1948 *Present :* **Wijeyewardene A.C.J., Jayetileke S.P.J. and Nagalingam J.**

ELAINE MUTHUMANI, Appellant, *and* MUTHUMANI *et al.*, Respondents.

S. C. 109—D. C. (Inty.) Kandy, X 989.

Entail and Settlement Ordinance—Sale sanctioned by Court—Upset price fixed—Sale above upset price—Subsequent higher offers—Application to set aside sale—Power of Court.

Petitioner applied to Court under section 5 of the Entail and Settlement Ordinance for the sale of certain property which was subject to a *fidei commissum*. The sale was allowed and the Court fixed an upset price of Rs. 13,800. The property was sold for Rs. 13,950 to the ninth respondent. Thereafter the petitioner applied to Court to have the sale set aside on the ground that since the sale sho had received higher offers.

Held, (Jayetileke S.P.J. dessenting), that the Court was not entitled to set aside the sale even though it was subject to confirmation by Court and minors were interested in getting the highest possible price for the property.

APPEAL from a judgment of the District Judge, Kandy.

H. V. Perera, K.C., with *C. E. L. Wickremesinghe*, for the petitioner-appellant.—The sale which the petitioner seeks to set aside in these proceedings was a sale under the Entail and Settlement Ordinance (Cap. 54). The Court ordered the sale subject to confirmation by the Court. Under section 4 of the Entail and Settlement Ordinance it is the Court that has the power to sell, and the Court, for the sake of convenience, employs an agent, *i.e.*, an auctioneer, to conduct the sale. In execution proceedings under the Civil Procedure Code the position is different. Under section 218 of the Civil Procedure Code a judgment-creditor is empowered to seize and sell by the hands of the Fiscal the judgment-debtor's property, and the Court merely supervises the conduct of such execution proceedings under the sections of the Civil Procedure Code. The Court has no power to sell in execution proceedings, but under the Entail and Settlement Ordinance the power to sell is vested in the Court and in the Court alone.

On broad general principles the Court which has ordered the sale subject to confirmation by the Court has the power to refuse to confirm the sale, just as a private owner, who has deputed an agent to sell something belonging to the private owner subject to such owner's confirmation, can refuse to confirm such sale by such agent. In such a case the contract of sale is only complete when confirmation by the owner is obtained. The private owner, in such a case, can act arbitrarily and refuse to confirm the sale for no reason at all, but the Court must act reasonably and judicially. Subject to the restriction that the Court must act judicially and reasonably, the Court has power to refuse to confirm the sale.

There is in this connection a difference between what the Court could do and what the Court should do. The two things are different and should be kept apart. This is an appropriate case where the Court should have set aside the sale, as by doing so the minor stand to benefit considerably. The District Court is the guardian of all minors and should see that minors' interests do not suffer by any act done under the Court's authority. The principle that the minors' interests should be protected in the case of sales of minors' property was recognized and followed both in Roman Law and in the Roman-Dutch Law.

The Courts of Ceylon are Courts of Equity as well as Courts of Law. That is to say in appropriate cases, well recognized principles of Equity which English Courts of Equity followed have also to be followed by the Courts of Ceylon.

What is called the practice of Opening Biddings, *i.e.*, odering resale of estates sold on the orders of Court when a higher price was offered after the sale, was a practice which has been followed by the English Courts of Equity. See *1838 Edition 2, Burge's Colonial Law, pp. 641 and 642.* See also *Lefroy v. Lefroy* [1]; *Scott v. Nesbit* [2]; *Brooks v. Snaith* [3]; *Pearson v. Collet* [4].

These authorities show that opening of biddings was at one time common in English Courts of Equity and an advance on the purchase price was considered sufficient to allow the bids to be opened. There can be no doubt that the English Courts of Equity would have ordered a resale of the property in the circumstances of this case if the matter had come up before them at a time when such practice of opening biddings was followed. The fact that the Act for amending of Law of Auctions of Estates of 1867 (30 and 31 Victoria (Chap. 48)) put an end to opening of biddings cannot make a difference so far as the Courts of Ceylon are concerned, because 30 and 31 Victoria (Chap. 48) does not form part of the Law of Ceylon.

No appearance for the first to eighth defendants, respondents.

N. E. Weerasooria, K.C., with *H. W. Tambiah, H. W. Jayewardane, S. Kanagarayer*, and *W. D. Gunasekere*, for the ninth defendant, respondent.—The reopening of biddings was a practice, looked at with disfavour by the English Courts even when such practice was in vogue. See *Barlow v. Osborne* [5]. After the Act of 1867 (30 and 31 Victoria (Chap. 48)) a sale could be set aside only on two grounds, *i.e.*, fraud and improper conduct in the management of sale. There is no need to resort to a practice which has been put an end to by Act of Parliament and which has been described as a "pernicious practice" by the Engish Court See *In re Bartlet Newman v. Hook* [6]. See also *Brown v. Oakshott* [7].

Further, when one considers the conditions of sale under which the property in this case was sold, it is clearly wrong for the Court to set

[1] *(1827) 2 Russel's Reports 606 ; 38 E. R. 463.*
[2] *(1792) 3 Browne's Reports 474 ; 29 E. R. 651.*
[3] *1814) 3 Vesey and B. 144 ; 35 E. R. 433.*
[4] *(1824) 13 Price's Reports 213 at 215.*
[5] *(1858) 6 H. L. Reports 556 at 566.*
[6] *(1880) L. R. 16, Ch. 561 at 568.*
[7] *(1869) 38 L. J. Reports, Ch. 717.*

aside the sale on the ground of price Condition (1) says the highest bidder shall be the purchaser. Condition (13) says that the sale is subject to confirmation by the Court. It would not be right to construe Condition (1) which says that highest bidder shall be the purchaser to mean that the highest bidder shall not be the purchaser by reason of Condition (13) which says that the sale is subject to confirmation by the Court.

When the Court has fixed an upset price, as it has done in this case, and has said that the highest bidder should be the purchase and the property has been knocked down to the highest bidder at a price above the upset price, the only possible view is that in such a case the Court has no power to set aside the sale merely because a higher price has been offered after the sale. When the conditions are fulfilled the only grounds on which a sale may be set aside are fraud and improper conduct in the mangement of sale. The power to confirm sale reserved to Court is for the purpose of seeing that the sale has been properly conducted. See Seaton on Decrees, Vol. 2 p. 1398 (1879 edn.).

The cases cited on behalf of the appellant do not assist the court as no details as to conditions, &c., are available. In the usual conditions of sale there is no clause that the highest bidder shall be the purchaser. See Daniel's *Chancery Forms.*

Our courts have not adopted the practice of reopening biddings. See *Wettesinghe v. Jayan* [1] ; *Annamalai Chettiar v. Ludovici* [2].

H V. Perera, K.C., replied.

Cur. adv. vult.

July 26, 1948. WIJEYEWARDENE A.C.J.—

This is an application to set a side a sale under the Entail and Settlement Ordinance. It comes up for hearing before a Bench of Three Judges on a reference made by my brothers Jayetileke and Nagalingam under section 48 of the Courts Ordinance.

Under a deed of gift executed in March, 1944, the petitioner was seized and possessed of a small block of land in Kandy and six tenements standing on it. The gift was subject to the condition that on the petitioner's death the property should devolve on her lawful heirs. The petitioner is married to the first respondent, a medical practitioner, and has seven children—second to eighth respondents.

In November, 1946, the petitioner applied to Court, under section 5 of Ordinance, for the sale of the property. She made her husband and children respondents to the petition—the first respondent being also the guardian *ad litem* of the children. In support of her application she stated that her father, who was a resident of Kandy, looked after the property until his death in 1946, and that after his death she and her husband, being residents in Colombo, found it difficult to collect the rents or attend to the minor repairs of the tenements, the need for which

[1] *(1891) 2 Ceylon Law Reports 33.* [2] *(1929) 31 N. L. R. 285.*

occurred frequently as the tenements were "not built of the best materials". She made the following further averments in her affidavit :—

(*a*) "I have had several very desirable offers for the purchase of these tenements, due perhaps to the present favourable condition of the money market, which I am advised is not likely to continue much longer."

(*b*) "I consider it a very favourable opportunity to dispose of the property either by private treaty or by public auction as the Court may be pleased to direct . . ."

This petition was duly inquired into by the District Judge of Kandy on December 12, 1946. The Counsel who appeared for the petitioner produced a valuation report 9R1 from Mr. Morley Spaar, a well-known valuator in Kandy, who gave detailed reasons in that report for his valuation of the property at Rs. 13,800.

The District Judge allowed the application for sale but directed the property to be sold by *public auction* at the upset price of Rs. 13,800.

The property was put up for sale by public auction on March 15, 1947, and purchased for Rs. 13,950 by the ninth respondent to the present petition. The purchaser paid the auctioneer's charges and 25% of the purchase money on the date of sale, and deposited in court the balance purchase money on April 11, 1947. The purchaser's Proctor filed a motion in Court on April 23, moving for an order confirming the sale and directing the execution of a conveyance in favour of his purchaser, On the same day, but subsequent to the purchaser's motion, the petitioner applied to have the sale set aside.

In the affidavit filed by her in support of that application the petitioner stated :—

"I now find that I have offers of much larger sums and that the sale has not been properly advertised and that there have been material irregularities in the advertising and conducting of the sale and otherwise there would have been many other bidders for this property which is situate within the Municipality of Kandy."

At the inquiry into that application, the Counsel for the petitioner stated that he was not supporting the application on the ground that there had been material irregularities in the advertising and conducting of the sale. The evidence of the auctioneer called by the ninth respondent showed that the petitioner's Counsel acted prudently in making that submission, as the auctioneer has in the words of the District Judge, "done all that is humanly possible to advertise the sale of the property". The District Judge had, therefore, to consider the application on the ground set out in the affidavit—"I now find that I have offers of much larger sums". It will be noted that the affidavit does not give any details as to these offers—the dates when the offers were made, the amounts offered or the persons who made the offers. The petitioner and her husband gave evidence at this inquiry on July 31, 1947. The relevant parts of the petitioner's evidence are as follows :—

"Subsequent to that date (date of auction sale) I received other offers. About a week or two ago, I received some offers for this land.

I received an offer of Rs. 20,000 from my husband, the first respondent. Before that too I received some other offers. Those offers were also for Rs. 20,000. I do not know the names of the people who made those offers. I received letters containing those offers."

(These letters were not produced).

"The first offer I received for this land was about two or three weeks ago. I am not sure of the date. That person made the offer to my brother-in-law, Mr. de Livera. A man came to my house and offered Rs. 20,000 to me. That was after Mr. de Livera had communicated to me the offer he had received . . . . The offer by the man who came to my house of Rs. 20,000 was between the offer that Mr. de Livera had received and my husband's offer. My husband's offer was about a week ago. The person who came to my house and made the offer did not want me to mention his name. I do not want even to give the race of the person who made that offer to me. A Sinhalese gentleman and a Mohamedan gentleman came to my house and offered. I do not know if they were brokers or purchasers . . . . I now say that two persons came and offered to buy this property after the offer was made to me by Mr. de Livera. I received all these offers after I filed papers to set aside the sale."

The petitioner's husband gave the following evidence :—

"A few weeks ago my wife received the offers. The offers were received only about two or three weeks ago. A man called Samarakoon made one offer. The offer was Rs. 20,000. He saw Mrs. de Livera and made the offer. Mrs. de Livera is my wife's sister . . . . Our Proctor, Mr. Kolugala, said that Mr. Samarakoon refused to come to Court and give evidence. One or two days ago a gentleman came to see me and said he was a relative of one Mr. Ismail, and offered Rs. 20,000. It was a Muslim gentleman who came. I do not know his name. The offer that the Muslim gentleman made was Rs. 17,500 . . . . I am prepared to buy the property now for Rs. 20,000 and I am prepared to pay the costs incurred by the purchaser at the sale. I am prepared to deposit the money in Court immediately. I am offering this sum of Rs. 20,000 in the interests of the minors and I may, if I get a higher price, sell it for a higher price . . . . I do not know whether Samarakoon wanted to buy for somebody else or buy for himself."

That evidence shows clearly that the petitioner made an untrue statement in her affidavit when she said, "I now find that I have offers of much larger sums". All the offers about which she and her husband spoke at the inquiry have been made nearly three months after she swore the affidavit. None of those who made those higher offers, except her husband, gave evidence. The evidence with regard to those other offers is so vague that the petitioner cannot justly complain if a Judge regards her evidence and the evidence of her husband regarding those offers just as untrue as the statement made by her in her affidavit. We are then left only with the offer of Rs. 20,000 made by the petitioner's husband, the first respondent, a week before the inquiry. I am unable to disagree with the District Judge when he says that he does not consider it

as " a genuine one ". The first respondent was present in Court when the application was made for the sale in December, 1946, and the valuation report 9R1 was produced. The first respondent who is a medical practitioner would have known what the upset price was. Neither he nor the petitioner took the trouble to be present at the sale, presumably because they felt that their interests and their children's interests were amply protected by the Court forbidding a sale of the property below Rs. 13,800. If they thought that the property was worth about Rs. 20,000, and if the first respondent was willing to buy it at that price, he would have been present at the sale. There is another ground for questioning the genuineness of the first respondent's offer. The application for sale was made on the ground that it was inconvenient for the petitioner to look after the property and collect rents. The first respondent, who is now so solicitous about his minor children's interests, could very well have undertaken to look after this property himself or by an agent if it was possible for him to do so. The only inference I could draw is that it was not convenient for him to look after the property. And yet he now wishes to buy for Rs. 20,000 the property for which he thought the valuation of Rs. 13,800 quite reasonable.

The Valuator, Mr. Morley Spaar, gave evidence for the ninth respondent. There is not the slightest suggestion made against his integrity or capacity as a Valuator. He stated that in his opinion the price of the property had not risen since he issued the report.

It is clear from the evidence given by the petitioner and her husband that at the time the petitioner presented the application she had received no higher offer from any source. She wanted to get the sale set aside as she did not want the sale to go through. She thought she could get the sale set aside by alleging irregularity in conducting the sale. When she found she would fail on that ground, she looked about for offers of a higher price shortly before the date of inquiry. Not finding any such offers, she was prepared to state at the inquiry that she received an offer of Rs. 20,000 from her husband a week before the date of inquiry and called him as a witness to support her. The husband did not bring the money into Court. However, when he thought that it would help his wife's application if he said that he was willing to bring the purchase money into Court, he was not unprepared to make that statement under cross-examination.

The District Judge has considered the evidence carefully and come to the conclusion that none of the alleged subsequent offers were genuine. On the material before him, I do not think it could be said that he should not have come to that conclusion. In such circumstances a Court of Appeal would not be prepared to interfere with a finding of a Judge of first instance. Moreover, in any event, the rights of the parties must be determined as at the date of the application to set aside the sale (vide *Silva v. Nona Hamine*)[1]. On that date there were no higher offers at all.

I shall consider now the argument that was addressed to us that, in any event, the Court could have refused to confirm the sale in view of the 13th clause in the Conditions of Sale which stated " the sale to be subject to confirmation by Court ". I am not prepared to assent to

[1] *(1906) 10 N. L. R. 44.*

that proposition. A District Judge cannot act arbitrarily and tell the purchaser, " It is true that you have observed all the conditions of sale and that you have given the highest bid above the upset price, but I will not confirm the sale." The case of *Annamalai Chetty v. Ludovici* [1] is a clear authority against the appellant on that point. I am of opinion that under clause 13 of the Conditions of Sale the District Judge could have refused to confirm the sale only on such grounds as fraud and improper conduct in the management of the sale.

As the matter was argued at some length, I shall deal with the appellant's contention that the District Judge should have refused to confirm the sale, if he was satisfied that the petitioner received genuine higher offers after the auction sale. He referred us to some early English cases. The cases cited by him were *Scott v. Nesbit* [2]; *Brooks v. Snaith* [3]; *Pearson et al. v. Collett et al* [4] and *Lefroy v. Lefroy* [5]. These cases show, that in those days Courts of Equity re-opened the biddings when a higher bid was received at any time before the absolute confirmation of the Master's " report of a purchaser ". The Court re-opened the biddings " almost as of course, but, certainly, as wholly in the discretion of the Court ". The terms on which the biddings have been opened have been " very various " according to the circumstances of each case (vide *147 English Reports 970*).

It will be noted that all these cases have been decided before the end of Lord Eldon's Chancellorship, by which time Equity had become a system of rules as well settled as ever the Common Law had been, and it had become incapable of judicial alteration except by the application of old rules to new subjects or to fresh circumstances (vide *13 Halsbury's Laws of England*, para 2). That practice of the Courts of Equity relating to the opening of biddings was swept away by the Sale of Land by Auction Act, 1867 (30 and 31 Victoria (Chapter 48)). Section 7 of that Act enacted :—

> " That the Practice of opening the Biddings on any sale by Auction of land under or by virtue of any Order of the High Court of Chancery shall, from and after the time appointed by the commencement of this Act, be discontinued, and the highest *bona fide* Bidder at such Sale, provided he shall have bid a Sum equal to or higher than the reserved Price (if any), shall be declared and allowed the Purchaser, unless the Court or Judge shall, on the Ground of Fraud or improper Conduct in the management of the Sale, upon the Application of any Person interested in the Land (such Application to be made to the Court or Judge before the Chief Clerk's Certificate of the result of the sale shall have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the Land to be resold upon such terms as to Costs or otherwise as the Court or Judge shall think fit."

The Judicature Acts of 1873 and 1875 effected a fusion of law and equity and laid down certain rules either varying or affirming the previous rules in equity or at law as to specific matters, and provided generally that

[1] *(1929) 31 N. L. R. 285.*
[2] *(1792) 3 Brown Chancery Cases 475 (29 English Reports 651).*
[3] *(1814) 3 Vesey & Beames 144 (35 English Reports 433).*
[4] *(1824) 13 Price 213 (147 English Reports 968).*
[5] *(1827) 2 Russell 606 (38 English Reports 463).*

in all other matters in which there was a conflict between the rules of equity and rules of the Common Law, the rules of equity should prevail. But relief on equitable grounds was obtainable only in cases where it would have been granted by a Court of Equity before the Judicature Act of 1873 (vide *13 Halsbury's Laws of England*, paras 73 and 74).

I cannot see how our courts could adopt today a chancery practice which came into existence even before the Chancellorship of Lord Eldon and which was discontinued in England nearly five years before the Judicature Act of 1873, and has been characterised as a " pernicious practice " (vide *In re Bartlett Newman v. Hook*[1]). Our courts, no doubt, decide certain matters according to the Law of England which has been enriched by the principles of equity. But it has to be remembered that our courts are courts of law created by the Charter of 1833 and cannot claim to have the wide and vague powers which the Chancellors of the early days exercised on the ground of conscience.

Moreover, so far as one could gather from the few reported local cases on the subject, our courts have not adopted at any time the practice of re-opening bids (vide *Wettesinghe v. Jayan*[2] and *Annamalai Chetty v. Ludovici* (*supra*)). In the latter case the property of an insolvent estate was put up for sale by auction on conditions of sale a clause of which provided, " on payment of the remainder of the purchase money by the purchaser and *the confirmation of sale by Court*, the vendor shall execute a conveyance . . . . "

The property was purchased by the appellant who was the highest bidder at the sale. After the close of the auction sale, an offer was made by a third party to purchase the property at a price " very considerably higher" than the bid of the appellant. Relying on the clause referring to the need for confirmation by court, the District Judge refused to confirm the sale to the appellant. Fisher C.J. (Drieberg J. agreeing) said :—

> " The mere fact that a fresh offer of an enhanced sum is made after the close of the sale by auction is not of itself enough to justify the court in refusing to confirm the sale, and I think, therefore, that the court was not entitled to refuse to confirm the sale on that ground."

The appellant's counsel sought to support his argument by saying that the Court would be within its rights in refusing to confirm the sale, if by such refusal it would benefit the minors. It is no doubt, necessary that the Courts should safeguard the interests of minors, but it is equally necessary that Courts should not act in an arbitrary manner. If a Court sets aside a sale on grounds not recognised by law, the faith of the general public in sales sanctioned by Court will be irretrievably shaken and it will become increasingly difficult to attract bidders to such sales.

I would affirm the judgment of the District Judge and dismiss the appeal with costs.

After I concluded writing this judgment my attention was drawn by Jayetileke J. to *Ramanathan v. Alagacone*[3] (*vide* S. C. Minutes of September 25, 1947) in which the District Judge refused to confirm a sale by auction as he thought the price realised was inadequate. The District

[1] *(1890) 16 Chancery Division 561.* [2] *(1891) 2 Ceylon Law Reports 33.*
[3] *18 D. C. (Inty.) Jaffna 144.*

Judge purported to act in the interests of some minors and justified his order on the ground that he had reserved to himself " a discretion to confirm or refuse ", when he made his order sanctioning the sale. Affirming the decision of the District Judge, Howard C.J. and Windham J. said :—

> " One of the conditions of the sale was that the Judge, who did not put a reserve price upon the property, retained an absolute discretion as to whether he would confirm it. In these circumstances intending purchasers were warned that the sale might not be confirmed. Not without some hesitation, we have come to the conclusion that the District Judge has not acted arbitrarily in setting aside the sale. In these circumstances the appeal is dismissed with costs, but at the same time we direct that the Judge should come to a conclusion himself as to what is the proper price which should be given for this property and give the appellant the first opportunity of purchasing the property at that price."

It will be seen that in that case no reserve price was fixed. The significance of a reserve price was referred to by Lord Cranworth L. C. in *Edward Barlow v. Edward Com Osborne et al.*[1]. He said :—

> " Even if the original practice was right, of the Court having this power of opening the biddings for the purpose of preventing sales at an undervalue, it does seem rather unreasonable that the vendor should be, as it were, protected at both ends, not only by the reserved bidding, but by the power of putting an end to the purchase after it had been made; and it does appear to me to be a very useful suggestion, whether a general order might not be made, either that there should always be a reserved bidding, or, if not, that whenever there is a reserved bidding, then, upon the mere ground of advance bof price, no bidding shall ever be afterwards opened. That, however, though it may be very useful to enact hereafter, is not the law at present."

Moreover, the direction given by this Court to the District Judge in *Ramanathan v. Alagacone* (*supra*) shows that this Court did not want the District Judge to receive bids over and above what the District Judge thought was the " proper price " and then give the property to the highest bidder but to offer the property to the auction purchaser at the " proper price " fixed by the Judge. That decision, when closely examined, is really an authority for the proposition that, where an upset price was fixed by Court and the property was sold by auction at or above the upset price, the Court should not set aside the sale even though the sale was subject to confirmation by Court and minors were interested in getting the highest possible price for the property.

NAGALINGAM J.—I agree.

JAYETILEKE S. P. J.—

This appeal relates to a sale held under the Entail and Settlement Ordinance, Chapter 54.

By deed No. 4,595 dated March 6, 1944, one Stephen de Silva, the father of the petitioner, gifted to the petitioner six tenements bearing assessment

[1] *(1858) 6 House of Lords 558 (10 English Reports 1412).*

Nos. 53, 55, 57, 59, 61 and 63, situate at Mahaiyawa, in Kandy, subject to the condition that, upon her death, the said tenements should devolve on her lawful heirs.

The petitioner is married to the first respondent, who is a doctor practising in Colombo, and has six children by the marriage, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents, all of whom are minors of the ages of 17, 16, 13, 8, 4 and 1½ years respectively.

On July 15, 1946, the petitioner made an application to the District Court of Kandy, under section 4 of the Entail and Settlement Ordinance, for leave to sell the said tenements on two grounds : (1) that they needed constant repairs, and (2) that she found it difficult to recover the rent as she was residing in Colombo. On November 18, 1946, she amended her application by making her husband and her children respondents to the application. She submitted a valuation report from one Mr. Spaar, a retired Superintendent of Minor Roads, in which he valued the tenements at Rs. 13,800. The report is by no means a satisfactory one. Mr. Spaar says that the annual value of the premises is Rs. 170, the rent is Rs. 120 a month, and that the premises are worth Rs. 13,800. The basis of the valuation is not given in the report.

On December 12, 1946, the District Judge made the following order :—

> " The application is allowed. Let the premises described in the schedule be sold by public auction at the upset price of Rs. 13,800. The purchaser will get the property free from the conditions contained in deed of gift No. 4,595 of March 6, 1944, and the conditions contained in the deed of gift will attach to the money that is to be brought into Court on March 12, 1947."

On Janurary 28, 1947, the District Judge issued a commission to K. Edmund Perera, returnable on March 12, 1947, which was extended late to March 31, 1947, to carry out the sale on certain conditions of sale approved by him.

The sale was held at the spot on March 17, 1947. Neither the petitione nor the 1st respondent was present at the sale. There were only two bidders and the 9th respondent purchased the premises for Rs. 13,950.

On April 23, 1947, the petitioner filed a petition and affidavit and moved that the sale be not confirmed as she had received higher offers since the sale for the said premises.

At the inquiry, the petitioner gave evidence that she received one offer of Rs. 20,000 through her brother-in-law, Mr. de Livera, and another of Rs. 20,000 personally from two persons. She also said that the 1st respondent told her that he was prepared to buy the property for Rs. 20,000. The 1st respondent, too, gave evidence. He supported the evidence of the petitioner that there were two offers of Rs. 20,000 each, and he stated that he was prepared to deposit Rs. 20,000 in Court, and to pay any expenses incurred by the 9th respondent in connection with his purchase.

The learned District Judge rejected the petitioner's evidence with regard to the alleged offers on the ground that there was a conflict between her evidence and her affidavit as to the dates of the offers. He has

clearly made a mistake on this point, for he has lost sight of the fact that the petitioner stated that she could not be certain about the dates. He was also of opinion that the offer made by the 1st respondent was not a genuine one. He, accordingly, dismissed the application with costs. I examined the proceedings in the case very carefully to see whether there were any materials which supported the learned District Judge's observation.

> " I do not think that the offer of the 1st respondent is a genuine one."

but I could not find any. Not a single question seems to have been put to the 1st respondent either by the 9th respondent or by the Court suggesting that his offer was not a genuine one. The surest way of testing whether or not the 1st respondent's offer was a genuine one would have been to order him to deposit the amount in Court, but that was not done. In these circumstances I do not think that the observation made by the learned District Judge was either fair or proper. I may add that, at the argument before us, Mr. Perera offered to deposit in Court immediately Rs. 20,000 plus the expenses of the 9th respondent, and further to pay into Court for the benefit of the minors any sum in excess of Rs. 20,000 which the 1st respondent may realise by the resale of the premises.

Two questions were raised at the argument before us.

(1) Whether the Court had the power to refuse to confirm the sale.

(2) If so, whether, in the circumstances of the case, the Court should have accepted the 1st respondent's offer and refused to confirm the sale.

Section 4 of the Entail and Settlement Ordinance gives the Court the power ot order entailed property to be sold upon such terms and subject to such conditions as the Court shall deem expedient. *In re the application of Misso* [1] Shaw J. said :—

> " I think that an order should be made if it is reasonable from the point of view of the fiduciary that it should be sold and there is no prospect of loss to the fidei commissary."

Section 4 vests in the Court the power to give directions for the conduct of the sale, but it is silent as to the nature of the directions the Court should give. The Ordinance leaves the whole conduct of the sale in the hands of the Court. It follows, therefore, that the directions which the Court gives are its own, unlike sales in execution, to which the provisions of section 225 of the Civil Procedure Code and those sections which follow are applicable. The particulars of the sale and the conditions of sale are usually prepared by the petitioner's proctor with the aid, where necessary, of the intended commissioner, and submitted to the Court for its approval. In settling the particulars and conditions of sale the Court looks not only to the interests of the parties to the application, but also to the interests of the person who may happen to be the purchaser at the sale. The conditions of sale constitute the terms upon which the property is sold. Where a property is sold by auction under written conditions of

[1] *(1920) 22 N. L. R. 334.*

sale, such conditions, when signed, form the contract between the purchaser and the seller. In the present case there were thirteen written conditions of sale of which those that are relevant to the decision of the appeal are :—

1. The highest bidder shall be the purchaser . . . .
2. Immediately on the fall of the hammer, the purchaser shall pay into the hands of the auctioneer the full amount of the purchase money where it does not exceed the sum of Rs. 100, and, where it is above that, the purchaser shall pay to the auctioneer a deposit of 25% in part payment of the purchase money and shall sign an agreement for the payment of the remainder . . . .
5. On the payment of the remainder of the purchase money by the purchaser and the confirmation of sale by the Court, the vendor shall execute a conveyance of the said property . . . .
13. Sale to be subject to confirmation by Court.

There was no condition that the sale would be subject to a reserved or upset price. The agreement which the respondent signed after the sale contains the following clause :—

> "I have this day purchased at public auction the said premises above described upon and subject to the conditions thereto subjoined."

Where a land is sold by auction on the order of the Court, it has always been the practice for the Court to confirm the sale if it is in order. That is the confirmation that is referred to in condition five. In addition to condition five there is, in this case, a special condition that the sale is to be subject to confirmation by Court. What is the effect of the words "subject to" ? Mr. Perera contended that they introduce a condition or proviso which makes the sale conditional on the Court confirming it. He contended further that no contract is concluded when the property is knocked down to the highest bidder as the sale is, by its conditions, a sale subject to confirmation by the Court. I think that these contentions are sound. In *McManus v. Fortescue* [1] Collins M. R. said :—

> "The sale took place under conditions of which the second is that each lot would be offered subject to a reserve price, and the fact lies at the root of the discussion that every bid is made subject to such condition. What then is the meaning in such a case of the fall of the hammer ? Under the authorities that have been cited, it appears that it amounts to an acceptance of the offer of the bidder, but that offer was, as I have said, conditional on the reserve price being reached, and a conditional offer cannot be treated as a general and unconditional one. The condition cannot be lost sight of, and a conditional acceptance by the auctioneer of a conditional offer cannot amount to a binding contract to sell, unless some custom is proved that it shall be so treated, and of that there was no evidence. No authority has been cited to us that the fall of the hammer could do away with a condition especially stipulated for by the conditions of sale."

[1] *(1907) 2 K. B. D. 1.*

and Fletcher Moulton L. J. said :—

"I further wish to express my entire agreement with the view expressed by the Master of the Rolls that in a sale by auction with notice that it is subject to a reserve every offer by the auctioneer, and every bid, including the final one, and the acceptance of that final bid indicated by the fall of the hammer, is conditional. The public is informed by the fact that the sale is subject to a reserve, that the auctioneer has agreed to sell for the amount which the highest bidder is prepared to give only in case that amount is equal to or higher than the reserve."

In an unreported case, *In re the Estate of Alagakone, deceased Ramanathan v. Alagakone* [1], the respondent, who was the administratrix, of the estate, applied to the Court for permission to sell a land by public auction for the payment of testamentary expenses and debts. The application was allowed subject to the condition that the property should be sold at the upset price of Rs. 19,000. The Commissioner to whom the commission was issued returned the commission to Court with the report that there were no bidders at the sale. Thereupon, the respondent made a further application to the Court for leave to sell the property by public auction without reserve. The Court allowed the application but reserved to itself the right to confirm the sale or not at its discretion. At the second sale the property was knocked down to the appellant for Rs. 11,100. After the sale the appellant moved to have the sale confirmed and the respondent moved to have it set aside. At the inquiry the respondent called one Mr. Sanders who said that he was prepared to buy the property for Rs. 15,000. The Court considered that, in the interests of the heirs of the deceased, some of whom were minors, it should not confirm the sale and made order accordingly.

The appeal came up for argument on September 2, 1947, before Howard C.J. and Windham J. who remitted the case to the District Judge for his report on the following points :—

(1) What exactly he had in his mind when he said :—"I do not think that I am acting arbitrarily in directing the sale to be set aside. I am only doing what I had in mind when I made the order when I reserved a discretion in me to confirm or refuse and that the sale was not to be considered final till I confirm the sale."

(2) Does it mean that he reserved a discretion in himself to confirm or refuse to confirm the sale in the event of his considering that a higher price should or might have been obtained, or had he in mind some particular price that he considered the property should fetch at the sale ?

(3) In the event of such a price not being obtained, was it in his mind that he would then reiuse to confirm the sale ?

The District Judge sent his report in which he stated as follows :—

"Counsel for the purchaser urged that, at a sale by public auction at the instance of a private party, if the price realized was considered by the party inadequate or for any other reason he may arbitrarily refuse to confirm the sale and execute a deed of transfer ; but this was

[1] *18 D. C. (Int.) Jaffna 144, S. C. M. September 25, 1947.*

a judicial sale and the Court could not arbitrarily refuse to confirm the sale; a judicial discretion had to be exercised and in the exercise of that discretion inadequacy of price would not be a factor to be considered. I stated in my judgment, by way of reply, that I did not consider my order to set aside the sale the arbitrary act of a judge when called upon to confirm because I had reserved already a right in me to confirm or to refuse according to my discretion as minors' interests are my special care. What I intended to convey was that if parties were all majors I would have no concern, and in confirming or refusing to confirm I would be exercising a judicial discretion and I should not act arbitrarily. But section 69 of the Courts Ordinance has vested the care of minors' property in me, and it is my duty to see that their interests did not suffer. Therefore, quite apart from any jurisdiction of a Judge to confirm a sale or not, I had in granting sanction to sell reserved in me a discretion to confirm or refuse. This reservation is expressed in the journal entry of December 10, 1945, and was made a condition of sale. What I had in mind was that I should confirm or refuse to confirm according to whether in my opinion the price fetched was a reasonably good price. My idea was to refuse to confirm if I thought that a better price should or might have been obtained. I did not have in mind a particular price."

The case came up for further argument on September 25, 1947, before the same bench and Howard C.J. delivered the following judgment :—

" The only question to be decided in this case is whether the District Judge in setting aside the sale of this property was acting arbitrarily. One of the conditions of the sale was that the Judge, who did not put a reserve price upon the property, retained an absolute discretion as to whether he would confirm it. In these circumstances intending purchasers were warned that the sale might not be confirmed. Not without some hesitation we have come to the conclusion that the District Judge has not acted arbitrarily in setting aside the sale. In these circumstances the appeal is dismissed with costs, but at the same time we direct that the Judge should come to a conclusion himself as to what is the proper price which should be given for this property and give the appellant the first opportunity of purchasing the property at that price."

So far as I could follow the reading of this judgment, the learned Chief Justice has not expressed anything in the nature of disapproval of the decision of the trial Judge that he had the power to refuse to confirm the sale. I think this decision is an authority both on the main point as well as on the minor point raised in this case. The judgment of the learned Chief Justice implies that a condition like condition thirteen must not be considered as giving an arbitrary power to the District Jusge to refuse to confirm the sale, and that the District Judge will exercise that power only if there is some reasonable ground for doing so. This view has the support of the judgment of Collins M. R. in *re Jackson v. Hadden's Contract.* [1]

[1] *(1906) L. R. 1 Ch. Div. 412.*

The judgments of this Court in *Annamalai Chetty v. Ludovici*[1] and *Wettesinghe v. Jayan*[2] are not in point. The conditions of sale under which the sales were held in those cases did not have a condition that the sales would be subject to confirmation by Court. Mr. Perera conceded that, but for condition thirteen, the Court would be obliged to confirm the sale in this case.

Mr. Weerasooria relied very strongly on condition one. He argued that the sale was complete on the fall of the hammer, and that condition thirteen was intended to give the Court the power to refuse to confirm the sale only in such cases where the Commissioner fails to follow the directions given by it. There does not seem to be any reason to limit the scope of condition thirteen to such cases. It is very wide in its terms and the words used are very clear. When the words used are clear it is not permissible for the Court to admit parol evidence to explain the meaning of the words. Nor is it pemissible for the Court to depart from the ordinary and plain meaning of the words used on the mere supposition that the intention of the draftsman was otherwise than indicated by the plain and ordinary interpretation of the words used. I do not think it would be necessary to make any provision to meet a case of the kind referred to by Mr. Weerasooria because the Court has the inherent power to refuse to confirm a sale when the Commissioner fails to carry out its directions. (See *Feron v. Ismail Lebbe Marikar*[3].)

If Mr. Weerasooria's contention is sound it will not be possible for an owner to put a property for sale by public auction subject to confirmation by him. The answer to Mr. Weerasooria's contention is to be found in the observations of Collins M.R. quoted above. For the reasons given by me, I am of opinion that condition thirteen gives the Court the power to refuse to confirm the sale.

With regard to the second question, it is important to bear in mind that the difference between the highest bid and the 1st respondent's offer is Rs. 6,050 and that some of the parties who stand to benefit by the acceptance of the 1st respondent's offer are minors. Under the Roman-Dutch law the guardian of a minor is empowered, under certain circumstances, to alienate the property of his ward, but such alienation cannot be effected without the decree of a Court of competent jurisdiction. Grotius[4] says :—

> " Immovable property, also rents and canons accruing to the wards may not be sold or encumbered by the guardian, even with the knowledge of the *Weesakamer*, but the same must be effected under direction of the Court of Holland or of the ordinary Judge, where such is the practice. The Court and the Judge, however, may not grant permission until after due inquiry (in which case it is the practice to hear the nearest relations of the four quarters) it shall be found necessary for the discharge of any debts or the support of the minor children or otherwise manifestly for the ward's advantage."

[1] *(1929) 31 N. L. R. 285.*
[2] *(1891) 2 C. L. Rep. 33.*
[3] *(1930) 31 N. L. R. 319.*
[4] *Herbert's Translation 1. 8. 6.*

Vanderkeesel[1], Van Leeuwen,[2] and Voet[3] are of the same opinion. In *Hider v. Corbet*[4] Cayley C.J. said :—

> " I think that by virtue of the rules and orders relating to the testamentary jurisdiction of District Courts the jurisdiction of the old *Weesakamer* is, for many purposes, now vested in the District Court, and that the District Court holds also in these matters the same position as the ' ordinary Judge ' mentioned by Grotius and Van Leeuwen."

The rules and orders referred to by the learned Chief Justice were repealed and substantially re-enacted in section 69 of the Courts Ordinance, Chapter 6.

In *Perera v. Perera*[5] Middleton J. said :—

> " Now the theory which underlies the objection of the Roman Law to alienation by a guardian of the immovable property of his ward without permission was, I take it, that the minor was not to be deprived of his hereditary lands except on the grounds of the most absolute necessity, those lands being indispensable for the proper upholding of the rank and position in life of the minor ; and it was deemed, I have no doubt, that a disinterested authority should approve the guardian's opinion as to the existence of such authority or restrain his tendency to fraud on the minor."

In *Mustapha Lebbe v. Martinus*[6] Layard C.J. said :—

> " The appellant's Counsel contended that the mere power given by the deed to the guardian to sell, if she sees it necessary and expedient for the advantage and benefit of the minors, dispenses with the sanction of the District Court. Notwithstanding the insertion of that power in the gift to the minors *it appears to me just as necessary for the Court to see that the price is a fair one and that the sale is manifestly for the advantage of the wards.*"

These authorities show that, when an application is made by a guardian to sell any property belonging to a minor, it is the duty of the Court to protect the interests of the minor. In this case the Court has protected the interests of the minors by providing in its order that the property should be sold at the upset price of Rs. 13,800, and by making further provision in the conditions of sale that the sale should be subject to confirmation by it.

In England, before the Sale of Land by Auction Act, 1867[7], in the case of sales on the orders of Court, the practice of opening the biddings after the estate had been sold was in vogue ; that is to say, the Court allowed a person to offer a higher price than that at which the property had been sold and, upon such offer being made, directed a resale of the property. In *Lefroy v. Lefroy*[8] at a sale held under a decree one Andrews bought part of the property for £12,010. One Smithers moved to open the biddings by offering an advance of £300. The Lord

[1] *Thes. 130, 131.*
[2] *Com. p. 96.*
[3] *27.9.6.*
[4] *(1876) 3 S. C. C. 46.*
[5] *(1902) 3 Browne's Reports 150.*
[6] *(1903) 6 N. L. R. 364.*
[7] *30 and 31 Vict. c. 48.*
[8] *(1827) 38 E. R. 463.*

Chancellor indicated that he was prepared to open the biddings if an advance of £500 was offered. Smithers raised his offer to £500 and the order was made. In the course of his judgment the Lord Chancellor said :—

> " What the Court looks to is the benefit of the parties interested in the produce of the sale, and the additional sum which is offered beyond the price already obtained ; and more particularly in the case of infants, creditors, &c., the Court is in the habit of trying how much it can make of the estate for the persons interested. "

In *Brooks v. Snaith* [1] at a sale under a decree the highest bid was £10,000. A motion was made after the sale to open the bidding, the advance offered being £500. The Lord Chancellor allowed the motion.

Burge [2] says that an advance of 10% used generally to be considered sufficient in the English Courts to open the biddings.

In *Barlow v. Osborne* [3] the Lord Chancellor said that the practice of opening the biddings led to great inconvenience, but at the same time he could not be affected by it. He thought that the matter may well be one for the attention of the Legislature in order to remedy that inconvenience. In 1867 the Sale of Land by Auction Act was enacted in order to put a stop to the existing practice. It provided that parties would be entitled to open the biddings after a sale by auction under the Court only on the ground of fraud or improper conduct in the management of the sale. There is no such provision in Ceylon. There can be no question that, if this case came up for consideration before the English Courts before the passing of the Sale of Land by Auction Act, 1867, the 1st respondent's offer would have been accepted without hesitation. To my mind there does not seem to be any reason why that offer should not be accepted by us. In *Kapadiya v. Mohamed* [4] Shaw J. said that the Courts of this Colony are Courts of Equity as well as of law, and in *Dodwell & Co., Ltd. v. John* [5] Viscount Haldane said that, under the principles which have always obtained in Ceylon, Law and Equity have always been administered by the same Courts.

The amount offered by the 1st respondent is considerably higher than the amount of the 9th respondent's bid, and it will manifestly be for the advantage of the minors that the offer should be accepted. It was urged that the adjoining property, which belonged to the petitioner's sister and which was valued by Mr. Spaar at Rs. 16,000, was put up for sale on the same day, and that there were no bidders for it, and that later it was sold by private treaty with the leave of Court for Rs. 16,000. There are no materials before us on which we can say whether or not that property was more valuable than the petitioner's property and why that property fetched only Rs. 16,000. From the mere fact that that property fetched only Rs. 16,000 it does not follow that the petitioner's property is not worth Rs. 20,000. There is, however, the undisputed fact that the 1st respondent is prepard to pay Rs. 20,000 for the petitioner's

[1] *35 E. R. 433.*
[2] *Vol. 2 1st Ed. p. 642.*
[3] *(1858) 6 H. L. 566.*
[4] *(1918) 20 N. L. R. 315.*
[5] *(1918) 20 N. L. R. 206.*

property. It seems a pity that the learned District Judge has not given his mind to the question whether or not the 1st respondent's offer should be accepted on the basis that it is a genuine one. I think it is undesirable that we should be invited to decide a question which was essentially one for the trial Judge to decide. But, however that may be, as the answer to the question does not depend on the credibility of witnesses, I think we are free to decide it ourselves. Having given my best consideration to the facts of the case, I have come to the conclusion that it is just and reasonable that the 1st respondent's offer should be accepted. I do not think that it is open to the 9th respondent to complain because he knew that his bid was accepted by the Commissioner subject to the sale being confirmed by the Court. Relying on the following passage in the judgment of Cayley C.J. in *Wettasinghe v. Jayan* (*supra*).

> " I think it is most dangerous to discredit public sales like these because one of the interested parties thinks that the property was sold for less than its value. "

Mr. Weerasooria contended that we should not interfere with the order made by the learned District Judge. I find myself in entire agreement with the observation made by the learned Chief Justice, but I do not think it is applicable to the facts of this case. As I said before, the conditions of sale under which the sale was held in that case did not provide that the sale would be subject to confirmation by Court. Mr. Weerasooria intimated to us at the argument that his client was not prepared to advance his bid to Rs. 20,000. The order of the learned District Judge is, in my opinion, wrong. I would, accordingly, set it aside and direct him to accept the 1st respondent's offer. The 9th respondent will pay the costs of the petitioner in both Courts.

Appeal dismissed.