1824.

The Monte Allegre.

[Prize. Judicial Sale.]

The Monte Allegre, Tenant, *Claimant.*

In judicial sales, there is no warranty, express or implied.

Upon a sale by the Marshal, under an order of Court, no warranty is implied.

Neither the Marshal, nor his agent, the auctioneer, has any authority to warrant the article sold.

Quære, How far the Marshal is responsible to the vendee, in his private capacity, if he undertake to warrant, or to do what would imply a warranty in a private sale?

Upon an Admiralty proceeding, *in rem*, where the proceeds of the sale are brought into Court, they are not liable to make good a loss sustained by the purchaser, in consequence of a defect being discovered in the article sold.

APPEAL from the Circuit Court of Maryland.

The appellant, Thomas Tenant, filed his petition on the 14th of November, 1821, in the Circuit Court for the Maryland District, setting forth that at a public sale of part of the cargo of the ship Monte Allegre, under an interlocutory order of the District Court, in the case of Joaquim Jose Vasques, Consul-General of Portugal, against the ship Monte Allegre, and her cargo, he became the purchaser of six hundred and fifty-three seroons of Brazil tobacco, part of said cargo, for which he paid to the Marshal of the District, under whose superintendence the sale was conducted, 15,495 dollars and 46 cents. That the tobacco was sold by samples, which were sound and merchantable, and that, believing the bulk of the to-

1824.

The Monte Allegre.

bacco corresponded, in this respect, with the samples, he became the purchaser. That, shortly afterwards, he exported the whole of the tobacco so purchased to Gibraltar; and, after its arrival there, it was found, upon examination, to be wholly unsound and unmerchantable, the greater part being entirely rotten, and the remainder unsaleable but at very reduced prices, and was, in fact, sold for 4,818 dollars and 52 cents.

The appellant, in his petition, further alleges, that the tobacco received no damage in its transportation to Gibraltar, but was, at the time it was sold by the Marshal, wholly unsound, rotten, and unmerchantable: that the cause in which the order was passed, by virtue of which the tobacco was sold, was still pending in this Court; and that the proceeds of said sale remained in the Circuit Court, under its authority and control; and, thereupon, prayed for such relief, as, upon proof of the allegations, he might be considered by the Court entitled to.

To this petition an answer was filed on the 2d of May, 1822, in the name of Joaquim Jose Vasques, Consul-General of Portugal, on behalf of the owners of the proceeds of the ship Monte Allegre and her cargo, resisting the claim of the appellant:

1. Because the Court had no jurisdiction or power whatever to sustain the petition, inasmuch as it was calling on the Court to award damages on a claim in the nature of an action for a deceit, or on a warranty, as an *incident* to a cause, in its nature wholly of admiralty and maritime cogni-

1824. The Monte Allegre.

zance, the claim being entirely of common law jurisdiction, and could not be made an incident to that which appertains exclusively to the Admiralty. And, secondly, the claim was resisted upon the merits. Proofs were taken on both sides, in the Court below, and a decree, *pro forma*, was entered by consent, dismissing the petition with costs; on which the cause was brought by appeal to this Court.

March 3d.

Mr. *Meredith*, for the appellant, in answer to the objection as to defect of jurisdiction, stated, 1. That this claim was an incident to the principal case of the Monte Allegre, which had been formerly determined in this Court by a decree of restitution to the original Portuguese owners.[a] The general rule is, that where a Court has jurisdiction in the principal question, it has jurisdiction, incidentally, over all interlocutory matters that are connected with, or arise out of, the original cause. It would seem to follow, therefore, that a sale, made in virtue of an interlocutory decree, by a Court exercising a rightful and exclusive jurisdiction over the cause in which such decree is pronounced, must necessarily be considered as an incident. It could not be denied, that the interlocutory decree itself was strictly incidental; and if so, the sale must necessarily have the same character, since it and the decree are inseparably connected. The decree and the sale both depend on the jurisdiction in the principal cause, and so does

[a] *7 Wheat. Rep.* 520.

1824.

The Monte Allegre.

the title acquired by the purchaser. The proceeds of the sale are in Court, and the Court has an undoubted power to distribute them according to equitable circumstances, and, so long as they remain within its control, to decide on all claims respecting them.[a] The answer in this case, however, places the jurisdiction on distinct ground. It is said, that the claim is in the nature of an action for a deceit, or on a warranty, which are actions known only to the common law, and cannot, therefore, be an incident to that which appertains exclusively to the admiralty. Such, however, is not the rule. Whether the original cause of action be either of admiralty or common law jurisdiction, all incidental matters follow the jurisdiction of the original cause, whatever the complexion of those matters, separately considered, may be.[b]

2. In judicial sales, the Court has entire control over the contract. It considers the contract as made with itself, and will interfere, under equitable circumstances, to relieve the purchaser, where it would not interfere in a private contract. This is the established doctrine in equity.[c] The same principle applies to sales under decrees in the Court of Admiralty, which executes a "wide equity."

a Smart v. Wolff, 3 *T. R.* 323.

b 3 *Bl. Com.* 107. 2 *Bro. Civ. and Adm. Law*, 107. 2 *Saund.* 259. *Cro. Eliz.* 685. *Doug.* 594. *Bee's Adm. Rep.* 370.

c *Sugd. Vend.* 34. 115., 1st Am. ed. Saville v. Saville, 1 *P. Wms.* 746. Morehead v. Frederick, *Sugd. Vend.* Appx. 524. Lawrence v. Cornell, 4 *Johns. Ch. Rep.* 542.

1824.

The Monte Allegre.

3. But, even admitting that the sale in this case is to be governed by the stricter rules of the common law, it may be brought within those rules. The proof shows, conclusively, that this was a sale by sample, which is equivalent to a warranty ;[a] and such warranty extends as well to the soundness and merchantable condition of the commodity, as to its particular species.[b] The proof, and the admission on the record, are conclusive, to show that at the time of sale the tobacco was unsound and unmerchantable ; and if the sale by sample amounts to a warranty, the purchaser was not bound to examine the tobacco. Such an examination, if made, would have been no waiver of the warranty.

4. The Marshal, being the agent of the Court, was authorized to sell by sample, that being, according to the proof, the usual and customary mode of sale ; and this even if he be considered as a special agent.[d] The Marshal, however, being the agent of the Court, in all sales under its decrees, is to be considered strictly as a general agent,[e] and is, therefore, authorized to do all acts within the scope of his employment.

a Hibbert v. Shee, 1 *Camp.* 113. Klinitz v. Surry, 5 *Esp. Rep.* 267. Gardiner v. Gray, 4 *Camp.* 144. Sands v. Taylor, 5 *Johns. Rep.* 404. Sweet v. Colgate, 20 *Johns. Rep.* 196. Bradford v. Manly, 13 *Mass. Rep.* 139.

b 13 *Mass. Rep.* 139.

c 1 *Peters' C. C. Rep.* 317.

d 3 *T. R.* 757. 4 *T. R.* 177. 5 *Esp. Rep.* 75. 2 *Camp.* 555. 12 *Mod.* 514. *Willes*, 407. 1 *Camp.* 259., and cases collected in *Paley on Agency.*

e 15 *East's Rep.* 408.

1824.

The Monte Allegre.

5. The proceeds now remaining in the registry, though not the specific proceeds of the tobacco, are, notwithstanding, liable to this claim. The proceeds of the tobacco were disbursed in payment of duties and expenses, which were a joint charge of ship and cargo. The fund now in Court is a common fund, on which the owners of the tobacco have a claim for their distributive charge.

Mr. *D. Hoffman*, for the respondents, contended, that the Marshal possessed no power to warrant the *quality* of the article sold, he being a special agent, with limited powers; and that if he had exceeded the scope of his authority, he could not thereby implicate the proceeds of the property, being the agent of the *Court*, and not of the *owners*. That the limited authority of the Marshal, in the case of sales by order of the Court, is universally known and acknowledged; that all persons, therefore, are presumed to purchase on their own means of judging; and public officers are never presumed to possess the same extent of knowledge in regard to the quality of property sold by them, as the owners thereof would be presumed to possess.

Admitting, then, *argumenti gratia*, that there has, in fact, been *gross fraud*, or a *warranty* express or implied, by the Marshal, or by his agent, the auctioneer, or by both, such fraud, or warranty, would neither implicate the property, nor involve the owners in any responsibility. It is not competent for a Court, nor for the Marshal, as agent of that Court, nor for the auctioneer, as agent of

1824. the Marshal, in any case, to charge the property or owners by any fraud or warranty.

The Monte Allegre.

And *first*, as to the power of the *Court* in this respect: It must be conceded, that the owners have had no agency in this sale; as to them, it was wholly *in invitum*. The sale was by the Court, not by the owners; the Court is not even the agent of the owners *pro hac vice;* and as the purposes of justice demand a sale, and nothing more, and as Courts are never presumed to know the *quality* of property sold under their order, so, in the present case, the order contains an authority to sell, which, we shall presently show, does not authorize a warranty. If the appellant's claim be well founded, in respect to the acts either of the Court or its agent, it must, as there has been no express warranty, repose either on the doctrine that a sound price will insure a sound article, or this, that a fraudulent representation imposes a legal obligation on the Court, to the same extent to which similar representations would bind an individual. The acts of a Court, as such, whatever the motives of the individuals who compose it, are, in the eye of the law, wholly uncontaminated by fraud or deceit. To that to which the law has assigned the part of declaring justice, it cannot impute a vice contradictory of such a character, nor suppose that the oracles of justice can dictate injustice. The distinction between judicial sales and those of individuals, rests mainly, (1.) on the actual or presumed knowledge of owners, and the actual or implied ignorance of Courts, (whose province it sometimes is to or-

1824.

The Monte Allegre.

der sales,) of the nature and quality of the thing sold; (2.) on the absolute impracticability of a Court's inquiring into circumstances of quality and title in these cases, and the consequent absence of any reliance, by purchasers, in these respects; and, (3.) on the total want of all motive in Courts and their officers, to warrant, defraud, or misrepresent. On these grounds is it that the maxim, *caveat emptor*, emphatically applies to such sales. It is on a similar principle that all judicial sales are out of the operation of the statute of frauds; and this is by no means because the judicial sale is at *auction*, for auction sales are within the statute, unless they are also in pursuance of judicial authority; but it is because there is a peculiar respect due to judicial sales. The danger which the statute intended to guard against, cannot be supposed of such sales.[a]

On the direct question under consideration, there are but few cases to be found in the books. In South Carolina it has been expressly decided, that, at a Sheriff's sale, *caveat emptor* is the best possible rule that can be laid down. The Court emphatically states, that all who attend such sales ought to take care and examine into the title, &c.; that no warranty, express or implied, can be raised on the part of the owner, as to whom the proceeding is compulsory, nor of the Sheriff, who is the mere agent of the Court, nor of the

a Attorney-General v. Day, 1 *Ves. sen.* 221. Bragden v. Bradbear, 12 *Ves.* 472. Mason v. Armitage, 13 *Ves.* 25. 3 *Munf.* 102. *Sugd. Vend.* 78.

1824.

The Monte Allegre.

Court itself; and, therefore, in that case, the claim of the defendant's wife to dower, is no reason why the purchaser should not pay the money bid at such sale.[a] In New-York, however, we find something of a contrary doctrine advanced by Mr. Chancellor Kent, who repudiated Lord Hardwicke's doctrine in the case of the *Attorney-General v. Day*, and held that Sheriff's sales are within the statute of frauds.[b]

The cases on this point, which have been cited by the appellant's counsel, may be distinguished.

The first is *Saville v. Saville*,[c] where it was merely decided, that while such a purchase before the Master remained *in fieri*, the Court would not actively interfere to compel performance, the purchase having been made under a prevalent delusion as to the value of estates, and the purchaser was willing, in order to be relieved, *to forfeit his deposit*, which was one tenth of the whole purchase money. It is further to be remarked of this case, that a *quære* is added by the learned commentator, "whether this be now the law of the Court."

Several cases also were cited from *Sugden*, all which may be accounted for by their peculiar circumstances. The sale was *in fieri* in every case; the Master, who conducted the sale, had all the knowledge possessed by the owners, was

a The Creditors of Thayer v. Sheriff of Charleston, 2 *Bay*, 170.

b Simonds v. Catlin, 2 *Caines*, 63.

c 2 *P. Wms.* 745.

1824.

The Monte Allegre.

possessed of every muniment of title, and ought to have known of every incumbrance; and most of the sales were voluntary; or, if not, the Court either required a forfeiture of the deposit, or the clearest proof of gross mistake, which it was in the master's power to have guarded against.[a]

Having nearly exhausted the common law sources of information, on this question, I shall be pardoned for seeking further light in the Roman code, that pure and copious fountain of written reason. It is well known how strict the Ædilitian law was in regard to the obligations of vendors. Not only a sound price warranted a sound commodity, but the seller was bound to declare all the faults known to him, nay, was responsible even for such as were altogether unknown to him. Yet all the commentators on this edict admit, that neither the action *quanti minoris, redhibitoria,* nor that *ex empto,* would lie in the case of *fiscal* and *judicial* sales. It appears that where an extravagant price was given for a commodity, the Roman law allowed a diminution of the price, to be enforced by the action *quanti minoris,* though the purchaser suggested neither fraud nor warranty. But this applied only to private sales, not those under public authority. So, if the commodity were unsound, or unfit for its ordinary purpose, that law compelled the vendor, by the *actio redhibitoria,* to take back the property, or make allowance for its defects; but the policy of

[a] *Sugd. Vend.* 34. 49. 115. 185. *App.* 524. Lawrence v. Cornell, 4 *Johns. Ch. Cas.* 542.

1824.

The Monte Allegre.

the law did not suffer judicial or fiscal sales to be impugned by the redhibitory action. Again, if the title proved defective, in lands or goods, the purchaser resorted to the action *ex empto;* but this, too, applied only to private sales.

This doctrine is emphatically stated in the Roman code. *Illud, sciendum est, edictum hoc non pertinere ad venditiones fiscales.*[a] To the same effect is *Domat,* who cites the Ædilitian edict. "Redhibition and diminution of price, on account of the vices of the thing sold, do not take place in public sales which are made by a decree of a Court of justice. For in these sales it is not the proprietor who sells, but it is the authority of justice, which adjudges the thing *only such as it is.*"[b] *Pothier,* commenting on the clause, "tamen illud sciendum est," says, that this exclusion of responsibility on the part of the owner of property, is owing to the trust and confidence reposed in Courts of justice: their sales, therefore, must stand; they shall not be annulled by the action *ex empto,* nor the price be reduced by the action *quanti minoris* or *redhibitoria.*" "Propter auctoritatem hastæ fiscalis (continues *Pothier*) cujus fides facile convelli non debet."[c] The same author, in his treatise of the contract of sale, after commenting on the various remedies under this celebrated edict, says, "but the consequential actions on account

a Dig. l. 1. t. 1. De Ædilio. Edicto.
b Domat's Civ. Law, b. 1. t. 2. s. 11.
c Poth. Pand. Just. l. 21. t. 1. s. 4. art. 1. No. 5.

1824.

The Monte Allegre.

of redhibitory defects, are not allowed on sales made under judicial authority."[a]

Leaving the Roman code, analogous principles are not wanting in the jurisprudence of other countries. In Holland and the Netherlands, certain purchasers have the privilege of *rescinding* their contracts within twenty-four hours, if the inequality of the transaction exceeds one half the price paid. But it is said, that this right does not appertain to any sales made under a decree, or in the presence of a Judge, and that it certainly does not to sales on *involuntary* decrees.[b] There is a similar *locus penitentiæ* accorded to the inhabitants of these countries, who, as the same author in substance remarks, "through much internal heat are commonly much inclined to liquor, and, therefore, in the midst of innocent drunkenness, are induced to mislead and defraud the unwary in their sales and purchases. The persons thus used may recede within twenty-four hours, which privilege is, in every respect, to be understood of private trade, as there can be no suspicion of deception, where the sale is public by an authorized functionary." In the same jurisprudence we find what is called an *appropriation* or *redemption right*, which gives to the *vendor*, in certain cases, within a limited time, the privilege of repossessing himself of the property sold, at the

a Traité du Contrat de Vente, s. 232.
b Van Leeuwen's Com. b. 4. c. 20. s. 4.
c Ib. s. 6, 7.

1824. same price. But this permission applies in no case to judicial or public sales.[a]

The Monte Allegre.

But it is said that the *Marshal* was competent to warrant the quality of the property sold, or, at least, that he has done so, and that, therefore, it is the Court's duty to adopt his acts, and to save the purchaser from loss. This doctrine, we presume, can hardly be sound. The Marshal is only a *ministerial* agent of the Court; his authority cannot be more extensive than that whence it flows:—*derivitiva potestas non potest esse major primitiva.* Nay, further, he was *pro hac vice* a *special* agent with defined powers; his authority was only to *sell*, and *sale* does not *ex vi termini* imply even a warranty of the title, much less of the quality of the commodity sold: for if the *title* should be defended by the Court, it would be only on the ground that, as the proceeding was *in rem*, all the world was a party, and not on the principle of *warranty*, either express or implied. The Marshal, had he been guilty of fraud, or exceeded his powers by warranting the quality of the tobacco, could only have subjected himself to personal responsibility, and not the property; nor could any such excess in the execution of his powers impose the least obligation on the Court, either to bind the property, or compel the owners to ratify his act. The Marshal's authority was to *sell*, and this, it has often been decided, does not convey a power to *warrant*.[b] Again, the acts of an agent beyond the

a Van Leeuw. Com. b. 4. c. 19. s. 1. 12.

b Nixon v. Hyscrott, 5 *Johns. Rep.* 58. Gibson v. Colt, 7 *Johns. Rep.* 390.

1824.

The Monte Allegre.

scope of his authority, are void as to every one but himself.[a]

The Marshal is necessarily a *special* agent only, and his, like all other defined authorities, must be strictly pursued. He need not be directed *not* to warrant: this is implied *ex natura officio.*[b] He cannot be presumed to warrant, because between him and the owners there can be no privity. An owner has the requisite knowledge of the nature and qualities of his merchandise; he, and his agent, the auctioneer, who have the fullest means of judging, may consequently sometimes *impliedly* warrant. But an officer of Court cannot be presumed to warrant any thing, since he sells the products of every region of the globe, often without invoices, letters, description, or muniments of title, and often without seeing, or the possibility of seeing, the contents of numerous packages, whose opening might lead to expense or prejudice. And even with respect to agents and servants, the general doctrine is, that they are not competent to implicate their constituents, either by their warranty or their fraud; though there are many cases where the principal has been bound, especially in the sale of horses, which rests on special grounds. It is, however, laid down by *Rolle*, that "a warranty on a sale must be made by him who sells; and, therefore, if a servant, on a sale of goods of

a Paley on Agency, 165. 302, 303. 3 *Johns. Cas.* 70. 1 *T. R.* 205. 3 *T. R.* 757. 4 *Taunt.* 242. 1 *Dow's Rep.* 44. 15 *East.* 45.

b Paley on Agency, 165. 170, 171.

1824.

The Monte Allegre.

his master, warrant them, it will be a void warranty, for it is the sale of the master."[a] So here, if the Marshal have warranted the property, it is a void warranty as to the source whence he derived his power to sell.

What has been said of the Marshal, applies with like force to the auctioneer. It may, besides, be remarked, that auctioneers are ever considered as *special* agents, and that generally they have an authority to sell only.[b] The auctioneer's powers were defined in this case by the character of the source whence he drew them, and this source was known to every bidder. But where auctioneers are clothed with a general authority, *usage* may, and has limited it in this class of cases, though private instructions, without usage, might not have availed.[c]

As to the question of express warranty, or fraud, it may be laid down as a settled principle, that purchasers are bound to apply their attention to those particulars, which may be supposed within the reach of their observation and judgment; and that if they are wanting in that attention where it would have protected them, they must endure the loss, unless in the case of an express warranty, or of gross fraud.

This is a case in which the purchaser's vigilance should have been particularly awakened. He well

a Roll. Abr. 95. pl. 30. 2 *Roll's Rep.* 270.

b 7 *Ves.* 276.

c Paley on Agen. 163. note 9. Dickinson v. Lilwall, 4 *Campb.* 279.

1824.

The Monte Allegre.

knew, that the tobacco was sold under an interlocutory decree, which must have been either under a perishable monition, the consent of proctors, or the arbitrary mandate of the Court. The decree itself, however, seemed to imply the perishable state of the property; and besides, interlocutory decrees for the sale of property are seldom allowed, unless from some such necessity. This alone was sufficient to put the party on the inquiry. A Court, also, and its officers, (unlike owners,) cannot be presumed acquainted with the quality and condition of the property offered for sale; and the nature of the property itself (as we shall presently see) excluded the possibility of the Marshal or his agent's possessing any knowledge not equally within the reach of the purchaser's observation. These circumstances bring the case entirely within the position just laid down, and more extensively expressed and well illustrated, in *Fonblanque.*[a] It is a rule of law, no less than of moral justice, that if both parties be ignorant of the quality, a loss, if any, must be sustained by the purchaser: *Vigilantibus non dormientibus jura subserviunt.*[b] If, then, the vendor have knowledge of patent defects discoverable by ordinary attention, the disclosure of them is a duty but of *imperfect* obligation, and he cannot be charged by the purchaser, unless there has been a concealment *ex industria*, or a warranty.[c] Nay,

a *Fonbl. Eq.* 379, note 12.

b *Hob.* 347. 2 *Day*, 128. 1 *Hayw.* 464. 1 *Hardin*, 50.

c *Sugd. Vend.* 1, 2. 195. 200. 2 *Bay* 383. 7 *Johns. Rep.* 392. 4 *Dig.* 4. 4. 16. 4.

1824.

The Monte Allegre.

further, a purchaser is not presumed to have been put off his guard, and diverted from his inquiry, by the vendor's commendation of the goods. Even under the Ædilitian edict, the maxim was *simplex commendatio non obligat;* for though that law aimed at producing the utmost good faith in sales, yet it was also a rule of the civil code, that "in buying and selling, the law of nations connives at some cunning and overreaching;" *in pretio emptionis et venditionis naturalitur licet contrahentibus se circumvenire;* and our law has adopted these principles, in *regard both to commendation and enhancement of price.* We are, then, brought to the inquiry, *first,* whether the soundness of the price paid will entitle the purchaser to a sound article, or to compensation for its defects; *secondly,* whether there has been a sale by sample in this case, and what is the true meaning of, and obligation flowing from, a sale by *sample.*

Admitting a sound price to have been paid for this tobacco, we contend, *first,* that this does not, in our law, insure a sound and merchantable commodity. Every common law author, *Wooddeson* excepted,[a] sustains this position. "In the civil law," says *Lord Coke,* "a sound price demands a sound article; but it is not so in the common law, in which there must be either *fraud* or an *express* warranty.[b] Wooddeson's position is unsustained by any authority; nor has it been subsequently ap-

a Sugd. Ven. 3. 1 *Tyl. Rep.* 404. 2 *Com. Con.* 265. 2 *Dall.* 146. 322. 2 *Wood.* 415.

b Co. Litt. 102 b.

1824.

The Monte Allegre.

proved by the profession. In America, Coke's law has been almost universally sanctioned. Wooddeson's doctrine has been adopted only in the two Carolinas, and by a few elementary writers in this country.[a] We might go even farther, and say, that if the vendor not only receives a full price, but affirms the goods to be sound, neither the fulness of the price nor the falsity of the affirmation will oblige him to a diminution of the price.[b] An implied warranty as to *quality*, is wholly unknown to the common law, all the cases of implied warranty being applicable to *title* only.[c] The only exception to this, may be in the sale of provisions, which, if unsound, are positively noxious. But even this exception, though its policy is obvious, is denied.[d] The same doctrine has also been maintained in equity.[e] No implied warranty, then, can be inferred, either from the fulness of the price, or from any affirmation having been made. And even in those Courts where a sound price has been held to imply a warranty of the soundness of the commodity, it has been held, that if the purchaser has neglected to inform himself of such matters within his observation, as might have prevented the purchase, he shall bear the loss: and,

a 2 *Bay*, 17. 19. 380. 1 *Tayl.* 1. 2 *Swift's Conn. Law*, 120.
b 5 *Johns. Rep.* 354. 18 *Johns. Rep.* 403. 2 *Caines' T. R.* 48.
c 12 *Johns. Rep.* 468. 10 *Mass. Rep.* 197.
d 5 *Ves.* 508. 6 *Ves.* 678. 10 *Ves.* 505. *Sugd. Vend.* 199.
e 1 *Fonbl.* 109. 373. 1 *Johns. Rep.* 96. 129. 274. 4 *Johns. Rep.* 421. 1 *Bin. Rep.* 27. 6 *Johns. Rep.* 5. 2 *Caines*, 48. *N. H. Rep.* 176. *Peake's N. P. Cas.* 123. 2 *East*, 448. 2 *Caines' R.* 48. 55. 1 *Dall.* 217. 4 *Dall.* 334.

1824. The Monte Allegre.

farther, even an express warranty would not extend to things discernable by ordinary vigilance.[a]

The only remaining ground, then, on which the appellant's claim can rest, is, *secondly*, that there has been, *in fact*, a sale by *sample*, and that this, *in law*, implies a warranty that the bulk of the commodity shall correspond with the article exhibited. We deny the fact; and contend, that no sale by sample ever did take place; and as to the law relating to sales by sample, we entertain opinions extremely different from those which have been advanced.

We have shown that the common law knows but two sources of obligation on the part of the vendor, in regard to the *quality* of the article sold, viz. *fraud* and *express warranty;* and that no warranty can be inferred from the doctrine that a sound price insures a sound commodity, this principle forming no part of our jurisprudence. The only remaining source of obligation, therefore, is, that this is a sale by sample; but, to establish this, it will be necessary to maintain that *the naked presentation of a portion of the bulk of the commodity sold, is, per se, a warranty that the bulk shall agree in quality with the portion exhibited;* a doctrine by no means sustainable by any cases which have been, or can be cited, as to sales by sample. We fully admit, that a sale actually by sample, is tantamount to a warranty; but we differ materially from the counsel as to what constitutes a sample, which, we appre-

[a] 2 *Caines' R.* 202.

hend, is technical, and something very different from the mere exhibition, at the time of sale, of a part of the commodity offered for sale. 1824. The Monte Allegre.

A sample is a portion of the bulk of a commodity, exhibited by the owner or his agent, with the intention to induce persons to buy, expressing the owner or agent's knowledge of the general character of the whole, and his willingness to warrant to the purchaser that the bulk shall correspond in all material respects with the part exhibited. It is a *symbolical express warranty*, being conventional, and as much expressive of intention as words. Thus we preserve the harmony of the law, which excludes all *implied* warranty as to *quality*. We deny that sale by a portion exhibited, is necessarily sale by sample of *quality:* the *quo animo* is always matter of evidence; and we conceive the following to be essential circumstances in the creation of that warranty of quality which arises from the sale by sample: (1.) That the vendor be the *owner*, or have some privity or connexion with him; otherwise the vendee cannot presume him to be clothed with the authority to warrant, or possessed of that knowledge of the quality of the commodity requisite to do so. In such cases the portion exhibited is merely to enable the purchaser to form a reasonable judgment of the generic or specific character of the commodity; and if he be not satisfied of this, or of the fairness of the selection of the sample, he should demand an express warranty, which would *personally* obligate the person giving it, or he may refuse to purchase. If he do neither, *caveat*

1824.

The Monte Allegre.

emptor. (2.) There must be a want of power in the purchaser to examine for himself; for, in the absence of such power, the presumption is greatly strengthened, that the portion exhibited is to serve in lieu of examination. (3.) It should appear that the purchaser was in search of *quality*, that he desired to exercise some judgment, and placed some reliance on the quality of the portion exhibited; since, if the sample had no operation in determining the mind to purchase, no such influence ought to be ascribed to it. (4.) There must be some further manifestation of intention to exhibit the portion as a sample of quality, than the mere fact of its presence: the minds of the seller and purchaser must have concurred on this point, and the part must be shown *animo warrantizandi*. (5.) What is declared in connexion with the exhibition of this portion, must be something more than mere opinion; for if a sample be given of what the purchaser knows the seller *has never seen*, it must, from the very nature of things, be matter *of opinion only* that the commodity will correspond in bulk with the part shown.

The sale in this case was under judicial authority; the purchaser well knew that the Court and its officers possessed little or no knowledge of this tobacco; they were neither the growers, packers, nor owners of the commodity; and, consequently, even supposing the Marshal competent to warrant, there would be no warranty of the quality, unless the purchaser had reason to suppose that the Marshal or auctioneer had nearly the same knowledge as the owner. The case of

1824.

The Monte Allegre.

Gardner v. Gray,[a] cited on the other side, fortifies this view of the subject, for there the specimen exhibited came direct from the owner, and the plaintiff had a verdict, not only because he had not opportunity to examine for himself, but because the commodity in bulk could not be sold at all under the denomination of *waste silk*, which the specimen certainly was. To the same effect is the case of *Laing v. Fidgeon*,[b] where the goods were manufactured by the defendant, to whom the plaintiff had sent *patterns* of the commodity he wanted, which, when sent, was found wholly unsaleable. Now, here the *purchaser* exhibited the sample, and the manufacturer, by shipping the article to him, adopted the sample, and the plaintiff fully relied on having an article fairly corresponding with it. In all the cases relied on by the appellant, it will be found that the plaintiff had no opportunity of judging for himself; whereas here the appellant, and every other purchaser, had full liberty to examine. The authorities are explicit, that the specimen exhibited must have been relied on as indicating the quality, and so are all the forms of pleading in such cases.[c] In *Bradford v. Davis*,[d] a case much relied on by the appellants, the Court expressly instructed the jury, that if they believed it was the *intention* of the defendant so to represent, by exhibiting the sample, then the plaintiff would be entitled to a ver-

a 4 *Camp.* 144.
b 6 *Taunt.* 108. 4 *Camp.* 169.
c 13 *Mass. Rep.* 140.
d *Ib.* 139.

1824.

The Monte Allegre.

dict; clearly showing the Court's opinion, that the mere exhibition of a specimen is not, *per se*, a sale by sample. To the same effect is the case of *Chapman v. March*.[a] But in the case under consideration, every circumstance combines to show that there was no *intention* to warrant, and these circumstances were perfectly well known to the purchaser.

The specimen exhibited, and what is declared in regard to it, may be evincive of *opinion* only, in which case all the authorities agree that there is no sale by sample.[b] *Hibbert v. Shee*[c] has been much relied on by the appellants' counsel. It must be recollected, however, to have been conceded in that case, that the sale was by sample, and the only question was, how far the commodity corresponded with the sample. The sugar had been purchased by a sample, which, after long exposure to the sun, had lost its colouring matter; the plaintiff supposed, therefore, that he was getting sugar nearly white, because he had a right to presume that the samples were fresh.

The *Attorney-General*, for the appellants, in reply, insisted upon the evidence to show that this was, in fact, a sale by sample. The jurisdiction of the Court below, as a Court of Admiralty, was admitted; the objection to it having been waived.

a 19 *Johns. Rep.* 291. 20 *Ib.* 196.

b 2 *Caines*, 55. 3 *T. R.* 57. 20 *Johns. Rep.* 203. 2 *Comyn. Cont.* 273.

c *Camp. Rep.* 113.

1824.

The Monte Allegre.

How ought this jurisdiction to have been exercised? The libellant's claim was *in rem*, and in the alternative, for the fair value of the property, if transmuted. He now asks vastly more. If the specific thing had been preserved in the custody of the Court, he would have received nothing but its real effective value. How, then, can he claim more, in consequence of the sale? How can a Court of justice permit such injustice to be done to an incidental suitor, who has purchased under its decree? A sale by sample is a symbolical warranty. A sale by sample is where a portion of the thing is shown, as a specimen of the entire commodity. The language of Mr. Chief Justice Parker, in *Bradford v. Manly*,[a] applies: "Among fair dealers, there could be no question, that the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented, if the law should refuse its aid to the party who had been deceived in a purchase so made." The sample could not have been exhibited merely to show the generic character. The principle of the legal rule is, the impression which is naturally produced on the mind of the vendee, by the production of the sample. The Marshal and auctioneer, although acting under the authority of the Court, must be considered as the agents of the owners of the goods. If these judicial agents proceed exactly as a merchant would have done, under the same circumstances, the purchaser has a right to draw the same inference as

[a] 13 *Mass. Rep.* 143.

1824. in the case of a private sale. The Court has power to relieve, and will relieve, upon the same principles which govern a Court of equity, while it is *in fieri*. The rules of the Roman law on this subject have never been incorporated into our municipal code, and we are rather to look to the analogous practice of the Courts of Equity. The circumstance of its being a judicial sale, so far from its disabling the Court, gives it the more authority to redress the party, in case of mistake or misrepresentation, even in a state of facts where relief would not be granted in a private sale. It has complete control over the whole subject, and may, therefore, do the most liberal justice. Even admitting that the officers of the Court have no authority to warrant expressly, or by legal implication, still the Court may interfere; and, pursuing the example of a Court of equity, may do justice to those who have suffered an incidental injury from judicial proceedings, which are entirely *in invitos*.

The Monte Allegre.

March 16th. Mr. Justice THOMPSON delivered the opinion of the Court, and after stating the case, proceeded as follows:

Upon the argument in this Court, the counsel for the respondent abandoned the objection to the jurisdiction of the Court. It becomes unnecessary, therefore, that we should notice that question.

In examining into the merits of the claim set up by the appellant, in his petition, it ought to be borne in mind, that the Monte Allegre and her cargo were illegally captured and brought within the United States, and that judgment of restitu-

tion has been awarded in favour of the original owners. (7 *Wheat. Rep.* 520.) Granting the claim now set up, will be throwing upon the owners an additional sacrifice of their property, without any misconduct of theirs, but, on the contrary, growing out of the illegal and wrongful acts of others. Such a result, in order to receive the sanction of a Court of justice, ought to be called for by some plain and well settled principles of law or equity. It may be said that the appellant is not chargeable with any of the misconduct imputable to those who have occasioned the loss upon the Monte Allegre and her cargo. But when one of two innocent persons must suffer, he to whom is imputable negligence, or want of the employment of all the means within his reach to guard against the injury, must bear the loss.

The proceedings to obtain the order of sale of the tobacco, were without the knowledge or consent of the owners, and their property exposed to sale against their will. The appellant became the purchaser voluntarily, and with full opportunity of informing himself as to the state and condition of the tobacco he purchased. The loss, therefore, for which he now seeks indemnity, has come upon him by his own negligence.

Keeping in view these considerations, we proceed to an examination of the appellant's claim, which, if sustained, must be on the ground of fraud, or warranty, or some principles peculiar to admiralty jurisdiction, and unknown to the common law.

1824.

The Monte Allegre.

If the appellant has sustained an injury, by a fraud not imputable in any manner to the appellee, it would be obviously unjust that he, or his property, should be made answerable for the damages. No part of the proof in the case affords the least countenance to the idea, that the appellee had any agency, directly or indirectly, in the sale of the tobacco; he, of course, cannot be chargeable with fraud, and this alone would be sufficient to reject any claim on this ground. But any allegation of fraud is not better supported against the Marshal or auctioneer. The petition does not allege directly, and in terms, fraudulent conduct in any one; but only states, that from the representations of the Marshal and auctioneer, the petitioner, and other purchasers, believed the tobacco to be sound and merchantable, and that under such belief he became a purchaser, at a fair price for sound and merchantable tobacco. Whether this allegation is sufficient to let in an inquiry at all upon the question of fraud, is unnecessary to examine, because, if sufficiently alleged, it is wholly unsupported by proof. No witness undertakes to say that the Marshal made any representations whatever respecting the tobacco; and the Marshal himself testifies that he was present at the sale, which was made by the auctioneer under his direction, and that he gave him no instructions, other than telling him it was public property, and was to be sold as it was, and by order of the Court. Nothing was, therefore, done by the Marshal, calculated to mislead or deceive purchasers. And the auctioneer testifies that he knew

No proof of fraud in the sale, to support the appellant's claim.

the property was sold by order of the Court, and that he received from the Marshal no instructions other than to sell for cash; that there was no deception intended or practised in the sale. And that this was true, so far as respected himself, is fully confirmed by the fact, that the house of which he was a partner, after the sale, and before the shipment to Gibraltar, purchased one third of the tobacco from the appellant. 1824. The Monte Allegre.

There is, therefore, no colour for charging any one with fraudulent conduct in the sale of the tobacco. And, indeed, this did not seem, on the argument, to be relied upon as a distinct and independent ground for relief, but only to be brought in aid of the claim, on the ground of warranty, which we proceed next to examine.

It was made a question on the argument, by the counsel for the appellee, whether the evidence in the case warranted the conclusion, that the tobacco, at the time of the sale, was in as deteriorated a state as it was found at Gibraltar? According to the view taken by the Court of the case, this inquiry becomes wholly unnecessary. It would be very reasonable to conclude, that if the tobacco was in a decaying condition at the time of sale, it would become more injured by lapse of time. But, were the inquiry necessary, the agreement of the counsel, filed the 18th of May, 1822, would seem to put that question at rest, for it is there expressly admitted, that the tobacco sustained no damage on the voyage.

In support of the claim, on the ground of warranty, it is said, this was a sale by sample, and Warranty.

1824.

The Monte Allegre.

that all such sales carry with them a guaranty, that the article, in bulk, is of the same quality, in all respects, as the sample exhibited. If the rules of law which govern sales by sample, are at all applicable to this case, it becomes necessary to ascertain by whom the warranty is made. In private transactions, no difficulty on this head can arise. A merchant, who employs a broker to sell his goods, knows, or is presumed to know, the state and condition of the article he offers for sale; and if the nature or situation of the property is such that it cannot be conveniently examined in bulk, he has a right, and it is for the convenience of trade that he should be permitted, to select a portion, and exhibit it as a specimen or sample of the whole; and that he should be held responsible for the truth of such representation. The broker is his special agent for this purpose, and goes into the market, clothed with authority to bind his principal. In such cases, if the article does not correspond with the sample, the injured purchaser knows where to look for redress; and the owner is justly chargeable with the loss, as he was bound to know the condition of his own property, and to send out a fair sample, if he undertook to sell in that way.

In judicial sales, there is no warranty.

But in judicial sales, like the present, there is no analogy whatever to such practice. The proceedings are, altogether, hostile to the owner of the goods sold, which are taken against his will, and exposed to sale without his consent. And it would be great injustice, to make him responsible for the quality of the goods thus taken from him.

1824.

The Monte Allegre.

Nor can the Marshal, or auctioneer, while acting within the scope of their authority, be considered, in any respect whatever, as warranting the property sold. The Marshal, from the nature of the transaction, must be ignorant of the particular state and condition of the property. He is the mere minister of the law, to execute the order of the Court; and a due discharge of his duty does not require more, than that he should give to purchasers a fair opportunity of examining, and informing themselves of the nature and condition of the property offered for sale. An auctioneer, in the ordinary discharge of his duty, is only an agent to sell; and in the present case, he acted only as the special agent of the Marshal, without any authority, express or implied, to go beyond the single act of selling the goods. And the Marshal, as an officer to execute the orders of the Court, has no authority, in his official character, to do any act that shall, expressly or impliedly, bind any one by warranty. If he steps out of his official duty, and does what the law has given him no authority to do, he may make himself personally responsible, and the injured party must look to him for redress. With that question, however, we have not, necessarily, any concern at present. But in that point of view, we see nothing in the present case, to justify the conclusion, that the Marshal went beyond what was strictly his official duty. This was not a sale by sample, according to the mercantile understanding of that practice, or the legal acceptation of the term. In such sales, the purchaser

1824.

The Monte Allegre.

trusts entirely to his warranty; and in general is not referred to, nor has he an opportunity of examining, the article in bulk; and, at all events, is not chargeable with negligence, if he omits to make the examination, which he has it in his power to do. Although most of the witnesses speak of the tobacco exhibited at the auction, as a sample, we must look at the whole transaction, and see what is the judgment of law upon it, and not be governed by what may be miscalled a sample. The Marshal denies that he ever authorized the auctioneer to sell by sample; he says he saw some seroons opened, but he supposed it was to show the description of property, or the species of goods offered for sale; that he never examined the tobacco himself, and knew nothing about it; that he never did sell by sample, and never conceived himself authorized so to do; and the auctioneer does not pretend to have had any authority or instructions from the Marshal to sell by sample. Whatever, therefore, from the testimony of the auctioneer, bears the appearance of a sale by sample, was of his own mere motion, and without authority; and if the appellant has been misled by any one, it must have been the auctioneer; and if he has exceeded his authority, so as to make himself personally responsible, redress, if at all to be had, must be from him alone; and in examining his testimony, it ought not to be lost sight of, that, after the sale, he became interested in the purchase, and probably looks to the event of this suit for indemnity for his own loss. But his testimony, when taken together, affords no just inference against

1824.

The Monte Allegre.

him. He states, that a part of the tobacco was stored at Fell's Point, a part on Smith's wharf, and from sixty to eighty seroons in the warehouse of himself and partner, *which was so announced at the time of the sale;* that fifteen or twenty seroons were taken into the street, out of which three or four were opened, as a sample of the whole parcel, by which the whole quantity was sold. But he also states, *that the mode in which this tobacco was sold, is the usual and ordinary mode in which merchandise is generally sold at auction,* when no specific directions to the contrary are given. This shows very satisfactorily, that he did not understand the sale to be *by sample,* in the legal sense of the term, so as to carry with it a warranty. For sales at auction, in the usual mode, are never understood to be accompanied by a warranty. Auctioneers are special agents, and have only authority to sell, and not to warrant, unless specially instructed so to do. Information was given to those who attended the auction, where the tobacco was stored, to give them an opportunity of examining it, if they were disposed to do it. Some who attended with a view of purchasing, did examine, and satisfied themselves that it was unsound. Not only that which was stored at a distance was found in this condition, but also that which was in the store house, where the auction was held, and under the immediate view of purchasers. The appellant had it, therefore, in his power, to obtain the same information with respect to the condition of the tobacco, if he had thought it worth while to give himself the trouble. So that

1824.

The Monte Allegre.

whatever loss he has sustained is attributable solely to his own negligence, without the fault or misconduct of any one; and the law will not, and ought not, to afford him redress. In sales of this description particularly, and generally in all judicial sales, the rule *caveat emptor* must necessarily apply, from the nature of the transaction; there being no one to whom recourse can be had for indemnity against any loss which may be sustained.

Judicial sales in Admiralty proceedings are to be governed by the same rules as in other Courts.

Is there, then, any thing peculiar in the powers of a Court of Admiralty that will authorize its interposition, or justify granting relief, to which a party is not entitled by the settled rules of the common law? We know of no such principle. Courts of Admiralty proceed, in many cases, *in rem*. But this does not alter the principles by which they are to be governed in the disposition of the *res*. It is true that the proceeds of the Monte Allegre and her cargo remain in the Circuit Court, and may be subject to the order of this Court, if a proper case was made out, which, in law or equity, fixed a charge upon this fund. These proceeds are in Court as the property of the original owners, and for distribution only. And if such owners would not be liable at law for the loss upon the tobacco, it is not perceived that any principles of justice or equity will throw such loss upon their property. The principle, if well founded, cannot depend upon the contingency, whether or not the proceeds shall happen to remain in Court until the defect in the article sold is discovered. If the proceeds are liable, they ought to be followed into the hands of the owner after distribution; and if

1824.

The Monte Allegre.

they cannot be reached, the remedy ought to be *in personam*. Such is the end to which the doctrine must inevitably lead, if well founded. But it is presumed no one would push it thus far.

Practice of the Courts of equity.

There is no rule in Courts of equity to sanction what is now asked for on the part of the appellant. The case of *Savile v. Savile*, (1 *P. Wms.* 746.) is not at all analogous. The application there, was to compel the purchaser of certain property to complete his contract, he wishing to forfeit his deposit, and go no farther; and the question was, whether he should be compelled to go on and complete the contract: and the Court permitted him to forfeit the deposit, considering it a hard bargain, not fit to be executed. But, in the case before us, the contract was executed. Every thing respecting it had been consummated months before the discovery of the damaged condition of the tobacco. The property had been delivered, and the consideration money paid; and the bargain was as much beyond the control of the Court, as if the discovery of the defect had been made years afterwards. We are, therefore, brought back to the question, whether, in sales like the present, the rule *caveat emptor* is to be applied; and thinking, for the reasons already suggested, that it is, the decree of the Circuit Court, dismissing the petition, must be affirmed.

Decree affirmed.