investigation by courts and juries, why then, by the rules or the practice of this court, the act of Congress is substantially repealed, and the proceedings of the courts below are a mere mockery. The value of the subject of the controversy, as ascertained in the court below, supplies the only safe and uniform rule as to jurisdiction, in cases wherein jurisdiction is dependent on value. My opinion, therefore, is, that it is incompetent to either of the parties, or to this court, in the indirect *and collateral mode here attempted, and [*134 upon evidence entirely dehors and unconnected with the record, to impeach or inquire into the verdict and judgment rendered in the District Court of Texas; that such a proceeding is utterly subversive of the act of Congress limiting the right to appeals and writs of error, and equally subversive of the fundamental rule of pleading and of evidence, which establishes undeniable verity in the solemn proceedings of courts acting within the sphere of their jurisdiction, and establishes every fact and every conclusion embraced within the scope of those proceedings.

Order.

On consideration of the motion made by Messrs. Hughes and Howard, on a prior day of the present term of this court, to wit, on Friday, the 25th day of January last past, to dismiss this writ of error for the want of jurisdiction, and of the arguments of counsel thereupon had, as well in support of as against the same, it is now here ordered by this court, that the said motion be, and the same is hereby, overruled.

SAMUEL VEAZIE, COMPLAINANT AND APPELLANT, *v.* NATHANIEL L. WILLIAMS AND STEPHEN WILLIAMS, DEFENDANTS.[1]

Where false steps are taken to enhance the price of property sold at auction, a court of equity will relieve the purchaser from the consequences and injury caused by these unfair means.

Therefore, where the owners had instructed the auctioneer to take $14,500 for the property, and the real bids stopped at $20,000, and the auctioneer, even without the consent or knowledge of the owner, continued to make fictitious bids until he ran it up to $40,000, this was a fraud upon the purchaser.

These sham bids could not have been made by the auctioneer upon his own

[1] Reported below, 3 Story, 611.

account. Even if they had been so, it is very questionable whether they would have been valid.

Being the general agent of the owners, the latter are responsible for his acts if they receive the benefit of them. By-bidding or puffing by the owners, or caused by or ratified by them, is a fraud, and avoids the sale.[1]

The sale being made on the 1st of January, 1836, but the fraud not discovered until 1840, and the bill being filed in 1841, there is no sufficient objection to relief owing to lapse of time.[2]

A release given by the purchaser to the auctioneer, for the purpose of making him a competent witness, did not operate as a bar to a recovery against the vendors. He would have been a competent witness without it.

There was no necessity for making the auctioneer a defendant in the suit.

The various modes of relief examined.

THIS was an appeal from the Circuit Court of the United States for the District of Maine, sitting as a court of equity.

*135] The complainant, Veazie, resided at Bangor, in the state of *Maine, and the defendants in Massachusetts, viz., Nathaniel L. Williams at Boston, and Stephen Williams at Roxbury.

The facts of the case were these:

On the 1st of January, 1836, Nathaniel L. Williams and Stephen Williams were the owners of two mill privileges, situated on Old Town Falls, in the town of Orono and state of Maine. On that day, they offered the property for sale, at public auction, in the town of Bangor. The whole controversy in the case having arisen respecting the manner in which the sale was effected, it is necessary to state the circumstances as they were disclosed by some of the witnesses. The owners employed Mr. Stephen H. Williams to proceed to Bangor and attend to the sale, who hired an auctioneer by the name of

[1] A person interested in an auction sale requested the auctioneer to bid $2,500 for him; this was accordingly done, and, no higher bids being made, the property was knocked off to such person. *Held*, that as it appeared that the auctioneer's authority to make such bid was fairly used, the sale was valid. *Richards* v. *Holmes*, 18 How., 143, 148.

An agency simply to bid a particular sum for a purchaser, amounting to no more than receiving from the purchaser, before the sale, a bid which is to be treated as if made there by the purchaser himself, is not necessarily inconsistent with any duty of the auctioneer, and does not enable any one to avoid the sale. *Ib.*

An association of persons may lawfully appoint one of their number to bid for them at a sale, in the absence of actual or constructive fraud. *Piatt* v. *Oliver*, 2 McLean, 267; s. c. 3 How., 333, and notes, *q. v.*; *Kearney* v. *Taylor*, 15 How., 494.

In some jurisdictions it is still held that an auctioneer making a sale cannot act for himself, or *any other person*, in bidding for the property. *Brock* v. *Rice*, 27 Gratt. (Va.), 812.

Where defendants employed a puffer to bid at a partition sale, with intent to impose upon plaintiffs and induce them to bid more than they would otherwise have done, and plaintiffs were thereby induced to purchase the property at a higher price than they would otherwise have bid for it—*Held*, that the sale should have been set aside absolutely, on defendants' application, and that the denial of a motion therefor should be reversed. *Fisher* v. *Hersey*, 17 Hun (N. Y.), 370.

[2] See note to *Oliver* v. *Piatt*, 3 How., 333.

Head to effect it. The most material parts of the transaction are thus stated by Head, who was examined as a witness on the part of the complainant.

"I was employed, in the winter of 1836, by a son of one of the Messrs. Williams, to sell certain real estate in Orono, as an auctioneer. The estate sold was mill privileges, situated in Old Town, near Old Town Falls. It was put up at a minimum price of $14,500, but it is my impression that the minimum price was not fixed or named at the sale; but it commenced at a much lower sum, which I have now forgotten, and run on up to about eighteen thousand dollars; it might have been more or less. I then received from Samuel J. Foster bids, who was the only person that bid, to my recollection, after the sum last named. Foster bid a hundred dollars, and I then advanced upon him; he then bid again, another hundred dollars, or some other sum; I again advanced upon him, and so on, till the bid got up to forty thousand dollars, when it was struck off to Samuel J. Foster. I don't recollect the terms of sale. A certain per cent. was to be paid down, but what it was I don't recollect."

To the third interrogatory. "I don't recollect that said sale was conditional, except as I have stated. I don't recollect the sum first offered, but it is my impression that it was something like five thousand dollars. I don't recollect what the bids were from that sum. My impressions are, that Samuel J. Foster, Ira Wadleigh, John B. Morgan, and, I think, James Purrington, were the bidders. There might have been others. The highest sum bid by any person other than the purchaser was somewhere in the vicinity of eighteen thousand dollars, to the best of my recollection."

To the fourth interrogatory. "I have already answered, as near as I can recollect, as to the highest sum offered as a bid, *except that at which it was struck off. After [*136 other bidders stopped, he, Foster, bid a hundred dollars, or so. I then advanced upon him, and he then again bid, and so on up to forty thousand dollars."

To the fifth and a half interrogatory, viz., "What was the highest sum offered as a bid at said sale, which you received as a bid, except the bids offered by said Foster?"—"It was somewhere about eighteen thousand dollars, as I have already answered. The actual bidders were about to that sum, as near as I can recollect. It is my impression that I advanced from that sum, or thereabouts. I cannot say for a certainty from what sum I so advanced. But I think it could not have exceeded twenty thousand dollars at which the actual bidders

stopped, and my impression is, that they ceased to bid beyond eighteen thousand dollars."

To the sixth interrogatory. "I never communicated said facts to said Veazie, to my knowledge. I cannot recollect when I first communicated them to any one who would have been likely to have communicated them to Veazie. About six months ago, J. P. Rogers, Esq., came to me, and said that he had knowledge of certain facts that I knew. I did not know what he meant. He then referred to the sale of this property. I did not tell him anything about it at that time. He called on me again; I refused, as I did not know but I might implicate myself. Afterwards, he called again, and I then told him, if Veazie would give me a writing holding me harmless, I would state the facts. He said he would give me such a writing, as attorney for Veazie, which would be good. He did so, and I then went forward and gave my deposition in a case between the parties, as to the facts of the case."

To the ninth cross-interrogatory. "Said defendants, nor any agent of theirs, did not request me to employ any by-bidder at the sale, nor to use any other than fair and lawful means to enhance the price of the said property."

Samuel J. Foster, who was the person employed by Veazie, the complainant, to bid for him thus testified:—

To the second interrogatory. "I did attend said auction sale in the winter of 1836. It was held on the 1st day of January, 1836, at the Penobscot Exchange, in Bangor. Certain mill privileges and appurtenances, situate near or on the Old Town Falls, was the property sold."

To the third interrogatory. "The highest sum bid for said property was forty thousand dollars. I bid it, and was acting and bidding for Samuel Veazie."

*137] To the fourth interrogatory. "Previous to the sale, I was *instructed by General Veazie to bid to the amount of twenty thousand dollars. At the time of the sale, after the bidding had gone up to twenty thousand dollars, Mr. Veazie came to me, under considerable excitement, and told me to advance and bid it off. I have no distinct recollection what my first bid was, but my impression is, that I commenced with about five thousand dollars. It advanced pretty rapidly, till it amounted to fifteen or sixteen thousand dollars. I think, between that point and twenty thousand, the bidding was not very prompt, but it went on finally from twenty thousand, till it was struck off to me at forty thousand dollars. I think I did not communicate my relation to General Veazie to any one, until the property was knocked off. I then notified Mr. Bright, the agent of the defendants, a Mr. Williams, the son

of one of the defendants, and Mr. Head, the auctioneer, that I bid for General Veazie, and the parties made arrangements to meet, the afternoon of the same day, at the office of William Abbot, Esq., in Bangor, to settle and close the business."

To the fifth interrogatory. "John Bright, who acted as agent, and a Mr. Williams, son of one of the defendants, were present, apparently acting for them. I have no recollection of their making any remark at the time of sale, nor that they did anything, at that time, about the sale."

To the fifth and one half interrogatory. "My impression is, that I saw or heard no bidding after it got up to sixteen or eighteen thousand dollars. The biddings, audibly, or by signs, then ceased to be known to me. I observed Mr. Wadleigh, and believe he was present from the beginning to the close of said sale. My impressions are very strong that I noticed Mr. Wadleigh's biddings till it reached to sixteen or eighteen thousand dollars. After that, I am positive that there were no signs, or open bids, that would enable me to discover who, or that any one, was bidding against me. I endeavored to discover if Wadleigh was doing so, and could find no sign or nodding from him, or from any one else."

Ira Wadleigh, also a witness on the part of the complainant, thus testified:—

To the second interrogatory. "I know the property, and that it was sold to Samuel J. Foster at forty thousand dollars. About a month before the sale I was in Boston, and called on Nathaniel L. Williams to see if he would sell me the property. He said they thought of putting it up at auction, and would let me know in a few days, as soon as he could see his brother Stephen. I advised him to sell, so that mills could be built that winter. *On coming out of Boston, I met Stephen Williams's son, Stephen H. Williams, who was coming [*138 down to see to selling the property; and after he reached Bangor, I saw him here, and talked with him about the property, and asked him if he would sell it at private sale. He told me he would sell it for fifteen thousand dollars or thereabouts;—I think he told me so. Afterwards it was advertised to be sold at the Exchange in Bangor. Stephen H. Williams appeared to be acting for the defendants."

To the third interrogatory. "The property was sold at auction; I was present at the sale, and bid I cannot say how many times, nor what sums I bid; but somewhere from fifteen to twenty thousand dollars. I don't remember bidding over twenty thousand dollars, although I might have done so. Nicholas G. Norcross bid; I think Myrick Emerson bid, and Samuel J. Foster, and some others; but I do not recollect

who. I cannot tell how much they bid, but from where it started up along, but how far I cannot say."

To the fourth interrogatory. "When they first commenced, the bids were audible, and properly made; but after they got up to twenty thousand dollars and over, it was by signs."

To the fifth interrogatory. "I saw General Veazie at the auction; he was about the room there; and was walking back and forth in the long entry part of the time. I did not see anything very particular in his manner. I did not mind much about it."

To the sixth interrogatory. "I talked with Head before the sale, and told him I wanted to buy it. He asked me how high I would go. I told him to seventeen thousand dollars, if I could not get it for less. I agreed with Norcross to take it at that sum; and told Head that I would hold my pencil between my thumb and forefinger, and turn it for a bid. I soon went up to twenty thousand and upwards, and stopped. I found the bidding was going on without my nodding, turning my pencil, or making any sign, and stepped up to Head, and asked him if he was bidding for me. He made no answer; and I said, 'For God's sake, don't bid any more for me,' and went and sat down and bid no more. After the sale I had a conversation with young Williams, and, I think, told him how the bidding went on; but he must have seen it, as he was siiting behind, and close to Mr. Head. He said he was surprised at the sale; that the property sold for much more than they expected."

To the seventh interrogatory. "There were four privileges; and they were not then actually worth more than two thou-
*139] sand dollars a privilege. I don't believe it would sell to-day *for four thousand dollars at auction,—the whole property, that is, the four privileges."

Four other witnesses, viz., Myrick Emerson, Levi Young, Richard Moore, and Isaac Smith, who were present at the sale, were examined on behalf of the complainants, whose evidence corroborated that of the preceding witnesses, as far as mere spectators could have any knowledge of the transaction.

Ten witnesses were examined on the part of the defendants. Stephen H. Williams, the authorized agent of the owners of the property, thus testified:—

"My name is Stephen H. Williams. I am thirty-four years old. I am a merchant, and reside in Roxbury; I know the said parties. Mr. Veazie resides in Bangor, and is the president of a bank; I don't know his occupation. Mr. Williams resides in Boston, and is retired from business; he is my uncle.

"To the second interrogatory he says:—In the winter of 1835–36, I was employed by the defendants to go to Bangor, and act as their agent in selling at auction certain mill privileges, at Orono or Old Town; I went to Bangor; the sale took place, January 1, 1836; the property was sold by Henry A. Head, as auctioneer, and was knocked off to a man named Foster, but Mr. Veazie was the purchaser. The price was forty thousand dollars.

"To the third interrogatory he says:—On arriving at Bangor, being a stranger, I made inquiries of Mr. John Bright as to who was the most respectable auctioneer in the place, and he referred me to Mr. Henry A. Head, as the person employed in disposing of the government lands, and in his opinion the most desirable auctioneer. I accordingly applied to him to dispose of the property, and he consented to do so. On the day of the auction, previous to commencing the sale, he asked me what amount was to be paid to him for his services; being unacquainted with the amount of commissions usually paid to an auctioneer, I told him that he should be paid what was customary. Nothing further was said respecting his fees previous to the sale.

"To the fourth interrogatory he says:—I have already answered this interrogatory in my reply to the third interrogatory.

"To the fifth interrogatory he says:—I did not authorize, or request, or in any way suggest to the said auctioneer, to bid himself on the said property, or employ any other person to do so, or to do or permit any thing unfair, unusual, or in any way improper, to be done at the said sale to enhance the price of the said property; and I did not know, nor had I any reason to believe, that he intended to do so.

*"To the sixth interrogatory he says:—I did not, nor [*140
did any one authorized by me, make any bid on the said property at the said sale.

"To the seventh interrogatory he says:—I knew the said Wadleigh, at the time of the sale, so as to speak to him; he was present at the sale.

"To the eighth interrogatory he says:—I did see the said Wadleigh, while the sale was going on, go up to the auctioneer and speak to him; the bid had then gone to thirty-nine thousand dollars. He did not go up and speak to him more than once; I am distinct in my recollection on this point.

"To the ninth interrogatory he says:—I did ask the auctioneer immediately after the sale what Mr. Wadleigh had said to him, when he came up to him during the sale, and he replied to me, that, on going into the room immediately pre-

vious to the sale, Mr. Wadleigh gave him unqualified authority to purchase the property for him, or, in other words, had told him that, when the property was knocked off, it was to be his (Wadleigh's). He (the auctioneer) also told me that, when Wadleigh came up to him on that occasion, he said to him, 'For God's sake stop, and bid no more for me.'

"To the tenth interrogatory he says:—The property was knocked off to a Mr. Foster, but after the sale, much to my surprise, I found that Mr. Veazie was the purchaser. He had told me previous to the sale, that he would not give more than twelve thousand dollars for it. He immediately desired a bond for the delivery of the deed. The bond was accordingly drawn, with a penalty of fifty thousand dollars, for the delivery of the deed, at Bangor, within ten days or a fortnight. After receiving the bond, and while he was folding it up, he said to me that he thought it proper to state, now that he was secure himself, that an express had been fitted out for the purpose of purchasing this property before the news of the sale, by auction, could reach the owner; and it is my impression that he said that Mr. Wadleigh was engaged in it, but of this I am not positive. I left to go to Boston and obtain a deed and return to Bangor. I remained in Boston a day or two to complete the deed, which having been done, I set out to return to Bangor. Between Boston and Portsmouth I found, by some conversation with the passengers, that Mr. Veazie had passed us on the road going to Boston. I accordingly made arrangements to return to Boston and meet him, and thus save my journey to Bangor. On returning to Boston I found he had left there an hour or two previous to my arrival. A day
*141] or two after, I started for Bangor again, and overtook Mr. *Veazie at Portland. We then travelled together to Bangor. During the journey, he told me that he had made up his mind to give forty thousand dollars for the property; that it had been canvassed in his family, and arrangements been made to that effect, and that he had secured this Mr. Foster to hold him harmless to that amount, and that the journey he had made to Boston was to obtain knowledge that I had a deed for him, as he was suspicious, on the return of those who went on the express, that they had succeeded in their design. And, by way of showing his anxiety, he told me that he had left Bangor for Boston on the evening of a large party given by his wife. He said that the value of this property to him was caused by a quarrel and lawsuit between him and Wadleigh, which rendered it of vast importance to either of them to obtain the property. He also said, that he

had traced the person who conducted the express as far as the Tremont House, and there all trace of him was lost.

"To the eleventh interrogatory he says:—Previous to and on the morning of the sale, Mr. Veazie manifested much indifference as to the purchase of the property, observing that he would give twelve thousand dollars for it, and no more. Of course I was surprised when I found he had given forty thousand dollars for it.

"To the fourth cross-interrogatory he says:—Immediately after the sale, I was informed by the auctioneer, that, when Wadleigh stopped him at thirty-nine thousand dollars, he (the auctioneer) then bid the remaining one thousand dollars on his own responsibility, alternately with Foster. On my return to Boston, I related this (with every thing else that had transpired) to the defendants, my employers."

John Bright, who was the agent for the owners of the property prior to the arrival of Stephen H. Williams, thus testified to the fourth interrogatory:—

"I did not, nor did any one to my knowledge or belief, request or authorize, or in any way suggest to the auctioneer, or any other person, to bid at said sale, in behalf of the defendants, or to make any fictitious or pretended bid at the said sale, or to do anything, or permit anything to be done, unfairly, to enhance the price of the said property."

To the fifth interrogatory:—

"I did attend the sale. I did not bid on the property, nor did I then know, nor had I cause to believe, that said auctioneer was himself bidding on the said property, nor that any one was bidding on said property for the defendants, or was using any unfair means to run up said property, or to enhance the price thereof."

*The witnesses all concurred, that there had been a great depreciation in the market value of mills and [*142
mill privileges since January 1, 1836.

The terms of sale were ten per cent. of the purchase-money payable immediately, and twenty per cent. more upon the delivery of the deed. These two sums together made $12,000, all of which was paid by Veazie. The balance, being $28,000, was divided into two notes of $14,000 each, payable in one and two years. The first was also paid, and the interest upon the second up to the 1st of January, 1840. The amount still due was, therefore, one note of $14,000, with interest from the 1st of January, 1840. Upon this note suit was brought against Veazie, prior to the filing of the bill in this case.

These were the circumstances attending the sale, as stated by the principal witnesses.

On the 21st of July, 1841, the following release was executed by Veazie to Head, viz.:—

"Know all men by these presents, that I, Samuel Veazie, of Bangor, in the county of Penobscot, and state of Maine, Esquire, in consideration of one dollar to me paid by Henry H. Head and Nehemiah O. Pillsbury, both of said Bangor, auctioneers, and late copartners in the auction business, under the firm and style of Head and Pillsbury, the receipt whereof I do hereby acknowledge, do hereby release and discharge said Head and Pillsbury, jointly and severally, from all damages by me sustained, or supposed to be sustained, and from all action, or causes of action, to me accrued, or accruing in consequence of any misfeasance, nonfeasance, or malfeasance, or any illegal management by them done, performed or suffered, at the sale at auction of Nathaniel L. Williams and Stephen Williams's real estate, situated in Old Town, in said county of Penobscot, on or near Old Town Falls, so called, which was sold at auction on or near January 1st, 1836, by the said Head and Pillsbury, as auctioneers; hereby, also, releasing the said Head and Pillsbury from any claim for damage, by or in consequence of any of their proceedings relating to said sale of said property.

"In witness whereof, I have hereto set my hand and seal, this 21st day of July, A. D. 1841.

"SAMUEL VEAZIE. [L. S.]"

This release was introduced into the cause by agreement of counsel, filed at a subsequent stage of the proceedings; by which agreement it was admitted that neither the respondents *143] nor their counsel had any knowledge of the existence of the *release until after the publication of the evidence in the suit, and also further admitted, that the release and circumstances under which it was given might be referred to and made use of in the cause with the same effect as if the same had been put in issue by a cross-bill and admitted by the answer. It will be seen by referring to the third volume of Story's Reports, page 66, that Mr. Justice Story did not consider this agreement as a proper mode of introducing the release into the cause, when it came up before him for argument. According to his suggestion, the proper steps to do so were immediately taken by filing a supplemental bill. These remarks are here made for the purpose of connecting the report of the case in 3 Story, 54, with this statement.

On the 23d of July, 1841, Veazie filed his bill of complaint

on the equity side of the Circuit Court of the United States for the District of Maine.

The bill stated, that, on January 1, 1836, defendants owned two mill privileges in Maine, and on that day offered them for sale, at auction, at Bangor, in Maine, employing one Head as auctioneer, and, by themselves or agent, instructed Head to put them up, beginning with $14,500, minimum, and prescribed certain conditions of sale as to payment; that the complainant, relying on the good faith of defendants and of Head, attended the sale, and bid, by one Foster as agent, and, the minimum having been offered, Head continued to announce a still higher sum, and Foster, supposing it fair and honest, made a still higher bid, and so on, until said property was struck off to Foster, for the plaintiff, at $40,000. And thereupon the complainant, supposing the sale had been conducted and the bidding made in good faith, complied with the conditions of sale, paid $4,000 in cash, $8,000 more on delivery of the deed, gave his note for $14,000 in one year, with interest, which he has since paid, and his other note for $14,000 in two years, with interest, on which he has paid the interest annually to January 1, 1840. And defendants executed a deed to complainant, and complainant a mortgage of same to defendants to secure said notes, and another of $1,900, received as part of the $8,000 aforesaid.

The bill further alleges, that there was no real bid at said auction for more than $16,000 or $18,000; but that the auctioneer, by sham bids, run up said Foster from about $16,000 to $40,000, Foster's being the only real *bonâ fide* bids over about $16,000; by means of which pretended bidding and management of the auctioneer, defendants have received from the complainant a large sum of money which they ought not *to have received; and so the complainant has been deceived and defrauded. [*144

The bill further alleges, that complainant discovered the fraud since January 1, 1840, and notified defendants of it, and hoped they would have refunded the money; but they not only refused to rescind, but have commenced a suit on the unpaid note, which is now pending in this court, and attached complainant's property.

The defendants are requested to answer specifically,— 1. Whether they authorized the sale, and employed Head as auctioneer. 2. Whether the land was put up at the minimum stated, and if Head was directed not to sell for less, and authorized to bid for defendants to that extent. 3. What sum they agreed to pay Head, prior to the sale; what they did pay; was he to be paid any sum if there was no sale;

how he was to be paid. 4. What amount, principal and interest, complainant has paid defendants. 5. Whether the note on which defendants have brought a suit is one of those given for said purchase. 6. Whether the whole purchase-money was not paid and secured by complainant, and the deed given directly to him; and whether it was not stated and understood, at that time, that Foster acted simply as complainant's agent at said sale.

The prayer of said bill is, that said suit may be enjoined, the note delivered up, the sale rescinded, and the money paid back with interest.

The answer admitted the ownership, and that defendants employed one Bright to advertise the property for sale at auction on January 1, 1836. That a few days before the sale they sent Stephen H. Williams, a son of one of the defendants, to Bangor, to employ an auctioneer and make all necessary arrangements. The defendants denied having instructed, intimated, or suggested to Williams, Bright, or any other person, that there should be any by-bidding or other unfairness; or that, before said sale, said Williams, Bright, the auctioneer, or any other person, received from defendants any instruction or suggestion that said property should be run up by fictitious bids, or that any thing unfair should be done.

They admit that they did fix $14,500 as a minimum, but aver that they gave no instructions to keep the same secret; that they believe the fact was well known at the sale; that they have been informed, and believe, that no bid was made by any agent of theirs in consequence of the fixing of the said minimum price, bids far exceeding that amount being immediately made by those desiring and intending to purchase.

The conditions of sale, as to payment, are admitted to have been as stated in the bill.

*145] *The answer admitted that Stephen H. Williams employed Head as auctioneer, who was said to be duly licensed, skilful, experienced, and believed to be honest. The defendants aver their belief that said Williams did not authorize or suggest any by-bidding or other unfairness by Head, but employed him as a public officer, duly empowered by the laws of Maine. They further aver, that they have been informed, and believe, that said Williams did not authorize Head to bid up to the minimum, or to make any bid on their account.

The defendants aver that they were not present at the sale; but deny that there was no real bid above $16,000 or $18,000, or any such sum; or that the auctioneer run up Foster, by

sham bids, from $16,000, or any such sum, to $40,000; or that there was no real bid above $16,000, or any such sum.

Defendants admit that complainant informed them, after the sale, that Foster was his agent, and allege that complainant exhibited great anxiety to have the conveyance made; and they have been informed, and believe, that there was great competition at the sale, both on account of the intrinsic value and the local position of the property, and that complainant authorized Foster to bid as high as $40,000.

Defendants completed the sale, gave a deed, received payment of all but the last note, and interest on that to January 1, 1840; but complainant did not notify defendants that he considered the sale invalid until January 14, 1841, and they then brought a suit, as alleged.

That more than five years and six months have elapsed since said sale, and defendants have lost the benefit of evidence as to occurrences at said sale, and there has been a great depreciation in such property, owing to an increase in the number of mills, the scarcity of timber, and financial difficulties in that region, by which mill-sites have much depreciated in value; and defendants believe that changes have been made in the property by building or altering.

The defendants do not know when, in particular, the complainant pretends to have discovered the alleged fraud; but whatever was done at the sale might have been known, on inquiry, at any time; and they pray for proof of diligence.

They believe that complainant, since the changes in value, would gladly annul the bargain, and compel defendants to repay the price, and pay for his expenditures; but they submit that this ought not to be, after such a lapse of time and the changes in condition and value, especially as they deny the fraud alleged, and any concealment, on their part, of any thing done at the sale.

*That S. H. Williams agreed to pay Head for his [*146
services what was customary, and did pay him $200,
after the sale, which defendants think was reasonable; and there was no agreement that Head was to receive nothing if no sale was effected.

It has been before mentioned, that when this cause came up for argument before Mr. Justice Story, as reported in 3 Story, 54, he suggested that a supplemental bill should be filed, for the purpose of properly introducing the release to Head into the cause.

The supplemental bill alleged that Head paid no consideration for the release, and made no satisfaction; that it was not intended as a discharge of any claim against the defendants;

and if such was its effect, it was a fraud and a mistake; that it was given because Head refused to disclose the facts, on the ground that complainant might sue him, and complainant wished to obtain proof with a view to institute proceedings in equity against defendants; that the whole agreement with regard to it was between Head and complainant's counsel, and it was signed by complainant without inquiry, and without any negotiation between Head and complainant, and no indemnity against Head's liability to defendants was asked or intended. The supplemental bill then prayed that said release may be reformed and restrained to the true intention of the parties.

The answer to this supplemental bill stated that the existence of the release was not discovered by defendants until after the testimony had been taken in the original case; that defendants now insist on it as a bar; do not know whether any consideration was paid for it; and as to the intentions of the parties, or any understanding as to its legal effect, no fraud was practised to procure it to their knowledge, or any language used that was not intended by complainant, by whom it was signed by the advice of counsel and under no mistake of fact; and it is not competent for him to control or alter it by extrinsic evidence. They have no knowledge of the intentions of the parties to it, or what inducements or agreements led to it. They have been informed by Head, that Veazie's counsel promised him an indemnity, and this was accordingly given. They deny that Head expected that, after said release, he would be liable to any action by defendants, or any construction given to the release which would prevent his being held harmless against them.

To this answer there was a general replication.

On the 3d of August, 1844, a bill of revivor was filed *147] against Louisa Williams, the widow and executrix of Stephen *Williams, deceased, and at May term, 1845, the bill was revived by consent of counsel, and the cause set down for hearing.

At the same term it came on to be heard upon the bill, answer, pleadings, and evidence, when the judges of the court, being divided in opinion on the merits of the cause, ordered and decreed that the bill be dismissed, without costs to either party.

This decision is reported in 3 Story, 612.

An appeal from it by the complainant below brought the case up to this court.

It was very elaborately argued by *Mr. Fessenden* and *Mr. Webster*, for the complainant and appellant, Veazie, and by *Mr. Davies* and *Mr. Gilpin*, for the defendants.

The points on the part of the appellant were thus stated by *Mr. Fessenden*. They were stated somewhat differently by *Mr. Webster*, as will be mentioned afterwards.

As stated by *Mr. Fessenden* they were,—

I. That the defendants were owners and sellers of the property described, at said auction sale, by and through Head, as auctioneer; and that the complainant was purchaser of the same through the agency of Foster.

II. That Head, the auctioneer, did, by pretended and illegal bidding at the sale, greatly enhance the price to the complainant; that he actually received no bid from any *bonâ fide* bidder, or person proposing to purchase, other than the complainant's agent, above the sum of twenty thousand dollars, or thereabouts; but, by illegal and fraudulent practices, induced the complainant's agent to bid, and the complainant to pay, a much larger sum than they would have done had said sale been fairly conducted.

III. That Head, the auctioneer, was the general agent of defendants for all the purposes of the sale, and in all the transactions connected therewith; and they are responsible for all his acts, and his knowledge, connected with the sale, and cannot avoid that responsibility on the ground that he was a public officer.

IV. That an auctioneer cannot legally be a bidder on his own account; and therefore, whether the bidding by Head was really for himself, as intending to purchase, or merely pretended, for the purpose of enhancing the price, it was equally a fraud upon the complainant, and vitiated the sale.

V. That defendants became actual parties to the fraud by having received information of one illegal act of the auctioneer at the sale, before the contract was closed, which they did not *communicate to the complainant, [*148 but concealed, and by which they were put upon inquiry.

VI. That equity will not allow the defendants to retain the proceeds of a fraud committed by their agent, whether they had knowledge of it or not.

VII. That Head was not a necessary party to the bill.

VIII. That the release to Head and Pilsbury is no bar,—

1. Because equity will not extend its operation beyond its legal effect and the intention of the parties, which were a release of damages.

2. Because it was a release to the agent, and not to the principal.

3. Because the defendants would have no right of action against Head and Pilsbury, should the sale be rescinded.

4. The extent and design of a release, like a receipt, are explainable by extrinsic evidence.

IX. That the claim of the complainant to rescind the contract is not barred by lapse of time.

Because six years had not elapsed between the sale and the filing of the bill, or between the discovery of the fraud and the filing of the bill, and there had been no loss of evidence or change in the actual condition of the property, such as would justify the court in refusing relief; and because the circumstances attending the sale were not such as to excite the complainant's suspicions, or put him upon inquiry.

X. Even if there was no fraud, the sale should be rescinded for mutual mistake of a material fact.

As stated by *Mr. Webster*, they were,—

1. That an auctioneer is the agent of the owner until the sale is made, and also afterwards, until he gives a memorandum in writing. This writing is given in order to avoid the statute of frauds, and in making it, the auctioneer becomes the agent of both parties.

2. That fraud by an auctioneer, committed whilst he is the agent of the vendor, vitiates a sale as thoroughly as if it had been committed by the vendor himself.

3. That it is not necessary to show that the principal was cognizant of the fraud.

4. That the auctioneer is the *alter ego* of the party who employs him. What he knows, the principal knows; or, as the rule is substantially stated in 6 Cl. & F., 448, 449, if an agent made wilfully false representations, and then made a contract, equity will relieve just as much as if the *scienter* were traced to the principal.

*149] *5. An agent to sell cannot buy. Therefore an auctioneer cannot bid for himself. This rule may not be very applicable in this case, because the auctioneer does not say that he intended to purchase the property for himself.

6. The owner of real estate, put up at auction, may protect himself in one of two ways.

1st. He may fix a minimum or starting point. If no bid is made for this amount, then it is no sale. This mode appears to have been pursued here. The minimum was fixed at $14,500, and this fact was made known to the purchasers at the sale. This fact is highly important.

2d. The owner may employ one person to bid up to the minimum, or he may bid himself. But in this mode, as in the preceding, where the bidding has reached the minimum, then all by-bidding or puffing is fraudulent, and vitiates the sale. The highest real bidder, after reaching that point, is entitled to the property.

The points stated and argued by the counsel for the defendants were the following:—

1. That neither on the allegations or form of the complainant's bill, nor on the evidence, is he entitled in the Circuit Court of the United States, sitting in equity, to the relief he prays for.

2. That neither on the allegations of the bill, nor on the evidence, is there ground to charge the defendants with fraud.

3. That the evidence does not establish any fraud on the part of Head, the auctioneer, but if it does, it will not entitle the complainant to the relief prayed for in this suit.

4. That the release of Head is a conclusive bar to the complainant's prayer for relief.

5. That, both on the facts of the case and the well settled principles of equity jurisprudence, the decree of the Circuit Court, dismissing the bill, was correct, and ought to be affirmed.

Mr. Justice WOODBURY delivered the opinion of the court.

This was an appeal from a decree of the Circuit Court in the Maine district, dismissing a bill which was brought originally by Veazie, the appellant.

As to the contents of the bill and the evidence in its support, it may suffice to say here, that the bill asked the rescission of a sale at auction, made about the 1st of January, 1836, of certain mills, owned by the respondents, and a return of the money paid, and the notes still held by them for a part of the purchase money. It asked this, on the alleged ground of imposition in *the sale by means of puffing [*150
or by-bidding, so as to advance the price about $20,000 above what it otherwise would have been. In their answer, the respondents denied any such bidding by their procurement, or that it avoided the sale if happening; and further contended, that they had been discharged from any liability which might have existed by a release to the auctioneer, one of the persons implicated in the by-bidding. The answer insisted, also, that the auctioneer should have been made a

party to the bill, and that any claim to relief by the plaintiff is barred by the lapse of time since the sale.

The leading point arising in this case involves so difficult questions both of fact and law, that they have, in some degree, divided this court, as well as the court below, and great care and discrimination will be necessary in order to reach conclusions that can be satisfactory.

The relief here is not sought, as has been objected, on account of inadequacy of price,—though that may at times be so gross as to show fraud, and might here very well raise some presumption of it. *Warner* v. *Daniels*, 1 Woodb. & M., 111; *Coles* v. *Trecothick*, 9 Ves., 234; 2 Ves. Sr., 155. But it is sought for a fraud practised in augmenting the price; or, in other words, for taking false steps to enhance it; and it is the consequence and injury caused by these unfair means that the plaintiff would avoid.

How far, then, in point of fact, was the price increased above the real bids? and by what means? A minimum price of $14,500 is clearly proved to have been fixed by the owners. The weight of the testimony is, that the real bids went only $3,500 to $5,500 higher. There is no pretence that Wadleigh —the rival or competitor of the plaintiff—bid or authorized others to bid for him above eighteen or nineteen thousand dollars, though a statement of the auctioneer to one person has been relied on to the contrary. Wadleigh denies it,—nobody testifies to it,—and nobody is produced who bid or employed others to bid higher, unless the auctioneer himself did it. The true value, also, as fixed by the owners at $14,500, tends to confirm the idea that no real, fair bid would be likely to go above $20,000,—or over $5,000 or $6,000 beyond the owner's own estimate.

It is, then, a leading feature in this case, that should not be overlooked, as it gives a stamp and character to the whole equity as between these parties in favor of the plaintiff, that the respondents fixed the minimum bid for the sale of their property at $14,500, and authorized the auctioneer to dispose of it for that amount, when in truth, by some means or other, *and without any real rival bids above $20,000, they obtained for it $40,000. Whether this extraordinary result was effected by any improper conduct on their part, or that of any agent for whom they may in law be responsible, is the next prominent inquiry.

*151]

In the outset, the probability certainly is, that property like this could not be sold at auction for from $25,000 to $26,000 more than the owner asked for it, unless under some imposition or great mistake. And the further presumption seems at

first to be reasonable, that the respondents, whose property was thus sold, and by an auctioneer employed by themselves, and who have benefited by the large excess in the price given, by taking the money and securities, were either instrumental in causing the excess, or, having availed themselves of it and all its advantages, should be answerable *civiliter* for any wrong and error connected with it.

It is conceded, in point of fact, that some other bids than Veazie's went nearly to $40,000, and as no person is shown to have made them but the auctioneer, it follows that they must have been real bids by him for himself, or fictitious ones by him, with a view to increase the price to be obtained by the respondents, and to increase his own commissions on a sum so much larger than had been anticipated when the sale began.

Looking to the supposition that the bids were real and for himself, that idea is not supported, but rather disproved, by the testimony. The auctioneer does not appear to be a man of wealth, able to buy so valuable property for investment, nor was such a purchase in the line of his business or profession, nor does he seem to have had the means or disposition for speculation, and especially on so large a scale; and he must have well known that the true value of this property was not considered by the owners above $14,500, nor its value to Wadleigh as enhanced by its locality in his dispute with Veazie, as above $18,000.

The weight of the testimony, then, is decidedly against the correctness of the supposition, that the bids above $20,000, except the plaintiff's, were by the auctioneer for himself and on his own account.

Had it been otherwise, it would be very questionable whether, in point of law or equity, an auctioneer can be allowed to bid off for himself the very property he is selling. It has been laid down that he cannot. *Hughes's case*, 6 Ves., 617; *Oliver et al.* v. *Court et al.*, 8 Price, 126; 9 Ves., 234; 8 Id., 337; Long on Sales, 228; Babington on Auctions, 164. The principles against it are stronger, if possible, and certainly were enforced earlier in courts of equity than of law. An opposite course *would give to an auctioneer many [*152
undue advantages. It would tend, also, to weaken his fidelity in the execution of his duties for the owner. He would be allowed to act in double and inconsistent capacities, as agent for the seller and as buyer also; and the precedents are numerous holding such sales voidable, if not void, and at all events unlawful, as opposed to the soundest public policy. See *Michoud* v. *Girod*, 4 How., 554; 15 Pick. (Mass.), 30;

1 Mason, 344; 2 Johns. (N. Y.) Ch., 51; *Tufts* v. *Tufts*, Mass. Dist., 1848, and cases there cited; Long on Sales, 228; 9 Paige (N. Y.), 663; 1 Stor. Eq. Jur., § 315; 3 Story, 625. That an auctioneer is a general agent for the owner usually, though questioned in the argument, cannot be doubtful. See *Howard* v. *Braithwaite*, 1 Ves. & B., 209; Stor. on Agency, §§ 27, 28; 4 Burr., 1921; 1 H. Bl., 85. He is so till the sale is completed. Long on Sales, 231; *Seton* v. *Slade*, 7 Ves., 276; Babington on Auctions, 90; 20 Wend. (N. Y.), 43. And though he may be agent of the buyer after the sale for some purposes, such as to take the case out of the statute of frauds (*Williams* v. *Millington*, 1 H. Bl., 84; 3 T. R., 148; Cowp., 395; Long on Sales, 228, 60, 63; *Emerson* v. *Heelis*, 2 Taunt., 38; 1 Esp., 101), yet this does not affect the other principle, that till the sale, and before it, he acts for the vendor alone. Nor is an auctioneer a public officer in Maine, and a license required to him. 2 Laws of Maine, p. 390, ch. 134. But whether a public officer or not is a circumstance that does not generally appear to have changed the liability of the principal for his acts, if taking the benefit of them.

Treating his bids, then, as made by the auctioneer, not for himself, and the proof having failed to show that they were for a stranger, the only remaining hypothesis is, that they were made by him while agent of the owners, with a view to their benefit particularly, though with hopes of some incidental gain to himself in increased commissions. How does this view accord with the evidence of the transaction, taken as a whole? It is the only plausible aspect of it existing. The auctioneer found Wadleigh willing, on account of his quarrel with Veazie and his interests near the property, to go about $5,000 higher than the owners' estimate, and then found Veazie, for like reasons, willing to go still higher rather than let Wadleigh purchase the premises, for whom he supposed the auctioneer was bidding. In the eagerness of competition and with ample capital, Veazie seems in this way to have been induced to go even as high as $40,000, under the exciting but delusive and false impression, that he thus was obtaining the
*153] property against the efforts of Wadleigh or others, real bidders and real competitors. That *impression the auctioneer sought to create, and did create, by deceptive means.

Residing on the spot and acquainted with the character of the parties, he doubtless suspected that Veazie, rather than let the property go to Wadleigh, might bid very high,—and perhaps, by rumor, even to $40,000,—and proceeded, after the real bids were over at about $20,000, to make by-bids, either

on his own judgment, to benefit his employers and increase his own commissions, or on the suggestions or signs of Stephen H. Williams, who was present as agent of the respondents, and is proved to have sat behind and near the auctioneer at the sale.

Veazie being thus situated so as to be more easily duped by either of them, and his condition and fears and anxieties being probably known to Head, if not to Stephen H. Williams, the auctioneer, by the means before described, procured for his employers nearly treble what they expected or what had been agreed on as the minimum price. The next inquiry is, if such a transaction renders the sale in point of law void, either for fraud or mistake. In some countries, under the civil law, a buyer of immovables is of right entitled to a rescission of the sale if it turn out, though without fraud, that the price was more than fifty per cent. above the true value. Pothier on Contracts of Sale, part 5, ch. 2, § 2; and see Domat, tit. 6, § 3. Here the price was at least a hundred per cent. above,—yet there must in this country be fraud also, or a mistake.

Though no evidence is seen of fraud practised by the respondents in person, nor by their express directions, yet a fraud was evidently perpetrated by the auctioneer, as agent for the respondents, or by him in connection with Stephen H. Williams, and the respondents have taken and still retain the benefit of it. This conclusion is indisputable, whatever obscurity or concealment may have been flung over the case by the auctioneer.

Does this state of things, then, in point of law, require the sale to be relieved against, on sound principles of equity and public morals?

By-bidding or puffing by the owner, or caused by the owner, or ratified by him, has often been held to be a fraud, and avoids the sale. Cowp., 395; 6 B. Mon. (Ky.), 630; 11 Serg. & R. (Pa.), 86; 4 Har. & M. (Md.), 282; Babington on Auctions, 45; 3 Bing., 368; 2 Carr. & P., 208; 6 T. R., 624; *Rex* v. *Marsh*, 3 Younge & J., 331; 11 Moor, 283. He may fix a minimum price, or give notice of by-bids, and thus escape censure. Ross on Sales, 311; *Howard* v. *Castle*, 6 T. R., 642. *But this shows that, without such notice, it is [*154 bad to resort to them. *Crowder* v. *Austin*, 3 Bing., 368; 3 Younge & J., 331. "The act itself is fraudulent," says Lord Tenterden. *Wheeler* v. *Collier*, 1 Moo. & M., 126.

The by-bidding deceives, and involves a falsehood, and is, therefore, bad. It violates, too, a leading condition of the contract of sales at auction, which is that the article shall be knocked off to the highest real bidder, without puffing. 2

Kent Com., 538, 539. It does not answer to apologize and say that by-bidding is common. For, observed Lord Mansfield, "Gaming, stockjobbing, and swindling are frequent. But the law forbids them all." Cowp., 397. In *Bexwell* v. *Christie*, Cowp., 396, the pole-star on this whole subject, it is said,—"The basis of all dealings ought to be good faith. So more especially in these transactions, where the public are brought together in a confidence that the articles set up for sale will be disposed of to the highest real bidder."

Even in a court of law, Lord Kenyon has, with true regard to what is honorable and just, said,—"All laws stand on the best and broadest basis, which go to enforce moral and social duties." *Pasly* v. *Freeman*, 3 T. R., 64. See also *Bruce* v. *Ruler*, 2 Man. & Ry., 3. And in *Howard* v. *Castle*, 6 T. R., 642, he held that Lord Mansfield's doctrine, that all sham bidding at auctions is a fraud, was a doctrine founded "on the noblest principles of morality and justice."

Nor does it lessen the injury or the fraud if the by-bidding be by the auctioneer himself. He, being agent of the owner, is equally with him forbidden by sound principle to conduct clandestinely and falsely on this subject. Cowp., 397. All should be fair,—above-board.

Indeed, in point of principle, any fraud by auctioneers is more dangerous than by owners themselves. The sales through the former extend to many millions annually, and are distributed over the whole country, and the acts accompanying them are more confided in as honest and true than acts or statements made by owners themselves in their own behalf, and to advance their own interests. Great care is therefore proper to preserve them unsullied, and to discourage and repress the smallest deviations in them from rectitude.

Here the auctioneer virtually said to his hearers, when he made a fictitious bid,—"I have been offered so much more for this property." But he said it falsely, and said it with a view to induce the hearers to offer still more. He averred it as a fact, and not an opinion; and as a fact peculiarly within his knowledge. Now if, under such an untrue and fraudulent assertion, *persons were persuaded to give more,—relying, as they had a right to, on the truth of what was thus more within the personal knowledge of the auctioneer, and was publicly and expressly alleged by him, and being of course more willing to give higher for what others had offered more, who probably were acquainted with such property and had means to pay for it,—they were imposed on and injured by the falsehood. It is said—"A naked, wilful lie, or the assertion of a falsehood knowingly, is certainly evidence

*155]

of fraud." 1 Const. (S. C.), 8. The following authorities support the views here laid down. 3 Younge & J., 331; Moo. & M., 123; 2 Carr. & P., 208; *Bexwell* v. *Christie*, Cowp., 395; *Howard* v. *Castle*, 6 T. R., 642; 1 Hall (N. Y.), 146; 1 Dev. (N. C.), 35; 6 Cl. & F., 444, 329.

Some cases, and some reasoning found in them, attempt to sanction a contrary doctrine, if the by-bids were made merely to prevent a sacrifice of the property,—a "defensive precaution,"—but not otherwise. *Connolly* v. *Parsons*, 3 Ves., 625, note; *Smith* v. *Clarke*, 12 Id., 477; *Steele* v. *Ellmaker*, 11 Serg. & R. (Pa.), 86; *Woodward* v. *Miller*, 1 Collier, 279; 5 Madd., 34.

These exceptions still concede that the by-bidding, when an artifice to mislead the judgment and inflame the zeal of others,—"to screw up and enhance the price," in the language of Sir William Grant,—is fraudulent and makes the sale void. 12 Ves., 483; 2 Kent Com., 537.

Some cases hold, too, that the by-bidding will not vitiate, if real bids besides those of the vendee occurred after. 3 Ves., 620. But neither of these excuses or apologies existed here. These by-bids were made after some thousands of dollars had been offered over the value of the mills, as estimated by the owners themselves, and were palpably made "*to screw up*," or enhance the price. Any other excuses, which have ever availed, either are anomalies, or rest on a false analogy. Thus, at one time in England duties on auctions were remitted, if the property was bought in by the owner. 3 Ves., 17, 621; 1 Fonbl. Eq., 226. This, however, was founded on the theory that no sale had taken place, and hence no duty should be paid, rather than that a sale under such circumstances was valid. It, therefore, strengthens rather than impairs the view taken of the present case.

It is no answer to this reasoning to say, as has been done, that Veazie bid voluntarily, or expressed satisfaction with his purchase, and was in haste to close it up. Because, in all this, he was laboring under a misapprehension that others *had honestly valued the property near the same [*156 price, and been in truth as anxious as himself to bid it off,—and because he believed that he had thus succeeded against a real rival in securing the mills and some incidental advantages,—when in reality there had been no such honest bids over $20,000, and he had been contending against a man of straw falsely set up by the auctioneer. In short, he had been imposed on by the agent of the respondents; and that by virtual falsehood, and in a point material, and in a manner likely to mislead. He was not allowed to exercise his judgment,

and bid higher or not on the truth,—on facts,—but on falsehoods. 6 T. R., 644. He was not the highest bidder at $40,000, except through deception wrought on him fraudulently. Id. Secrecy was practised,—privacy as to the real offers,—stratagem,—which, as already seen, is in the teeth of the great principles of a valid public sale. *Bexwell* v. *Christie*, Cowp., 396; 2 Kent Com., 539.

A technical objection to the quantity rather than weight of the evidence has been urged, which it may be well to dispose of here. It is said that fraud is denied as to the defendants, and is not proved against them by two witnesses. It is conceded that the denials that the respondents were personally guilty of fraud, or expressly directed falsehood and fraud, are not overcome, nor are they in controversy. But it is the puffing or by-bidding of the auctioneer, their agent, which is in controversy as a fact. As to that they can make no denial from any personal knowledge pro or con.,—not having been present; and hence their answer furnishes no evidence in respect to it, as an independent fact. But this fact being substantiated by the agent, and the matter proved by others, as to no real bids being made over $20,000, and by various other circumstances in the case, the amount of evidence for it is ample. It is true, they deny that they ordered it. It is to be remembered, however, that they are not held liable here merely by declarations of their agent, when not ordered by them or perhaps known to them at the time,—though it is a sound doctrine that the verbal declarations of an agent at a sale often bind the principal. 1 Ves. & B., 209; 6 Cl. & F., 448, 449; Story on Agency, § 107. And that the agent is bound to disclose all and to act as the principal is when present, and selling. 1 Metc. (Mass), 560; *Hough* v. *Richardson*, 3 Story, 698; 3 Hill (N. Y.), 260; 1 Woodb. & M., 353. And that a principal so acting in person cannot be justified in asserting what is false, and by which another is injured. *157] *Pasly* v. *Freeman*, 3 T. R., 51; *Vernon* v. *Keys*, 12 East, 632; 2 Id., 92. And that what the *vendor may not do in person, or may not employ others to do in his absence,—that is, make by-bids to enhance the price,—his agent, the auctioneer, cannot rightfully do.

But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed *in statu quo;* or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury.

160

The principal in such case is profiting by the acts of the agent, and is hence answerable *civiliter* for the acts of the agent, however innocent himself of any intent to defraud. 13 Wend. (N. Y.), 513; 1 Vt., 239; 1 Salk., 289; 7 Bing., 543; *Mason et al.* v. *Crosby et al.*, 1 Woodb. & M., 342, and cases there cited; *Doggett* v. *Emerson*, 1 Id., 1; Story on Agency, § 451; *Doggett* v. *Emerson*, 3 Story, 700; *Olmsted et al.* v. *Hotaling*, 1 Hill (N. Y.), 317; *Taylor* v. *Green*, 8 Carr. & P., 316. Whether the principal knew all those acts or not, is not the test in this case, as in 2 East, 92 notes, and 13 East, 634, note, though it may be in some others, as in 5 Bing., 97; 6 Cl. & F., 444.

But the test here is, Was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson* v. *Fuller*, 3 Ad. & Ell. (N. S.), 68.

The sale thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration, and take back the mills, or indemnify the purchaser to the extent of his suffering.

Some miscellaneous objections to these results are yet to be considered. It is said to be justly deemed an extraordinary power in a court of chancery to rescind contracts at all, instead of leaving parties to a suit at law for their damages. Sugden on Vendors, 392; 11 Pet., 248. And that a fraud or mistake must be very manifest to justify it. 10 Price, 117; 13 Id., 349; 7 Cranch, 368; 2 Johns. (N. Y.) Ch., 603; 12 Ves., 477. And that the burden of proof to show these grounds for a rescission rests on the plaintiff, and not on the defendant. Grant this. Yet all requirements appear fulfilled here. On satisfactory proof, also, executed, as well as executory, contracts may in such cases be set aside. One case is reported of its being done after twenty years. 8 Price, 125. And a defendant is likely, in most cases, *to suffer no more by a rescission in chancery, than by damages adequate to the loss or injury. [*158

There is next the objection, that too long a time had elapsed here before seeking redress. More force would attach to this if Veazie had discovered the imposition sooner. The sale happened January 1st, 1836; the discovery of the fraud was after January 1st, 1840, and this bill was filed July 23d, 1841, after demanding redress of the respondents in January, 1841.

Having effected his object in the purchase,—to obtain the property rather than let his rival get it, who, he doubtless supposed, was bidding against him,—and being a man of

ample means, Veazie submitted, as feeling bound, to the excess of price. Nor did he suspect any imposition till informed of it within a few years; and then he seasonably applied for relief, and should not be barred from obtaining it by any lapse of time while the fraud or mistake as to the bids not being real remained undiscovered. *Doggett* v. *Emerson*, 3 Story, 740; *Daniels* v. *Warner*, 1 Woodb. & M., 90; *Doggett* v. *Emerson*, Id., 1; 8 Cl. & F., 651; 1 Russ. & M., 236.

It is said that, after this lapse of time, the plaintiff is not in a proper condition to restore the mills. 16 Me., 42. He is less likely to be, if they are ordered to be restored; but that is the fault of the fraud, and the concealment of it, rather than his fault. The defendant, too, if the property has deteriorated in value, is in no worse a condition than he would be where an avoidance of the sale takes place at law for fraud.[1]

If the plaintiff has sold the property, or disabled himself from restoring it, when ordered by a decree, then the evil consequences will light on himself, and not the defendants. That is what is meant by inability to restore the property, in 8 Cranch, 476. Nor is there any need he should aver substantively in his bill that he can restore it, this being presumed as a usual if not necessary, consequence, when he applies to have the contract rescinded, and every thing placed in *statu quo*.

The last exception to a recovery here by the plaintiff is, that the release to Head, the auctioneer, should be considered as discharging the respondents also. Neither the design of the parties to the release, nor the agreement or consideration to make it, extended beyond the auctioneer. It was suicidal for the plaintiff to pay for a release to get a witness in a case, which release would destroy the case itself. (2 Ired. (N. C.), 219.) Sitting as we do in a court of equity, we cannot, without an open and gross departure from equity, give to the release any effect beyond the design in making it, and the *159] literal words of it, reaching *only to the discharge of the release. It is a strict rule at law, and not of equity, which goes further in any case. 7 Johns. (N. Y.) Ch., 207; 18 Wend. (N. Y.), 399; 22 Pick. (Mass.), 308. The operation was meant to be like a covenant not to sue him; and such a covenant is no bar to suing others when jointly liable. *Ferson* v. *Sanger*, 1 Woodb. & M., 138.

Again, in the present instance, there was no joint liability at law by the respondents and the auctioneer. Their accountability was separate, and resting on different grounds; his on

CITED. *Neblett* v. *McFarland*, 2 Otto, 104.

actual falsehood,—theirs on the adoption of the benefits of it, and the accountability thus arising for it. The release of one, therefore, is not like the release of a joint contractor or joint trespasser. 1 Anstr., 38. And in equity it may well be limited to the person released, and the person paying the consideration for it. Hopk. (N. Y.), 251, 334.

Beside this, Head was in law a competent witness for Veazie, without any release, his interest being against Veazie. This conclusion as to the release is an answer, likewise, to the objection, that Head ought to have been made a party to this bill. His liability resting on a separate ground, and not joint, he could not be united at law, nor is it always done in equity under like circumstances. See *Mason et al.* v. *Crosby*, 1 Woodb. & M., 342; *Ferson* v. *Sanger*, Id., 138; *Jewett* v. *Conrad*, 3 Id., ——; *Small* v. *Atwood*, 6 Cl. & F., 352, 466.

All that remains is to decide upon the most equitable course to carry these views into effect, consistent with sound principles. One mode is to set aside unconditionally the whole sale, for the fraud practised in it, and have the mills reconveyed by Veazie, and the money, notes, and mortgage returned by the respondents. Another mode is to treat as unjust only so much of the proceedings as was fraudulent; that is, the excess of price over $20,000 obtained by by-bidding, and to cause that excess only to be refunded.

To attain this last result in some way is preferable, considering the length of time which has elapsed here, and the probable deterioration in value of the mills by use and the fall of prices in the market since the inflation of 1836, and, though objected to by the respondents, is likely more than the other to secure them against loss.

To restore the excess of consideration, or to restore all and have back the mills, has in other respects much the same effect. The plaintiff in either way will obtain nothing which did not belong to him, nor the respondents lose anything which was theirs before the falsehood or mistake. It [*160 is, at the same time, *gratifying to find, that, by either of these courses, no incidental loss or inconvenience will fall on the respondents, except what has been occasioned by the misbehavior of their own agent, and the fruits of which they accepted, and which they cannot *in foro conscientiæ* retain against those injured by that misbehavior.

But there is one equitable operation before named, in relieving only as to what is fraudulent, which makes it most desirable, if legal. It is objected, first, that it will be giving damages, like a court of law, to the extent of the wrong, rather

than rescinding the whole contract on account of fraud or an evident mistake.

We are inclined to think, unless under peculiar circumstances, that damages cannot be given in a court of equity, but the parties must be left to a court of law to recover them. 17 Ves., 203; 1 Russ. & M., 88; 2 Keen, 12; 1 Cow. (N. Y.), 711; 5 Johns. (N. Y.), 193. The exceptions of damages in part, under certain circumstances may be seen in the following cases, and the authorities there quoted. 2 Story Eq. Jur., §§ 711, 779, 788, 794; 4 Johns. (N. Y.) Ch., 460; 14 Ves., 96; 9 Cranch, 456.

But the course we propose, to have the sale stand so far as not fraudulent, and to make the defendants restore only what was obtained by the puffing and fraud, is not giving damages either *eo nomine* or in substance. It requires to be surrendered merely the money and interest on it, and the notes and mortgage unpaid, which were obtained by the deception of by-bidding. This, among other things, is prayed for in the bill. This course will only carry out the established rule on this subject, laid down in elementary treatises,—that "the injured party is placed in the same situation, and the other party is compelled to do the same acts, as if all had been transacted with the utmost good faith." 1 Story Eq. Jur., § 420; 1 Madd. Ch. Pr., 209, 210; Fonbl. Eq., book 1, ch. 3 and 4, notes.

Everything is thus relieved against, to the extent to which it is wrong or fraudulent, but nothing beyond it. *Jopling* v. *Dooly*, 1 Yerg. (Tenn.), 289.

It is suggested, however, secondly, that this course does not set aside the whole sale, or whole contract, which ought to be done, if intermeddled with at all. It is true that, generally, a part of a deed, or contract, or sale, cannot be avoided without avoiding the whole. 2 Ves., 408; 1 Madd. Ch., 262. Though at times there may be a division or break in them where fraud begins and good faith ends, and where beyond that line only it would seem just to annul them. (1 Yerg. (Tenn.), 289.)

*161] *But if the whole must be annulled or none, it can be here, and yet equitable terms imposed on the plaintiff to let such part of the transaction remain undisturbed as is consistent with equity and good faith. This is justified, not only by the general principle that he must do equity who asks it, (4 Pet., 328,) but that it is one of the leading principles on this particular subject in a court of chancery, "if it should *rescind* the contract, to allow it only upon terms of due compensation, and the allowance of countervailing equities."

2 Story Eq. Jur., § 694; *Harding* v. *Handy*, 11 Wheat., 126; *Bromly* v. *Holland*, 5 Ves., 618.

So it is said, that, "when the judgment debtor comes into court, asking protection, on the ground that he has satisfied the judgment, the door is fully open for the court to modify or grant his prayer upon such condition as justice demands." *The Mechanics' Bank of Alexandria* v. *Lynn*, 1 Pet., 384.

This court on its equity side, says Chief Justice Marshall, is "capable of imposing its own terms on the party to whom it grants relief." *Mar. Ins. Co.* v. *Hodgson*, 7 Cranch, 336, 337. And it will not grant relief even in fraud, unless the party "wishing it will do complete justice." *Payne* v. *Dudly*, 1 Wash. (Va.), 196; *Semb.*, 1 Johns. (N. Y.) Ch., 478; *Scott* v. *Nesbit*, 2 Cox, 183. Here, then, in the decree, we can set aside the whole sale and contract; but, instead of doing it unconditionally, the plaintiff should be required first to do equity, and to allow any countervailing equities on the part of the respondents,—which are, to let the sale itself stand at what was fairly bid for the property, and require only the residue of the consideration, being entirely fraudulent, to be restored. 1 Story Eq. Jur., §§ 344, 599, and cases there cited; *McDonald* v. *Neilson*, 2 Cow. (N. Y.), 139, 192.

Thus, a borrower of money on usury will not be allowed relief in chancery, except on the payment of principal and legal interest. *Scott* v. *Nesbit*, 2 Cox, 183; 2 Bro. Ch. Cas., 649; 2 Story Eq. Jur., § 696; *Stanly* v. *Gadsby*, 10 Pet., 521; *Jordan* v. *Trumbo*, 6 Gill. & J. (Md.), 106; 3 Ves. & B., 14; *Fanning* v. *Dunham*, 5 Johns. (N. Y.) Ch., 143. Like terms are imposed on borrowers under void annuity bonds. (See same cases.) So, by analogy, the cases of specific performance frequently exhibit the enforcement of a part only, when just. *Pratt et al.* v. *Law et al.*, 9 Cranch, 456; *Hargrave* v. *Dyer*, 10 Ves., 506; *Harnett* v. *Yielding*, 2 Sch. & L., 553; 1 Madd. Ch., 431. So, in respect to injunctions, one may issue against a judgment for land, and stay execution for a part, and allow it to stand for the residue. *Dunlap et al.* v. *Stetson*, 4 Mason, *364. See other illustrations [*162 and cases, Com. Dig., Chancery Appendix, 6 and 18; *Fildes* v. *Hooker*, 2 Meriv., 427; 14 Ves., 91; *Wharton* v. *May*, 5 Ves., 27.

The form of a decree nearly adapted to this case may be seen in *Fanning* v. *Dunham*, 5 Johns. (N. Y.) Ch., 146.

The last real bid here being in some doubt as to its amount, whether eighteen or twenty thousand dollars, we think the weight of evidence is in favor of the last sum, and the computations are therefore to be made on that basis. The judgment

below must therefore be reversed, and a mandate sent down directing the proper decree, in conformity to these views, to be entered for the plaintiff.

Mr. Chief Justice TANEY, Mr. Justice McLEAN, and Mr. Justice GRIER dissented from this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the pretended sale of the two mill privileges, at and for the sum of $40,000, as set forth and described in the pleadings and proofs in this cause, was fraudulent, and should be set aside; but as equitable terms imposed on the complainant, he is to let the sale stand for the sum of $20,000, fairly bid by him; and that the balance of the moneys paid by the complainant over and above the said $20,000 should be refunded to him by the defendants, with legal interest thereon, and that the notes and securities given for the payment of any part of such excess should be cancelled and given up by the defendants to the complainant; that the defendants should pay the costs in this court, upon this appeal, and all the costs which have accrued in this cause in the said Circuit Court, or which may accrue therein, in carrying out the decree of this court.

Whereupon, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court dismissing the complainant's bill be, and the same is hereby, reversed and annulled. And this court, proceeding to render such decree as the said Circuit Court ought to have rendered herein, doth now here order, adjudge, and decree, that the aforesaid sale, as above set forth, be, and the same is hereby, rescinded and set aside; that the said complainant shall, as equitable terms, retain the said property at and for the said *163] sum of $20,000, part of the moneys paid by him to the said defendants, and that *the said defendants shall, on or before the third day of that term of the said Circuit Court next ensuing the filing the mandate of this court in said Circuit Court, refund and pay to the complainant all such sums of money over and above the said last-mentioned sum of $20,000, as they or either of them shall have received from the said complainant on account of the purchase of said property, together with legal interest thereon from the time or times at which they were so received by the said defendants, and that the said defendants shall, on or before the same day

of the same term of the said Circuit Court, cancel and deliver up the notes and securities given for the payment of any and every portion of the excess over and above the said $20,000. And this court doth further order, adjudge, and decree, that the said defendants do pay the costs in this court upon this appeal, and all the costs which have accrued in this cause in the said Circuit Court, or which may accrue therein, in carrying out the decree of this court. And this court doth further order, adjudge, and decree, that this cause be, and the same is hereby, remanded to the said Circuit Court, with instructions to carry this decree into effect, and with power to make all such orders and decrees as may be necessary for that purpose.

JAMES PHALEN, PLAINTIFF IN ERROR, *v.* THE COMMONWEALTH OF VIRGINIA.

In 1829, the legislature of Virginia passed an act appointing five commissioners to raise by way of lottery or lotteries the sum of $30,000 for the benefit of the Fauquier and Alexandria Turnpike Road Company. Two of the commissioners declined to act, and the remaining three took no steps to execute the power for a long time. On the 25th of February, 1834, the legislature passed an act for the suppression of lotteries, which prohibited all lotteries and sale of lottery-tickets after the 1st of January, 1837, saving, however, contracts already made which were by their terms to extend beyond the 1st of January, 1837, or contracts hereafter to be made under any existing law, which were to extend beyond that day. These were permitted to go on until the 1st of January, 1840. On the 11th of March, 1834, the legislature passed an act appointing two commissioners in the place of the two who had declined to act. On the 19th of December, 1839, these commissioners entered into a contract with certain persons, authorizing these persons to draw as many lotteries as they might think proper, without limitation as to time, upon the payment of a certain sum per annum to the commissioners.

Held, 1. That the right to draw lotteries under the act of 1829 was not a contract the obligations of which were impaired by the act of 1834.

2. That it may be doubted whether it constituted a contract at all; but that if is was a contract, it was not unlimited as to time, and the act of 1834, allowing the grant to continue *for a certain time, stood upon the [*164 same ground as acts of limitation and recording acts, which this court has said a state has a right to pass.

3. That the privilege granted by the act of 1829 had become obsolete from non-user, and the act of 1834, appointing two commissioners, did not fully revive it, because the two acts of 1834 must be taken together; and the limitation contained in one must apply to the other.[1]

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[1] It is an elementary principle in the interpretation of written law, that statutes *in pari materia* are to be construed together. *United States* v. *Collier*, 3 Blatchf., 325; *Alexander* v. *Mayor, &c.*, 5 Cranch, 1; *The Elizabeth*, 1 Paine, 10; *United States* v. *Harris*, 1 Sumn., 21; *United States* v. *Hewes*, Crabbe, 307; *Black* v. *Scott*, 2 Brock., 325; *Dubois* v. *McLean*, 4 McLean, 489; *Patterson* v. *Winn*, 1 Wheat., 385, 6; *Chandler* v. *Lee*, 1 Idaho, 349.

In construing any particular section