I think that the letter written by Messrs Moore & Weinburg to Messrs Ernsthausen on 19th September 1913 cannot be construed as an offer, but as an unconditional statement that (as was the fact) the two unopened bales were then lying at Messrs Ernsthausen's disposal in the warehouse of the Trades Lane Calendering Company, Limited, Dundee. It is unnecessary for the purposes of this case to consider the precise relation of a warehouse-keeper to the person into whose name goods have been transferred in his books. The only point is whether after that transference had taken place the conditions existed which by Scots law are requisite for that form of diligence which consists in arrestment *jurisdictionis fundandæ causa*. There was then no real contingency that Messrs Moore & Weinberg would revoke the delivery which had taken place, even if it were an ambulatory delivery that they had made and it were in their power to revoke it. It is quite certain that that is the last thing they would have thought of. There can be no doubt at all this storekeeper regarded himself as accountable to Messrs Ernsthausen, and that there was no possibility of any dispute as to that accountability, and it is to my mind quite clear that as a matter of business there was nothing required for the resolution of any conceivable question in the matter beyond the production of the letter of the 19th September 1913 to the storekeeper bearing the signature of Moore & Weinberg.

Under these circumstances I think the authorities support the view that Messrs Moore & Weinberg had so dispossessed themselves of the goods, and that the arrestees so held the goods under such present accountability to the defenders, as to make the arrestment in question apt to found jurisdiction.

Upon the point as to costs I agree with what has been said by your Lordship.

Their Lordships dismissed the appeal with expenses.

Counsel for the Appellants — Moncrieff, K.C.—Garson. Agents—Webster, Will, & Company, W.S., Edinburgh — Coward & Hawksley, Sons, & Chance, London.

Counsel for the Respondents—Mackenzie, K.C.—Brown. Agents—Buchan & Buchan, S.S.C., Edinburgh—John Kennedy, W.S., Westminster.

COURT OF SESSION.

Friday, November 10.

FIRST DIVISION.

[Lord Cullen, Ordinary.

WRIGHT *v.* BUCHANAN AND OTHERS.

Sale—Auction—Sale of Heritage—Validity of Purchase of Heritage by One of Seven Bondholders Selling.

Seven persons, who had a bond and disposition in security for £7000 over certain heritable subjects, exposed the subjects for sale by public auction without notice of a reserved right to bid. One of them bid up to £5400 for the subjects, and that being the highest bid the property was knocked down to him. The upset price, £4000, had been offered by a member of the public, and the price ultimately reached was the result of competition between that member of the public and the bondholder. The former brought an action concluding for reduction of the minute of enactment and preference, and declarator that the property had been sold to him for £4000. The owners of the property were called as defenders but did not appear. There was no suggestion that the bondholder in bidding was acting not in good faith. The other bondholders appeared as defenders to uphold the sale. *Held* that the action was irrelevant and must be dismissed on the ground (*per* the Lord President, Lord Johnston, and Lord Mackenzie) that the bondholder's bidding could not be challenged by the pursuer, a member of the public; *question* if it could have been challenged by the owners of the property (*per* Lord Skerrington) on the ground that as the pursuer could not succeed in his conclusion that the property should be declared his at £4000, he had no interest or title. *Authorities examined.*

James Wright, building contractor, Glasgow, *pursuer*, brought an action against Robert Colburn Buchanan, theatrical manager, Edinburgh, and others, the creditors in a bond and disposition in security for £7000 executed by the Kilmarnock Theatre Company, Limited, now in liquidation, the Kilmarnock Theatre Company and the liquidator thereof, and Richard Edmiston junior, auctioneer, Glasgow, *defenders*, concluding as follows, viz., that "the defenders ought and should be decerned and ordained by decree of the Lords of our Council and Session to exhibit and produce before our said Lords a minute of enactment and preference by the said Richard Edmiston junior as judge of the roup, dated 30th March 1916, whereby he preferred the defender Robert Colburn Buchanan to the purchase of all and whole that piece of ground at Kilmarnock delineated and coloured pink on a plan endorsed on a feu disposition . . . lying within the parish of Kilmarnock and county

of Ayr, together with the theatre erected on the said area or piece of ground, and the whole adjuncts and accessories thereof, including furnishings, decorations, seating, upholstery, scenery, and office furniture, with the whole pertinents of the said subjects and the exposers' whole right, title, and interest in and to the same, at the price of £5400, and enacted him purchaser accordingly, and the said deed ought and should be reduced by decree of our said Lords, and the pursuer reponed and restored thereagainst *in integrum;* and (second) that it ought and should be found and declared by decree foresaid, upon decree of reduction as above concluded for being granted, that the pursuer was the true purchaser of the said property at the price of £4000 sterling, the upset price thereof when it was exposed for sale within the Faculty Hall, St George's Place, Glasgow, on 29th March 1916, he being the sole offerer and lawful bidder for the purchase of the said property; and further, that the defender the said Richard Edmiston junior ought and should be decerned and ordained by decree foresaid to sign a minute of enactment and preference in favour of the pursuer as purchaser of the said property at the said price of £4000 sterling."

Defences were lodged by R. C. Buchanan, and also by David Kirkland and others, certain of the creditors under the bond and disposition in security.

The *facts* of the case appear from the following narrative taken from the opinion of Lord Johnston—"The facts are simple. The Kilmarnock Theatre Company was incorporated in 1904. In August of that year it acquired a local theatre. In spring of 1907 the company borrowed from the defender R. C. Buchanan and six others on bond and disposition in security £7000. These seven persons were on the face of the security joint-creditors. Their individual interests are not disclosed. The company went into liquidation in the spring of 1908. In 1913 the bondholders brought the property to sale by auction under the powers of their bond. The upset price of February 1913 was £9000, of March 1913 was £6500, and of February 1914 was £5000; but no one appeared to bid. After waiting until spring of 1916 the bondholders again exposed the property at the upset price of £4000. At this exposure John Maxwell, writer, Glasgow, offered the upset price of £4000 admittedly on behalf of James Wright, builder, Glasgow. He was opposed by R. C. Buchanan, one of the bondholders, and he bid the property up to £5200, the limit of his authority from Mr Wright, but was outbid by Mr Buchanan. Mr Wright, who was himself present, then intervened and personally bid a further hundred pounds, or £5300, when he was outbid by Mr Buchanan, to whom the property was knocked down at £5400. Mr Wright now seeks to set aside the minute of enactment and preference, and to claim the property at the upset price of £4000 on the ground that Mr Buchanan's bids were illegal, and that he was entitled to be preferred at the upset price bid by his agent on his behalf. There is no suggestion of any collusion between Mr Buchanan and his co-bondholders, or between him and the liquidator of the company. He was acting perfectly independently. It is an important fact that Mr Wright, the pursuer, avers that he did not know that Mr Buchanan, the competing bidder, was one of the bondholders who were exposing the property. His own bids through his agent, and still more by himself, were therefore from his point of view bids in a genuine competition. He was willing to give the price which he ultimately offered, and was disappointed at not getting the property at that figure. That figure therefore was his own genuine valuation of the property to him as a buyer. Yet he seeks to acquire it at £4000, or £1300 under his own valuation, not only in a question with Mr Buchanan but with the other bondholders, and with the liquidator as representing the general creditors and the company in liquidation in reversion."

The pursuer pleaded, *inter alia*—"1. The defender the said Robert Colburn Buchanan having illegally and without authority offered for the said property as condescended on, the minute of enactment and preference ought to be reduced as concluded for. 2. The pursuer having been sole offerer for the said property on the occasion condescended on, and having offered the upset price therefor, is entitled to decree in terms of the second conclusion of the summons."

The defender Robert Colburn Buchanan pleaded, *inter alia*—"3. The action is irrelevant as laid, and should be dismissed."

The compearing defenders pleaded, *inter alia* — "2. The averments of the pursuer being irrelevant, the action should be dismissed."

On 20th July 1916 the Lord Ordinary (CULLEN) pronounced an interlocutor sustaining the third plea-in-law for the defender Buchanan, and the second plea-in-law for the other compearing defenders.

Opinion.—"[*After narrating the facts of the case*]—Now it seems *prima facie* a peculiar result that the other selling creditors should be bound to accept a sale of the property to the pursuer for £4000 although £1400 more has been offered for it by Mr Buchanan. To relinquish Mr Buchanan's offer means a large sacrifice. The pursuer says, however, that they are bound in his interest to submit to it. In support of this contention he founded on *Faulds* v. *Corbet*, 21 D. 587; *Taylor* v. *Watson*, 8 D. 400; *Stirling's Trustees*, 3 Macph. 851; *York Buildings Company* v. *M'Kenzie*, M. 13,367; and Bell's Com., ii, 250.

"It appears to me that the question raised is ruled by the case of *Shiell* v. *Guthrie's Trustees*, 1 R. 1083, 11 S.L.R. 625. There two out of ten beneficiaries in whose interests a property was exposed to public roup offered for it and were preferred to the purchase. The next lowest offerer, proceeding on the same view as the pursuer here, brought a reduction maintaining that the purchasers being identified with the sellers could not legally purchase at the sale. This contention failed, and the validity of the sale was affirmed. It was not a case of white-bonneting—that is to say, fraudulently inflating by competing

bids in the interest of the sellers the price to be paid by some-one else—but a *bona fide* purchase; and it was not a case of *idem emptor et venditor*, because a sale could legally be made between the whole body of the beneficiaries as represented by the trustees and two of their number.

"It does not seem to me that there are any essential points of difference between that case and the present. The defender Mr Buchanan was one out of seven exposers, and his interest under the bond amounted to a one-seventh share. He did not fraudulently compete at the sale as a whitebonnet, but with a *bona fide* view to purchasing, and he was preferred to the purchase because he was willing to pay a higher price than the pursuer was willing to pay. Mr Buchanan's interest as an offerer with a view to purchase was not to inflate the price but to buy as cheaply as possible —that is to say, it was different from and opposed to his interest as one of the creditors under the bond.

"I accordingly follow the case of *Shiell* v. *Guthrie's Trustees*, and doing so I shall sustain the third plea-in-law for Mr Buchanan and the second plea-in-law for the other compearing defenders and dismiss the action."

The pursuer reclaimed, and argued—(1) The exposer of a property to public roup did so on the footing that he would not bid at the roup or employ another to bid for him, and he entered into an implied contract with the public to that effect. He might reserve a right to bid, giving notice thereof, but if he did not do so, and made a bid at the sale, he was in breach of contract with the public, quite apart from fraud. (2) Where the offerer was not the seller or exposer but the owner or in substance the true owner, as where he was the only person beneficially interested, and made a bid without notice of a reserved power to do so, his action was open to challenge, not as being a breach of contract but as a matter of equity. (3) If the offerer stood in a fiduciary position to the true owner, such as to exclude his acting in a question with the owner, his action in making bids and acquiring the property was open to challenge by the owner. The present case fell within the first of these categories, and the sale was open to challenge—*Grey* v. *Stewart*, 1753, M. 9560; Duff's Feudal Conveyancing, p. 165; Moir's Notes to Stair, p. xci. As a result of the implied contract, any interference at the sale by the sellers, directly or indirecty, vitiated the sale —*per* Lord Wood delivering the opinion of Court in *Faulds* v. *Corbet*, 1859, 21 D. 587, at p. 593. *Faulds'* case (*cit.*) fell under the second category, but Lord Wood was laying down a general rule—*Rutherfurd* v. *MacGregor & Company*, 1891, 18 R. 1061 (*per* Lord Rutherfurd Clark at p. 1065), 28 S.L.R. 768. At common law the extent of the interest in the subject of the seller or exposer was immaterial so long as an interest existed; thus a heritable creditor selling under a power of sale could not bid—*Jeffrey* v. *Aiken*, 1826, 4 S. 722; *Taylor* v. *Watson*, 1846, 8 D. 400 (*per* Lord President Boyle at p. 405, Lord Mackenzie at p. 406, Lord Fullerton at p. 407, Lord Jeffrey at p. 407, and Lord Cunningham (Ordinary) at p. 403); *Stirling's Trustees*, 1865, 3 Macph. 851, where creditors petitioned unsuccessfully for a judicial factor to enable them to buy. Neither could one of several co-owners—*Morrice* v. *Craig*, 1901, 39 S.L.R. 609; *Thom* v. *MacBeth*, 1875, 3 R. 161, 13 S.L.R. 94. Here the sellers or exposers were the heritable creditors and the purchaser was one of them; at common law therefore the sale was open to challenge. No doubt under the bankruptcy statutes a heritable creditor could effectively bid and buy, but it was essential in that case that the sale should be in virtue of the Bankruptcy Acts—Bankruptcy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 20), sec. 116; Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 213 (3); *Cruickshank* v. *Williams*, 1849, 11 D. 614, which was in contrast with *Taylor* (*cit.*). These provisions were expressly enacted to remove the disability of the creditor at common law—*Rutherfurd's* case (*cit.*) (*per* Lord Kyllachy at p. 1063); Goudy's Bankruptcy, p. 304. But a creditor selling under the power in his bond had no such right, and there was no relevant averment that the defenders here were proceeding on anything but the power in their bond, or that they had proceeded in virtue of the Bankruptcy Statutes or under the Heritable Securities (Scotland) Act 1894 (57 and 58 Vict. cap. 44), sec. 8, which also conferred a statutory right on the creditor to purchase as an exception to the common law. The common law in England was to the same effect—Bell's Prins., section 131. Further, the considerations which gave rise to the judgment in the *York Building Company* v. *Mackenzie*, 1793, M. 13,367, 3 Pat. 378, were found in the present case, for the defender was a theatrical manager who had special knowledge of the subjects—Bell's Comm. ii, 250; *Shiell* v. *Guthrie's Trustees*, 1874, 1 R. 1083, 11 S.L.R. 625, was distinguished, for in that case trustees were selling and one of several beneficiaries bought; the purchaser was not and could not be a party to the contract with the public, for he was not seller or exposer; thus the purchaser was unable to control the sale, as by choosing a particular time for selling or by imposing conditions, or in the articles of roup; the trustees, however, had complete control of the sale, subject to a right in the beneficiaries to an accounting. The cases enumerated by Lord President Inglis in that case at p. 1089 were not exhaustive, and did not embrace the present. *Aberdein* v. *Stratton's Trustees*, 1867, 5 Macph. 726, 3 S.L.R. 346, was distinguished, for the facts were different from those of the present case. The sale to the defender being open to challenge, the remedy sought was competent—*Grey's* case (*cit.*). On the question of remedy *Shiell's* case (*cit.*) was not in point, for there the person challenging the sale had not signed the minute of enactment, consequently there was no contract with him; here there was a contract, and if the sale was reduced and the subjects were re-exposed, the pursuer might lose the subjects he had bought, the bids above his being invalid. Consequently upon

the minute of enactment, which was probative evidence of the sale to him, he had a title, and he had also an interest to sue.

Argued for the defender and compearing defenders (respondents)—In a sale by auction where there was no notice of a reserved right to bid, the owner could not bid, neither could one who was in substance the owner, as, for example, one with the sole beneficial interest. If either of those made a bid, such a bid was quite ineffectual, and no sale resulted to such a bidder, on the principle of *idem emptor et venditor*. The result was that a member of the public could challenge the alleged sale, and if his bid was above the upset price he was entitled to be preferred to the subjects at the price he offered before the illegal competition with the owner or substantial owner began. Where, however, neither the owner nor the substantial owner bid, but another, the result of whose bidding was to produce conflict of interests in himself—*e.g.*, a heritable creditor selling whose interest as seller was to get enough to cover his bond, and thereafter to secure as high a price as possible for the debtor, and as buyer to secure the property as cheaply as possible—the sale to such a person was not void but voidable, and the sole title to challenge it lay in the owner or substantial owner. The remedy was a complete reduction, so that the subjects might be re-exposed of new. The owner or substantial owner might, however, elect to accept the sale, in which case no other had a right to challenge it, on the principle of *jus tertii*. Thus *Grey's* case (*cit.*) was an example of the first category, and in that case the sole question was whether the bid in question was *bona fide* or not; it was never *bona fide* where there was in reality the same buyer and seller, and a member of the public could challenge the fictitious bids and get the property, it being a breach of contract for the owner to bid—*Green* v. *Baverstock*, 1863, 32 L.J., C.P. 181; *Warlow* v. *Harrison*, 1858, 1 E. & E. 295; Chitty on Contracts, p. 363; *Faulds'* case (*cit.*) (*per* Lord Ardmillan at p. 590, *per* Lord Wood at p. 593). It was impossible to bring the pursuer within that class of case. He paid a full price, and there was real transference of property to him, No doubt he was one of seven heritable creditors who were selling; but he had no interest as owner, and the utmost interest he could be said to have was his share as creditor in the bond. It had never been held that an owner in such a share as one-seventh was in the present circumstances to be treated as a full owner so as to let in a challenge by a member of the public, and the possession of a share in the possession of a bond was a still weaker case. Moreover, the authorities were the other way—*Aberdein's* case (*cit.*) (*per* the Lord Justice-Clerk Patton at p. 732, and Lord Cowan at p. 783); *Shiell's* case (*cit.*) (*per* Lord President Inglis at p. 1089, and *per* Lord Ardmillan at p. 1092). *Taylor's* case (*cit.*) fell within the second category and was no authority for the pursuer, whose only title to challenge was as a member of the public, whereas in that case the challenge was by the heir of the owner. In *Rutherfurd's* case (*cit.*) it was held that a member of the public had no right to challenge. The *York Building Company's* case (*cit.*) was decided on the same ground. Further, in any event, the sale was valid under the Bankruptcy Statutes, for it would be recognised by them, as the bankrupt and the other bondholders concurred, and it was therefore in virtue of those statutes—*Cruickshank's* case (*cit.*) The action was also incompetent as laid. It concluded for reduction of certain bids of the defender and the preference of the pursuer to the subjects at the price offered by him prior to the competition with the defender. But the pursuer's only remedy, if he had one, was that of complete reduction — *Shiell's* case (*cit.*) (*per* Lord President Inglis at p. 1089, Lord Deas at p. 1900, and Lord Ardmillan at p. 1092); *Aberdein's* case (*cit.*) (*per* Lord Cowan at p. 734), and *Faulds'* case (*cit.*) (*per* Lord Wood at p. 595). *Silkstone and Haigh Moor Coal Company* v. *Edey*, [1900] 1 Ch. 167, and *Williams* v. *Scott*, [1900] A.C. 499, were also referred to.

At advising—

Lord President—Adopting the language of Lord President Inglis in the case of *Shiell* v. *Guthrie's Trustees*, 1874, 1 R. 1083, at p. 1089, 11 S.L.R. 625, I say that "the law which prevents a person from bidding, under certain circumstances, for property exposed for public sale is founded upon considerations which do not apply here."

The facts of this case, which are undisputed, are few and simple. Seven heritable creditors exposed their security-subject for sale by public auction at the reduced upset price of £4000. The defender Buchanan was one of the sellers. The pursuer, a building contractor in Glasgow, appeared at the sale and offered the upset price. Competition followed, and ultimately the property was knocked down to the defender Buchanan at the price of £5400. All the heritable creditors and the owners are satisfied. The pursuer is not. He challenges the bids made by the defender Buchanan as unlawful, and contends that he ought now to be preferred at the upset price of £4000.

I am of opinion that he ought not, and that the bids made by the defender Buchanan were, at all events in a question with him, an outside bidder, unlawful.

The pursuer's case was based exclusively upon an observation which fell from the bench in the old case of *Grey* v. *Stewart*, 1753, M. 9560, which runs as follows:—"The person who advertises a sale by auction pledges his faith to the public that he is to sell to the highest bidder, and is not to buy for himself." Now the case of *Grey* (*cit.*) was a "whitebonnet" sale, and was characterised from the bench, in the sentence immediately preceding that which I have read, as "a manifest cheat." In the somewhat loose and inaccurate language which I have just read it was obviously intended, as one can easily see from the context, simply to restate the old and familiar doctrine that a seller may not himself buy the subjects which he is selling. Accordingly the pur-

suer's case, which rests exclusively upon the doctrine as laid down in the passage which I have just read, obviously fails because the defender Buchanan was not selling his own property. The fact that he was an exposer is in my opinion quite immaterial if he be not the person beneficially entitled to receive the price. If he be the person beneficially entitled to receive the price, then obviously all his bids are fictitious. As Lord Wood observed in the case of *Faulds* v. *Corbet*, 1859, 21 D. 587, at p. 593, which was a successful challenge of the bids of one who was not an exposer, but was beneficially entitled to receive the price, "the defender was a mere fictitious offerer. He could not be otherwise. Let him offer what he might, if the property was knocked down to him he never could have anything to pay, for any payment made to the trustees would have been simply a fiction. It would have been a payment by himself to himself—a taking of the money out of one pocket to put into another. A person who offers while he has not to pay cannot be a *bona fide* offerer. He can be nothing else than a fictitious offerer. Therefore in bidding up the price it could not be as a *bona fide* intending purchaser that the defender made his offers. It could only be as a fictitious offerer, to enhance the price which he was himself to receive. And to say that offerers could be liable to have their biddings interfered with by the defender Miller, situated as he was in relation to the property to be sold and the price to be obtained, would be to reduce the sale represented to be a *bona fide* one at an upset price to a mere pretence and delusion." The case of *Faulds* (*cit.*) is a capital illustration of the unsoundness of the pursuer's contention here and, as I think, a direct authority in the defenders' favour, because it was a successful challenge at the instance of an outside bidder against the bids of one who was certainly not an exposer, but was entitled to receive the purchase price. Every bid which he made was therefore obviously a fiction.

In the case of *Aberdein* v. *Stratton's Trustees*, 1867, 5 Macph. 726, 3 S.L.R. 346, we find an excellent illustration of the converse of *Faulds* (*cit.*) and a direct authority in the defender's favour here, because there the challenge was unsuccessful although made against the bids of an exposer of the property, but one who was not entitled to receive the purchase price. In that case David Fairweather and David Stratton, testamentary trustees, exposed a portion of the trust subjects for sale by public auction. At the sale John Fairweather, appearing on behalf of David Fairweather, one of the exposers, competed and was subsequently preferred to the purchase. His bids were challenged by an outside bidder, his sole competitor, on the ground that John, appearing on behalf of David, was bidding on behalf of an exposer of the property. The challenge proved unsuccessful on the simple ground that although John, appearing on behalf of David, was an exposer of the property, still, inasmuch as the purchase was made on behalf of David Fairweather himself and not on behalf of the beneficiaries entitled to receive the price, his bids were unchallengeable. If, on the other hand, John, appearing on behalf of David, had been acting on behalf of the beneficiaries of the trust, the result would have been entirely different. So that, although David was an exposer, his bid was unchallengeable in respect that he was not beneficially entitled to receive the price. Nor would it have been different if the bids made on behalf of David had been made on behalf of both exposers of the property, for, as Lord Cowan observed in that case (at p. 734), "assuming that the purchase was for their joint behoof as individuals, the case must fail for the same reasons as have been stated against the relevancy of the statement that only one of their number was the offerer." Accordingly I regard the case of *Aberdein* (*cit.*) as a direct authority in support of the defenders' contention in the case before us.

In deciding in favour of the defenders the Lord Ordinary founded himself on the judgment of this Court in *Shiell* v. *Guthrie's Trustees* (*cit.*). In the opinion of the Lord Ordinary there were no essential points of difference between that case and this. I agree with the Lord Ordinary, and I am disposed to think, indeed, that in the case of *Shiell* (*cit.*) the Lord President states exhaustively the classes of persons who by the common law of Scotland are precluded from bidding at a sale by public auction. They fall under three categories—First, no man can be buyer and seller at the same time. If there are not two parties to a sale there can be no sale at all. Second, if the exposer of the property puts forward someone to bid for him, so as to run up the price, that will not do. Third, if a person in a fiduciary capacity becomes the purchaser of property held by him in that capacity the sale will be set aside, but the challenger must be a beneficiary under the trust.

It is obvious that the case of the defender Buchanan does not fall within any of these three categories. The Lord Ordinary was therefore right in sustaining the defence, and I am for affirming his interlocutor.

LORD JOHNSTON—[*After the narrative of the facts, supra*]—The recognised right to challenge proceedings in a sale by auction is founded on equity. The demand of Mr Wright on the face of it would not lead to an equitable result, for it would give Mr Wright the property at a proved, and not merely estimated, under value, and would prejudicially affect the right and interests of the heritable creditors as a body, the general creditors, and the bankrupt, in this case the company in liquidation. If Mr Wright gets the property at £1300 or £1400 under value, it follows that the bondholders are left with a larger balance for which to claim on the general estate. The general creditors therefore suffer, and the bankrupt company's prospect of reversion is just so much diminished. It matters not in principle that in this case there was probably no general estate. Neither heritable creditors nor general creditors nor the company in liquidation take any exception to the sale to

Mr Buchanan, but are acquiescent. On the face of it, therefore, if there is any equity in Mr Wright's claim, it is met by a countervailing equity, and ought not to succeed. That is the conclusion to which I should have come if there were no authority on the subject. There is, no doubt, a great deal. But I do not find anything which is counter to the conclusion which I have indicated.

Two further facts—Mr Buchanan was the theatrical manager of the company in liquidation, and must therefore be deemed to have been better acquainted with the value of the property than anyone else. On the other hand he seems to have bought not in his own name but for a party of friends associated with him. Neither of these points affects, in my opinion, the result to be arrived at.

In relation to such challenge of a sale by auction, the opportunity for challenge may arise in two different sets of circumstances, and the principle or equitable consideration applicable varies with the circumstances. There is, first, the proper case of "white bonnetting," where the owner, either directly or through an intermediary, bids up the subject exposed against the public. There is, second, the case of one who occupies to the owner or his creditors a fiduciary position in relation to the property and its sale, and who openly or secretly buys it on his own behalf. In the first case the principle applicable is that the seller must be held to invite the public to an honest and *bona fide* sale, and not to be putting a fraud upon them. It is often said that he contracts with the public that the sale shall be a fair business transaction, free of dishonest tricks, and therefore that he will do nothing, directly or indirectly, by engineering a bogus competition to enhance the price against the public. I do not think that anything is gained by stating the case as one of contract. It is really an equitable implication from the circumstances of the sale. The leading case is *Grey* v. *Stewart*, 1753, M. 9560. In the second case the principle applicable is again the equitable one, that no one in a fiduciary capacity can be allowed to take advantage of that position to obtain a benefit for himself. If his duty and his interest conflict, he is barred from acting in his own interest. The leading authority is that of the *York Buildings Co.* v. *Mackenzie*, 1793, M. 13,367, 3 Pat. App. 378.

It is obvious that the interest affected by a breach of these equities is different, and the interest affected determines the title to sue. In the first case the interest of the disappointed bidder, a member of the public is essential to the challenge. In the second place the interest of the true owner and of anyone deriving from him is the foundation of the challenge. If, so far as the owner and those deriving from him are concerned, the sale is a *bona fide* sale, though someone whose actings might have been challenged by them or any of them has been preferred, if they are content, and probably anxious that he should retain the property at a higher price than anyone else was prepared to offer for it, and accordingly raise no challenge, I cannot see on what ground a member of the public is damnified by anyone else not in collusion with the true owner but *in bona fide* offering and willing to pay a higher price than himself, being preferred to him. I think that is borne out by *Aberdein's* case, 1867, 5 Macph. 726, 3 S.L.R. 346. If I am right, that ends the question, for the pursuer then has neither title nor interest to sue. Moreover, his remedy is inept. The right of the competent objector or objectors is to set aside the sale *in toto*, and recover the property, that it may be retained or again sold. That would not suit the present pursuer, who wants to acquire the property at his first, and as he contends the only legal, bid. For that result against the owner, the heritable creditors, and the general creditors, represented by the liquidator, none of whom are personally responsible for the action of the bidder preferred, there is no equity whatever.

I have dealt with the case on general grounds, but it is right to refer to more special ones. It is the foundation of the case for the pursuer that Mr Buchanan was the seller, for that must be the interpretation of the term "exposer." Now Mr Buchanan was only one of a number of heritable creditors who jointly exposed the property. If the preferred bid had been by the heritable creditors as a whole the case would have been covered by that of *Taylor* v. *Watson*, 1846, 8 D. 400, by which I should have been bound. It determined, but in a question with the heir of the owner, that a heritable creditor bringing the security subject to sale was incapacitated from bidding. It does not follow that the objection would be open to a disappointed competitor. But I participate in the hesitation expressed by Lord Fullarton, and I think the question even as raised in *Taylor* v. *Watson* (*cit.*) by the radical owner or one in his right is worthy of reconsideration. I think that it assumes that the *York Buildings Company's* case lays down an absolute canon, whereas the learned Lords who took part in the judgment were very particular to inquire into the nature and extent of the particular relation between the radical owner of the estate and the common agent in the sale—that is, into the circumstances bearing upon the fiduciary nature of the latter's position. I doubt whether the mandate to sell which the heritable creditor receives from the owner creates such a relation as precludes him bidding even in a question with the granter, let alone in one with a competing bidder. There is much to say in support of the view that his true relation both to the radical owner and those claiming through him and to a competing bidder, precludes the application of either the principle of *Grey's* case (*cit.*) or that of the *York Buildings Company* (*cit.*). What the mandate does imply is that the creditor will use proper business discretion in the mode of sale. Circumstances are conceivable in which the actings of a creditor selling might if he

bought in for himself give the debtor right of relief, not generally but in the circumstances.

I do not think, however, that we are required to canvass further *Taylor's* case (*cit.*), for the present bears to be discriminated even if that decision be accepted as a ruling authority. In *Faulds* v. *Corbet*, 1859, 21 D. 587, it was decided, for reasons which can hardly be disputed, that where trustees put up a property for sale a residuary legatee who is solely interested in it is precluded from bidding. In *Shiell* v. *Guthrie's Trustees*, 1874, 1 R. 1083, 11 S.L.R. 625, again, where trustees were the sellers, a single beneficiary out of several was held entitled to bid. In both these judgments Lord Glencorse, first as Lord Justice-Clerk and then as Lord President, took part, and both were well-considered decisions. *Pari ratione*, even if the heritable creditor be debarred on the authority of *Taylor's* case (*cit.*) the position of one who is not the heritable creditor but only one of seven joint heritable creditors, if there is no suggestion of collusion, or of acting secretly for the whole body and not for himself as an individual, is distinguishable, and no objection can be taken to his bid.

I think therefore that the Lord Ordinary's interlocutor should be affirmed.

LORD MACKENZIE—The pursuer seeks to reduce a sale by public roup to the defender Buchanan of certain heritable subjects in Kilmarnock at the price of £5400. He asks for declarator that he is the true purchaser of the property at the price of £4000. The ground upon which he bases his demand is that Buchanan bid for the property though he was one of seven heritable creditors holding a bond and disposition for £7000 over the subjects who were the exposers at the roup. The subjects belonged to the Kilmarnock Theatre Company, Limited, which was in liquidation. The other heritable creditors join with Buchanan in resisting the demand made. The result of the pursuer's success would be that there would be £1400 less to pay the heritable debt.

It is to be observed that the pursuer of this action is not the owner of the property. He cannot found upon any fiduciary relationship between himself and Buchanan. No assistance can be obtained by the pursuer from cases in which the ground of action was breach of fiduciary relationship, such as the case of the *York Buildings Co.* v. *Mackenzie*, 1793, M. 13,367, 3 Pat. App. 378.

The way in which the pursuer's case was put in argument was that when members of the public are invited to bid for property which is exposed for sale by public roup it is an implied term of the contract that the exposer shall not be a bidder unless there be a reserved power to bid. It may be conceded that if the exposer of property to public roup is a person other than the true owner, and if he purchases, the sale is voidable as in a question between him and the true owner. It does not follow that a third party has the same right, for the ground of challenge is the existence of a fiduciary relation. It is also true that if the exposer is the true owner he cannot bid for his own property. The principle on which this rests is that the bidding must be *bona fide* and not fictitious. No man *bona fide* bids for what already belongs in complete property to himself. The law therefore attributes to him the only motive possible. He does not bid in order to be preferred to the subjects, but in order to force another bidder to pay a higher price. The test of a *bona fide* bid is that a man desires to obtain property which is not his. The test of a fictitious bid is that it is made for the purpose of inducing an outside bidder to give a higher price. The case of *Grey* v. *Stewart*, 1753, M. 9560, is authority for this. There James Grey, the owner of lands, exposed them for sale by public roup to the highest offerer. Millar was the highest offerer, and Andrew Grey was the second. The action was at the instance of Andrew Grey on the ground that Millar was what is called in the report a "white bonnet." The Court sustained the pursuer's contention, and held that Millar's bid, being made by commission from and for behoof of James Grey, the seller, was illegal and fraudulent. It was mentioned from the bench "that this too common practice of employing 'white bonnets' at roups was a manifest cheat. The person who advertises a sale by auction pledges his faith to the public that he is to sell to the highest bidder and is not to buy for himself. In this case the pursuer was really the highest offerer, seeing the offer of a 'white bonnet' is no offer at all." This dictum must be taken *secundum subjectam materiam*, and cannot be taken to mean, as the pursuer here contended, that in all cases the advertiser, which he said meant the exposer, whether beneficially interested in the subject of sale or not, enters into an implied contract not to bid. Nor is this what Professor More represents the case as deciding. This seems clear from a comparison of More's Notes to Stair, pp. lx and xci, for in the former of the passages the case is dealt with under the head of "Fraud." The case of *Faulds* v. *Corbet*, 1859, 21 D. 587, in which Lord Wood delivered the opinon of the Court, was founded upon by the pursuer as authority for the proposition that the true ground of challenge is breach of contract. The circumstances in *Faulds* case (*cit.*) were peculiar. The bidder there was the residuary legatee, who was entitled to the whole residue after payment of debts. The bidding reached a figure that was enough to pay the debts, and the residuary legatee went on bidding after that. In effect this was bidding for what was his own property, for any surplus belonged to him. As Lord Wood says (at p. 593)—"I hold it to be clear that in entering into competition with the pursuer the defender was a mere fictitious offerer. He could not be otherwise. Let him offer what he might, if the property was knocked down to him he never could have anything to pay, for any payment made to the trustees would have been simply a fiction. It would have been a payment by himself to himself—a taking of the money out of one pocket to put into another. A person who offers

while he has not to pay cannot be a *bona fide* offerer. He can be nothing else than a fictitious offerer. Therefore in bidding up the price it could not be as a *bona fide* intending purchaser that the defender made his offers. It could only be as a fictitious offerer, to enhance the price which he was himself to receive." His Lordship then goes on to say that it was not necessary to aver fraud or fraudulent collusion between the defender and the trustees who put the property up for sale. The opinion of the Lord Ordinary (Lord Ardmillan), whose judgment was affirmed, is to this effect (at p. 589)—"No authority in the law of Scotland has been adduced by the defenders in support of the right of the person alone interested in the price and substantially the owner of the subject to bid it up at a public auction, and the principle of our law is all the other way. In a sale by public auction, where an upset price is fixed and no right to bid is reserved or notice given, it is the implied understanding and condition of the auction that all the bidding shall be real and by *bona fide* competitors, and that the seller shall not bid." When the Lord Ordinary says that the seller shall not bid, this is exegetical of what is meant by saying that the bidding must be real. In *Rutherfurd* v. *Macgregor & Co.*, 1891, 18 R. 1061, 28 S.L.R. 768, Lord Rutherfurd Clark (at p. 1065) refers to *Faulds* (*cit.*) as proceeding on the ground that a seller may not himself buy the subject he is selling. The exposers in the present case are heritable creditors, and what Lord Ardmillan says in *Faulds* (*cit.*) is inapplicable to such a case. As regards the debtor, there is a fiduciary duty on the part of the bondholder who exposes. There is no such duty towards third parties who bid. The challenge here is not by the radical owner but by a competing bidder. In the case of *Taylor* v. *Watson*, 1846, 8 D. 400, the challenge was at the instance of the radical owner, and this explains the wide terms in which the law is stated in the opinions. There Lord Mackenzie says (at p. 406)—"I hold it a general rule of law that a creditor having an heritable bond, with a power of sale, cannot sell to himself. He is the mandatory of the debtor in the sale of the land, and as such bound in duty to sell fairly, and with due diligence, to get a price for the benefit of the debtor." Lord Fullarton had doubts, which are expressed in the following passage (at p. 407)—"The only question then is, whether an heritable creditor, exposing lands to sale under a power of sale, is entitled to become a bidder. If this question had been open I should have entertained great doubts indeed in holding that a creditor was in the position of a trustee or agent. But I must now hold that point to have been settled by authorities both here and in England, which rest on considerations of expediency as forcible here. The case of *Jeffrey*, 1826, 4 S. 722, carries the principle very far indeed." The case of *Jeffrey* (*cit.*) was also a case where the challenge was by the owner. The law laid down in *Taylor* (*cit.*) does not in my opinion apply to a case like the present where the challenge is by another bidder. In *Cruickshank* v. *Williams*, 1849, 11 D. 614, the challenge was at the instance of a purchaser from the heritable creditor who had bought at the roup. The purpose of the action was to clear his title. It was held that the transaction had statutory protection under section 91 of the Bankruptcy Act (2 and 3 Vict. cap. 41), which empowered a creditor to purchase when the sale was under the Act. No doubt the Lord Ordinary (Lord Robertson) says (at p. 617), with reference to *Taylor* v. *Watson* (*cit.*)—"But unless the Act expressly sanction such a sale, it would be clearly void under the authority of that judgment and consistently with previous cases." The fact, however, is not adverted to by the Lord Ordinary or the Inner House that in *Taylor's* case the action was at the instance of the owner.

Two cases show that where there is no breach of fiduciary relationship the ground of challenge is that the bid was fictitious. These are *Shiell* v. *Guthrie's Trustees*, 1874, 1 R. 1083, 11 S.L.R. 625, and *Aberdein* v. *Fairweather, &c., Stratton's Trustees*, 1867, 5 Macph. 726, 35 S.L.R. 346. In *Shiell's* case (*cit.*) trust property in which several beneficiaries were interested was exposed for sale by the trustees at public roup and one of the beneficiaries purchased. The challenge was by a competing bidder. Lord Shand, who was the Lord Ordinary, shows clearly in his opinion the distinction between such a case and that of *Faulds* (*cit.*), which may be summarised thus—A real seller cannot sell his property to himself, for the right to it is already his. The offer by one beneficiary accepted or acquiesced in by the other beneficiaries binds the offerer as in a question with them to take the property at the sum offered. The Lord President and Lord Ardmillan both point out that the case was not one to which objection could be taken on the ground of *idem emptor et venditor*. The Lord President (Inglis), dealing with the different classes of cases, says this (at p. 1089)—"Though there be no suspicion of fraud, yet if a person in a fiduciary capacity becomes the purchaser of property held by him in that capacity, then the sale will be set aside at the suit of any persons having a sufficient interest. But to have sufficient interest the party must be a beneficiary under the trust. A third party, even though a competing bidder, has no interest." The concluding passage of the opinion of Lord Ardmillan seems to me applicable to the present case. The position of a competing bidder is made clear by *Aberdein* v. *Stratton's Trustees* (*cit.*). The pursuer's averments in that case which were held irrelevant were that two trustees had exposed heritage for sale by auction; that he had offered the upset price; that after competition between him and another party, who was the only other offerer, he had been declared the purchaser; and that he had discovered that the offers of his competitor had been made on behalf of the exposers or one of them. The action was dismissed. The Lord Justice-Clerk (Patton) says, at p. 732—"I think that the act of one out of a body of trustees in employing a party to bid for him cannot have

the legal effect of depriving the trust estate of the benefit of an advantageous sale, or lead to the conclusion that another and much lower offerer shall have the estate at what is manifestly an undervalue." Lord Cowan says (at p. 734)—"Those trustees who exposed the subjects in this case could not become joint purchasers as individuals without the risk of their purchase being set aside by the parties interested in the trust." Lord Neaves (at p. 736) says that if the trustee put forward someone to bid for him, "that could only be pleaded as an objection by the beneficiaries under the trust. They might repudiate the sale if they thought it for their interest to do so, but the public have nothing to do with that matter, and it would indeed be strange to compel the beneficiaries to set aside the highest offer and to give the property to a lower bidder, on a principle established solely for the benefit of the beneficiaries, to prevent trustees from getting too good a bargain from their private knowledge of the circumstances of the trust estate. That which is introduced as a privilege to the beneficiaries cannot become a privilege to the competing bidder, so as to turn it against the beneficiaries by giving effect to a still lower offer than the trustee has made." This seems directly applicable to the present case.

There being no averments in the case sufficient to show that Mr Buchanan was other than a *bona fide* bidder I am of opinion that the pursuer's case is irrelevant.

In this view it is unnecessary to consider whether the sale is protected by the terms of sections 108 and 116 of the Bankruptcy Act of 1913 (3 and 4 Geo. V, cap. 20). These provisions of the Bankruptcy Act are made applicable to liquidations by the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), section 213 (3). As regards the remedy sought it is not necessary to say anything, but reference may be made to what the Lord President says in *Shiell's* case (*cit.*).

I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD SKERRINGTON—The pursuer, an unsuccessful competitor at an auction sale of heritable property, brings this action, in which he concludes in the first place for reduction of the purchase of the subjects by the successful competitor. The ground of reduction is that the purchaser was one of seven creditors in a bond and disposition in security for £7000, and that these creditors being the exposers of the property, none of them could lawfully purchase. The pursuer concludes in the second place for declarator that he became the true purchaser of the property by offering the upset price of £4000. The price at which the property was knocked down to Mr Buchanan, the principal defender, and which the latter is able and is willing to pay, was £5400. The pursuer's last bid was £5300. It will be seen that there is no equity in favour of the pursuer's claim, which is resisted not only by Mr Buchanan but also by the other heritable creditors in the bond and disposition in security. The debtor in the bond, a limited company and its liquidators, have not lodged defences. The pursuer's counsel did not cite any authorities which directly supported his client's claim, but it remains to be considered whether there exists some legal principle which, properly applied to the facts of the present case, entitles the pursuer to the remedy which he seeks.

I concur with your Lordships in thinking that the pursuer's action fails. I do so upon the ground that if he has suffered a wrong at the hands of the defender Mr Buchanan, he has chosen a remedy which is incompetent in the circumstances. I refer, of course, to his conclusion that he must be deemed to have purchased the property at the upset price of £4000. Unless he can succeed in this conclusion he has no title or interest to challenge the sale to Mr Buchanan. Even if the purchase by the latter were reduced in the present action the heritable creditors would be under no obligation to re-expose the subjects to public auction, but might by arrangement with the liquidators sell the property privately to Mr Buchanan.

I do not think it necessary to express any opinion upon the question whether when a heritable creditor exposes the subject of his security to sale by auction in the exercise of a power of sale in the ordinary statutory form and without expressly reserving to himself a right to bid, a member of the public who bids at the roup has a legal right to complain if the selling creditor or one of the selling creditors buys the subjects at the auction or even bids for them. If such a question should hereafter arise there would be something to be said for the view that a heritable creditor has no mandate or authority from the debtor to sell the subject of the security to himself, that a member of the public bidding at an auction is entitled to assume that the sale will be conducted legally and in terms of the authority vested in the seller, and that if a heritable creditor thinks fit to buy or even to bid he is guilty of a breach of duty, not merely towards the debtor in the bond, but also towards the persons who on his invitation bid at the auction. It may, no doubt, be argued that the decision in *Aberdein* v. *Stratton's Trustees*, 1867, 5 Macph. 726, 3 S.L.R. 346, is conclusive against any such a contention. I do not so regard it, although the opinions of the Judges in that case may by analogy be used to found an argument against the competency of any person except the debtor in the bond or someone in his right challenging such a purchase. Assuming, however, that such a complaint is open to a member of the public bidding at a public sale, his natural remedy if he was the successful purchaser would be to ask for rescission of his bargain upon the ground that the price at which the property had been knocked down to him had been unfairly enhanced through the illegal intervention of the exposer. Again, I could understand an action of damages by one of the bidders being brought against the exposer upon the ground that the defender by his illegal conduct had made the auction sale abortive, and had thus deprived the pursuer of his

chance of purchasing the subjects. But what I do not understand is, upon what view it can be maintained that because a heritable creditor has committed a breach of the duty which he owed to the debtor in the bond the Court ought to subject the unfortunate debtor to the further disadvantage of being bound by a purely imaginary sale of his property at less than the highest price which was offered at the roup.

Before referring to the authorities cited by the pursuer in favour of this somewhat extraordinary claim, I may refer shortly to what has been decided as to the disability of a heritable creditor to purchase the security subjects when he himself is the exposer. If he is not the exposer, there is, of course, no disability—for example, if a second bondholder either bids for or buys subjects which were exposed for sale by the first bondholder—*Scottish Imperial Insurance Company* v. *Lamond*, 1883, 21 S.L.R. 98. The leading case as to the disability of a heritable creditor to fulfil the double rôle of seller and purchaser is *Taylor* v. *Watson*, 1846, 8 D. 400. That decision settled conclusively that it is illegal for a heritable creditor to purchase subjects of which he is himself the seller. Some of the opinions of the Judges are open to criticism, because they suggest that a heritable creditor is in the position of a trustee for sale. Obviously that is not so. A trustee for sale is a trustee or agent who is bound if he sells to act with a single eye to the interests of his trust or of his principal, whereas a heritable creditor is entitled to keep both his eyes firmly fixed upon his own interests. In justice, however, to the learned Judges in the case of *Taylor*, it is fair to point out that they were influenced by a passage which was cited to them from Sir Edward Sugden's Treatise on Sale, and which expressed what at that time was understood to be the law of England on this question. The legal fiction that a creditor is a trustee has long been abandoned in the country of its birth, and need not now trouble us in Scotland. The disability of a heritable creditor to purchase from himself may be justified upon the simple ground that if a person is authorised to sell another person's property, it is not reasonable to construe the authority as empowering him to sell the property to himself unless a contrary intention clearly appears. If he exceeds his power by selling to himself, it is probable, on the analogy of the case of *Fraser* v. *Hankey*, 1847, 9 D. 415, that the sale is not void but only voidable. In England, while it is settled that a mortgagee is not a trustee, it is also settled that he cannot sell to himself—*Farrar* v. *Farrars, Limited*, 1888, 40 Ch. D. 395 (*per* Lindley, L.J., at pp. 409, 410-11). I do not know whether a sale in violation of this rule is void or only voidable.

The pursuer relied primarily upon the case of *Grey* v. *Stewart*, 1753, M. 9560, in support of his claim that contrary to the known facts of the case he must be deemed to have purchased the property at the price of £4000. This case did not arise out of a purchase by a heritable creditor, but belonged to a somewhat different chapter of law—that relating to bids and purchases which are not merely voidable, as in the present case, but which are null and void because they are inept and fictitious. An example of a fictitious purchase or bid is where a beneficial owner of property puts it up for sale and purports either to buy it for himself or to bid for it. A man cannot buy his own property from himself, and if he attempts to do so the transaction is meaningless, inept, and wholly inoperative. The distinction between a fictitious transaction and one which is real and genuine, though objectionable as being unauthorised, is a very real and important one; but from the point of view of a member of the public who has been led on to bid against a competitor who afterwards proves to be disqualified from purchasing, I am not sure that there is any material difference between a disqualification which is absolute and incurable and one which may be cured provided some third party can be induced to ratify the transaction. Another distinction between the present case and that of *Grey* (*cit.*) is that the judgment in the latter case proceeded upon the ground that the seller had acted fraudulently. This distinction also I put aside as inconclusive, because the decision would, I think, have been the same even if it had appeared that the seller had acted honestly though under a mistaken view of his rights. The fundamental distinction between the present case and *Grey* v. *Stewart* (*cit.*) is that in the latter case the seller was the beneficial owner of the property which he exposed for sale. By making fictitious bids he was held to have committed a fraud, and apart from fraud he violated an implied condition of the sale. Accordingly on the principle of personal bar he was precluded from founding upon his own wrong by averring and proving that the auction had proved abortive. It followed that the pursuer was entitled to be treated as the purchaser. In the present case, however, Mr Buchanan, whom I regard as if he was the sole creditor in the bond, exposed for sale not his own property but that of the company and its liquidators. No breach of duty committed by Mr Buchanan could preclude these parties from averring and proving that the pursuer was not in fact the highest offerer. The case of *Grey* would have been in point if the seller in that case, being a trustee, had bid for and purchased the property in the interests of the trust, and with the object of preventing it from being sold at an under-value. Such a purchase would have been fictitious, there being complete identity between the seller and the purchaser. Could it have been seriously maintained in that case that, although in point of fact the auction sale had proved abortive through the fault of the trustee, it must by a fiction be treated as an auction in which the whole proceedings had been regular, and in which only a single competitor had appeared and offered the upset price? Nothing more unjust to the innocent beneficiaries can be imagined, seeing that the intervention of the seller, however well meaning, was likely to discourage the public from bidding. In a case which

actually occurred, a purchaser claimed successfully to be relieved from his purchase of part of a sequestrated estate because the bankrupt had appeared at the auction without the knowledge of his trustee and had bid for the property—*Anderson* v. *Stewart*, Dec. 16, 1814, F.C. Would the purchaser have been listened to if not content with being relieved of his bargain he had tried to set up an imaginary purchase by him at the upset price?

The view which I have expressed as to the incompetency of the remedy claimed in the present case derives support from the opinions of the Judges in the case of *Shiell* v. *Guthrie's Trustees*, 1874, 1 R. 1083, 11 S.L.R. 625. I cannot, however, agree with the Lord Ordinary in regarding that case as deciding that Mr Buchanan was entitled to bid at an auction where he himself was one of the exposers. In that case certain testamentary trustees were the exposers and the sole exposers, and the two residuary legatees who purchased the property at the auction were under no known disability which precluded them from purchasing. The only other case to which I need refer is *Faulds* v. *Corbet*, 1859, 21 D. 587—a decision strongly founded on by the pursuer. In that case, which was a judgment on relevancy, testamentary trustees exposed a property for sale at an upset price more than equivalent to the money which they required to raise in order to provide for certain charges. So far as appears from the report, the trustees acted in the matter, not as agents for the sole residuary legatee, but in pursuance of a duty committed to them by the testator. The Court took the view, however, that as the residuary legatee was entitled to receive the price obtained at the sale so far as exceeding the upset price he was virtually the exposer. If on the facts averred the Court was entitled to identify the residuary legatee with the exposers, as to which I reserve my opinion, it followed that the purchase by the former was fictitious. The pursuer claimed that the subjects had been sold to him, not at the amount of his highest bid, but at the amount of his lowest bid, namely, the upset price. The Court sustained the competency of the remedy claimed. In this case, however, as in *Grey's* case (*cit.*), the pursuer's demand inflicted no injustice upon innocent third parties. This decision accordingly does not help the pursuer. Founding upon certain expressions in the opinion of the Court in *Faulds'* case (*cit.*), the pursuer's counsel argued that in a sale by auction the exposer is under an implied contract to sell the property to the highest genuine offerer. If such were truly the contract the Court would be compelled to enforce it in every case, without regard to the consequences to innocent third parties, and irrespective of the question whether the seller was or was not to blame for the competition having proved abortive. I prefer to think that the exposer's obligation is in every case conditional upon the regularity and legality of the proceedings at the auction, although where he himself was in fault he may be personally barred from taking advantage of the fact.

The only point that remains to be noticed is the failure of the debtor in the bond (now represented by two liquidators) to appear and oppose the pursuer's demand that he should be treated as having purchased the property at £4000. The other creditors, however, in the bond have a clear interest to resist this demand, and I do not think that they are in any way precluded from doing so.

I accordingly think that the Lord Ordinary's interlocutor should be affirmed.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for the Pursuer (Reclaimer)—Christie, K.C.—Gentles. Agents—Weir & Macgregor, S.S.C.

Counsel for the Defender (Respondent) R. C. Buchanan—Horne, K.C.—Ingram. Agent—J. George Reid, Solicitor.

Counsel for the Compearing Defenders (Respondents) — MacRobert. Agents — Pringle & Clay, W.S.

Wednesday, November 15.

FIRST DIVISION.

[Lord Hunter, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* NIDDRIE AND BENHAR COAL COMPANY, LIMITED.

Railway—Carriage of Goods—Contract—Rates—Construction of Agreement with Trader.

One of several traders who all shipped coal from the same ports and had their goods carried at a group rate, claimed to have his carried at a reduced rate owing to his position nearer the docks. After many years of controversy, during which the trader had obtained some concession, though insufficient in his view, an agreement was made which, after dealing with connections, sidings, &c., provided—"(4) That the rate for coal to Leith and Granton for shipment be reduced to 9½d. per ton for coal in railway waggons, and 7½d. in traders' waggons, and that these rates be entered in the railway company's rate books, and be operative as from 1st October 1912. . . . (7) That for a period of ten years this company (the trader) will not directly or indirectly assist in the promotion of any new lines to Leith Docks (or other parts). such as, for instance, were embraced in the Lothian Railways Bill, and will continue during that period to give the railway company their traffic as heretofore." After the date of the agreement a general rise in rates took place, and the railway company raised the rates of all the traders in the district and added ½d. per ton to the rates in the agreement. The trader refused to pay the increase, and the railway company sued him therefor. *Held* that the agreement did