person employed to bid for the vendor, or to a person with whom the vendor had contracted that he should have it at £35,000, and that no bidding under that amount should interfere with his contract, it is precisely the same thing so far as the public is concerned; for below that amount there is, in either case, no bidding which can have any effect.”

As Scrutton L. J. put it in *Rawlings v. General Trading Co.* (1921) 1 K.B. at page 644, the employment by a vendor of a puffer to bid on the vendor's behalf at a sale advertised as to the highest bidder was held at law to be a breach of the vendor's representation that the highest bidder, other than himself, would get the goods, and was rested on fraud.

In short, the principle of law which would be applicable to a similar case in England (apart from statute) is that where it is announced or stipulated that property is to be sold by auction and delivered to the highest bidder this imports that there shall be no bidding, directly or indirectly, on the part of the vendor, and the employment of any bidder at a sale under such conditions is fraudulent because it is considered to be a breach of the vendor's representation that the highest bidder, other than himself, would get the property.

In Cyprus, as already stated, there is no express statute regulating the sale of immovable property by auction, and it was submitted by plaintiff's counsel that paragraph (b) of section 17 (1) of our Contract Law, Cap. 192, is applicable to the present case. That paragraph defines fraud as “the active concealment of a fact by one having knowledge or belief of the fact.” On the other hand it was submitted by defendant's counsel that under section 19 (1) and (4) of the Contract Law the plaintiff's consent to the contract was not caused by the employment of puffers on the vendor's part at the sale. This submission was based on three grounds:

(a) that plaintiff bid by stages and believed that the property was worth the price; he was employed as an architect by the defendant and knew that a sum of £25,000 had been spent on buildings on the property in question; and he had estimated it at £62,000;

(b) that plaintiff claimed £3,000 more by his action soon after the auction, and that this was conclusive evidence that the plaintiff considered the property worth more than £49,000; and

(c) that plaintiff had given a written estimate to defendant that the property in question was worth £73,000 and that this was conclusive evidence against him.

As to grounds (a) and (c), the English authorities are agreed that what is the real value of the property put up to auction is immaterial, as a bidding announced to be without reserve is a representation that there will be no interference, direct or indirect, by the vendor, and that the highest bidder, other than himself, would get the property, otherwise the employment of a bidder by him amounts to a violation of his contract with the public.

As regards ground (b), we do not consider that too much weight should be attached to plaintiff's claim in action No. 3655/54 (exhibit 12): first, because the sum of £3,000 claimed over and above the £8,000 paid by the plaintiff, viz. the sum of £11,000 damages, is not claimed in the alternative to the claim for specific performance; and secondly, as submitted by plaintiff's counsel, the extra sum of £3,000 may have been intended to cover plaintiff's expenses to the U.K. and U.S.A. in trying to secure money to pay off the purchase price. However slender this explanation may sound, it should not be lost sight of that that action was instituted and settled in plaintiff's absence from Cyprus and without his knowledge as to particulars of claim, and that no pleadings were filed or delivered.

In his address to the Court, defendant's counsel referred to *Pollock and Mulla on Indian Contract*, 7th edition, page 121, note headed "Explanation: as to causing consent", on section 19 of the Indian Contract Act, from which our section 19 is reproduced; but, having read that extract, with respect, we feel unable to agree that it is applicable to the present case.

Apart from the provisions of paragraph (b) of section 17 (1) of our Contract Law, whereby it is provided that the active concealment of a fact by one having knowledge or belief of the fact is fraud, paragraph (d) of the same section further defines fraud as "any other act fitted to deceive". This provision reproduces section 17 (4) of the Indian Act, about which Pollock and Mulla, 7th edition, at page 108, make the following comment: "The mention of 'any other act fitted to deceive' in

subsection (4) appears to be inserted merely for the sake of abundant caution". In addition to this, Pollock and Mulla, at page 107, comment on section 17 ("fraud") as follows:

"Fraud in general—fraud is committed wherever one man causes another to act on a false belief by a representation which he does not himself believe to be true."

Lastly, it should be borne in mind that the definition of fraud in our section 17 is not exhaustive. Consequently, whether defendant's act in employing a puffer or puffers at the sale fits within the definition of our section 17 (1), paragraph (b) or (d), there is no doubt that on the English authorities the employment of a puffer or puffers is considered to be a fraud on the purchaser, and our section 17 should be interpreted in the light of those authorities.

It was submitted by defendant's counsel that, as the alleged puffing by Apostolides was not included in the plaintiff's prayer (paragraph 8 (a) of the Statement of Claim), and that reference was made in that prayer to the alleged puffing by Loizides only, the employment of Apostolides as a puffer should be disregarded by the Court. Plaintiff's counsel stated to Court that this particular act of fraud, viz. Apostolides's puffing, was by oversight omitted from the prayer in para. 8 (a) of the Statement of Claim, but he submitted that that omission should not preclude the plaintiff from succeeding in his allegation, if proved, as that particular fraudulent act was expressly pleaded in paragraph 6 of the Statement of Claim. We are of opinion that the omission from the prayer of that particular fraudulent act does not preclude the plaintiff from succeeding on it. In fact, we are of opinion that it would have been sufficient for the plaintiff in his prayer (paragraph 8 (a) of the Statement of Claim) to have asked for a declaration that the sale is voidable (and not void, as stated therein) by referring to the previous paragraphs in the Statement of Claim, without repeating them in a summary form.

To sum up: (a) the sale was stipulated in the auction bill (exhibit 1) to be a sale without reserve, that is, that the property would be knocked down to the highest bidder;

(b) the defendant employed Loizides and Apostolides as puffers who as such bid at the auction;

(c) the employment of either of these puffers would have been sufficient to vitiate the sale on the ground of fraud;

(d) the sale is, therefore, voidable at the option of the plaintiff (sec. 19 (1) of our Contract Law).

We, therefore, give judgment in plaintiff's favour as follows:

(1) The judgment in action No. 3655/54, given on the 19th November, 1954, is hereby set aside as having been obtained before plaintiff had knowledge of the fraud now proved.

(2) The sale of the "Paradisos" café on the 26th September, 1954, by defendant to plaintiff, is hereby declared void.

(3) (a) The plaintiff is entitled to recover from defendant the money paid by him against the purchase price, viz. £8,103.0.0.

(b) Plaintiff's claim for architect's fees against the defendant is hereby reserved.

(4) Defendant to pay the costs of this action.
Judgment accordingly.

Appeal by the defendant from the judgment of the District Court of Nicosia (Action No. 517/55).

C. Severis with *M. A. Triantafyllides* for the appellant.

Gl. J. Clerides with *S. Haji Minas* for the respondent.

The judgment of the Supreme Court was delivered by:

HALLINAN, C.J.: In this case the defendant-appellant was the owner of a property known as "Paradisos" in Nicosia and he put this property up to auction on the 26th September, 1954. The sale was advertised as without reserve, but prior to the auction the seller had made an agreement with a Mr. Loizides dated the 25th September, the effect of which was that the auction was not in fact a sale without reserve, and Loizides and a certain Apostolides in fact attended the auction and acted as puffers. The plaintiff-respondent purchased the property at the auction for £49,000. Although he gave the seller towards the purchase price the sum of £8,103, he was unable to find enough money to pay the balance. The seller was about to sell the property again at another auction to be held on the 14th November, when the buyer on the 13th November instituted action No. 3655/54 claiming specific performance and damage for breach of contract. The action was settled by a consent order made on the 19th November, and, when the plaintiff was unable to complete the purchase, another consent order was substituted for the first, on the 11th December. This consent contained three short provisions:

(1) The property was to be sold by auction on the 19th December with a reserve price of £41,000.

1956
January 7
DEMETRIOS
STYLIANOU
v.
ANDREAS
PHOTIADES

(2) If the reserve was not reached the seller, that is the defendant-appellant, was to accept and keep the property in satisfaction of the balance of his claim against the buyer for the purchase price; and

(3) All costs of the sale were to be borne by the buyer.

Presumably the seller was to retain the moneys received from the buyer in part payment of the purchase price. On account of the riots in Nicosia on the 19th December the sale never took place. In the beginning of February, 1955, the plaintiff, as alleged by him, discovered that the auction of the 26th September had not been without reserve and that puffers had been employed. As a result he instituted these proceedings claiming a declaration that the sale of the 26th September was void and claiming refund of the moneys that he had paid against the purchase price.

The defendant in the course of his Statement of Defence pleads that the plaintiff is estopped from proving the alleged fraud in this case by the consent order of the 11th December. No reply was delivered by the plaintiff, but the plaintiff at the close of his case applied to the Court to amend the statement of claim by including therein a prayer that the consent order of the 11th December be set aside. The Court deferred its ruling on this application and at the end of the defendant's case heard counsel on both sides in argument as to whether this amendment should be allowed. Finally, when delivering its judgment, the trial Court allowed the Statement of Claim to be amended and directed the plaintiffs to pay the costs of the application. At the conclusion of a very careful and lucid judgment the trial Court set aside the consent order in action 3655/54, declared the sale of the 26th September to be void, and ordered that the defendant should refund the money paid to him against the purchase price, that is to say £8,103.

The first grounds of appeal taken by counsel for the defendant-appellant are that, although it is conceded that the auction of the 26th September was not in fact a sale without reserve and that (subject to the ground of appeal next argued) Loizides and Apostolides were employed as puffers, nevertheless this was not sufficient to avoid the sale since the plaintiff's consent in bidding up to £49,000 was not induced by the puffing, and, secondly, that there was no evidence of his having suffered damage.

It has been argued that the puffing did not materially affect the plaintiff's consent because there was considerable evidence that he considered the property was worth even more than he bid for it, and this fact showed that his consent was not induced by the fraud. The short answer to this argument concerning consent is that where a seller advertises an auction as without reserve whereas

in fact there is a reserve and puffers are to be employed, the mind of the public who attend the auction and bid is never *ad idem* with the seller, for they believe that the auction is being conducted as an auction without reserve. It is clear from the authorities cited in the judgment of the trial Court that such a sale is voidable at the option of the buyer; and we agree with the trial Court that this is fraud within the meaning of section 17 (1) of the Contract Law (Cap. 192).

The submission that the plaintiff's claim to rescind the contract of sale and set aside the consent order cannot succeed unless he proves damage is, in our view, based on a misapprehension of the nature of the claim. In an action for deceit, that is to say, an action in tort based on fraud, it is necessary to prove damage. But where the plaintiff is suing to rescind a voidable contract or to set aside a judgment on the ground of fraud, we have not been able to find any authority for the proposition that such a plaintiff cannot succeed unless he proves damage. In the present case indeed it might be argued that it was for the defendant to show that the purchase price would have reached £49,000 even if there had been no puffing. But we do not consider that it is necessary even to go as far as this; the fraud as proved entitles the plaintiff to have the contract rescinded and to have the money which he paid against the purchase price refunded.

Another and minor ground of appeal was without substance, namely: that the puffing done by Apostolides although taken into consideration by the Court was not relied on in the Statement of Claim. It was certainly not necessary to make any allegation about this in the prayer and the allegation is in fact made in paragraph 6 of the Statement of Claim.

We now come to the principal ground of appeal, which concerns the manner in which the Court dealt with the defendant's plea that the plaintiff was estopped from establishing fraud so long as the consent judgment in action No. 3655/55 had not been set aside; and that the trial Court erred in setting aside this consent judgment. The first point taken in respect of this ground of appeal is that the consent judgment could only have been set aside in a special action brought for that purpose. In the consent judgment the plaintiff virtually said to the defendant "I agree that you can keep the money that I have paid towards the purchase price of the premises, get what you can for the premises by putting them up again to auction, and that, if you cannot obtain £41,000 at that auction, you can keep the premises in satisfaction of the balance of the purchase price". This, we think, does constitute an estoppel which has to be set aside before the plaintiff can succeed in this case. The appellant has strongly relied on the case of *Kinch v. Walcott & Others* (98 Law Journal, Privy Council, 129). Lord Blanesbrough

in his judgment at page 135 cites a passage from the judgment of *Wilding v. Sanderson* (66 Law Journal, Chancery, at p. 469) to the effect that a party bound by a consent order "must when once it has been completed abide by it unless and until he can get it set aside in proceedings duly instituted for the purpose." The question that falls for decision in the present case is whether the plaintiff can pray to have the consent judgment set aside in the present proceedings or whether he must have instituted separate proceedings for this purpose.

The facts in Kinch's case were complicated, but in so far as they touch the present point they might be summarised as follows: Kinch was claiming a refund of £1,200 from Walcott, Hutchinson & Taylor on the ground that he had been forced to pay the money to Taylor by a threat to prosecute him for certain criminal offences. Now, a previous libel action brought by Walcott and Hutchinson against Kinch had been settled upon Kinch withdrawing these very allegations of duress. His action in withdrawing these allegations was relied on by Walcott and his co-defendants as an estoppel. Kinch, in his reply to this plea of estoppel, pleaded that the consent orders in the libel action were obtained by Walcott and Hutchinson who had fraudulently concealed from, or omitted, to disclose to him the fixed determination of Hutchinson to prosecute Kinch for perjury committed in a certain affidavit. It will be seen from this that the duress and threats alleged by Kinch as his grounds for recovering the £1,200 are quite different from his allegation of fraud pleaded in order to have the consent order in the libel action set aside. Now, in the present case the fraud on which the plaintiff relies to have the contract declared void is precisely the same as the fraud on which he relies for setting aside the consent judgment. In Kinch's case the issue of fraud that Kinch raised in his reply to the plea of estoppel, raised a completely different issue to the issue of duress upon which he was seeking to recover the £1,200; but in the present case where the issue of fraud is the same we can see no objection to the plaintiff praying the Court to set aside the consent judgment in the same action as he asks for a declaration that the contract of the 26th September, 1954, be declared void.

It was undoubtedly essential before an order setting aside the consent judgment could be made that the Statement of Claim should be amended, indeed it was more important to have the consent judgment set aside than to have the sale declared void for it would appear (although this point was not taken in argument) that the contract of sale merged in the consent judgment. The question then arises whether at the close of the plaintiff's case the pleadings could have been amended; and what form that amendment should have taken. The amendment

should have inserted into the body of the Statement of Claim an assertion that the same fraud which had vitiated the contract of sale of the 26th September, 1954, also vitiated the consent judgment; and then the amendment should go on to amend the prayer in paragraph 8 (a) of the Statement of Claim so that the consent judgment should be set aside. The plaintiff's application to amend merely asked that in paragraph 8 (a) of the Statement of Claim, after the prayer that the sale of the 26th September be declared void, a prayer should also be added that the consent judgment in Action No. 3655/54 "be declared a nullity and be set aside". The plaintiff did not seek to insert in the Statement of Claim an allegation of the grounds on which he wished the consent judgment set aside, but in his application by summons for amendment under the heading "Facts relied upon" he stated: "The amendment applied for is a consequential amendment. The Statement of Claim alleges that fraud was practised by the defendant at the auction sale of the property the subject matter of this action, and therefore the sale should be declared void. Consequently the judgment given on such sale before the discovery of the fraud is a nullity and should be set aside."

This statement of "Facts relied upon" undoubtedly makes quite clear to the Court and to the defendant the ground on which the plaintiff seeks to set aside the consent judgment, namely the very fraud which was the cause of action for setting aside the auction sale of the 26th September. In the whole of these proceedings there is, in our view, only one cause of action, and that is the fraud; the remedies for which the plaintiff prayed were the setting aside of the auction sale and of the consent judgment, and the recovery of the moneys which he had paid to the defendant against the purchase price. Had the record been put right by the plaintiff filing an amended statement of claim containing an allegation of fraud on which he seeks to set aside the consent judgment, and also a prayer that that consent judgment be set aside, in our view, the trial Court could, at the close of the plaintiff's case, have properly ordered that the statement of claim be amended in this sense.

Unfortunately the trial Court put off its decision as to whether it would permit the plaintiff to amend the statement of claim until they delivered their judgment on all the issues in suit. It has been submitted for the appellant that not knowing how the Court would decide upon the application to amend, he was not able to properly defend the issue raised by that amendment, namely, whether the consent judgment had been obtained by fraud. One infers on reading the record on appeal that the trial Court assumed that the evidence on the issue of fraud with regard to declaring the sale void was the same as the issue of fraud on setting aside the consent judgment.

1956
January 7

DEMETRIOS
STYLIANOU

v.

ANDREAS
PHOTIADES

and that it was only necessary to hear the arguments of counsel. These arguments were in fact heard at the conclusion of the evidence.

Counsel for the appellant has in this Court argued that the appellant could have adduced evidence from which it might be inferred that the plaintiff between the sale on the 26th September and the consent judgment on the 11th December became aware of the fraudulent nature of the auction sale. The appellant's counsel have not been able to suggest the sort of evidence he might lead to raise this inference against which there is the statement of the plaintiff that he only became aware of the fraud in February, 1955, and he was in fact out of Cyprus between the 23rd October and the 18th December.

Nevertheless we feel that there are two serious errors of procedure in the trial of this action. First that the statement of claim as amended does not contain an allegation of the ground on which the consent judgment is set aside. True, the application to amend stated the ground, but it is not on record. Lord Russell of Killowen in his speech in *Brackenborough v. Spalding Urban District Council* (1942) A.C. 310, at page 347, stated:

"Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or, at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be "deemed to be amended" or "treated as amended". They should be amended in fact."

The second error of procedure was this: It is a fundamental principle of procedure that the defendant be afforded an opportunity of pleading to an amendment and of calling or recalling witnesses. The procedure followed in this case offended against this principle.

We therefore order that the plaintiff within seven days file an amended statement of claim in proper form and that the defendant be at liberty to file a supplementary statement of defence thereto within seven days of receiving a copy of the amended statement of claim.

The order of the trial Court that the consent judgment be set aside is vacated and this case remitted to that Court to adjudicate afresh upon the issue as to whether the consent judgment should be set aside for the fraud alleged in the amended Statement of Claim. Upon the hearing of this issue the Court may take into account all evidence already given in the action and either party may re-call any witness for examination or cross-examination or adduce fresh evidence relevant to this issue. If the trial Court shall then order that the consent judgment be set aside, the rest of the order appealed against shall stand, otherwise it shall be set aside.

The appellant is entitled to half his costs on this appeal.