ART AND ANTIQUE AUCTIONS AND THE LAW

BY

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1. INTRODUCTION

Art and antique auctions are thriving as never before. The big auction houses abroad report sales records for single objects and an increasing volume of sales. It is the same in the Nordic countries, although on a smaller scale. The large Danish and Swedish auctioneers attract an international public while in Norway, though operations are more modest, the market is extremely active and the amounts of cash involved annually are considerable.

There are two reasons for this. First, during the last few decades prices in the art and antique market have risen sharply as objects of art have become international objects of investment. Speculative buying is on a steady increase. Secondly, the sale of arts and antiques has gradually turned away from the arts dealers to the auction firms. Between the wars, international trading in arts was dominated by firms such as Agnew and Wildenstein, through which the most important collections and single works changed hands. The turning point occurred in a very dramatic way on 15 October 1958 when Sotheby had seven impressionist paintings from the collection of the deceased Jacob Goldschmidt under the hammer. In 19 minutes they were all sold for £781,000, at that time an astronomic amount.[1] Internationally, that auction represented a milestone. It presaged the enormous price rise we have witnessed since, and laid the foundation for other forms of selling. Collectors and investors used to do their buying through galleries and arts dealers. From now on these came to play the part of agents, handling the buying at auctions or buying on their own account.

Today, most sales in the arts and antique market, at least internationally and probably also in Scandinavia, take place at auctions. Apparently, general opinion now has it that this way of selling on the whole guarantees the best prices for sellers, while at the same time buyers can be certain that they have bought at market prices and also have benefitted from the experience of the auction house. Despite the unpredictable occurrences and uncertainties linked with this form of selling, which may result in a disproportion between the quality of the work and the price, the main impression is that today there is nothing hazardous about buying art at an auction.

In view of this, it seems as if the ideas underlying the statutory rules

[1] See Jeremy Cooper, *Under the Hammer*, London 1977, p. 22.

on auction buying do not conform with present reality in the arts and antique market. The *travaux préparatoires* to the Sale of Goods Act of 24 May 1907 No. 2 state that "When objects are sold at an auction, the customary opinion is that they are bought 'as is', with no guarantee from the seller. Thus, the buyer himself must find out whether the objects have the qualities he expects them to have."[2] Apart from the fact that the statement on customary opinion may be somewhat dubious,[3] the thinking seems to show that auctions are regarded as pure horse-trading where the buyer can get what he wants for a song but where he must also risk buying a pig in a poke.

The statement in the Sale of Goods Act draft of 1976 that auction sales are not so common as they used to be,[4] probably only applies to such auctions, although used-car auctions may be an exception. However, as for auctions of the kind we are concerned with here, it cannot be true that such buying is inherently hazardous, with the constraints so loose that sellers and buyers are very much leading each other up the garden path. The basic attitude to be reflected below is that the demand on good faith applies to these purchases also; but that it must be adjusted to the special form of selling we are dealing with.

Legislation on auctions is sparse. In addition to the well-known rule in sec. 48 of the Sale of Goods Act, an Act on public auctions and invitations to tender of 14 August 1918 No. 3 (the Auctions Act) contains some provisions of interest in a private law context, and an Act on debt collection, auctions and legal aid of 1 February 1936 No. 1 deals with a rather moderate system of licensing for such activities. The following discussion will be limited to the private law aspects of auction sales; the public law requirements are so insignificant that they seem to provide but little safety for the parties.

1.1. *The parties to auction buying*

Normally, three parties are involved in auction buying; the seller (below sometimes called the principal), the auction business (which will be used as a not very precise term for the person who has accepted the commission) and the buyer. The parties may also have intermediaries as their representatives. Thus, in British auction practice the buyer very often gets one of the auction firm's sales clerks to take care of the bidding.

[2] *Travaux préparatoires* to Act on Purchases, Kristiania 1904, p. 60.

[3] Professor Hagerup advocates the opposite in his 1884 lectures on purchases, see Francis Hagerup, *Om Kjøb og Salg* (On Sales and Purchases), 2nd ed. Kristiania 1884, p. 90.

[4] *NOU* 1976:34, p. 80.

Similar arrangements can be found in Denmark where the tradition is also that the member of the staff receives a fee of 2 per cent of the "hammer price". In Norway such commissions are usually handled free of charge by the auction firm, and we shall therefore not discuss such arrangements.

Under the Auctions Act, sec. 7, second paragraph, a person whose business it is to hold auctions for others cannot sell something on his own account at auctions of other persons' property. Even if this rule is not always observed (some auction firms advertise that they buy whole decedent estates for cash for re-sale) it means that the kind of auction we are dealing with here will normally take place for a third party's account. Also, sales always take place in the name of the auction firm. Thus, the auction firm does not act as an agent, but as a factor and sellers normally remain anonymous. This means that the provisions of the Act relating to mercantile agency, sec. 4, second paragraph, apply, and that the auction firm becomes solely liable to the buyer for fulfilment of the agreement according to sec. 56, first paragraph. The firm cannot reject disputes concerning the purchase and refer the buyer to the seller instead, even though the buyer was fully aware that the agreement was not concluded by the firm on its own account, but on behalf of the seller. The question figured in a decision reported in 1975 NJA 152 where *Auktionsverket* in Stockholm (a municipally-owned auction firm), in a dispute with the buyer of a painting offered at an auction, alleged in vain that the suit was incorrectly filed, and that the claim must instead be directed against the seller.

> It was held that "Auktionsverket does not sell in its own name but only performs a public law function" (p. 153), but this was not accepted. The courts held that "Auktionsverket, which sold the goods on behalf of the seller, must be considered as having acted in the capacity of his commissioner. Therefore the municipality has no grounds for its objection that the municipality should not be the proper defendant in the case" (p. 154).

What follows is an attempt to describe some important legal aspects of auction sales. The order will be chronological, from the owner's delivery of the sales object to the auctioneer up until fulfilment of the final purchase agreement. In between, a few detours will lead the reader temporarily away from the main project.

2. THE DESCRIPTION

The first thing that happens when the auctioneer and the seller meet is that a *description* is undertaken of the object to be offered for sale. For

ordinary purchases, the main rule is that the seller is presumed to know what he is offering, so that the risk of a so-called *error in substantia* is his, and he cannot then allege that the performance he has promised is worth more than he thought.[5] The underlying reason is that the seller as a rule is the one who knows the sales object best. However, in the relations between the seller and the auction firm this view can hardly be upheld. The auction firm is a professional trader who undertakes to try to obtain the best possible price for the object by offering it at an auction.[6] However, if the object is not properly described, the right price will normally not be obtained. Therefore, the starting point must be that the auctioneer has a duty to show care in relation to the seller. He will be liable in tort if the object is inadequately described or presented. Sec. 7, first sentence, of the Act on Commissions supports this assumption.

When assessing what demands can be made on the auctioneer's expertise, a distinction must be made between the typical specialist auction business selling, for instance, only coins, stamps or international graphic art, and the more ordinary auction houses which receive all kinds of art objects and antiques. Large auction houses abroad have their own expert departments, which makes this distinction superfluous.

Great demands must be made on the specialist auction firms. They must normally be presumed to be familiar with the principal specialist literature, and also to know the market. These demands are not unreasonable considering the flow of existing information on such special objects. On the other hand, an auction firm cannot normally be expected to possess the same knowledge as museum staff who are experts within their fields. For instance, the rarity of a Greek or Roman coin can be determined by finding out how many similar specimens exist in the most important public collections all over the world. If there is no similar coin in the British Museum, this seems to suggest very strongly that the coin is unique. But one cannot as a rule expect auctioneers to possess such specialist knowledge. The situation might indicate, however, that the auctioneer ought to seek expert advice: relying exclusively on his own expertise may lead to liability.

A few examples from real life may show where the borderline should be drawn.

[5] See Oscar Platou, *Privatrettens almindelige del* (Private Law, General Section), Kristiania 1914, p. 187, and in *Rt.* 1911, p. 554, H. Ussing, *Aftaler* (Contracts), 2nd ed. Copenhagen 1945, p. 497 with further references.

[6] Cf. Charlesworth & Percy, *On Negligence*, 7th ed. London 1983, p. 530.

Some years ago Christie's sold the remainder of a large collection owned by a noble family. Among the objects was a marble bust collected on a "grand tour" by one of the previous owners, and it was described simply as an Italian Baroque, showing a prelate. A lucky buyer got the bust for a modest sum. Later it was easily established that this was a work by Bernini. Nothing is known about the legal sequel to this case, but both the provenance of the work and its unquestionable quality do indicate that in this case Christie's description was unjustifiably superficial.

In 1933, on the other hand, the firm's conduct was probably acceptable when a 21-year old journalist, Pierre Jannerat, greatly interested in Italian Renaissance, acquired a small bronze horse at an auction for 11 1/2 guineas. He was convinced right from the start that he had snatched a work by Leonardo da Vinci from under the eyes of the international art dealers. For many years, museum people scoffed, but after long and detailed research, he succeeded in convincing experts that this must be one of the few existing sculptures by Leonardo, made after a wax model of the battle of Anghiari.[7] The value of the bronze must have far exceeded £100,000, but there can be no doubt that the unfortunate sellers could not claim compensation from the auctioneer.

As for the less specialized auction firms which receive the whole spectrum of works of art and antiques, that is, most of the dealers in Scandinavia, the demands on the standard of care must be different. It must be recognized that an auction business cannot be an expert in every possible field. On the other hand, the firm must be expected to maintain a reasonably professional standard. The staff must therefore have general knowledge of art history, and must be able to distinguish between the main types of object. The most elementary classification of the object must as a rule be correct. The firm must be able to distinguish between a machine-woven carpet and a handwoven one, a graphic print and a reproduction, hand-made silver and machined silver, cut glass and moulded glass etc.

Strangely enough, mistakes do occur even in reputable auction firms. The present author himself has seen a woodcut by Gustav Vigeland being clubbed as a signed reproduction for a few hundred Norwegian kroner, only to turn up later at one of the city antique dealer's at a price more than twenty times the sales price.

Further demands must depend on the nature of the object. If the objects are simple things for ordinary use, the autioneer's elementary classification may suffice. The decisive factor must be whether the description seems to be sufficiently correct to secure the right price. Where valuable art or antiques are concerned, a more reliable definition is usually required.

[7] See Cooper, *op.cit.*, p. 35.

The level of requirement depends to some extent on conflicting considerations. The desire to obtain the best possible price indicates that a rather thorough specification should be given. On the other hand, the auctioneer does not enjoy expert knowledge, and an incorrect description may be to the seller's disadvantage as he may be sued for non-performance under sec. 48 of the Sale of Goods Act.

Nevertheless, a high degree of accuracy is required. The auctioneer is a professional and he must be judged in that capacity. When he is selling a carpet, it is not good enough to describe it as Persian or Turkish.

> If the carpet is of good quality, its origin must be described in some detail, because its value depends very much on where it was produced. But the auctioneer does not have to say much about its age; whether it is antique, semi-antique or only used can often be so hard to determine that expert knowledge is required and circumstances may indicate that an expert ought to be consulted. In the same way, old silver ought to be classified in more detail if marked decipherably. And in the case of a graphic print by an internationally known artist, *oeuvre* catalogues *ought* to be consulted because they can provide information about the rarity of the picture which may have considerable influence on the price.

A recent English court ruling marks a borderline case. A Mrs Penelope Luxmoore-May in Surrey had been given as a wedding present two plain paintings of some fox-hounds. The paintings had been exiled to an obscure place in the hall for forty years until the owner took them to a small auction business in the neighbouring village. The auctioneer's staff found the paintings rather uninteresting, but to be on the safe side showed them at one of the weekly exhibitions at Christie's in London. After a short inspection, an assistant there valued them at between fifty and sixty pounds. The auctioneer took the pictures back and offered them for sale. It came as quite a surprise to both auctioneer and owner that they fetched nearly 900 pounds, and the owner began to have misgivings. If the paintings could fetch so much at a small country auction, they might actually be worth more. Mrs Luxmoore-May became quite angry when some time later she saw in the newspapers that two small oil paintings by George Stubbs, the 18th-century master, had been sold at Sotheby's for close to 100,000 pounds. They were her pictures. She later sued the small auction firm for 80,000 pounds in damages. Her claim was upheld by the High Court of Justice. The judge deemed it negligent that the auction firm had not discovered the potential of the paintings, and reasoned that the auctioneer's duty was not discharged by simply handing the work over the counter at a major metropolitan house such as Christie's or Sotheby's (*Luxmoore-May* v.

Messengeer May Baverstock. The Times, November 23, 1988, Simon Brown J.).

If it proves impossible to define an object with the resources available to the auction firm, the question is whether the auctioneer ought to withdraw and refuse to accept the object for sale. A Tang horse, for example, if genuine, might be very valuable; but it may not be possible to establish its authenticity with the expertise available in this country. If the auctioneer informs the seller that uncertainty about the age of the object will influence the price and at the same time tries to take care of the seller's interests by agreeing on an adequate reserve price, then the auction firm must be presumed to be in the clear. If, on the other hand, the firm accepts the commission without reservation, liability ought probably to arise.

3. THE RESERVE PRICE

The foregoing brings us to the question of *agreed reserve price*, which is usually the next step in the sales procedure. A number of problems may crop up here.

3.1. The first question is what standard of due care the auctioneer must observe in relation to the seller when fixing the reserve price. If the seller has perhaps already made up his mind not to fix a reserve price, this is of course decisive; unless his decision appears to be based on obvious misjudgment, in which case the auction business will have a duty of guidance. Otherwise, when defining the standard of care, there is always some conflict of interest between the parties. The seller wants to be certain that the object is not sold too cheaply, while the auction firm cannot prosper from objects that are withdrawn for lack of an acceptable offer. This problem is much more acute in Norway than in England; here fees are paid *only* on completed sales, whereas sellers in England must normally pay 5 per cent of the reserve price regardless of whether that price is reached.[8] It must therefore be accepted that the auctioneer tries to agree on more moderate reserve prices, provided they are not unjustifiably low.

3.2. The next question is whether the auctioneer is obliged to conceal the agreed reserve price. For certain objects such as coins and stamps,

[8] See Cooper, *op.cit.*, p. 28.

the established practice seems to be that the reserve price is stated. There should be nothing questionable about this, considering that such objects usually have a fixed catalogue price; so that a low reserve price is not likely to depress the price much. As for other objects, there seems to be no firm practice. Until a few years ago, one of the big Oslo arts auctioneers disclosed reserve prices if requested. But the main impression today is that this is not done any more. In England, firmly established practice keeps reserve prices absolutely secret.[9] There may be good reasons for this. A low reserve price for an object without a definite market price may tend to hold the price down. People buy as cheaply as possible, and information about how low the seller might be willing to go might make bidders hold back. Besides, it might make it easier to establish a *ring*, where buyers pay each other to refrain from buying, cf. below under 5.7. This seems to indicate strongly that the auction firm should as a main rule have a duty to keep reserve prices secret.

3.3. Where the reserve price is not obtained, one may also ask whether the auction firm has a right to make bids on its own behalf and thus become the owner of the object. The clue here is the agent's contracting on his own behalf, which is regulated in detail in secs. 40–45 of the Act on Commissions. According to sec. 40, the agent can "only where agreement, usages of the trade or other customary practice gives him such right, perform the assignment by appearing as the buyer ... for his own account". The basic principle is therefore that there exists no right to contract on one's own behalf, and that, if this is to be done, it requires a specific basis in the law. In England, the auctioneer sometimes guarantees to pay a reserve price to the seller even if the bids do not reach that price. Big auction houses usually mark objects with a "minimum price guarantee" with a "G" in the catalogue. In such cases the right to contract on one's own behalf is of course evident, but there appear to be no similar agreements in Norway. And the practice of buying on one's own account will hardly be recognized as usage of trade or other custom by the courts. Such practice would have to be disregarded as unreasonable, cf. sec. 36 of the Contracts Act.

The point of departure must be that a person who puts up his property for sale at an auction presumes that it will be sold after free bidding, at the best possible price; and that the auctioneer will not be allowed to buy it cheaply for himself because of possible unfortunate

[9] See Cooper, *op.cit.*, p. 29.

circumstances. The combination auction/reserve-price-unobtained is therefore not adequate as a legal basis for purchase by the auctioneer.

3.4. A rather different issue is whether the auctioneer is permitted in relation to the seller to sell the object privately instead of putting it up for auction.

In principle, to sell privately must be in conflict with the assignment. Normally, permission to sell in ways other than by auction cannot be implied. This view was maintained in English law as early as the 18th century in *Daniel* v. *Adams*.[10] A husband and a wife instructed their steward to sell some property at an auction, with a reserve price of £120 per object. The auctioneer thought he had a right to sell privately so long as he achieved the reserve price, and he sold the objetcs for £150, which was well above the reserve price. The sellers refused to effect the sale, however, and their standpoint was upheld. The question of principle must be the same in Norway.

On the other hand, it is not quite certain whether the auction firm has a right to sell privately at the reserve price, where this has not been achieved at the auction. In such a case, the property has been offered in the market and no purchaser has been found, so that there should be nothing risky in a private sale. And yet unpredictable things do happen in the auction trade, so that the property might well achieve a price above the reserve at a later auction. There seem to be strong indications therefore that private sales require the advance consent of the seller.

3.5. If the auction house should by mistake knock down the object at a price below the reserve, the question is whether the principal is nevertheless bound by the agreement. According to sec. 54 of the Act on Commissions, the buyer will "nevertheless be entitled to the property if he, at the conclusion of the agreement, neither knew nor ought to have known that the agent by the agreement substantially disregarded the demands of the principal".[11] Thus, good faith is sufficient. Even if the buyer feels that the lot has become his at a suspiciously low price, he ought also to have realized that the auctioneer had here largely neglected the seller's interests. Can the text of the law be taken literally in this respect? Sec. 54 of the Act on Commissions is older than sec. 33 of the

[10] (1764) Amb 495. See also Harvey & Meisel, *Auctions. Law and Practice*, London 1985, pp. 20 f.

[11] See also Phillips Hult, *Om kommissionärsavtalet* (On Commission Contracts), Stockholm 1936, pp. 109 f.

Act on Contracts and precedes further development of the principle of "honesty or good faith". The buyer can probably not claim his right under the agreement if the latter conflicts with sec. 33 of the Act on Contracts. Since accidents are more frequent at auctions than in the case of ordinary purchases, the buyer must have more margin than otherwise, and the question of a narrower interpretation of sec. 54 of the Act on Commissions is therefore of more formal significance.

Clearly, the fact that an object is sold at a price far below a fixed assessment price is insufficient to make the buyer lose his title to the object. It happens quite often that the hammer price is far below the assessed value. If it has been stated in advance that the property shall be sold at the best possible price, without a reserve (which is quite common in connection with decedent estates) the buyer must be able to count on everything being above board. This point of view chimes well with the decision in an English case, *Rainbow* v. *Howkins*.[12] On the other hand, the buyer's knowledge that the object was offered with a reserve price cannot be decisive, even though this was presumed in another English court decision, *McManus* v. *Fortescue*.[13] Here the view was that the auction purchase was made on the conditions stated in the catalogue, including a reservation about reserve prices. In Norway, when applying sec. 54 of the Act on Commissions it should at least be required that the reserve price be stated in advance. And even so, it must be accepted that the buyer may rely on a somewhat lower bid being within the price which the auctioneer can agree to. If nothing is said about a reserve price, the buyer's right under sec. 54 is fairly secure. The main rule must be that the buyer is entitled to the property and that the dissatisfied seller must seek compensation from the auctioneer.

3.6. Under sec. 7, second sentence, of the Act on Commissions, the agent must comply with his principal's instructions as far as is possible.

This rule must imply that the seller has a right to instruct the auction firm further as to reserve price, also including raising the price. Thus the original agreement on a reserve is not binding on the seller. The right to raise the reserve price must stand, even if the new price may prevent a sale. The fact that the property has already been entered in the auction catalogue at a lower assessment price can hardly be presumed to prevent the auction firm from following the seller's new instructions.

[12] [1904] 2 K.B. 322.
[13] [1907] 2 K.B.1. See also *Bowstead on Agency*, 14th ed. London 1976, p. 248.

4. CUSTODIAL RESPONSIBILITY

Auction firms handle large values that are often exposed to damage. Precious china may become chipped or cracked, antique furniture may get scratched, canvases may be cut or torn. In addition to the risk of physical damage, the property may also be stolen, etc.

Section 10, second paragraph, of the Act on Commissions obliges a commission agent to keep the property insured against fire, unless this should be unnecessary considering the nature of the property or other circumstances. The law lays down no other duty for auction firms to insure the property. It is therefore of considerable interest to find out what kind of liability for property received the auctioneer has vis-à-vis the principal or a possible buyer.

NL 5-8-17 (the Norwegian Code of 1683) contains rules on safe-keeping which must be presumed to impose a liability for damages with the burden of proof resting on the owner. The theory has been, however, that the rule is applicable only where safe-keeping is the chief purpose of the contract.[14] This leaves the rule of sec. 10, first paragraph, of the Act on Commissions, which imposes on the agent a duty of safe-keeping of property handed to him by the principal for sale. The Norwegian scholar Sandvik points out that liability for breaking this rule presupposes negligence and maintains that, in accordance with ordinary thinking, the person claiming compensation must prove negligence.[15] The present author disagrees. General theory states that the burden of proof of negligence in contract shall be shifted unless thereby the debtor's contractual obligation, given the character of the contract and the damage occurring, should prove more burdensome than it would be with an equitable division of the burden between the parties.[16] In cases such as the present one, where the debtor is most able to account for the cause of the damage, general principles lead to a shifting of the burden of proof.[17] A decision in 1964 NRt 132 supports such a reversal of burden of proof.

[14] See L.M.B. Aubert, *Den norske Obligationsrets specielle Del* (The Law on Contracts and Torts. Special Section), vol. 1, 2nd ed. Kristiania 1901, p. 335, also H. Ussing, *Enkelte kontrakter* (Some Contracts), Copenhagen 1940, pp. 379 f.

[15] See Tore Sandvik, *Handelsagenturer og andre mellommannsforhold i varehandelen* (Mercantile Agencies and Other Agency Relationships in the Commodity Trade), Oslo 1971, p. 85.

[16] See Bernhard Gomard, *Obligationsretten i en nøddeskal* (The Law of Contracts in a Nutshell), vol. 2, Copenhagen 1972, p. 154.

[17] Gomard, *op.cit.*, p. 155, and Erling Selvig in *Knophs Oversikt over Norges Rett* (Knoph's Introduction to Norwegian Law), 8th ed. Oslo 1981, p. 440.

> This case concerned compensation for aircraft snow-skis that were to be covered in plastic, but which were destroyed during a fire at the plastics factory. The judge delivering the first vote of the unanimous Supreme Court stated that "When adjudging this case, my reasoning is that as the damage occurred on the factory premises and while the damaged objects were in the factory's custody, it must be the factory that shall provide all the information necessary to prove that no fault on its part has caused the damage. I also find that as the factory in its activities processes particularly inflammable materials, adequate measures must be taken to counteract this special hazard" (p. 133).

What exactly must be proved is not quite clear. The statements in the 1964 decision probably tend to free an auction firm if it can be proved that the firm has taken reasonable precautions against damage. A decision reported in 1968 NJA 17 does go one step further, however. Some Chinese export porcelain had been sent in for auction, and when the pieces were to be delivered to the buyers, it appeared that there had been some damage to the edges so that the buyers did not want to stand by the agreement. The Swedish Supreme Court stated that "As the [lower] courts have found, it must be considered certain that the damage to the china in question occurred only after the auctioneer's duty of care had commenced. There has been no report as to the cause of the damage, and it has not therefore been proved that it cannot be attributed to negligence on the part of the auctioneer" (p. 23).

5. THE BIDDING

The next stage is the *bidding* itself, which we shall look at in some more detail.

5.1. It may happen that the property is withdrawn before the auction starts, so that interested parties get no chance to buy at all. This gives rise to at least two questions.

First, the disappointed would-be buyer may have incurred some expense in connection with the purchase, and he may now seek recompense, arguing that the announcement of the auction implies a promise that actual attempts will be made to effect the sale. In other words, he claims compensation for the so-called tort measure of damages such as travelling expenses, fees for consultation of experts etc. In reality, such expectations seem too loosely founded to warrant compensation under tort law. Potential buyers have no guarantee of actually acquiring the property, so that their expenses in this connection may anyway be in

vain. Hence an English court decision on this issue, *Harris* v. *Nickerson*,[18] where compensation was refused, must be applicable in this country too.

> In this case the court stated: "This is certainly a startling proposition and would be excessively inconvenient if carried out. It amounts to saying that anyone who advertises a sale by publishing an advertisement becomes responsible to everybody who attends the sale for his cab hire or travelling expenses."

As for the case, unusual in this field, that an auction has been advertised "all lots must be sold", the Norwegian scholar Arnholm presumes that those who are interested in bidding should be able to claim at least compensation for expenses incurred if the auction is stopped, but probably also that the auctioneer must accept one of the bids.[19] The Swedish scholar Karlgren goes one step further and states that there should be a duty to compensate where "an auction of movables is stopped or substantially reduced without proper cause".[20]

One may entertain some doubt about this. First, the difficulties in obtaining proof must tell against the solution.

The second issue is whether in relation to the auction firm the principal has a right to withdraw the property before the auction begins. Failing an agreement on this, which presumably is a rare occurrence, the decision must be based on policy considerations. In practice, withdrawal seems to be widely accepted, but this may of course be due to the generous attitude of the auctioneer. Apart from the lost prospect of profit, the auctioneer may have incurred direct expenses, such as description and photographing, in connection with the catalogue entry. On the other hand, the prospect of sales is always uncertain, and, besides, the principal may in practice preclude any sale by fixing the reserve price at an unwarranted high level before the auction starts. As mentioned above, it must be assumed that the auctioneer is bound by such instructions. There is therefore every indication that the principal should be allowed to withdraw the property provided he compensates the auctioneer for his expenses.

5.2. When the object is called out at the auction, the general opinion in Norway seems to be that this is to be regarded only as an invitation to

[18] (1873) L R 8 Q.B. 286.

[19] See Carl Jacob Arnholm, *Privatrett II, Avtaler* (Private Law II, Contracts), Oslo 1964, p. 66, note 2.

[20] See Hjalmar Karlgren, *Avtalsrättsliga spörsmål* (Contract Law Issues), 2nd ed. Stockholm 1954, p. 18, note 13.

bid.[21] It has also been assumed in English law ever since *Payne* v. *Cave* in 1789[22] that the announcement is not a binding offer making the highest bidder the acceptant, with agreement being concluded when the last bid has been made, but that it is only an attempt to "set the ball rolling".[23] Many auction terms contain rules stating that the lot shall be knocked down to the highest bidder, but that the auctioneer can reject any bid. Legally, such reservations must be superfluous: bids are to be regarded as offers, and the auctioneer is of course free to choose between them. There exists no duty of contracting in that respect. However, in relation to the principal there is a duty to achieve the best possible agreement, so that the highest bid is normally what the auctioneer has to accept.

In Anglo-American law, the bidder is supposed to have a right to withdraw his bid until the hammer falls.[24] In Norway the starting point is the opposite; according to the usual principles for promises, the bid is considered binding when it has come to the knowledge of the auctioneer. It is possible, however, to withdraw *re integra*, and it is also believed that the bidder has a right to withdraw an oral bid so long as it has not been accepted.[25] So, even if the point of departure is the opposite, the rule here too is that a bid is not binding until accepted; and in any circumstance the bid must be presumed to lapse when followed by a higher bid which is not immediately rejected.[26]

A binding agreement is not concluded until the auctioneer accepts the bid by letting the hammer fall or in some other way. Sec. 11 of the Act on Auctions prescribes that "before the hammer falls, the highest bid shall be announced repeatedly and in a loud and clear voice". This must be regarded as a regulation, the violation of which has no private law effects. A bid made after the fall of the hammer cannot be considered. The auctioneer can, on the other hand, resume the bidding under sec. 11, second paragraph, of the Act on Auctions if it appears that two or more persons have made the highest bid or if a dispute arises about the bid. If the bid is not raised, the law says that the auctioneer shall decide "who shall be considered the highest bidder", which must mean that he can accept one of the bids as the final one.

By accepting a bid, the auction firm has assumed a duty of care in

[21] See Arnholm, *op.cit.*, p. 66, and Ussing, *Aftaler*, p. 36.
[22] See Cheshire and Fifoot, *Law of Contract*, 10th ed. London 1981, p. 28.
[23] (1789) 3 Term Rep 148.
[24] See Sale of Goods Act 1979, sec. 57(2), cf. Cheshire & Fifoot, *op.cit.*, p. 28, and John D. Calamari and Joseph M. Perillo, *The Law of Contracts*, St. Paul 1970, p. 24.
[25] See Arnholm, *op.cit.*, pp. 58 f.
[26] See Ussing, *Aftaler*, p. 77.

relation to the seller. First, the firm must normally accept only the highest bid, and it must withdraw the property if the agreed reserve price has not been reached. Whether the auction firm must otherwise decide not to accept a bid because it is impossibly low, is less certain. If the lot has achieved the agreed reserve price, the auctioneer is at any rate on the safe side. The situation is less clear where no reserve price has been agreed. The indications are probably that the auction firm shall not be burdened with the task of checking the bid, because the seller deliberately takes the risk of selling in this way. Moreover, when accepting a bid, the auctioneer must be sure to note the buyer's identity in accordance with sec. 12, second paragraph, of the Act on Auctions. This must not be considered absolute, however. In the English case of *Hardial Singh* v. *Hillyer & Hillyer*,[27] the auction firm was freed from the principals' claim for compensation, because the buyer disappeared from the premises making it impossible for the staff to get his name and address. Most Norwegian rules regarding auctions lay down that the lot shall be paid for in cash on collection, and that it shall be collected within a short, definite time limit. This is customary here. Therefore, it cannot normally be considered as negligence on the part of the auctioneer that he does not demand security at the fall of the hammer, for instance by payment of a deposit. This by the way is also the case in English law following the decision in the case of *Andrade (Cyril) Ltd.* v. *Sotheby & Co.*[28]

> There was much publicity about the case because of the people involved. At an auction at Sotheby's a very fine suit of armour was knocked down for £5000 to a Mr. Bartel who had previously appeared as the agent of William Randolph Hearst, the newspaper owner, and whom he was believed to represent again. For this reason, Sotheby's did not require a deposit from Mr. Bartel, even though the terms prescribed that a deposit had to be paid "if required". Later Mr. Hearst refused to stand by the purchase, as Mr. Bartel had not acted upon authority from him, and the armour was returned to the sellers. The sellers sued Sotheby and demanded £2500 in compensation, representing the 50 per cent deposit that Sotheby should have claimed, but the firm was acquitted. The reasoning was that there was a firm practice of not requiring a deposit unless the buyer was unknown or the firm lacked the necessary confidence in him.

As regards the actual collection of the purchase amount, sec. 7 of the Act on Commissions prescribes that the auctioneer is not obliged to reveal the identity of the purchaser to the principal; on the other hand,

[27] (1979) E. G. 951.
[28] (1931) 47 T.L.R. 244.

the auctioneer himself will then be responsible for the purchasing sum under sec. 14, second paragraph. If the buyer does not pay within the fixed time limit, it follows from sec. 57, second paragraph, that the principal may proceed directly against him. According to these provisions, therefore, the auction business is responsible for the purchasing price when they refuse to reveal the identity of the buyer who fails to pay. A further statutory responsibility is probably contained in sec. 8 of the Act on Auctions, which lays down that "if the auctioneer or other agent has undertaken to collect the payment, he is in his capacity as guarantor responsible for correct payment". However, it is probably correct to distinguish between undertaking to receive settlement, which is the normal substance of the commission agreement between the principal and the auction firm, and undertaking to collect payment. In other words, the rule must be narrowly construed, so that the auction firm does not automatically have a responsibility as surety. This view corresponds to that of English law, where *Chelmsford Auctions Ltd.* v. *Poole* established the auction firm's right to collect the purchasing amount from the buyer,[29] and in *Fordham* v. *Christie, Manson & Woods Ltd.* it was decided that the auctioneer had no obligation vis-à-vis the principal to effect collection.[30]

5.3. Bids may be made expressly, but of course also by tacit conduct. In Norway the former method is the most common, while in international auction houses the practice of bidding by agreed conduct is quite widespread. This is often preceded by a "bidding arrangement" agreed upon between the customer and the auctioneer, where the choice of signs to be considered as bids is specified in detail. Such agreements may be rather complex, and may make the auction quite an ordeal for the auctioneer. The purpose of such arrangements is usually to ensure a bidder's anonymity during the bidding, so as to avoid raising prices. If it becomes known that for instance a big dealer, a museum or a famous art collector is bidding, this in itself will tend to press prices up.

To bid by signs agreed upon in advance is not without risk. The bid may be overlooked. In such case it is doubtful whether there are legal grounds for resuming the bidding, and in any case the bidder will by then have lost his anonymity. Any accidental bid must be considered binding according to the "bidding arrangement" made.

> In a famous case a collector had made an agreement to the effect that the sales clerk of an auction business should bid on his behalf until he placed a

[29] [1973] 1 Q.B. 542.
[30] *The Times*, June 24, 1977.

> pen in the breast pocket of his suit. Of course, the inevitable happened; the collector dropped the pen and while he was frantically trying to find it among the legs of the people there, the sales clerk had spent a small fortune for which the collector had not been prepared.[31]

5.4. It may happen that the fixed reserve price for the property is not obtained. According to English practice, the auctioneer will then continue the bidding "off the wall", meaning that he will pretend that bids are still being made until the reserve price has been reached.[32] Since, as we have seen, bidding often takes place by previously agreed signs or gestures, it will be impossible for those present to check what is going on. One might call this pure conjuring, the only purpose of which is to trick others present into overbidding. However, in England, two reasons are cited in favour of this practice; formally, bids "off the wall" are considered as being bids by the seller himself, because, as mentioned, he will have to pay a fee of 5 per cent of the reserve price to get his property back. To this can be added a more valid argument: it is generally considered extremely detrimental to the property if the reserve price is not achieved. At the big London auctions, this is held to show that the lot does not attract sufficient interest from a representative selection of potential buyers. Therefore, out of regard to the seller, it ought not to be known that the object has been withdrawn.

In Norway no such considerations apply. The seller may have his property back free of charge, and besides, accidental occurrences play such a considerable part at auction sales that the property will probably come to no harm if it becomes known that the reserve price has not been attained. On the other hand, the dubious aspects of the English system seem conspicuous; the risks of abuse and of cheating the public are obvious. Therefore, everything seems to indicate that such practice should be considered illegal in Norway, and that in that case bids made will be invalid according to sec. 33 of the Act on Contracts.

5.5. The paragraph above leads us naturally to a related problem. It happens, probably rather often, that the seller bids for his own lot in order to raise the price. Such so-called puffing occasions complex and unsolved problems. If puffing is considered illegal, a possible sanction must be that the buyer can declare his bid invalid because upholding it would conflict with honesty or good faith, cf. sec. 33 of the Act on

[31] See Cooper, *op.cit.*, p. 39. Another famous case regarding the sale of a Rembrandt at Christie's in 1965 is cited in Harvey & Meisel, *op.cit.*, pp. 129 f.

[32] See Cooper, *op.cit.*, p. 28.

Contracts, or would be unreasonable, cf. sec. 36 of the Act on Contracts. Under sec. 36, the agreement can also be revised so that the buyer will get the property at the highest "real" bid.

The principal's right to bid for his own property is now subject to statutory regulation in the English Sale of Goods Act 1979, sec. 57(4) of which prescribes: "Where a sale by auction is not notified to be subject to a right to bid by or on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale, or for the auctioneer knowingly to take any bid from the seller or any such person." The following section, sec. 57(5), lays down that "A sale contravening subsection (4) above may be treated as fraudulent by the buyer". Sotheby's standard terms state that "Where a reserve has been placed, only the auctioneer may bid on behalf of the seller. Where no reserve has been placed, the seller may bid, either personally or through the agency of any one person." Similarly, the standard terms of Christie, Manson & Woods Ltd. state that "The seller shall not bid for his property or employ any person to bid for him save that he may impose a reserve in which case the Auctioneer alone shall have the right to bid on behalf of the Seller". A detailed regulation of the issue is contained in the American Uniform Commercial Code, which in sub-division 4 of sec. 2–328 states that

> If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such a bid is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to completion of the sale. This subsection shall not apply to any bid at a forced sale.

The rule is construed to mean that it does not prevent the seller from stipulating a reserve price.[33]

The main impression of Anglo-American law is that puffing is not considered much worthy of protection because a false impression is created of the interest in the property, and bidding is therefore induced.

There appears to be no corresponding legal source material in Scandinavia. However, on a real basis there seems to be reason to distinguish between the cases.

If the seller has not stipulated a reserve, it seems basically acceptable that he may be justified in wishing to protect his own interests by trying to recover his own property instead of seeing it sold at a ridiculously low price. Indeed, the seller has taken a deliberate chance, so that he ought

[33] Calamari and Perillo, *op.cit.*, p. 24.

not afterwards to be helped to avoid the consequences of his own silliness. But this hardly carries much weight; the law does afford a rather wide protection against silliness, and where there is a normal interest to buy among the public, it should hardly be risky to let the lot go without a reserve price. A weightier objection to letting the seller bid is that legally it is not possible to distinguish between cases where the bidding must be viewed as self-defence, and where it is just speculative and not worthy of protection. However, the risk of incurring a commission and in some cases also VAT will probably cast a damper on the wish to speculate. Everything therefore seems to indicate that the seller must be allowed to bid when he has not fixed a reserve price.

If, however, a reserve price has been stipulated, the seller has no need to protect his own interests by taking part in the bidding. Here, on the other hand, the dubious aspects are making themselves very much felt; the seller actually inveigles buyers into making bids by creating a false impression of the real demand for the property. There are weighty arguments in favour of regarding this as unacceptable, thus invalidating the buyers' bids. If a buyer still wants the property, he must have a right to claim, under sec. 36 of the Contracts Act, a reduction in price to the highest real bid, provided this exceeds or equals the reserve price and regardless of whether he himself or a third party made this bid.

5.6. As mentioned earlier, the auction firm is often commissioned to make purchases. The firm then appears as the buyer's agent, since it acts in someone else's name and for someone else's account.

There are conflicting interests between the roles of commissioner and agent. As commissioner, the auction firm wishes to sell at the best possible price; as agent the firm is to buy at the lowest possible price. Yet years of experience show that such a combination is permitted. But in this internal conflict it is important that rules be made concerning the conduct of the auction house.

> In English law there is no longer doubt that the auction business can be the agent of both seller and buyer. In *Fullwood* v. *Hurley,* Lord Hamworth MR stated: "If and so long as the agent is the agent of one party he cannot engage to become the agent of another principal without leave of the first principal with whom he has originally established his agency."[34] The crucial words are "without leave". It is presumed that if the auction firm informs the seller that he will handle buying commissions for interested persons, then he is not guilty of any breach of contract in relation to the seller.[35] Most auction firms state in their standard terms that they also handle

[34] [1928] 1 K.B. 498.

[35] See Harvey & Meisel, *op.cit.*, p. 73.

commission buying. This practice was accepted in a dictum in the case of *Fordham* v. *Christie, Manson & Woods Ltd.*[36]

In English practice the auction firm's absolute duty of confidentiality is considered a fundamental rule.[37] One aspect of this, the fact that the auctioneer cannot disclose a reserve price, has already been discussed. Another aspect is that the bidder is entitled to confidentiality in relation to the principal and other interested persons.

The requirement of confidentiality in relation to the principal seems to apply in Norway too. The auction firm is commissioned to buy as cheaply as possible up to a certain limit. If the principal is notified of the commission, he has only to raise the reserve price, so that he will be certain to obtain the maximum price of the commission. This would contravene the auctioneer's duties in relation to the bidder.

It is not quite certain whether the bidder is also entitled to confidentiality in relation to other bidders. It may be argued that since the bidding itself is public, the auctioneer must be allowed to make known beforehand bids made in advance. However, one important objection is that in such cases the bidder is barred from raising the bid, because it is impossible for him to know which way things are going. Since the auctioneer by accepting the commission to buy has undertaken to try to secure the property for the bidder, there are indications that it would contravene the auctioneer's obligations so as to reduce the absent bidder's prospects of becoming the owner. An argument in favour of this solution is also that it involves a warranty against the seller being indirectly informed about bids made. The rule must therefore be that the bidder also has a claim to secrecy in relation to other prospective buyers.

5.7. At the auction, bidding is presupposed to be free, so that the property may fetch the best price possible in the market. If bidders agree not to bid against each other, this presupposition might not hold. The British term for such an agreement is a *ring*.

According to the English Auctions (Bidding Agreements) Act of 1927, even a more innocent agreement between friends not to bid against each other is a punishable offence if a remuneration is paid and one of the parties is a trader. However, the primary aim of the Act is to prevent organized activities between buyers who give and take bribes in order to acquire property at the lowest possible price. Such buyers are looked

[36] (1977) 244 E G 213, 215 per May J.
[37] See Cooper, *op.cit.*, p. 29.

upon as the sharks of the art market and are feared by sellers and auction houses alike.

> Now and again efforts to unveil such activities have met with success, as for instance when the Sunday Times in a dramatic report in November 1964 was able to uncover a conspiracy between forty buyers who at a country auction had managed to buy a Chippendale chest of drawers for £750, one-tenth of the market price. They were caught red-handed when they were about to divide the spoils of its subsequent resale.[38]

In Norwegian law there are no rules or judicial decisions concerning these questions. The decision as to whether forming a "ring" is to be considered illegal, thus making the sale invalid and the conduct subject to liability, must therefore depend on policy considerations.

Subjectively, the purpose in these cases will be to injure the seller. Since there is a tendency to attach weight to this also when assessing conflicting legal rules, this is not without significance. It may of course be argued that much intentional damage in the area of non-violation of integrity is quite legal, but that is usually because the mode of action serves a social purpose, for instance free competition in trade and business. But one can hardly say that the forming of a "ring" is socially desirable, This is, rather, a case of shady business practice which we can very well do without. Given the considerable damage the practice can cause to sellers, and the fact that it also conflicts with much of the intention behind auctions, there are sufficient grounds for maintaining that "ring" agreements must be considered illegal vis-à-vis the seller. However, this ban should be aimed primarily at specifically commercial conditions, not for instance at agreements between collectors. The rule should be therefore, that "rings" be illegal only where buyers agree, for a consideration, not to bid against each other. If such agreements can be brought to light, the seller will be able to declare the sale void, and he may also claim compensation.

6. THE RULES ON DEFECTS

It may happen that the property is not what the buyer expected it to be, so that he may wish to invoke breach of contract due to defects. Sec. 48 of the Sale of Goods Act prescribes that "in the event of auction sales, the buyer cannot adduce that the property suffers from a defect, unless the property does not correspond to the description under which it is

[38] See Cooper, *op.cit.*, p. 36.

sold, or the seller has acted fraudulently". The provision is based on the opinion that auction sales must be presumed to take place with the general reservation that the property is taken over "as is", even if this is not expressly stated in the auction conditions. The legislator has perceived a need for a special rule stressing that the sale shall take place on such terms that auction buyers will not think that they are protected by the general statutory rules on defects or faults. Thus it is emphasized that this provision should supply a special incentive for the buyer to examine the lot carefully in advance.

Perhaps the rule is too strict in relation to the buyer? It can be argued that objects for sale by auction are often used and unique, and therefore buyers, even according to general rules, largely carry the risk of defects. The principle must be that the buyer takes over the property in the existing state, without the seller assuming any responsibility. At the same time, however, good faith requires that the seller shall not abuse this method of sale to deceive the buyer. The substance of this argument will be discussed later.

6.1. First, the property must comply with "the description according to which it is sold". Without compliance on this point, the buyer may invoke defects even if the misdescription is quite excusable and even if the property is worth less than supposed.

Whether the lot complies with the description under which it is sold, is often a purely factual question requiring other expertise than jurists have.

> In a decision reported in 1931 UfR 187 ØL, the situation was that a clock had been sold with the following description: "1 mahogany English clock with a striking train and moon hand, signature Thomas Hunter, London". After the auction the clock was thoroughly examined by an expert who said that the clock was actually a Bornholmer, albeit in the English style. The name-plate had been put on later, and the case and the works did not originally belong together. On this basis, the court could only find that the clock did not comply with the sales description, and the buyer could cancel the deal.

However, the burden of proving that property does not comply with its description rests with the buyer. Since art experts often have to make several reservations in their statements, the rules on burden of proof may entail the buyer losing his rights because he is unable to prove his allegation.

> This was the situation in another Danish court decision reported in 1947 UfR 781 ØL. An art dealer bought at an auction, for a considerable sum, a

painting described as "The Child Murder in Bethlehem, signed Cogniet 1824". It was further stated that the picture had been shown at the Paris Salon in 1824, and the catalogue referred to relevant literature about the painter. In addition to this, an expert declaration on the state of the picture and its authenticity was presented at the showing. After the auction, the buyer found that the picture stemmed from the collection of one Baron von Gerhardt. It was an almost official secret that most of von Gerhardt's paintings must be considered forgeries, and the buyer then refused to stand by the purchase.

He referred to the fact that, as an art dealer, he would have to inform possible buyers about the provenance, whereupon the painting was expected to fall in value. During the case, Mr. Leo Swane, a curator, admitted that he lacked specialist knowledge of Cogniet, the painter, "because, regardless of the contemporary assessment, the artist cannot now evoke much interest" (p. 784). Swane could, on the other hand, confirm that Baron von Gerhardt's collection consisted mostly of non-authentic pictures, and that he had several times warned people who came to him for advice regarding purchases from this collection not to have anything to do with it. But of course he could not rule out the possibility that "among scores and scores of unauthentic pictures there might be one genuine one" (p. 784). The court had to conclude that the expert statement afforded no proof that the picture was not genuine and added that, on the basis of the expertise presented, the buyer ought to have been aware of the picture's link with the von Gerhardt collection.

Even if the court decision must be correct, some of the reasoning is hard to understand. Thus "to begin with, the Court will state that there cannot with certainty be derived, from the information given in connection with the sale of the painting by the defendants, any guarantee of the authenticity of the painting" (p. 785). There is certainly room for disagreement here. As the picture was sold not only as a signed Cogniet, but with information on previous exhibitions and with references to literature about the artist, the buyer must have been justified in presuming that it was authentic. If the opposite presumption obtains, a seller must make reservations, so that the buyer is aware that he is taking a chance when buying. Although international practice is that stating only the surname of the artist indicates that the work is a copy, the practice is rare in Scandinavia.

The more detailed the seller's description of the property, the greater the risk of the buyer invoking breach of contract. A brief description, however, will not often be considered as misleading.

This can be illustrated by a court decision reported in 1975 NJA 152. At an auction an object called out was described as a "tavla" (a rather inane term for a picture)—a work bearing the signature of the well-known French artist Paul Signac. It was clubbed to the buyer at about SEK 7,500. The picture proved to be a reproduction, believed by one person to be worth SEK 110, by another about SEK 1,200. Consequently, the buyer alleged that it did not comply with the description under which it was sold. The auctioneer's objection to this was upheld by the courts of all instances: "at

the calling out, the lot number and the word 'picture' were called out. The word 'picture' is not reserved for any special kind of picture, but in ordinary usage means only a pictorial presentation designed to be hung as a decoration. By using the word 'tavla', the auctioneer let it be understood that this was not a proper oil painting. The word 'picture' without naming the artist or the technique is, according to the practice of the auction firm, used especially in cases of copies or forgeries. This practice is well known to the experienced auction public, to which even Ali (the buyer) must be said to belong" (p. 153). The court stated its opinion that "the word 'tavla' ('picture') is found in everyday language without this implying a limitation to original oil paintings" (p. 154).

How short can a description be without being regarded as misleading? Almén argues that if, at a book auction, one buys a lot described as "Lagerlöf: Jerusalem", the buyer may allege breach of contract if he receives only the first part, possibly also if one or more leaves are missing in the second part.[39] This standpoint seems to accord with the Danish commentary on the Sale of Goods Act, under which a defect is believed to exist "where the sales object lacks essential qualities that must normally be expected in connection with the sale of objects of the kind in question; so that it has not been justifiable to sell the object under the description applied without drawing the buyer's attention to these circumstances".[40] The impression one gets from judicial decisions is rather mixed, however.

A decision reported in 1914 NJA 219 goes very far in acquitting the seller. In this case a lot described as "securities" was sold as shares in a company that had gone into liquidation more than four years previously. The Supreme Court found that the shares were nevertheless not sold "under a false description" (p. 222). The decision would hardly be considered tenable in Norway.

It is easier to accept a City Court decision reported in 1918 UfR 453. An unsigned painting was sold at an auction under the description "W. Marstrand: Italian Woman". The work appeared to be little more than an unfinished sketch by Marstrand, which had later been worked up by another hand, whereby among other things a new background had been added. One of the experts stated that it was quite usual for a work to be catalogued under the artist's name even if it had later been changed by someone else, and that it was a matter of taste whether this could be considered justified. This notwithstanding, the Court based its decision on the following: "As stating the artist's name is of essential significance as regards the price of a picture, it must in this case, where a relatively modern picture is involved, be assumed that the buyer, even if stating the signature cannot be regarded

[39] T. Almén, *Om köp och byte av lös egendom* (On Buying and Exchanging Movables), 4th ed. by R. Eklund, Stockholm 1960, p. 654.

[40] Jacob Nørager-Nielsen and Søren Theilgaard, *Købeloven af 1906 med kommentarer* (The Sale of Goods Act with Comments), Copenhagen 1979, p. 856.

as a guarantee proper of the authenticity of the picture, shall not carry the risk if it appears that the picture has been finished by someone else" (p. 464).

The above case naturally brings us to the field of copyright law, because it is possible that the auction buyer's acquisition can be threatened by the rights of the artist. For instance changes may have been made in an existing copy of the work in contravention of the artist's *droit moral* under sec. 3, second paragraph, of the Copyright Act.

A dramatic example is a decision reported in 1932 UfR 702 H concerning misrepresentation of a painting. A painting by Harald Slott-Møller, showing Aegir and his daughters, had been partly painted over by someone else and entitled "The birth of Venus", without the signature having been changed. An art dealer who had bought the picture for re-sale, saw to it that it was shown to Slott-Møller, who destroyed it with a knife. The art dealer's claim for compensation was not upheld, because the painter must have a right to demand destruction of a painting that has been tampered with.—A similar constellation may occur if the object—for instance a casting of a sculpture—violates the author's sole right to presentation of copies according to sec. 2 of the Act, cf. sec. 11, second paragraph, so that confiscation may be claimed under sec. 56.

It has been maintained that in theory sec. 48 of the Sale of Goods Act cannot be applied in cases of defective title or other legal defects,[41] and the decisions in 1952 UfR 169 SH, 1952 UfR 421 ØL and 1955 UfR 711 Gros.soc. all tend in this direction. In practice there is reason to limit the scope of application for sec. 48 to physical defects, because these are the only ones that the buyer has a chance of detecting by advance examination of the lot. The rule ought to be, therefore, that the buyer may fall back on the general rules on defective goods where the rights of the artist prevent acquisition.

6.2. If the object does not comply with the description according to which it has been sold, the starting point is that the buyer may invoke defects. This does not apply unconditionally, however.

First, it is possible that the buyer, by examining the property, has found, or ought to have found, the description inadequate; so that he, following the basic principle of sec. 47 of the Sale of Goods Act, cannot invoke the defect. The relationship between sec. 47 and sec. 48 may be somewhat uncertain, however. The rule contained in sec. 47 is systematically linked to the general rules on defects in secs. 42–45, not to sec. 48. It could with some right be argued that when the property does not

[41] Nørager-Nielsen and Theilgaard, *op.cit.*, p. 857 and p. 991.

even comply with the description under which it has been sold, the buyer must at any rate have the right to invoke the defects. On the other hand, the rules in sec. 47 reflect the general contract law principle of *caveat emptor*, let the buyer beware. A decision reported in 1923 Rt II 360 indicates that sec. 47 also applies to auction purchases. A bankrupt estate sold "faarepølse" (lamb sausage) at an auction. It was believed that the buyer must have been aware that the sausage was a war product wholly or partly made from whale meat, because he had examined it before the sale so that there could be no invoking of defects. Yet there should be no question of imposing a strict duty of inspection on the buyer; normally he must be able to trust the information provided.

The second exception from sec. 48 may be of greater practical significance: nor does the buyer have any rights if he has been gambling, even if the lot does not comply with the description under which it has been sold. The fact that buying "on spec." deprives the buyer of his right to invoke defects, is presumed (not as regards auction purchases) in 1950 Rt. 683, 1946 UfR 23 H and 1946 NJA 482.

> In the latter case a person had bought from an art dealer a painting signed Paulus Potter. When asked, the dealer had said that he could not decide whether the picture was genuine or not. It was clear that works by Paulus Potter demanded far higher prices than what the buyer had paid, so this was obviously a speculative purchase. Therefore, the buyer had to bear the risk when the picture was later proved a forgery.

The rules concerning "gambling" must be applicable also to auction purchases. The question is what criteria should be used for characterizing an auction purchase as a gamble. Some auction terms contain general reservations to the effect that the auction firm does not guarantee the authenticity of foreign art. Apart from the fact that the term "guarantee" only concerns liability, it must be evident that such general renunciation cannot be sufficient. If a purchase is to be considered as a gamble, it must have been made clear that there is uncertainty connected with the description of a definite object. This can be done by adding the phrase "attributed to" or the like to the artist's name in the catalogue, or by stating generally that the description is not entirely reliable. One cannot, on the other hand, claim that the uncertainty should also result in a price reduction; in 1950 Rt. 683 and 1946 UfR 23 H the buyers paid the market price.

6.3. According to sec. 48 of the Sale of Goods Act, the buyer may also contend that the property suffers from a defect when the seller has acted fraudulently. The rule gives rise to several questions.

As mentioned, according to sec. 56 of the Act on Commissions the buyer can claim against the auction business only in connection with the purchase. In relation to the Act on Commissions, it is thus the auction firm which appears as the seller. It would be quite unacceptable, however, to construe sec. 48 so that only the conduct of the auction business is relevant according to this provision. The consequence would be that the seller, by choosing to auction his property, could deceive the buyer without risk. The provision in sec. 48 on recourse against parties other than the seller is also an argument against this. Therefore, the correct interpretation of sec. 48 must be that not only the auction business is considered as seller but the principal as well. The buyer can then invoke fraudulent conduct whether on the part of the auctioneer or the principal.

The next question is connected with a statement by Almén that "an act or omission on the part of the seller that would have been illegal had the sale been private without special reservations, is not necessarily so if the property is sold ... at an auction". Referring to the legal history of the Swedish text, he claims that "according to current legal opinion in our country, a mere suppression of defects in property offered for sale at an auction ... cannot be held against the seller as fraudulent conduct".[42] The Norwegian *travaux préparatoires* do not warrant such a narrow definition of the limits to what is to be regarded as fraud. And in practice, there is hardly any reason why auction sellers should be regarded more leniently than others. This way of thinking is probably linked to the old idea of auction purchases being a kind of institutionalized horse-trading, where the seller to a great extent is allowed to deceive the buyer. But considering legal development, such a point of view must be abandoned.

When the Sale of Goods Act came into effect in 1907, the rule on fraud was the uttermost limit for the rules on invalidity in contract law. In the Sale of Goods Act, there are links with general contract law in that fraud is not only an absolute cause for rescission, but also entails the rules on complaints and limitations becoming inapplicable. There is thus basically a double-track system, where the same legal facts of fraud produce the same result (apart from the liability for expectation interest and reliance interest respectively), whether one applies the provisions on invalidity under contract law or the rules on rescission under the Sale of Goods Act. It is presumed, however, that the rules on breach of contract will be of decisive significance.[43]

[42] Almén, *op.cit.*, p. 653 (author's italics).

[43] See K. Krokeide in *TfR* 1979, p. 155 with references.

It is against this background that the rule in sec. 48 must be considered. The question is then whether the rule on fraud in sec. 48 should be supplemented with the more recent rules on invalidity, primarily sec. 33, possibly also sec. 36 of the Act on Contracts.

Considering the wish for consistency and harmony, there may be arguments in favour of reading the latest legal development into the provision. However, such an interpretation does have consequences because of the rules on the right to recover damages under the contract.

It is probably going too far to assume that sec. 48 also applies where there are only circumstances that are affected by secs. 33 and 36 of the Contracts Act. Where substance is concerned, doing so will represent a considerable widening of the scope of the rule, and would remove entirely the sharp outlines given to the rule by the legislator. This is the reason why sec. 48 should be taken literally. There may be reason to equate with fraud the cases that are directly affected by sec. 33.[44] But in other cases the buyer must invoke the invalidity rules under contract law, not the rule on breach of contract in sec. 48.

6.4. When the Sale of Goods Act was revised in 1974, a rule was introduced into sec. 45b which regulates the significance of the fact that a sales object bought by a consumer from a professional salesman is sold "as is" or with similar reservations. To some extent, the rule probably only confirms the judicial practice of using "as is" clauses in general.[45] According to this rule, property may still be considered defective if, first, "it does not conform to the information provided by the seller" (letter a). Secondly, this applies if "the seller has omitted to provide information on qualities of the property which he must have known about and which the buyer ought to expect to get" (letter b). The rule applies only to facts which the seller actually knows.[46] Finally, the property is defective if it "is in a considerably worse state than the buyer would have expected considering the purchasing price and other circumstances" (letter c).

In the *travaux préparatoires*, the relationship between the new rule in sec. 45b and the rule on auction sales was discussed in more detail. It was stated that

> "The Ministry reasons that in principle the rule must also cover auction sales, at any rate insofar as nothing else follows from sec. 48. It is believed

[44] See in this respect Nørager-Nielsen and Theilgaard, *op.cit.*, p. 851.

[45] See Per Augdahl, *Den norske obligasjonsretts almindelige del* (The Norwegian Law of Contracts and Torts, General Section), 5th ed. Oslo 1978, pp. 175 f. Also Almén, *op.cit.*, pp. 649 f., and Nørager-Nielsen and Theilgaard, *op.cit.*, pp. 850 f.

[46] See *Ot.prp.* No. 25 (1973–74), p. 42.

> to be of little practical significance that sec. 45b will be deemed applicable to auction sales that are regulated by sec. 48. The provision in sec. 48, first sentence, does not actually apply "where a dealer sells his goods at an auction" (cf. the second sentence). Even if the concept "professional salesman" is wider than the term "dealer" (in relation to sales activities), this nevertheless means that the largest group of professional salesmen will be exempted from the rule in sec. 48."[47]

The discussion seems to rest on a misunderstanding: the fact that the auction firm, according to the Act on Commissions, is to be considered as a seller as far as auction sales are concerned, seems to have been completely overlooked. In relation to the provisions of the Sale of Goods Act, auction purchases may thus be consumer purchases from a professional salesman, even if the principal does not sell the property as part of his trade activity. While the Ministry assumed that only exceptionally would it be possible to apply both sec. 45b and sec. 48, first sentence, the circumstances are quite the opposite in that both provisions may apply to most auction purchases.

The question of resolving a possible conflict between the rules is of considerable practical interest, as most auction terms prescribe that the lot shall be sold "as is" or the like.

In the *travaux préparatoires* it is emphasized that the two rules will hardly lead to different results:

> The characteristic features of the auction situation must be taken into account when assessing the conditions in sec. 45b, b and c. For instance, at an auction such as the one dealt with here, the buyer cannot normally expect detailed information about the lots that are put up for sale. Moreover, the purchasing amount at auctions will often not be a very good indication of the value of the sales object. And finally, the fact that these are auction sales will have to be taken into account when assessing "the conditions otherwise" according to letter c.[48]

Even considering these reservations, sec. 45b, especially letter c, clearly has a far wider scope than sec. 48. It is therefore of considerable interest that the *travaux préparatoires* state that if there should turn out to be "a certain conflict between the rules, then sec. 48—as a subsequent special rule on auction sales—should, in the opinion of the Ministry, be given preference".[49] Even without the support found in the *travaux préparatoires*, the same result will be reached. As mentioned above, the legislator, when passing sec. 45b, was not aware of its actually

[47] *Ot.prp.* No. 25 (1973–74), p. 43.
[48] *Ot.prp.* No. 25 (1973–74), p. 43.
[49] *Ot.prp.* No. 25 (1973–74), p. 43.

overlapping most of the scope of sec. 48. This is why sec. 48 will lose most of its significance, which was obviously not the legislator's intention. Considering the support afforded by the *travaux préparatoires* and the principle of *lex specialis*, the solution must therefore be that sec. 45b is not applicable to auctions that are covered by sec. 48, first sentence.

6.5. When sec. 1a was passed in 1974, the Sale of Goods Act provisions on breach of contract were made mandatory for consumer purchases with professional salesmen. The term "consumer purchase" in sec. 1a, third paragraph, means "purchase of objects which, according to circumstances, appear mainly for the private use of the buyer, his household or circle of acquaintances, or otherwise for their private purposes". The terms "private use of the buyer" and "private purposes" contrast with the terms for occupational use or use in trade and business. The reason why there is special mention in the Act of "otherwise private purposes", is, according to the *travaux préparatoires*, to make it "clear that even objects applied in a way that cannot be called 'use' in a narrow sense (for instance a picture), come within the scope of the Act".[50] A purchase of art objects at an auction may thus be considered as a consumer purchase, so that there can be no deviation from sec. 48 to the detriment of the buyer. This must clearly be so, even if the purchase may be characterized as speculative, where the art object is bought partly for investment purposes. The distinction between what are private purposes and what are trade or business purposes may not be very clear. If the purchase is to be regarded as being for business purposes, the buyer's sales activities should be of a certain scope, so that it is no longer a question of replacing single objects in a collection, but a purchase to keep sales activities going (cf. for a similar distinction within tax law, 1952 Rt. 150 and for the distinction art dealer/collector in the law of duties and rates 1965 RG 280 Eidsivating). Thus for most auction purchases made by private persons, sec. 48 will be mandatory.

Nevertheless, a number of auction conditions contain quite general renunciations. It is true that practice varies in the auction trade. In the field of special auctions, e.g. coin auctions, the auctioneer as a rule guarantees the authenticity, but does not accept objections as to the quality of the object. The less specialized firms, which trade mainly in art and antiques, usually have sales conditions stating that complaints after the fall of the hammer will not be accepted. As a precaution, reservations are also sometimes made regarding omissions and errors in

[50] *Ot.prp.* No. 25 (1973–74), p. 68.

the catalogue. The main impression is that in general the auction trade seems to employ wide renunciations, which—at least in Norway—rarely seem to be shaped on the basis of legal expertise.

However, Norwegian auction firms are not the only ones that practise renunciation of liability and risks, yet some auction firms within the specialized fields in the international market go quite far in accepting responsibility for the descriptions made. On the whole, however, the English practice seems to predominate, according to which "Any statement as to the authorship, attribution, origin, date, age, provenance and condition is a statement of opinion and is not to be taken as a statement or representation of fact" (Sotheby, older conditions). In English law it is an open question, however, to what extent such general renunciations are acceptable under the Unfair Contract Terms Act 1977.[51]

> In their most recent terms, written in seven varieties for different kinds of object, Sotheby have a more detailed definition of the general clause on renunciation of liability and risks, while at the same time an express exemption has been made for "deliberate forgery". The general terms read as follows:
>
> 16. *Liability of Sotheby's and sellers*
>
> (a) Goods auctioned are usually of some age. All goods are sold with all faults and imperfections and errors of description. Illustrations in catalogues are for identification only. Buyers should satisfy themselves prior to sale as to the condition of each lot and should exercise and rely on their own judgment as to whether the lot accords with its description. Subject to the obligations accepted by Sotheby's under this Condition, none of the sellers, Sotheby's, its servants or agents is responsible for errors of description or for the genuineness or authenticity of any lot, no warranty whatever is given by Sotheby's, its servants or agents, or any seller to any buyer in respect of any lot and any express or implied conditions or warranties are hereby excluded.
>
> (b) Any lot which proves to be a "deliberate forgery" may be returned by the buyer to Sotheby's within 5 years of the date of the auction in the same condition in which it was at the time of the auction, accompanied by a statement of defects, the number of the lot, and the date of the auction at which it was purchased. If Sotheby's is satisfied that the item is a "deliberate forgery" and that the buyer has and is able to transfer a good and marketable title to the lot free from any third party claims, the sale will be set aside and any amount paid in respect of the lot will be refunded: Provided that the buyer shall have no rights under this Condition if:
>
> (i) the description in the catalogue at the date of the sale was in accordance with the then generally accepted opinion of scholars and experts or fairly indicated that there was a conflict of such opinion; or

[51] See Harvey & Meisel, *op.cit.*, pp. 116 f.

(ii) the only method of establishing at the date of publication of the catalogue that the lot was a "deliberate forgery" was by means of scientific processes not generally accepted for use until after publication of the catalogue or a process which was unreasonably expensive or impractical;

(c) A buyer's claim under this Condition shall be limited to any amount paid in respect of the lot and shall not extend to any loss or damage suffered or expense incurred by him.

(d) The benefit of this Condition shall not be assignable and shall rest solely and exclusively in the buyer who, for the purpose of this Condition, shall be and only be the person to whom the original invoice is made out by Sotheby's in respect of the lot sold.

7. QUESTIONS OF INVALIDITY

The buyer's bid may be subject to a cause of invalidity, so that he is not bound. In principle, the validity of the bid must be judged according to the general rules of invalidity of contract law, which it does not seem pertinent to discuss in this context. A few special questions will nevertheless be dealt with.

7.1. If the seller has given incorrect information, which has had a motivating effect on the buyer, the bid must as a rule be invalid. This does not apply to cases where the information can be found in the auction catalogue; if so, the buyer may invoke secs. 48 and 42 of the Sale of Goods Act.

If the misleading is intentional, the situation will be covered by sec. 33 of the Contracts Act; if it is negligent, it is presumed that sec. 33 must be construed generously so that it also covers cases where the recipient of the promise has been negligent.[52] If the information has been provided *bona fide*, it is presumed that, on the basis of judicial decisions (see e.g. 1922 Rt. 689) and theory, the promiser is not bound in these cases.[53] There used to be no express statutory authority for this solution, but today it appears natural to link it with sec. 36.

This point of departure is elementary. But the question is what kind of incorrect or misleading information given by the auction firm entails that it would be unreasonable, or a breach of honesty or good faith to base the sale on that bid. Distinctions may not be easy to make.

Norwegian conditions are still so provincial that one often hears the

[52] See, *inter alia*, Arnholm, *op.cit.*, p. 326, and Jo Hov, *Avtalerett* (Contract Law), Oslo 1980, p. 233, cf. p. 248.

[53] See Arnholm, *op.cit.*, p. 322, and Hov, *op.cit.*, p. 249.

auctioneer comment on the bidding, "this is cheap", "no one higher—do I hear right?" etc. This way of handling the bidding may very well make amateurs believe they can pick up a bargain, so that it will be an incentive to further bidding. If such statements remain on this general level, it must be quite clear that the bid may be all right even if the bidder has been influenced by them. This is also so where a painting, a sculpture or another art object is being presented as "a very important work" etc. However, if the statements claim to be accurate, they must as a rule also be correct.[54]

> A City Court decision reported in 1894 UfR 1314 makes one wonder. A painting had been bought at an auction on the strength of information that the picture came from a well-known named collector and connoisseur, whose big collection was under the hammer. The buyer himself knew very little about art, but relied on the previous owner's judgment. It appeared that the information about the picture was not correct; at the auction some pictures had also been included which belonged to a picture-frame maker. When the buyer got to know about the proper provenance of the painting, he refused to pay. The court found, however, that if the buyer were to withdraw, the previous ownership must have influenced the market price of the picture, and that was not proved.
>
> The judge's view seems obsolete. If incorrect information is given about provenance, participation in exhibitions, literary references etc. which have had a motivating effect as regards the bid, the buyer must have a right to declare himself not bound.

7.2. Quite often the buying public's misguided opinion about the qualities or value of a sales object stems not from the information provided by the auctioneer but from a lack of knowledge about art history and market conditions. The question in a contract law context is whether the auction firm is obliged to provide information, so as to acquaint the buyer with the facts. The legal basis, as formulated in the decision reported in 1984 Rt. 28, is sec. 33 of the Contracts Act and "non-statutory rules on loyalty in contractual relations" (p. 34). Besides, sec. 3 of the Act on Marketing maintains that there exists a private law duty of information.

As to the demands to be made on the seller's duty of information, these must, as stated in the decision in 1984 Rt. 28, be assessed in relation to the demands made on the duty of examination (p. 35). In the case of auction sales, it is probably right to say that as a main rule the duty to give information is subsidiary to the duty to undertake examinations. There are at least two reasons for this: first, auction purchases

[54] See Arnholm, *op.cit.*, pp. 321 f.

must probably in some degree be characterized as gambling because the objects are usually old, and this means that the seller must to a greater extent than usual take it for granted that the buyer examines the items, cf. 1920 Rt. 237. Next, a purely practical observation: when objects are being auctioned, there are limited opportunities of providing information to those who are interested. There are no sales negotiations, and the circle of potential buyers is unknown. By and large the information to be given must therefore be compressed into catalogues etc.

That is why the old principle that "when the thing itself speaks, the seller can keep silent" must apply to a somewhat greater extent.[55] Because the seller must be able to rely on the buyer examining the object, there is not the same need to inform him of defects, etc., as for ordinary purchases.

Further the demand on good faith in contractual relations certainly applies also to these purchases. The seller must not be permitted to use the auction form to deceive the buyer. To this must be added that the seller, represented by the auction business, is on the whole the most professional party, which indicates a duty of information, cf. 1984 Rt. 28 on p. 36. If the auctioneer because of his expertise has discovered or ought to have discovered something that the buying public cannot be expected to construe correctly, then he cannot keep silent.[56]

Therefore, both the seller and the auction business must provide information about factors that are essential to the evaluation of the object, which the buyer cannot be expected to discover by his examination.

> First, it may be necessary to give some more guidance as to the nature of the object: If for instance a print bears the stamp of the studio and no signature, this should be pointed out; if it is a signed print after a painting, it may not be sufficient to use the term pochoir, and it should also be expressly stated that Kashmir-Keshan has nothing to do with a Keshan carpet.
>
> The previously mentioned (under 6.1) court decision in 1975 NJA 152, where an item was offered under the description "tavla", probably demands less of the auctioneer. The buyer argued in vain that "Before the auction, the auction firm had found out through an art dealer that the item was not an oil painting, but merely a reproduction. By nevertheless offering the reproduction describing it as a "tavla", the auctioneer has failed to observe his duty of information" (p. 153). The court reasoned that "As .... regards the question of invalidity of the purchase under sec. 33 of the

[55] See Fredrik Stang, *Innledning til formueretten* (Introduction to Property Law), 3rd ed. Oslo 1935, p. 601.

[56] See Stang, *op.cit.*, p. 601, and Arnholm, *op.cit.*, p. 332.

Contracts Act, the district court found to begin with that it had not been the duty of the auctioneer to state expressly that the picture was a reproduction" (p. 154).

Moreover, information should be given as to serious defects which the buyer might easily overlook. If a rustic table has been substantially restored or composed of different parts, there is reason to notify. If a china object is defect, but has been carefully restored, this should be stated; if a print has been trimmed, torn or holed, or if it has been glued to a plate, it cannot be sold without comment.

In accordance with general principles, the duty of information must usually be concerned with facts, not with hypotheses and evaluations.[57] Thus, the auctioneer can normally keep to himself his assessment of the market value or of the rarity of the object.

It is for instance possible to find out something about the number of unnumbered prints, considering how often this particular detail is offered in the market.[58] But the auctioneer does not have to say that he has sold a large number of "Vampyren" by Edvard Munch in recent years, so giving the impression that the picture is quite a common one.

7.3. According to sec. 18 of the Act on Prices, it is "forbidden to charge, demand or agree on prices that are unreasonable". It is elementary contract law that the rule, to which penalty sanctions are linked, is also a private law rule on invalidity where unreasonably high prices have been charged, i.e. when there is a "clear and not insignificant deviation" from what is considered reasonable.[59] The law contains no exceptions for auction sales, nor are there any other indications that the seller can bypass the prohibition in sec. 18 by putting the property up for an auction.[60]

However, practising the rule at auction sales gives rise to problems. It presupposes that a comparison is to be made with the market price. But when sales records are noted at auctions, this is often an indication that the market price has changed, so that the previous price level no longer acts as a guideline. Sec. 18 of the Act on Prices does not ban changes of the market price, however, and it must be presumed that sec. 18 cannot apply to the ordinary auction record.

This does not mean that the rule is inapplicable to all kinds of auction

[57] See Stang, *op.cit.*, pp. 599 f.

[58] See F. Salamon, *A Collector's Guide to Prints and Printmakers from Dürer to Picasso*, London 1972, pp. 122 f.

[59] See *Innst. O.* II (Recommendation) (1953), p. 118.

[60] Eckhoff-Gjelsvik, *Prisloven med kommentarer* (The Act on Prices with Comments), Oslo 1955, p. 293, presumes that voluntary auctions shall be placed on a par with other forms of sales activities.

sale. As regards the more ordinary sales at auctions, the situation will often be that a high auction price does not reflect a changed market value. In such cases, the rule is applicable in principle. When judging whether the price is unreasonable, one must nevertheless take into account that the sales objects are often luxury articles, in which case there is reason to accept a more marked deviation than in the case of purchases of necessities. It should also be kept in mind that as a rule it is difficult to fix a market value for art objects, and that therefore some caution should be shown in determining the basis of comparison. With these reservations in mind, sec. 18 will nevertheless be of a certain significance for auction purchases, where there is a clear disproportion between the price obtained and the value of the property, for instance because it is defective.

7.4. One may finally ask whether the owner may make a claim against the buyer if it appears that a very good bargain has been made. The auctioneer has for instance misjudged an object so that it is sold at a fraction of its real value. The immediate answer might be that both the constellation of the parties and the form of sale *per se*, with its potential of gains and losses, exclude any claim. Since the object is sold through a professional dealer, the buyer should be the one to benefit if he has made a bargain. Moreover, the owner is not party to the agreement, and must probably be satisfied with claiming compensation from the party to his contract, the auctioneer.

The fact that the owner is not party to the sales contract can, however, hardly preclude claims against the buyer. The auction firm can at any rate be considered obliged to invoke the contended invalidity if the owner so requests. There is some doubt connected to this solution, because the auctioneer runs the risk of a lawsuit, in which for several reasons he might not want to be involved. It might seem more natural to cut right through the formal relationship of the parties and recognize a right for the owner to take the matter in his own hands. For even if the owner is not a party to the agreement entered into by the agent, he carries the full legal and economic risk according to the law. The case is therefore manifestly different from situations where a third party might otherwise be interested in invoking invalidity in a foreign contractual relationship, because he is actually affected by the agreement (cf. for instance 1985 NRt 1291, where the Supreme Court certainly avoided deciding whether sec. 36 of the Contracts Act "might possibly be invoked by someone who is not himself a party to the contract which, it is held, should be set aside as unreasonable"). The case may also have

some features in common with the questions of the buyer's claim against previous distributors. Such questions have long been recognized in theory and in legislation (see sec. 84 of the new Sale of Goods Act).

If a right for the owner to dispute an agreement is recognized, the main rule must nevertheless be that the purchase is entirely valid even if a bargain has been made because of a mistake committed by the auctioneer. In the contractual relationship, the auctioneer must normally be considered the most professional party, and as a rule profiting from the mistake made cannot conflict with "honesty" under sec. 33 of the Contracts Act, or be "unreasonable" according to sec. 36. A French case which has attracted considerable attention, the *affaire Poussin*, does show, however, that this basis does not hold entirely without exceptions. The Saint-Aroman family wanted to sell a painting which, according to family tradition, was by Nicolas Poussin. After being examined, the picture was attributed to the Carrachis school, and was sold at an auction as a school work in 1968 for 2,200 Francs. The Réunion des Musées Nationaux (a government agency) thereafter invoked its right of pre-emption, and shortly afterwards the painting was exhibited at the Louvre as as an original work by Poussin. The shocked owners contended that the purchase was invalid and they won their case by the decision of the Cour de Cassation of 13 December 1983 (Dalloz 1984.340). The reasoning of the Court was that the lower instance courts had misconstrued the law by refusing the owners "le droit de se servir d'éléments d'appréciation postérieurs à la vente pour prouver l'existence d'une erreur de leur part au moment de la vente". This paved the way for declaring the sale invalid, and the painting was re-sold on 12 December 1988, but then as a genuine Poussin and at an enormous price. The case caused quite a sensation also among jurists.[61] Museum people are said to be rather unhappy about the outcome of the case, which clearly restricts the possibilities of the museums to find bargains at public auctions.

8. REFORMS

By way of conclusion one may say that it is especially in the relations between seller and buyer that the rules on auction sales diverge. The point of departure in sec. 48 of the Sale of Goods Act stating that the

[61] The case has been commented on in greater detail by Jean-Pierre Couturier in *Dalloz* 1989, pp. 23 ff.

seller does not answer for anything, is greatly modified by contract law rules on good faith. This is where some harmonization might be needed. It is therefore of considerable interest that in the new Norwegian Sale of Goods Act of 13 May 1988 No. 27 (but not in the bills of the other countries), a special provision relating to auctions has been included in sec. 19(2). It is stated there that when used objects are sold at auctions, the rules of sec. 19(1) on "as is" purchases shall apply within their scope. The rule imposes a somewhat stricter liability on the seller for defects than what follows from the current sec. 48. At the same time it is presupposed in the *travaux préparatoires* that, when applying the rule, attention shall be paid to the special characteristics of auction purchases. According to its first paragraph, defects shall be regarded as existing in three cases: first, when "the object does not conform to information, provided by the seller on its qualities or use, which may be assumed to have had a bearing on the purchase". The rule includes the current sec. 48 and the contract law rules on false information. The *travaux préparatoires* expressly point out that the seller must have a right to make reservations concerning the information, or in some other way to express that it is not reliable.

Secondly, a defect exists where "the seller in connection with the purchase has omitted to provide information on essential circumstances concerning the object or its use which he must know and which the buyer could expect to get, if the omission may have influenced the purchase". The claim that these must be qualities which the seller must know about means that this presupposes actual knowledge on the part of the seller, while at the same time the wording aims at a more lenient claim for proof of the seller's knowledge (cf. sec. 33 of the Contracts Act). The *travaux préparatoires* emphasize that the seller's duty of information is influenced by the circumstances and possible customary procedures of auction purchases.

Thirdly, there is a defect where "the object is in a noticeably worse state than the buyer would expect judging from the price and other circumstances". At first sight, the provision seems to imply a considerable change from current law. Even if the *travaux préparatoires* presuppose a clear disproportion between the state of the object and the price, they do also make it clear that the seller must not necessarily have acted negligently. An auction buyer quite often buys a pig in a poke, because he pays excessively for the object. However, since sec. 18 of the Act on prices must be regarded as applicable to such purchases as well, and while stressing that the rule proposed states that the object must be in a noticeably worse state, not only of much less value, than might be

expected judging from the price, the provision can hardly be said to be an innovation.

Altogether, one can probably say that the rule in the main implies that the principles of sec. 33 of the Act on Contracts and sec. 18 of the Act on Prices are incorporated in the Act on the Sale of Goods.