

Cleveland State University  
**EngagedScholarship@CSU**



**Cleveland-Marshall**  
College of Law Library

---

Cleveland State Law Review

Law Journals

---

1977

# Auction Problems: Going, Going, Gone

Leonard D. DuBoff

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Commercial Law Commons](#), [Contracts Commons](#), and the [Entertainment, Arts, and Sports Law Commons](#)

**How does access to this work benefit you? Let us know!**

---

## Recommended Citation

Leonard D. DuBoff, *Auction Problems: Going, Going, Gone*, 26 Clev. St. L. Rev. 499 (1977)  
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol26/iss4/4>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact [library.es@csuohio.edu](mailto:library.es@csuohio.edu).

# AUCTION PROBLEMS: GOING, GOING, GONE

LEONARD D. DuBOFF\*

WORKS OF ART MAY BE bought, sold, and transferred by every traditional method of conveyancing,<sup>1</sup> though the type which appears to be most notorious is auctioning.<sup>2</sup> In this Article the auction process will be analyzed, many of the problems currently prevalent in the auction arena identified, and suggestions tendered which, if adopted, should reduce some of the difficulties discussed.

## I. AUCTIONING AS A SELLING TECHNIQUE

In a free market system, there are generally three basic modes of conveyancing: fixed pricing, negotiation, and competitive bidding. Determination of the method to be employed depends upon the nature of the goods, their supply, an evaluation of the goods' current worth, and the characteristics or requirements of the anticipated purchaser.

The individual consumer is probably best acquainted with the first of these market mechanisms — fixed pricing. In this situation, the buyer is given the choice of accepting or rejecting the item at a price designated by the seller.<sup>3</sup>

---

\* BES, magna cum laude, 1968, Hofstra University; J.D., summa cum laude, 1971, Brooklyn Law School; Professor of Law, Lewis & Clark Law School; President, Oregon Volunteer Lawyers for the Arts, Inc.; Chairman, AALS Section on Law and The Arts. Professor DuBoff is author of the Deskbook of Art Law (1977) and teaches a course on art law. The author wishes to recognize the valuable assistance of Mary Louise Stasak, member, senior class, Lewis & Clark Law School, and Mary Ann Crawford DuBoff, Executive Secretary, Oregon Volunteer Lawyers for the Arts, Inc.

<sup>1</sup> Art objects are personal property and so may be transferred in the same manner as any other piece of personal property, such as by gift, bequest, exchange or sale. This Article, however, will only be concerned with a specialized method of sale. For a more complete analysis of personal property conveyancing, see R. BROWN, *BROWN ON PERSONAL PROPERTY* (3d ed. 1975).

<sup>2</sup> For cases upholding auction regulations and displaying a judicial hostility toward this form of marketing, see, e.g., *Biddles, Inc. v. Enright*, 239 N.Y. 354, 146 N.E. 625 (1925). In recent years the distrust was expressed in this way:

The record is replete with testimony of the governing body of the City of Gatlinburg and other witnesses that they fear that incidents may occur in the conduction of the auction sale as conducted by Complainants which will reflect upon the town of Gatlinburg, and even though the Complainants guarantee satisfaction, or your money refunded, no one knows, and the record does not reflect, the number of people who, in the silence of their room after the chanting of the auctioneer has ceased and the pressure of the floormen in the presence of a great crowd is no longer with them, feel that they have paid entirely too much for some article, but they are too proud to ask for the return of their money, and inwardly they feel that they have been defrauded.

*Gatlinburg Art Gallery v. City of Gatlinburg*, 215 Tenn. 107, 384 S.W.2d 9 (1964). See also *B. Jeselsohn, Inc. v. Atlantic City*, 358 A.2d 797 (N.J. 1976).

<sup>3</sup> Until their repeal in 1975, Fair Trade Laws allowed others to legally fix prices. See Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (codified at 15 U.S.C. § 45(a) (1975)) repealing the fair trade laws. See also Note, *The Case for Repealing "Fair Trade,"* 7 ANTITRUST L. AND ECON. REV. 79 (1975); Givens and Worsinger, *Vertical Restraints after Repeal of Fair Trade*, 45 FORDHAM L. REV. 1093 (1977); Johnson and Boone, *Fairwell to Fair Trade: The End of Resale Price Maintenance Closes a Controversial, 45-Year Experiment in U.S. Retailing*, 24 M.S.U. BUS. TOPICS 22 (1976).

It is common for artists to fix the price of their creations initially and have dealers add a selling commission. See L. DuBOFF, *THE DESKBOOK OF ART LAW*, 779-88 (1977) (hereinafter cited as *DESKBOOK*).

This form is most efficient in minimizing transaction costs by reducing the time spent in determining the selling price of the article, although it is still costly to attract prospective buyers through advertising. One disadvantage of this method is the take it or leave it aspect of the sale, since there is usually a complete absence of negotiation.

Suppose, for example, that a person wishes to sell a painting for \$1,000. If the painting were not considered by the buyer to be worth \$1,000, but could have been sold for between \$500 and \$999, the owner has lost a sale. This example points out the benefit of negotiation. The seller may either specify a price which is understood by both the seller and buyer to be subject to negotiation, or not set a price at all, inviting a volley of offers and making counteroffers until an acceptable compromise is reached. Of course, the success of this method of sale is based upon the assumption that a suitable purchaser may be located readily. In most situations, the potential costs involved in finding a buyer either by advertising or through the contracted services of an agent are significant.

In the final mode, competitive bidding, the offer may be either disclosed or undisclosed. In undisclosed bidding, sealed or secret bids are submitted without knowledge of the competitors' bids.<sup>4</sup> In disclosed bidding, potential buyers openly compete in an attempt to outbid one another.

The gathering of all interested buyers to set the price by competitive bidding is known as auctioning, and is especially useful for art transactions since each piece is subject to radical fluctuation in market price. This is so because the value of art stems from a variety of factors including the cost of the materials used in creation, the aesthetic appeal, the artist's present status, the availability of similar works, the age of the piece, and the anticipated appreciation in monetary worth based upon the past performance of the artist or school.<sup>5</sup>

Both information and transaction costs become involved in setting up an auction. The costs of advertising, securing a location, and hiring an agent or auctioneer are but a few. Yet, because of the constantly changing and unpredictable price of works of art, the auction system is a very appealing vehicle for exchange.

## II. HISTORY OF THE AUCTION SYSTEM

The auctioning process was used in ancient times. Herodotus<sup>6</sup> noted that as early as 500 B.C., the Babylonians used two types of auctioning systems to offer their women in marriage. The loveliest ladies were offered by sale to the highest bidders, while the least desirable maidens were auctioned off to those who by their low bids indicated the amount of dowry they would accept as

<sup>4</sup> Sealed bidding is most commonly employed in government contracting. For an excellent analysis of this specialized field, see R. NASH, *GOVERNMENT CONTRACT CHANCES* (1975).

<sup>5</sup> This list of factors is illustrative and not all encompassing. It is impossible to pinpoint all the elements which will affect an art object's market price. For an interesting example of the effect that fashion has had on the price of particular art styles as a result of the recent flurry of traveling exhibits, see *Tut Mania*, *Newsweek*, May 9, 1977, at 94.

<sup>6</sup> Herodotus, *The Histories of Herodotus* 77 (Cary trans. (1899)).

compensation. The revenue gathered from the sale of the prettier women provided the dowries for the others.

It is also known that the ancient Romans<sup>7</sup> used the auction system as a sales device. Prospective Roman purchasers had the opportunity to preview the items before sale in the *aticum auctionarium*. The owner of goods, the *dominus*, turned his property over to the *argentarius*, the organizer of the auction, who would then sell it to the *emptor*, the highest bidder.

On the other side of the globe, auctions were also common at an early period. In seventh century A.D. China,<sup>8</sup> auctioning the property of deceased monks provided funds for the Buddhist temples and monasteries.

A millenium later in seventeenth century England<sup>9</sup> the auction house became a forum for selling art as well as other property. Interested parties gathered at coffee houses and taverns to examine and bid on paintings. By the time of the establishment of Christies in 1766,<sup>10</sup> art auctioning had become a formalized business.

Auctioning of goods as a sales method naturally accompanied the colonists to the New World.<sup>11</sup> The heavy influx of imported goods caused prices to fall rapidly, and inventories gradually rose. Merchants and importers looked to the auction block as a speedy means of disposing of their surplus. American and foreign items were auctioned side by side, and the price was determined by the high bid rather than by the cost of production. This marketing technique was disadvantageous to budding domestic manufacturers, while aiding the more efficient European industries. Although many resented the auction mechanism because it invited competition from foreign goods, it nevertheless benefited the American consumer by providing a forum for the introduction of new products which might otherwise have been unavailable.

The most infamous American auctions involved the sale of slaves in the Old South.<sup>12</sup> Just as the beautiful maidens of Babylonia attracted high bids, so did the young, healthy black men of pre-Civil War America.

During this same period, the auctioning system spread throughout the European continent.<sup>13</sup> The Dutch offered agricultural produce for competitive bidding at about the same time that the Germans discovered auctioning to be a quick, easy, and profitable method of selling fish. Auctioning was thus firmly imbedded in the market system. As such, numerous regulations were imposed on this sales device, and it was necessary for the judiciary to develop definitional criteria.

In an early English case,<sup>14</sup> the defendants advertised that they would

<sup>7</sup> Thomas, *The Auction Sale in Roman Law*, 2 N.S. JURIDICAL REV. 42 (1957).

<sup>8</sup> Lien-sheng Yang, *Buddhist Monasteries and Four Money-raising Institutions in Chinese History*, HARV. J. ASIATIC STUD. XII, 1974-94, June, 1950.

<sup>9</sup> R. CASSADY, AUCTIONS AND AUCTIONEERING 29-30 (1967) (citing Ash, *The First Auctioneer: Origin of Sales by Real Property*, Estates Gazette (Centenary Supplement) May 3, 1958, at 33) [hereinafter cited as R. CASSADY].

<sup>10</sup> CHRISTIE'S REVIEW OF THE SEASON 1974, at 9 (Herbert ed. 1974).

<sup>11</sup> Westerfield, *Early History of American Auctions: A Chapter in Commercial History*, Transactions of the Connecticut Academy of Arts and Sciences XXIII, May, 1920.

<sup>12</sup> F. BANCROFT, SLAVE TRADING IN THE OLD SOUTH 176-180, 226-231 (3d ed. 1967); U. PHILIPS, AMERICAN NEGRO SLAVERY 190 (1952).

<sup>13</sup> R. CASSADY, *supra* note 9, at 36-38.

conduct an estate sale by auction. Numerous individuals attended, but no bids were made. Rather, the estate was sold a few hours later in what the defendants contended was a private negotiated sale. The authorities nonetheless attempted to impose an auction tax on the sale proceeds. The court held that for the purposes of the act in question this was a sale by auction, stating that “[h]e [the seller’s agent] might have taken any individual he pleased and concluded a bargain with him; that would have been a transaction of a different kind; but here he treated with a number, and came under an engagement to accept the highest offer.”<sup>15</sup>

American courts also appear to have placed emphasis upon the competitive bidding feature in determining whether or not a sale was an auction. In *Crandall v. State*,<sup>16</sup> the Ohio Supreme Court held that a sale was not an auction within the meaning of the licensing statutes when the defendant sold by public outcry but never sold goods above or below a fixed price.<sup>17</sup> The Hawaii Supreme Court recently restated the importance of competitive bidding as the definitional criterion of a sale by auction.<sup>18</sup> In *Hawaii Jewelers Ass’n v. Fine Arts Gallery, Inc.*, the defendants argued that they were not holding an auction even though the sale was conducted by competitive bidding because their “thirty day money back guarantee” postponed the transfer of title to the purchaser. The court held that the money-back guarantee did not postpone the transfer of title, and that the defendants were conducting an auction without satisfying the statutory requirements for such sales. Thus, it appears to be firmly established that the hallmark of an auction sale is competitive bidding.

### III. METHODS OF COMPETITIVE BIDDING

The three most common methods of bidding are generally known by the names of the countries in which they first became popular. The English method<sup>19</sup> is an ascending bid — each successive bid must be higher than the preceding bid until an unchallenged bid is accepted. The Dutch method,<sup>20</sup> in contrast, is a bid made on a descending scale from the auctioneer’s opening figure. The Japanese method<sup>21</sup> involves simultaneous bidding during a short period allotted for placing bids, with the auctioneer determining who entered the highest bid.

The ascending bid is the most common form in the United States,<sup>22</sup> and is

<sup>15</sup> *Id.* at 642.

<sup>16</sup> 28 Ohio St. 479 (1876). See also *Territory v. Toyota*, 19 Hawaii 651 (1909) (relying on *Crandall v. State* and *Bouvier’s Dictionary*).

<sup>17</sup> *But see* *Mann’s Jewelers v. City of San Diego*, 140 Cal. App. 2d 578, 295 P.2d 468 (1956) (relying solely on statutory interpretation and ignoring the traditional common law criteria).

<sup>18</sup> *Hawaii Jewelers, Ass’n v. Fine Arts Gallery, Inc.*, 51 Hawaii 502, 463 P.2d 914 (1970).

<sup>19</sup> For a more detailed discussion of these bidding methods, see R. CASSADY, *supra* note 9, at 56-67.

<sup>20</sup> An electronic device, the Dutch clock, is used in larger markets. As the indicator moves downward a bidder registers his bid by depressing a button which flashes the amount bid and the first bidder’s number on the face of the clock. This mechanism allows high speed transactions because delays between bids are eliminated. *Id.* at 194-95.

<sup>21</sup> See *DESKBOOK*, *supra*, note 3, at 540. Some western style auctions have recently been conducted in Japan. See B. BURNHAM, *THE ART CRISIS* 191-213 (1975).

<sup>22</sup> Though some statutes and ordinances expressly include the descending as well as the ascending bidding within the definition of an auction, such as section 103.302(a) of the Los

adaptable to an infinite variety of techniques for entering bids. Oral bids called out during the sale and written, sealed bids entered prior to the sale are the most familiar. However, bids may also be entered by creative signals arranged between the bidder and the auctioneer.<sup>23</sup> This technique permits the bidder to attend the auction without revealing the fact that he is bidding. In an effort to accommodate potential buyers, some auction houses now use closed circuit television<sup>24</sup> and long distance telephone calls,<sup>25</sup> which allow extended participation in the bidding at major sales.

Since an auction is a method of forming a contract, it may be useful to identify the parties in traditional contract law language. Lord Kenyon's classic statement that "[e]very bidding is nothing more than an offer on one side, which is not binding on either side, until assented to"<sup>26</sup> by the auctioneer reflects the legal structure of auctions. It means that bidders play the role of offerors and auctioneers act as offerees. It also means that placing an item on an auction block is merely an invitation for offers. This characterization was codified in the Uniform Sales Act<sup>27</sup> and adopted by the Uniform Commercial Code (UCC).<sup>28</sup> The practical effect of this principle is that items generally may be withdrawn at anytime before they are sold, unless the goods are expressly put-up without reserve.<sup>29</sup> Similarly, the bidder may withdraw his bid without liability before the fall of the hammer,<sup>30</sup> but after an item is sold or "knocked down" the bidder is liable for the contract price.<sup>31</sup>

---

Angeles, California Municipal Code, others impliedly include both methods as a sale "to the highest bidder." See, e.g., OR. REV. STAT. § 698.510 (1977). For an early United States case discussing the descending bidding method, see *Crandall v. State*, 28 Ohio St. 479 (1876).

<sup>23</sup> In *Conover v. Walling*, 15 N.J. Eq. 173 (1852), the bidder signaled his bids by keeping his thumb in the buttonhole of his coat. After the auctioneer ignored his signaled bids on a second piece of land, the bidder successfully brought suit to have the sale to another bidder set aside. In 1961, a wink signaled the final bid of \$2,300,000 when the Metropolitan Museum of Art acquired Rembrandt's *Aristotle Contemplating the Bust of Homer*. See W. TOWNER, *THE ELEGANT AUCTIONEERS* 604 (1970) [hereinafter cited as W. TOWNER].

<sup>24</sup> Bidders were recently described as "hand-wavers, head-nodders, shouters, pencil-flickers, eye-blinkers, ear-tuggers and lapel-flippers." Reit, *Rules of Auction Etiquette Planned to Help All Buyers*, *Oregonian*, Jan. 10, 1977, § Cl., col. 1.

<sup>25</sup> Closed circuit television was first used in the United States at Parke-Bernet on Nov. 7, 1957 for the sale of the George Lurcy collection. W. TOWNER, *supra* note 23, at 584.

<sup>26</sup> *Parke Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970) (a defaulting buyer was brought within New York jurisdiction by his participation in an auction through long-distance telephone hook-up from California).

<sup>27</sup> *Payne v. Cave*, 100 Eng. Rep. 502, 503 (1789).

<sup>28</sup> UNIFORM SALES ACT § 21.

<sup>29</sup> U.C.C. § 2-328(3) (1972 version) provides:

Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

The UCC has been adopted by every state except Louisiana. Section 2-328, however, has been adopted in only 47 states (not adopted in Minnesota and Virginia). R. ANDERSON, *UNIFORM COMMERCIAL CODE* § 2-328(2) (1970 & Supp. 1970-1974).

<sup>30</sup> U.C.C. § 2-328(2) (1972 version).

<sup>31</sup> *Thompson v. Kelley*, 101 Mass. 291, 3 Am. Rep. 377 (1869); *French v. Sotheby & Co.*, 470 P.2d 318 (Okla. 1970). See note 26 *supra*.

The auctioneer, as the seller's agent,<sup>32</sup> is personally liable to the seller for the purchase price unless relieved of this duty by contract.<sup>33</sup> Thus, the auctioneer has standing to maintain an action against a defaulting buyer.<sup>34</sup>

#### IV. TACTICS

During an auction sale, the auctioneer, the sellers, and the bidders may engage in various tactical maneuvers suited to their respective goals. These tactics can range from the legitimate to the illegal. The auctioneer and the seller have a common interest in bringing out the highest bids possible since the auctioneer's commission is usually a percentage of the selling price.<sup>35</sup>

The auctioneer normally determines the order of the items to be sold. The goods will typically be numbered, catalogued, and displayed for a pre-auction viewing.<sup>36</sup> This is not a random assembly, and careful orchestration is necessary to establish the desired psychological environment.<sup>37</sup> Some auctioneers begin the auction by presenting less expensive items, using finer quality pieces to raise the level of bidding until the auction's summit is reached and the finest pieces are placed on the block.<sup>38</sup> Other auctioneers prefer to open the sale with the best objects in order to initiate bidding momentum.<sup>39</sup> Still other auctioneers may choose a less obvious pattern by commingling items of differing values as a technique to maintain audience interest throughout the sale.<sup>40</sup>

No matter which technique is used, the goal is the same — to obtain higher prices. Auctioneers try to charge the atmosphere with their banter, promoting spontaneous bidding which results in bidders acting before they have had a chance to reflect. Impulsive competitive bidding is known as auction fever<sup>41</sup> and may result in an individual acquiring an object for a price which exceeds the amount he would be willing to spend if he had an opportunity to think before buying. The auctioneer also influences the bidding by his dress,

<sup>32</sup> See RESTATEMENT (SECOND) OF AGENCY § 1, Comment e (1957).

<sup>33</sup> RESTATEMENT (SECOND) OF AGENCY § 364, Comment d, and § 376 (1957).

<sup>34</sup> *Id.* § 364, Comment d.

<sup>35</sup> See Harris, *Squaring Off: Christie's vs. Parke Bernet*, New York, May 9, 1977, at 48.

<sup>36</sup> It is essential for buyers to take advantage of the opportunity to examine the items before the auction since *caveat emptor* must be the watchword of auction goers. See, e.g., Weisz v. Parke Bernet Galleries, Inc., 77 Misc. 2d 80, 80-81, 351 N.Y.S.2d 911, 912 (Sup. Ct. 1974). See also Art News, Summer 1976, at 24.

<sup>37</sup> See D. DEFORREST, *HOW TO BUY AT AUCTION* 153-57 (1972) for an interesting discussion of the different rationales for scheduling the order of lots of auctioneers [hereinafter cited as D. DEFORREST].

<sup>38</sup> *Id.* This is the most common method of laying out an auction. It enables the auctioneer to begin the sale on time and still hold the main objects for late arrivals, as well as to become familiar with the audience while building momentum and heightening anticipation.

<sup>39</sup> *Id.* at 156. The author describes the technique used to sell the most important of two Van Gogh paintings. The auctioneer is quoted as saying: "When you have two important works by the same artist, if you begin with the less valuable people tend to hold back; whereas if the major picture is put up first, all unsuccessful bidders can try for the second one."

<sup>40</sup> *Id.* at 155. This is usually laid out in the auction catalogue. Some auctioneers will permit pieces to be auctioned out of order on request, though such requests have been criticized.

<sup>41</sup> *Id.* at 137-38. See also *Gatlinburg Art Gallery v. City of Gatlinburg*, 215 Tenn. 107, 384 S.W.2d 9 (1964).

manner, and personality. Auction houses with several auctioneers carefully select the person to handle a particular sale on the basis of the type of goods to be auctioned and the group of bidders anticipated.<sup>42</sup>

Auctioneers may allow oral bids and signals to be used simultaneously throughout the sale.<sup>43</sup> In addition, it is common to encourage the use of sealed bids for absentee bidders.<sup>44</sup> Sealed bids are written powers of attorney authorizing the auctioneer, or his agent, to bid up to a specified price for a particular object.<sup>45</sup> Clever auctioneers use this authority to heighten bidding momentum. If the auctioneer is actually exercising the power of attorney to raise a bid from the floor, then his conduct is legal.

It is uncommon for auctioneers to show sealed bids or to announce that they are being executed.<sup>46</sup> Therefore, unethical members of the profession may engage in the fraudulent practice of phantom bidding or running the bidding.<sup>47</sup> Most auction patrons will not be able to identify this artifice.

This problem can be avoided by having the auction house designate and identify an agent to exercise sealed bids. In this way, other bidders would know that bids are being made on behalf of absentee competitors.<sup>48</sup> In addition, it might be argued that the written bids should be open to inspection after the sale has been concluded. Auction patrons could then check the validity of a bid. The disclosure, however, would also reveal the identity of individuals who are interested in certain objects and the amount they were willing to spend. This invasion of privacy would surely reduce some phantom bidding, yet it could also inhibit sealed bidding by those who would

<sup>42</sup> W. TOWNER, *supra* note 23, at 393-96, 399-402, reports that Major Parke handled the major sales at Parke Bernet because his courtly manner and appearance was better suited to the clientele at these sales, while Mr. Bernet's more friendly and blustery manner was extremely successful with less important sales which attracted the small buyer.

<sup>43</sup> See, e.g., *State ex. rel. Fitch v. State Bd. of School Land Comm'rs*, 27 Wyo. 54, 61, 191 P. 1073, 1074 (1920), where it is stated: "A bid may be made orally, or in writing, by a wink or a nod, or by any mode by which the bidder signifies his willingness and intention to give a particular price."

<sup>44</sup> Sealed bids may also be used when an individual wishes to conceal the fact that he is interested in an object. In this way the prospective buyer can attend an auction, observe the competition, remain an anonymous bidder, avoid the expense of hiring a bidding agent, and avoid using signals when they might be misunderstood. For some of the problems encountered when signals are used, see R. CASSADY, *supra* note 9, at 150-51.

<sup>45</sup> See generally MEECHAM ON AGENCY § 41 (4th ed. 1952) (discussing the interpretation of written instruments).

<sup>46</sup> Some auctioneers have attempted to overcome the criticism that absentee bidding can result in abuses. These auctioneers have an identified agent sitting in the front of the auction gallery and bidding solely on behalf of absentee bidders.

<sup>47</sup> Phantom bidding, or running the bidding, is the practice whereby auctioneers cause bidders to bid against themselves. See, e.g., *Veazie v. Williams*, 49 U.S. 134 (1850).

For example, if a bidder is sitting near the front of the audience, the auctioneer can accept this person's bid, then point to a far corner and acknowledge a non-existent bid. A particularly knowledgeable or courageous bidder might inquire as to the identity of the last bidder if he suspects the auctioneer is running the bid. See *N.Y. Times*, March 6, 1977, at 40, col. 4. *But see* D. DeForrest, *supra* note 37, at 194-95, for cautions in using this technique, which is considered a breach of auction etiquette. For this reason experienced auction goers customarily sit as far back as possible in order to observe their alleged competition. If a defrauded bidder is able to establish that phantom bidding was involved, he can either rescind or obtain the goods for the last good faith bid. See UCC § 2-328(4) (1972 version).

<sup>48</sup> See note 46 *supra*, pointing out that some auction houses actually do employ this technique.



rather remain anonymous.<sup>49</sup> On balance the cure might be more harmful than the evil it is attempting to overcome.

An unethical seller may hire an agent to inflate the sales price artificially. This tactic may be even more difficult to recognize than running the bidding, since the agent is present in the audience and appears to be making a legitimate offer. These bids are made for the express purpose of raising the price and not as good faith offers to purchase. The process of employing an agent for the sole purpose of raising the sales price is known as shilling, puffing, or by-bidding.<sup>50</sup> Section 2-328 of the Uniform Commercial Code provides:

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

Unfortunately, it is not clear what is meant by "the last good faith bid prior to completion of the sale." Professor Hawkland<sup>51</sup> argues that in a situation in which one bidder is involved, the last good faith bid prior to completion of the sale is interpreted as the last good faith bid before the seller began bidding. This is true even when the seller and bidder compete with each other for a number of rounds. In a situation in which two good faith bidders are involved, Professor Hawkland tenders the following interpretation:

Suppose the buyer bids \$100 and is overbid by a puffer's offer of \$110. Suppose, at this point, an innocent third party bids \$120. If the buyer bids \$130, the Puffer \$140 and the goods are knocked down to buyer at \$150, what price must he pay for them? It is suggested that he must pay \$120. To use this figure, of course, gives the seller some advantage from his own fraud, but any other rule would unjustly deprive the third party of the goods. . . .<sup>52</sup>

It is submitted that the third party is not the buyer, and that the price he has bid is neither the "last good faith bid prior to the completion of the sale" nor the last bid by a good faith purchaser. The buyer should be able to obtain the goods in this situation using the same theory employed in a single bidder example; namely, for \$100. This theory should be adopted for several reasons. Depriving sellers of ill-gotten gains will have a deterrent effect, it is consistent with Professor Hawkland's one-bidder example and the justification tendered for selecting the third person's bid does not seem consistent with either Code language or philosophy.

The Code's condemnation appears to be directed only at seller puffing; yet, auctioneers may engage shills in order to increase auction sale commis-

<sup>49</sup> See D. DEFOREST, *supra* note 37, at 150-51, for some advantages of remaining anonymous while bidding.

<sup>50</sup> See, e.g., *Curtis v. Aspinwall*, 114 Mass. 187 (1873) (auctioneer employed by-bidder); *Peck v. List*, 23 W. Va. 338 (1883) (owner employed puffer).

<sup>51</sup> W. HAWKLAND A TRANSACTIONAL GUIDE TO THE UCC 40 (1964).

<sup>52</sup> *Id.*

sions. This ploy does not appear to be explicitly within the Code's prohibition. It might be argued that the phrase "[i]f the auctioneer knowingly receives a bid on behalf of the seller" can be interpreted as covering a situation in which a dishonest auctioneer hires an agent puffer to increase the sales price. Even if the seller is innocent of the fraud, he is nevertheless receiving a higher price for the goods than he would have if the unethical auctioneer had not technically received a bid on the seller's behalf tendered by the auctioneer's own skill.

The Uniform Sales Act<sup>53</sup> expressly prohibited auctioneers from employing skills, as well as prohibiting the other forms of puffing set forth in UCC section 2-328(4). If the Code's omission of auctioneer shilling was intentional, can the omission be read as an endorsement of the price? Section 1-103 of the UCC points out that common law principles shall supplement the Code's provisions. Section 1, comment (3) of the Second Restatement of Agency states that an auctioneer, as agent for the seller, is an independent contractor. Section 257 of the restatement provides that principals are liable for the tortious representations of independent contractors under the common law principles of agency.<sup>54</sup> Further, the auctioneer's scheme to artificially inflate prices is at least as injurious as seller shilling, and buyers who have been induced to pay higher prices as a result of an auctioneer's agent's activity should equitably be entitled to the same remedies as a buyer who has been injured by a seller's artifice.<sup>55</sup>

Bidders have also developed strategies to further their interests. Legitimate techniques include bidding through an agent, by prearranged signals, or by sealed bidding if the bidder feels that his interest in a piece might cause its price to rise.<sup>56</sup> An illegitimate means of discouraging competition is to make derogatory remarks about an item within the hearing of other bidders or to cause disparaging rumors about the piece to circulate. The bidder who attempts these latter strategies may find that his ploy to discredit a piece is unsuccessful, or may appear ridiculous if he bids on a piece he had previously criticized. In addition, if the scheme to disparage a piece is discovered, the bidder should be liable for civil damages.<sup>57</sup>

Another tactic which is illegal is for a group of bidders to agree in advance not to bid against each other on particular pieces in which they all have some interest in acquiring. This group is known as a ring.<sup>58</sup>

<sup>53</sup> Uniform Sales Act § 21(4).

<sup>54</sup> *Accord*, *Veazie v. Williams*, 49 U.S. 134 (1850).

<sup>55</sup> *Id.* But see UCC § 1-203, which states: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." It thus appears that the precontractual negotiations are not necessarily within the statute's coverage.

<sup>56</sup> Rival collectors, however, often relish the competition, and are of course important to the success of an auction. An auctioneer once took out insurance policies for \$250,000 on the lives of two combative book collectors prior to the sale of the Jerome Kern rare book collection in 1928. Both survived to enter their bids. See *W. TOWNER supra* note 23, at 448.

<sup>57</sup> *Hahn v. Duveen*, 133 Misc. 871, 234 N.Y.S. 185 (1929). The art dealer, Duveen, was sued for a defamation after claiming that the plaintiff's painting was not an original Leonardo da Vinci. He had never seen the painting. The case was set for retrial when the jury could not unanimously agree on a verdict. The case was never retried since Duveen settled out of court for \$60,000. See *DESKBOOK, supra* note 3, at 412.

<sup>58</sup> See *R. CASSADY, supra* note 9, at 177-192, for a detailed description of buyer rings as they operate in different commodity fields from antiques to timber.

Rings operated in England at a time when private collectors were barred by custom from bidding at auction house sales. Those who knew that an important collection would be sold at auction retained dealers to act on their behalf. It was customary for the collector to agree to buy a desired piece for a specified price from the dealer, regardless of what the dealer paid for the piece. If a collector attended the sale at all, it was only as a spectator. Dealers began conspiring to keep their acquisition costs low by organizing and agreeing before the sale not to bid against each other.<sup>59</sup> The rings were made up of dealers in the same fields, so that at an estate sale, for example, several rings might be operating at the same time — one for silver, another for antiques, and still another for paintings.<sup>60</sup>

After the auction, the members of a ring pooled their purchases and held a private or “knock-out” auction<sup>61</sup> among themselves with one of them acting as the auctioneer. Profits or losses from the knock-out auction — the difference between the price paid at the public auction and that paid at the private knock-out auction were divided among members of the ring. As a result of this conspiracy, auction prices remained depressed and actual market values of many objects were determined by what dealers obtained in reselling to private collectors. Rings are illegal by statute in England<sup>62</sup> but may still operate on occasion.<sup>63</sup> In the United States, rings are illegal under the anti-trust statutes which prohibit conspiracies in restraint of trade.<sup>64</sup>

The secret reserve tactic was developed in England to neutralize the effects of ring control over prices.<sup>65</sup> In an auction “with reserve” the reserve price is the minimum amount which must be bid before the auctioneer can sell an item to the highest bidder. American auctioneers generally adopted the tradition of allowing secret reserves,<sup>66</sup> and the reserve scheme is endorsed by

<sup>59</sup> See W. TOWNER, *supra* note 23, at 52-54.

<sup>60</sup> There even are rings within rings — unimportant members are paid off leaving an inner circle who then hold a second knock-out sale. See R. CASSADY *supra* note 9, at 182-83.

<sup>61</sup> *Id.*

<sup>62</sup> Auctions (Bidding Agreements) Act 1927, 17 & 18 Geo. 5, ch. 12, *as amended by* Auctions (Bidding Agreements) Act 1969, ch. 56.

<sup>63</sup> See *MP's Will Ask About State Art Deal*, THE TIMES (London), Dec. 17, 1968, at 3, col. g; *Hopkirk, 150,000 paid after 2,700 Auction*, THE TIMES (London), Oct. 29, 1968, at 1, col. b; *Renewed Attack on Art Sale*, THE TIMES (London), Nov. 1, 1968, at 2, col. g; *Dealer Quits Over the Duccio*, THE TIMES (London), Nov. 2, 1968, at 1, col. g; *Higher Penalties on Auction Rings to be Considered*, THE TIMES (London), Nov. 2, 1968, at 3, col. a; *Deportation of Art Dealer Sought by Tory MP*, THE TIMES (London), Nov. 7, 1968 at 2, col. d; *Penetrating the Art World's Wall of Silence*, THE TIMES (London), Nov. 7, 1968, at 16, col. c; *Dealer Help in Art Ring Inquiry*, THE TIMES (London), Nov. 14, 1968 at 1, col. a.

<sup>64</sup> *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *affd.*, 175 U.S. 211 (1899); *United States v. National Soc'y of Prof. Eng'rs.*, 555 F.2d 978 (D.C. Cir. 1977), *cert. granted*, 98 S. Ct. 51 (1977).

<sup>65</sup> W. TOWNER *supra* note 23, at 55. *But see* *Bexwell v. Christie*, 1 Cowp. (King's Bench) 396 (1776) (refusing to enforce a reserve contract).

<sup>66</sup> In New York, the secret reserve system was generally accepted until 1885 when the American Art Association (AAA), under the management of Thomas Kirby, auctioned the Seney collection of paintings. Kirby hoped to combat public criticism and hostility toward the auction market by establishing practices which would encourage private buyers to patronize and become the main support for auction sales. He intended to accomplish this by “selling without reserve, restriction or protection never permitting additions to sales of private or estates' collections, prominetly advertising and displaying real ownership, (and) making final payment to the seller

the UCC.<sup>67</sup> The Code is silent on the practice of employing *secret reserves*, though they should be read into every auction contract by trade usage.<sup>68</sup>

The reserve is customarily set by the consignor, and if the bids do not reach this price the auctioneer may either announce that the bidding has failed to reach the reserve and that absent higher bids the goods are being withdrawn, or he may interpose protective bids. The first method of withdrawing goods presents no difficulty. It is a right permitted the seller in explicit terms by the UCC.<sup>69</sup>

The validity of the second method of withdrawing an item from the auction block, known as a buy-in,<sup>70</sup> is open to question unless it has been announced that the owner reserved the right to bid on his own goods.<sup>71</sup> The UCC does not expressly address the problem of undisclosed buy-ins, and it is not clear whether the Code would permit them.

Assume that a painting is placed on the auction block with a secret reserve.

If a bidder offers less than the reserve price, and the auctioneer interposes protective bids, then it might be argued that the auctioneer is merely doing what the Code permits since the presumed purpose behind the prohibition against undeclared seller bidding is to protect buyers from paying artificially high prices.<sup>72</sup> Since no sale can take place until the reserve is reached,<sup>73</sup> when there is a buy-in no bidder will have paid an artificially high price because the item is returned to the seller. On the other hand, protective bids are by their very nature made on behalf of the seller, and the Code expressly prohibits auctioneers from knowingly receiving bids on behalf of a seller.<sup>74</sup> However, the apparent activity resulting from protective bids may cause an individual

---

within 30 days from the date of sale." Parke Bernet Galleries acquired the AAA and continued to use the same policies until shortly before Parke Bernet was merged into Sotheby Co. of London in 1964. Secret reserves have been common in London since they were initiated as a countermeasure to rings. The reinstatement of secret reserves in New York is generally dated with Sotheby's acquisition of Parke Bernet in 1964, however, Parke Bernet had announced in the early 1960's that reserves were available. The change in policy was apparently dictated by competitive pressure. See W. TOWNER *supra* note 23, at 55, 607-08. In an informal survey of seven other auction houses in New York in 1973, three stated that they accepted goods for sale with reserves. See Reif, *Sotheby's, Amid Criticism on Goods and Reserves, Shifts Rules*, N.Y. Times, July 17, 1974 § L, at 20.

<sup>67</sup> UCC § 2-328 (3) & comment 2 (1972 version).

<sup>68</sup> UCC § 1-205(2) (trade usage). For an article urging a broad interpretation of this section, see Carroll, *Harpooning Whales of Which Karl N. Llewellyn is the Hero of the Piece; or Searching for More Expansion Joins in Karl's Crumbling Cathedral*, 12 B.C. INDUS. & COM. L. REV. 139 (1970). But see W. WHITE & S. SUMMERS, *THE UNIFORM COMMERCIAL CODE* 371 (1972), which appears to give this section a narrower reading. See also *Coleman v. Duncan*, 540 S.W.2d 935 (Mo. App. 1976).

<sup>69</sup> UCC § 2-328(3) (1972 version). See also *United States v. Von Cseh*, 354 F. Supp. 315 (S.D. Tex. 1972) (discussing the term "without reserve" and pointing out that it does not mean without restriction).

<sup>70</sup> See, e.g., Canaday, *When Is An Auction Not An Auction? (You Might Be The Last To Know)*, N.Y. Times, Mar. 10, 1974, § II, at 19, col. 2.

<sup>71</sup> Generally, at sales where there are printed catalogues, reservation of the seller's right to bid is included under the "Conditions of Sale" printed in the front of the catalogue. Where there is no catalogue the conditions of sale are posted on the premises. See R. CASSADY *supra* note 9.

<sup>72</sup> 6 A. CORBIN, *CORBIN ON CONTRACTS* § 1469 (1962) [hereinafter cited as A. CORBIN].

<sup>73</sup> UCC § 2-328(3) (1972 version).

<sup>74</sup> UCC § 2-328(4) (1972 version).

to increase his offer above the reserve price and a sale can result.<sup>75</sup> The buyer could argue with some justification that he would not have made the purchase if the auctioneer had not been executing protective bids.

If this argument is adopted and Section 2-328(4) is triggered, the buyer should be able either to revoke the sale or to retain the goods and pay only the amount of the last good faith bid prior to completion of the sale. The latter remedy emasculates the reserve price system, and could not have been contemplated by the Code drafters.<sup>76</sup> Therefore, the statute should be read to prohibit protective bids at least when a sale results.

This does not necessarily mean that protective bids are not harmful even when they do not result in a contract. In this situation the item would appear to be sold for the protective bid and market distortion would result; that is, speculating consignors could set unreasonably high reserve prices, and when the goods are secretly bought back, the speculator would have established an apparent price or benchmark which could be exploited in a subsequent resale.<sup>77</sup> Unfortunately, the Code does not confront this problem.

It could be argued that the term "with reserve" is equivalent to the buyer's reservation of a right to bid.<sup>78</sup> If this argument is correct, then sellers will be entitled to bid at every unspecified auction sale since the Code presumes all sales to be with reserve unless otherwise indicated.<sup>79</sup> This hypothesis is not supported by the Code because the prohibition of seller bidding appears to apply to auctions both with and without reserve.<sup>80</sup> The confusion results from the fact that the Code drafters were not as clear as they might have been.<sup>81</sup> There has been some pressure to abolish the use of secret reserves, and in 1974 a bill was introduced into the New York legislature<sup>82</sup> which would have put an end to secret reserves and, in addition, required auction houses to disclose any interest in an item to be sold. The major auction houses successfully opposed this bill,<sup>83</sup> which died in committee. It is interesting to

<sup>75</sup> See note 41 *supra* and accompanying text for a discussion of auction fever.

<sup>76</sup> This difficulty is not unique to the auction section. Regretably commentators have found ambiguities throughout the UCC. See Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L. J. 199 (1973).

<sup>77</sup> It was felt that a work which is brought in is burned or tainted by the unsuccessful attempt to sell and cannot profitably be put on the market for anywhere from eighteen months to two years. Yet in the early 1970's, reports appeared in the press giving not only startling percentages of buy-ins for particular sales, but in some cases identifying the work. See, e.g., Hershman, *The Action in Auctions*, N.Y. Times, Aug., 1974 at 40; Katzander, *Discretionary Reserves, Money and the Setback in London*, International Art Market, May, 1976; Birmingham, *The Auction Crowd*, N.Y. Times, Mar. 6, 1977 (Magazine), at 38-40, 62-63, [hereinafter cited as Birmingham].

<sup>78</sup> A. CORBIN *supra* note 72.

<sup>79</sup> UCC § 2-328 (3) (1972 version).

<sup>80</sup> The provision which deals with seller bidding is not associated with either "with reserve" or "without reserve" alone; rather, it is found in a section separate and apart from the one which characterizes auctions. It therefore must be presumed that the seller bidding provision of section 2-328(4) is intended to apply to all auctions discussed in section 2-329(3). See generally C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION (4th ed. 1973).

<sup>81</sup> See note 76 *supra*. The term "with reserve" used in UCC § 2-328(3) can either mean that the seller reserves the right to remove the article or that the seller reserves the right to bid. Corbin uses the term "with reserve" both ways. See A. CORBIN, *supra* note 72, in which the author seems to imply that "without reserve" is an alternative to reserving the right to bid.

<sup>82</sup> New York Senate Bill 10111 (1974).

<sup>83</sup> See note 86 *supra*.

note that the New York City Administrative Code<sup>84</sup> contained provisions requiring disclosures of the fact that goods were being put on the auction block with reserve and whether the auctioneer or auction gallery had any interest in the articles other than the normal commission. It appears that these provisions were ignored.<sup>85</sup> In an apparent effort to forestall further legislation and to avoid the imposition of penalties for violation the New York City regulations, the New York auction houses announced a change of policy in July, 1974. Henceforth, they would disclose, in the catalogues, their ownership interests.<sup>86</sup>

Refinements in the New York City regulations were then proposed by the Department of Consumer Affairs which would have required disclosure of the amount of the reserve price as well as inclusion of guaranteed minimums in the definition of auction house interest.<sup>87</sup>

The requirements regarding disclosure of the amount of the reserve price were ultimately withdrawn because of continued strenuous opposition by the auction houses and little interest from consumers.<sup>88</sup> Nevertheless, the requirement for disclosure of guaranteed minimums became part of the Administrative Code.<sup>89</sup> At least one major auction house maintained that the move for full disclosure was initiated by the art dealers who were concerned only with reducing competition from the auction houses. They advanced five arguments in favor of retaining the secret reserve.<sup>90</sup> First, the secret reserve is still necessary to combat ring operations. Second, the seller should be allowed to protect himself against an uncertain market and the possibility of disastrously low prices caused by political or economic crisis, bad weather, or a downturn in the art market between the time of consignment and sale. Third, the consignor should be entitled to the same confidentiality in his financial transactions with the auctioneer or auction house as a client has with a dealer. Fourth, rather than reveal the amount of his minimum price, the consignor would send his works to another auction market where such requirements were not in effect. Fifth, disclosure of the amount of the reserve might depress bidding because a "psychological price" becomes fixed in the bidder's mind, above which he is reluctant to bid.

In opposition,<sup>91</sup> it was argued that different factors must be considered. The amount of the reserve price is a material fact in deciding whether or not

<sup>84</sup> *Id.* See New York City Charter and Administrative Code, ch. 32, art. 21 (1953) (Rules and Regulations Relating to Auctioneers).

<sup>85</sup> See note 66 *supra*. See also Seneer, *New Auction Practices and Protections*, Arts Magazine, Feb. 1975, at 27-28.

<sup>86</sup> See Reif, *supra* note 66. House ownership would be indicated by "Property from the Estate of John Smith sold by order of Sotheby Parke Bernet." The second form was subjected to some criticism by art and antique dealers as being misleading. Other auction houses indicated that they would identify house ownership by announcement before the sale or by an asterisk in the catalogue.

<sup>87</sup> The City Record, October 4, 1974, Vol. CII, No. 30732.

<sup>88</sup> See Reif, *City Relaxes Rules on Auction Sales*, N.Y. Times, Jan. 13, 1975, at 25, col. 4.

<sup>89</sup> New York City Charter and Administrative Code, ch. 32, art. 21 (promulgated March 24, 1975) (Rules and Regulations Relating to Auctioneers).

<sup>90</sup> Sotheby Parke Bernet Memorandum Opposing New York Senate Bill 10111, and Letter-enclosures from Thomas E. Norton, Senior Vice-Pres., Sotheby Parke Bernet, Inc. to L. DuBoff (March 3, 1975). Available from the Oregon Volunteer Lawyers for the Arts, Inc., Library.

to place a bid, particularly for non-professionals (collectors) and those who must travel some distance to attend the auction. The practice of starting the bidding well below the reserve price is the equivalent of a "mock auction" because only the auctioneer or auction house knows that the bids are meaningless until the reserve price is reached. Finally, the majority of the public who attend auctions misunderstand and are misled by the secret reserve system.<sup>92</sup> Regarding the protection afforded consignors against ring operation, the Art Dealers Association offered to join with the auction houses in sponsoring legislation in New York and other states which would specifically outlaw rings or any conspiracy to reduce or eliminate bidding, with provisions for penalties and prison sentences.

Regulations defining guaranteed minimums as ownership interests and reaffirming required disclosure of the existence of reserve prices became effective in March of 1975,<sup>93</sup> and notwithstanding the dire predictions, do not appear to have dampened sales in any way, nor to have discouraged other auction houses from opening branches in New York City.<sup>94</sup>

The accuracy of art market prices is doubtful because unidentified buy-ins have traditionally been included in sales in the post-sale catalogues distributed by auction houses. One major New York auction house has voluntarily discontinued this practice,<sup>95</sup> although it is not known what other auctions houses have done.

Auction sales are considered by many as the standard for establishing art values.<sup>96</sup> Yet some auction houses may still include unidentified buy-ins in their post-sale catalogues. Most auction houses persist in using protective bids to remove objects from the auction block when the secret reserve has not been met, and market manipulation appears to be the norm in auctions.<sup>97</sup>

The present diversity of regulations governing the auction sales of fine arts in New York illustrates the complex situation regarding the regulation of auction sales in general and art auctions in particular. Warranty provisions

---

Rules Governing the Conduct of Auctions, submitted on behalf of the Art Dealers Association of America, Inc., Nov. 4, 1974.

<sup>92</sup> *Id.* The Memorandum cites a survey requested by the Art Association of people entering or leaving Sotheby Parke Bernet, four New York City museums, and four art dealer's galleries. Reportedly 77 percent of those questioned believed that at a public auction the goods are sold to the highest bidder and when informed of the reserve price system 76 percent believed "the effect of that price should be revealed."

<sup>93</sup> See note 89 *supra*.

<sup>94</sup> Christies of London held the first sale in its New York branch in May, 1977. London's third ranking auction house, Phillip's, was scheduled to open a New York branch in the Fall of 1977. See International Art Market, July-Aug., 1977. Also, according to the SPB Memorandum, see note 90 *supra*, sales of \$65,000,000 were reported in the New York branch for the fiscal year ending just prior to the controversy over New York Senate Bill 10111. The net turnover for SPB New York in the season ending June, 1977, was reported at \$72,156,349. See International Art Market, July-Aug., 1977, at 147.

<sup>95</sup> See note 90 *supra*.

<sup>96</sup> See, e.g., O'Connell, *Defending Art Valuations For Tax Purposes*, TRUSTS & ESTATES, Sept., 1976, at 604-607, 605; *Market Confidence Seen Restored in Year's Figures*, International Art Market, Sept., 1975.

<sup>97</sup> See, e.g., Birmingham, *supra* note 77, reporting the uncertainty surrounding the sale of the Weintraub collection in May, 1970 when it was discovered that almost half the million dollar sale was bought in. A Giacometti bronze was apparently bought in at \$230,000, exceeding by \$70,000 the highest price ever paid for a sculpture.

are governed by the UCC as supplemented by special art legislation.<sup>98</sup> Auctions sales are governed by municipal regulations and the actual prices established are left in question.

As authentic art works become more firmly established as an investment vehicle<sup>99</sup> and auction sales an important method for acquiring or evaluating that investment,<sup>100</sup> uniform rules governing the sale of fine art anywhere in the United States become desirable. When it is remembered that New York has been in the forefront of art legislation with its statutes regulating all fine arts sales<sup>101</sup> and its municipal legislation requiring some disclosure,<sup>102</sup> the need for a comprehensive unified legal code in New York as well as other jurisdictions becomes apparent. It is hoped that such an integrated code will soon be developed.

---

<sup>98</sup> N.Y. GEN. BUS. LAW § 219-b (McKinney Supp. 1975); Michigan has enacted similar legislation. MICH. COMP. LAWS ANN. §§ 442.321-24 (West Supp. 1975). *But see* Hodes, *Wanted Art Legislation for Illinois*, 57 ILL. BAR J. 218 (1968).

<sup>99</sup> See DESKBOOK, *supra* note 3, at 361-82; R. RUSH, *ART AS AN INVESTMENT* (1961).

<sup>100</sup> See note 96 *supra*.

<sup>101</sup> See note 98 *supra*. For an analysis of this statute, see DuBoff, *Controlling the Artful Con: Authentication and Regulation*, 27 HASTINGS L. J. 973 (1976). For an interesting article analyzing auctions in New England, see *Auctions and Auctioneers in New England*, 40 B.U.L. REV. 91 (1960).

<sup>102</sup> See note 89 *supra*.



