of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our courts of justice, from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others: and so far our courts, no doubt, possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common-law cases, we are of opinion, is not within their implied powers.

ALEXANDER SHIRRAS, JOHN BLACK, WILLIAM MILLIGAN, WILLIAM BLACKLOCK and JOSEPH VERREES *v.* JOHN CAIG and ROBERT MITCHELL.

Mortgage.—Future advances.

A mortgage of land, made by one who has a legal and equitable title to a moiety of the property which the mortgage purports to convey, passes only his legal right, although he had a power, from the person who held the residue of the legal, but not of the equitable estate in the land, to sell and convey his right also; the mortgagor not having affected to convey any part of it under his power from the other person, although his deed purported to mortgage the whole; and the equitable title not being in the person who gave the power.[1]

A plat referred to in the deed as being annexed to it, but which was never in fact annexed, and was not recorded with the deed, affords no evidence in aid of the description of the property mentioned in the deed.

A person cannot be charged with fraudulently secreting a deed, who places it upon record, as soon as the law requires.

It is not necessary to the validity of a mortgage, that it should truly state the debt it is intended to secure; but it will stand as a security for the real equitable claims of the mortgagees, whether they existed at the date of the mortgage, or arose afterwards, upon the faith of the mortgage, before notice of the defendants' equity.[2]

ERROR to the Circuit Court for the district of Georgia, by Shirras and others, original complainants, *against Caig and Mitchel, original defendants, in a suit in equity, to foreclose a mortgage of a lot, [*35

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[1] Where one has both a power and an interest, a conveyance, without reference to the power, will be deemed to have been made in virtue of his ownership, though the ownership was not co-extensive with the power. Hay *v.* Mayer, 8 Watts 203; Jones *v.* Wood, 16 Penn. St. 25. S. P. Birdsall *v.* Richards, 18 Id. 256; Wetherill *v.* Wetherill, Id. 265.

[2] A mortgage may be given to secure future advances, and contingent debts, as well as those which are due and certain; the only question is, as to the *bona fides* of the transaction. Conard *v.* Atlantic Ins. Co., 1 Pet. 387; Conard *v.* Nicoll, 4 Id. 306; Lawrence *v.* Tucker, 23 How. 14; Jones *v.* Guaranty and Indemnity Co., 101 U. S. 622; Leeds *v.* Cameron, 3 Sumn. 488; Brown *v.* Keifer, 71 N. Y. 610; Taylor *v.* Cornelius, 60 Penn. St. 187. It is not absolutely necessary, that such mortgage should express that object upon its face, provided the extent of the intended lien be clearly defined. Craig *v.* Tappen, 2 Sandf. Ch. 78; Garber *v.* Henry, 6 Watts 57. And see Jones *v.* Guaranty and Indemnity Co., 101 U. S. 632-33. But such mortgage is only a lien, as against intervening incumbrances, from the time of making the advances, not from its date. United States *v.* Lenox, 2 Paine 180; Ripley *v.* Harris, 3 Biss. 199; Brinkerhoff *v.* Marvin, 5 Johns. Ch. 320; Bank of Montgomery County's Appeal, 36 Penn. St. 170; McClure *v.* Rowan, 52 Id. 458; First National Bank *v.* Morsell, 1 McArthur 155. Otherwise, if the mortgagee be under obligation to make the advance stipulated. Moroney's Appeal, 24 Penn. St. 372; Taylor *v.* Cornelius, 60 Id. 187; Griffin *v.* Bartnett, 4 Edw. Ch. 673; Hall *v.* Crouse, 13 Hun 557.

houses and wharf in Savannah, called Gairdner's wharf, which were in the possession of the defendants.

The mortgage was made on the 1st of December 1801, by Edwin Gairdner, in his own name, and also as attorney for the defendant, Caig (but without any authority from Caig so to do), to secure the payment of 30,000*l.* sterling, for which E. Gairdner had, on the same day, executed a bond for himself and Caig.

In the year 1796, this property had been purchased by James Gairdner, Edwin Gairdner and Robert Mitchel, as joint-tenants, who took a conveyance from Levi Sheftall to themselves, by the description of James Gairdner, Edwin Gairdner and Robert Mitchel, merchants and copartners, of the city of Savannah. The name of the firm was Gairdners & Mitchel. In 1799, this firm was dissolved, and the business was carried on, in Charleston, by Edwin Gairdner alone, under the firm of Edwin Gairdner & Co.; and by mutual consent, in December 1799, an entry was made in the books of Gairdners & Mitchel, by James Gairdner, charging this property, to the account of Edwin Gairdner & Co., at the price of $20,000. In 1800, Edwin Gairdner entered into partnership with John Caig, the defendant, at Savannah, under the firm of Edwin Gairdner & Co., under which name he continued to carry on business alone, at Charleston; and upon his books, at that place, made an entry, charging this property to the Savannah house (consisting of himself and Caig) at an agreed price; and the Savannah house, by an entry on their books, credited the same on the account of the Charleston house, consisting of Edwin Gairdner alone.

On the 7th of January 1802, Edwin Gairdner and John Caig dissolved their partnership at Savannah, and a new firm was established, consisting of Edwin Gairdner, John Caig and the defendant, Robert Mitchel, under the name of Gairdner, Caig & Mitchel, who, by their articles of copartnership, under seal, agreed to take the property in question, at a valuation, and hold it as their joint property.

*36] *Previous to this, viz., in March 1800, Mitchel had, by deed, conveyed his third part of this property to Edwin Gairdner and John Caig, as joint-tenants; and at the time of executing the mortgage (viz., December 1st, 1801), Edwin Gairdner had full power and authority from James Gairdner to sell and convey his share of the property.

Subsequent to the mortgage, viz., on the 27th of July 1802, Edwin Gairdner, as attorney for James Gairdner, by deed, conveyed to Mitchel one-third of the property, and by his own deed, of the same date, he conveyed one-sixth of the property to Caig, who had before received a conveyance of one other sixth from Mitchell.

These two last deeds were proved and recorded on the 14th of September 1802. The mortgage was proved on the 10th, and recorded on the 17th of September 1802.

By the law of Georgia, deeds of bargain and sale are to be recorded in twelve months; and by a law of 1768, every mortgage and deed, recorded within ten days after its execution, shall have preference of other deeds and mortgages, not recorded within that period.

At the time of executing the mortgage, therefore, the legal title of three-sixths of the property was in Edwin Gairdner, and according to the book-entries of the several copartnerships, he was also equitably entitled to the

same. The legal title of two-sixths was in James Gairdner, and of the other sixth in Caig, who, according to the book-entries, was equitably entitled to three-sixths; so that although Edwin Gairdner had a legal power to sell and transfer James Gairdner's two-sixths, yet he was bound in equity to transfer them to Caig.

The complainants in their bill claimed the whole. They stated that Edwin Gairdner was the real *bonâ fide* owner of the property; that the book-entries were made only to give a credit to the Savannah house, and were without consideration; that the Savannah house was only to hold it in trust for Edwin Gairdner, during the copartnership. That Edwin Gairdner became bankrupt on the 3d of November 1802, had received his certificate of discharge, *and that two of the complainants, Blacklock and Verrees, were duly appointed his assignees. That Caig and Mitchel, [*37 and the firm in which they were partners, were still largely indebted to Edwin Gairdner, who was also very largely indebted to the complainants. And they prayed that all conveyances, under which Caig and Mitchel claimed to hold possession of the property, might be declared void, and be cancelled; that the property might be sold, and the proceeds applied towards payment of the debts due to the complainants; and for general relief.

The answers of Caig and Mitchel, the defendants, did not admit that anything was due by E. Gairdner to the complainants, on the 1st of December 1801, the date of the mortgage, and suggested that, if anything was due, it had since been paid off, or otherwise settled. That Caig was made a party to the bond and mortgage, without his authority and consent. That the bond and mortgage were carefully kept secret, until the 13th of September 1802. That it was not a regular transaction, and ought not to avail against the defendants, who were *bonâ fide* purchasers. They set forth the several copartnerships and entries in the books, and averred that they and all the parties considered them as good transfers of the property, which was always holden and considered as stock in trade. They denied all private, secret or confidential trust for the benefit of E. Gairdner. They averred, that they believed, that at the date of the mortgage, the Charleston house was indebted to the Savannah house, after allowing credit for the property in question.

In this state of the cause, the defendants, Caig and Mitchel, filed a cross-bill against the complainants, Shirras and others, alleging secret transactions between them and E. Gairdner, and praying a discovery. They charged, that the execution of the bond and mortgage was an act of hurry and despair, in the confusion and embarrassment of entangled circumstances, and on the eve of one of the greatest and most distressing bankruptcies. That the deeds were not signed, until some weeks or months after their date. That no title papers were shown to the mortgagees (they being all in the hands *of Caig, at Savannah), nor any authority from Caig to [*38 convey his interest. That the mortgage was taken without reflection or previous contemplation, as to the security intended to be given, but as the last hope of saving or securing something from a person on the eve of insolvency. That the bond and mortgage were not executed for advances made, or money lent on the security, or hope of security, arising from the mortgage, but with the intent to indemnify the mortgagees for indorsements at the banks in South Carolina, for E. Gairdner, and for other

collateral securities entered into for him ; all which were settled and discharged by the exertions of E. Gairdner, and the resources he was then enabled to bring into activity. That there was no money due on the bond, or on the consideration for which the bond was given. That all the obligees had been fully paid, satisfied and indemnified, without having recourse to the mortgaged premises, and that the mortgage was kept up for speculating purposes, and to oppress Caig and Mitchel, or to cover some transaction between E. Gairdner and one of the obligees, subsequent to the execution of the mortgage, and which had no relation to the same. That the mortgage was concealed from Caig and Mitchel, for fear of injuring E. Gairdner's credit, and was not delivered to the mortgagees, until some time before it was recorded ; and was not recorded, until Caig and Mitchel had paid a valuable consideration for two-thirds of the property, and were in the quiet possession thereof, with the knowledge of the mortgagees. They claimed title to two-thirds of the property, under the various book-entries of the several firms.

The bill then sought a discovery of the day, and consideration, on which the bond and mortgage were really executed ; and whether the mortgages had not notice of the claim of Caig and Mitchel ; whether the mortgagees gave notice of the mortgage to them ; and required Shirras and others to disclose the real debts, together with the particulars thereof, actually due from E. Gairdner, to each of them, at the date of the mortgage. It prayed, that the mortgage may be decreed to be fraudulent and void as to Caig and Mitchel, and for general relief.

The separate answers of the several defendants, Shirras and others, to the cross-bill, set forth minutely *their several claims against E. Gairdner, and averred, that the moneys loaned and responsibilities incurred were upon the faith of the mortgage ; except Wm. Blacklock, who did not know that he was included in the mortgage, until some time after its date. Black, in his answer, produced, on oath, the plat referred to in the mortgage, which he said had remained with him ever since the execution of the mortgage.

*39]

They all admitted, that Caig and Mitchel were not notified of the mortgage, and that they knew of no authority from Caig to E. Gairdner, to incumber his share of the property. They admitted, they did not see any title papers, and that they did not require them, having a perfect confidence in the representations and character of Edwin Gairdner. They denied, that they had any knowledge of any transfer to Caig & Mitchel, except that E. Gairdner stated that Caig held one-sixth. They admitted, that the mortgage was kept secret until the 10th September 1802, lest it should injure the credit of the mortgagors. They averred, that it was executed on the day of its date, or within a very few days afterwards, and was not retained by E. Gairdner, but immediately delivered to the defendant, Black. The testimony in the cause related merely to the authentication of the instruments ; and the entries upon the books, and to the balance of the accounts between the Charleston and the Savannah house, tending to prove that the Savannah house was considerably indebted to the Charleston house, at the date of the mortgage.

In May 1807, the circuit court, consisting of Judges JOHNSON and STEVENS, gave the following opinion:

"In the great confusion of legal and equitable interest which exist in this case, the mind can resort to no other means of making a just discrimination, but that of recurring to the original state of the interests of the several parties, and following their respective portions through the several changes of property which resulted from subsequent transactions.

"By the conveyance from Levi Sheftall to James Gairdner, Edwin Gairdner and Robert Mitchel, each acquired a fee-simple in one-third of the property in question. *In legal language, they were each seised *per my et per tout* of a third part, in joint-tenancy. The third part of James [*40 Gairdner never was legally conveyed, until the deed of July 1802, by Edwin, attorney for James Gairdner, conveying it to Robert Mitchel. With regard, therefore, to that third, and the one-sixth conveyed by Mitchel and Caig, making up a moiety of the whole, there can be no doubt, that the complainants are not entitled to recover; both law and equity are on the side of the defendants. The only difficulties that exist, arise in relation to the one-sixth conveyed by Mitchel to Edwin Gairdner, and by him conveyed to Caig, and the remaining third, originally vested in Edwin Gairdner. With regard to these proportions, the complainants are in possession of the legal right, and the question is, how far are the defendants relieved in equity?

"It is contended, that this court ought not to aid the complainants, on several grounds: 1. Because this property ought to be considered as a part of the copartnership funds of the first firm of Gairdner, Caig & Mitchel, and of E. Gairdner & Co.; and neither copartner is at liberty to alienate his share, until the debts of those concerns are discharged, and their balances adjusted. 2. Because the amounts claimed by the several mortgagees were for loans and assumptions not existing at the time of the mortgage, but incurred afterwards, with a small exception. 3. Because by the articles of copartnership, the property is legally pledged to the last concern of Gairdner, Caig & Mitchel, and this instrument, as well as the conveyance of one-sixth to Caig, from E. Gairdner, are entitled to a preference to the mortgage, in consequence of the mortgagee's having neglected to record their mortgage, and thereby to put others on their guard.

"On the first of these grounds, we remark, there are many cases in which real property may be pursued, as part of a copartnership stock, but it is only in the hands of legal representatives, in cases of descent, bankruptcy, *&c., but not where a legal alienation has been made, or the property [*41 is unaffected by articles of copartnership.

"With regard to the 2d and 3d grounds, we think them of much importance. This court will certainly support a mortgage, when there exists no actual debt, if the mortgagee is under any liability or engagement which may ultimately subject him to loss, or the payment of money for the mortgagor; such, for instance, as the indorsement of notes; the renewal of notes originally indorsed, or an arbitration or administration bond, or other undertaking, from which a debt only may be incurred. But it is evident, that some bounds ought to be set to this mode of mortgaging on contingencies, especially, when the mortgagee retains an absolute unrestrained option, whether the mortgagor shall or shall not be his debtor; when he is under no legal or

moral obligation to make loans, or assume a liability in his behalf. But as we do not mean to found our decree in this case on this ground, we shall not now attempt to draw the line. The subject is a very delicate one.

"On the 3d ground, the court feel themselves compelled to decree in favor of the defendants. The complainants, by not making known to the world the existence of this mortgage, have lost their right to the aid of this court in obtaining a foreclosure in their behalf. The defendant, Caig, ought not to lose the benefit of the conveyance of the one-sixth executed to him by Gairdner. He was legally proprietor of the one-sixth, and, by book-entries, equitably, of another sixth. We consider the acknowledgment of interest in him, by Gairdner, upon the face of the mortgage as sufficient notice, to the complainants, of his interest, both legal and equitable. This alone would be sufficient to entitle him to the favor of this court, independently of his having become purchaser, afterwards, of the legal title, without notice of the mortgage. With regard to the remaining third, we consider the articles of copartnership, accompanied with the payment of the consideration, as a covenant to stand seised to the use of the firm, and entitled to a precedence to the mortgage, because of the latter's not having been recorded.

*42] *"The copartners, therefore, will be entitled to a preference as to Gairdner's third, both as to payment of creditors of the last house of Gairdner, Caig & Mitchel, and for the satisfaction of any demand which the copartnership may have upon him. Subject to their claims, the complainants will be entitled to relief."

In May 1808, the circuit court made the following final decree:—"The court, referring to the interlocutory decree of May term 1807, order, adjudge and decree, that the bill be dismissed, with costs, as against the defendants, John Caig and Robert Mitchel, as to the two-third parts of the mortgaged premises; and that the bill be sustained as to one-third of the mortgaged premises, reserving a preference on the said third part of the premises, both as to the payment of the creditors of the late house of Gairdner, Caig & Mitchel, and for the satisfaction of any demand which the copartnership may have upon him, said Gairdner." To reverse this decree, the present writ of error was sued out by Shirras and others.

C. Lee, for plaintiffs in error.(*a*)—The mortgage ought to avail the mortgagees, to the extent of the power and interest of the mortgagor. Edwin Gairdner had the legal estate of three-sixths in himself, and had full power and authority from James Gairdner to dispose of, sell and convey the two-sixths, whereof the legal estate remained in him. So that Edwin Gairdner's power and interest extended to five-sixths. It is true, he omitted to refer to his power of attorney, in making the mortgage; but this defect

*43] may *be supplied in a court of equity. *Sir Edward Clere's Case*, cited by Ch. J. Parker, 10 Mod. 35; s. c. 6 Co. 71 *b*; 3 Lev. 372;

(*a*) When this case was called, and before it was opened, *C. Lee* suggested, that it would be desirable to wait for a fuller court, as the judge who rendered the decree might think proper to retire from the bench.

LIVINGSTON, J.—That practice has been abandoned.

JOHNSON, J.—We have agreed among ourselves not to excuse the judge who passed the decree.

Tollet v. *Tollet*, 2 P. Wms. 490; Ibid. 623; *Smith* v. *Ashton*, 1 Cas. Ch. 263; *Wade* v. *Paget*, 1 Bro. C. C. 368; *Coventry* v. *Coventry*, 2 P. Wms. 222; s. c. 1 Str. 596, 604; *Jackson* v. *Jackson*, 4 Bro. C. C. 462; Amb. 640, 684; Hob. 165; 4 Ves. jr. 631; 7 Ibid. 567; 10 Ibid. 246; 6 East 105; Carth. 427.

There was no obligation upon the mortgagees to prove or record the deed sooner than they did. The law allows twelve months. Neither of the deeds was recorded within ten days after its date, and therefore, neither can claim a preference under that law.

It is no objection, that the mortgage was made to indemnify against future indorsements. *United States* v. *Hooe*, 3 Cr. 73.

If the power from James had been given to a third person, he would have conveyed to Edwin; but the power being to Edwin, he could not convey to himself, and the law will consider the equitable title, united with the power, as a legal conveyance to him.

The creditors of Edwin, who are the mortgagees, are superior in equity to Caig or Mitchel, who never paid anything for the property, and who are indebted to Edwin at this time; and who, if so indebted, would, if necessary, be decreed, in equity, trustees for the mortgagees, rather than they should lose their debts.

The entries on the books conveyed no legal title to the property: but if it is to be considered as stock in trade, and therefore, liable to be transferred by book-entry, E. Gairdner, being a partner, had a right to sell and dispose of the whole partnership effects.

Harper, contrà.—It is admitted, that the mortgage transferred all the legal and equitable estate of Edwin Gairdner, but not of James Gairdner. If an attorney means to convey the rights of his constituent, he must speak in the name of *his principal: Edwin had only one-half; the other half belonged to Caig and Mitchel. [*44

The plat not having been recorded with the deed, the description of the property is imperfect; it can convey, at most, only Gairdner's Wharf; and not the lot which lies at a distance, on the other side of the street.

The articles of copartnership between E. Gairdner, Caig and Mitchel, being under seal, operate as a conveyance by way of covenant to stand seised. Each party covenants to stand seised to the use of the firm.

The complainants admit, that they concealed the mortgage, and held it up, to prevent injury to the credit of Edwin Gairdner, and they contend they had a right so to do. Although they might have such a right at law, yet they have not in equity. Where the mortgagee does anything to induce a belief, that the mortgagor has still a right to incumber the property (such as suffering him to retain the title papers, whereby he gains a false credit), the first mortgagee shall be postponed to the second, who is deceived thereby. So, in this case, the deeds to Caig and Mitchel are to be preferred to the mortgage which was thus concealed. 1 Fonbl. 153.

Besides, the mortgage untruly recites the whole transaction. The bond was altogether fictitious. It was calculated to impose upon the world. The mortgage was, in truth, made only to cover future contingent responsibilities.

This property is to be considered as part of the joint funds of Gairdner, Caig & Mitchel, and liable, in the first place, to the debts of that firm. The

separate creditors of Edwin Gairdner can only claim his share, after payment of all the joint debts.

P. B. Key, in reply.—It cannot be denied, that, at the date of the mortgage, Edwin Gairdner had a legal estate in one-half of the mortgaged premises. *The mortgage, therefore, to that extent, is good, unless it want some formality, or unless the defendants have a prior title at law, or some prior equity of which the complainants had notice previously to the mortgage. No want of formality, nor prior legal estate are suggested; nor can it be contended, that Mitchel or Caig had any prior equity as to one-half the property. Mitchel in his answer expressly disclaims any interest prior to the mortgage.

*45]

It is, indeed, suggested, that this real estate is to be considered as part of the joint stock in trade of the firm of Edwin Gairdner & Co., of Savannah, consisting of E. Gairdner and John Caig; and one partner cannot dispose of any part of the joint funds, to his own use, without the consent of the other partner. But neither at law, nor in equity, will real estate be considered as stock in trade, so as to alter the nature of the estate, unless there be some express agreement for that purpose. *Thornton* v. *Dixon*, 3 Bro. C. C. 199, 200. In the present case, there were no articles of copartnership, prior to the mortgage, nor any agreement that the real estate should be converted into stock in trade. *Smith* v. *Smith*, 5 Ves. 189. In order to make partnership stock of real estate, it must be purchased with partnership funds, or there must be an agreement, at the time of purchasing, that it shall be used and invested as partnership stock. But in the present case, nothing was paid by the firm of E. Gairdner & Co., of Savannah, for this property, nor was there any agreement converting it into stock. The firm of Gairdner, Caig & Mitchell was formed, after the mortgage, and therefore, whatever interest they took in this property was subject to the mortgage.

There can be no doubt, that the mortgagees had a right, under such a mortgage, to recover, in equity, all advances made upon the credit of the mortgage, subsequent to its date, and before notice of junior incumbrances; and recording the subsequent incumbrance, is not of itself notice. Powell on Mort. 229, 230, 285.

*As to the objection, that one of the mortgagees was not a creditor, at the date of the mortgage, and did not become a creditor upon the faith of the mortgage, it is laid down in Powell on Mort. 275, that if one purchase in the name of another, without any authority to do so, yet, if he afterwards agree to it, he makes the former his agent *ab initio*.

*46]

The complainants, therefore, are entitled to a decree for a foreclosure of one-half of the property described in the mortgage, and for the recovery of all sums advanced on the faith of the mortgage, before the mortgagees had notice of the second incumbrance.

February 17th, 1812. All the judges (except WASHINGTON, J.) being present (*a*), MARSHALL, Ch. J., delivered the opinion of the court, as follows:—This is an appeal from a decree rendered by the circuit court for the district of Georgia.

(*a*) Judge WASHINGTON was prevented by indisposition, from attending on the 13th, 14th, 15th, 17th and 18th of February.

Shirras v. Caig.

Shirras and others, the appellants, brought their bill to foreclose the equity of redemption on two lots lying in the town of Savannah, alleged to have been mortgaged to them by Edwin Gairdner. The deed of mortgage is dated the first of December 1801, and purports to be a conveyance from Edwin Gairdner and John Caig, by Edwin Gairdner his attorney in fact. Edwin Gairdner not appearing to have possessed any power to act for John Caig, the conveyance, as to him, is void, and could only pass that interest which was possessed by Gairdner himself. The court will proceed to inquire what that interest was.

It appears, that on the 17th May 1796, the premises were conveyed to James Gairdner, Edwin Gairdner and Robert Mitchel, merchants and copartners, of the city of Savannah. In 1799, this partnership was dissolved; and in December in the same year, James Gairdner made an entry *on the books of the company, charging this property to Edwin Gairdner & Co., of Charleston, at the price of $20,000. This firm [*47 consisted of Edwin Gairdner alone. James Gairdner also executed a power of attorney, authorizing Edwin Gairdner to sell and convey his interest in this and other real property. In March 1801, a partnership was formed between Edwin Gairdner and John Caig, to carry on trade in Savannah, under the firm of Edwin Gairdner & Co.; and in the same month, Robert Mitchel conveyed his one-third of the lots in question to Edwin Gairdner and John Caig. About the said time, it was agreed between the house at Charleston and that in Savannah, to transfer the Savannah property to the firm trading at that place; and entries to that effect were made in the books of both companies; and possession was delivered to Edwin Gairdner and Co. of Savannah. Such was the state of title, in December 1801, when the deed of mortgage bears date.

The plaintiffs claim the whole property, or, if not the whole, five-sixths; because they suppose Edwin Gairdner to have been equitably entitled to his own third, to that of James Gairdner, and to half of the third of Robert Mitchel. But for this claim the court is of opinion, that there can be no just pretension, because he did not affect to convey by virtue of the power from James Gairdner; he did not affect to pass the interest of James Gairdner, but to pass the estate of John Caig and himself. Consequently, the power of attorney may be put out of the case, and the conveyance could only operate on his own legal or equitable interest.

In law, he was seised, under the original deed, and the deed from Robert Mitchel, of one undivided moiety of the property. Under the various agreements and entries on the books of the firms at Charleston and Savannah which have been stated, his equitable interest was precisely equal to his legal interest. In law and equity, he held one *moiety of the premises [*48 in question; the other moiety was in John Caig. To one-sixth, Caig was legally entitled by the conveyance from Robert Mitchel, and to two-sixths, he was equitably entitled, by the agreement with Edwin Gairdner and the consequent entries on the books. Of the equitable interest of John Caig, the mortgagees were bound to take notice, because the purchaser of an equitable interest purchases at his peril, and acquires the property burdened with every prior equity charged upon it, because the deed itself gives notice of Caig's title, and because Caig was in possession of the property. The

mortgage deed of December 1801, could not, then, in law or equity, pass more than one moiety of the property it mentions.

A question arises on the face of the deed, respecting the extent of the property comprehended in it. The plaintiffs contend, that both lots are within the description; the defendants, that only the wharf lot is conveyed. The property conveyed is thus described: "All that lot of land, houses and wharfs, in the city of Savannah, as is particularly described by the annexed plat, and is generally known by the name of Gairdner's wharf." The plat was not annexed, nor was it recorded with the deed. It is, however, filed as an exhibit in the cause, and appears to be a plat of part of the town of Savannah, including the lot on which Gairdner's wharf was, and also one other lot belonging to the same persons, which was designated as No. 6, and which does not adjoin the property on which the wharves are erected. The words descriptive of the property intended to be conveyed do not appear to the court to be applicable to more than the wharf lot. The word "lot" is in the singular number; the term "houses" is satisfied, by the fact that there are houses on the wharf lot; and there is no evidence in the cause, nor any reason to believe, that lot No. 6 was "generally known by the name of Gairdner's wharf." The court therefore, cannot consider that lot as comprehended within the conveyance.

*49] *The mortgaged property is in the possession of the defendants, Caig and Mitchel, who derive their title thereto in the following manner. On the 7th of January 1802, a new partnership was formed between Gairdner, Caig and Mitchel, and by the articles of copartnery, which are under seal, the Savannah property is declared to be stock in trade, and an entry was made on the books of the old firm, transferring this property to the new concern. On the 12th of the same month, the copartnership of Gairdner and Caig was dissolved. On the 27th of July 1802, by deeds properly executed, one-third of the property became vested in John Caig and one other third in Robert Mitchel. On the 3d of November 1802, Edwin Gairdner became a bankrupt; and this bill is brought by his mortgagees and assignees.

The claim to foreclose is resisted by Caig and Mitchel, because, they say, 1st. The mortgage was not executed at the time it bears date, but long afterwards, and on the eve of bankruptcy. 2d. That the transaction is not *bonâ fide*, there being no real debt, nor any money actually advanced by the mortgagees. 3d. That the mortgage was kept secret, instead of being committed to record. 4th. That the whole transaction is totally variant from that stated in the deed. They, therefore, claim the property for the creditors of Gairdner, Caig & Mitchel.

1. From the testimony in the cause, it appears, that the deed, if not executed on the day, was executed about the day of its date; and that Gairdner, at the time, was believed to be solvent.

*50] *2. It appears, also, that the mortgage was executed, in part, to secure the payment of money actually due at the time, and in part, to secure sums to be advanced, and to indemnify some of the mortgages for liabilities to be incurred.

3. The mortgage is dated the 1st of December 1801, and was recorded in September 1802. By the laws of Georgia, a deed is valid, if recorded within twelve months; but any deed recorded within ten days after its

execution, takes preference of deeds not recorded within that time, or previously on the record. It appears to the court, that neither negligence, nor that fraud which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the dispatch which the law requires. If subsequent purchasers, without notice, sustain an injury, within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisition. In this case, the subsequent purchasers might have proceeded to record their deeds within ten days, and have thereby obtained the preference they claim, but they have failed to do so. They are themselves chargeable with the very negligence which they ascribe to their adversaries; and were they to be preferred, the court would invert the well-established rule of law, and postpone, under similar circumstances, a prior to a subsequent deed.

4. It is true, that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of 30,000*l.* sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount.

It is not to be denied, that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a *rigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented, to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation. That cannot have happened in the present case. [*51

There is the less reason for imputing blame to the mortgagees, in this case, because the deed was prepared by the mortgagor himself, and executed, without being inspected by them, so far as appears in the case.

It is, then, the opinion of the court, that the plaintiffs, Shirras and others, have a just title, under their mortgage deed, to subject one moiety of the lot or parcel of ground, commonly known by the name of Gairdner's Wharf, to the payment of the debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the defendants, Caig and Mitchel; and that the decree of the circuit court of Georgia, so far as it is inconsistent with this opinion, ought to be reversed.

The following is the Decree of this Court:—This cause came on to be heard on the transcript of the record, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the deed of mortgage in the proceedings mentioned, and dated on the 1st of December 1801, is, in law, a valid conveyance of one moiety of that lot of land, houses and wharves in the city of Savannah, which was generally known by the name of Gairdner's Wharf, being the parcel of ground lying between the river and the street, and that the mortgagees in the said deed mentioned, are entitled to foreclose the equity of redemption in the said mortgaged property, and to obtain a sale *thereof, and to apply the proceeds of the said sale to [*52

the payment of what remains unsatisfied of their respective debts, which were either due at the date of the mortgage, or have been since contracted, either on account of moneys advanced, or liabilities incurred prior to their receiving actual notice of the title of the defendants, John Caig and Robert Mitchel. And the decree of the circuit court for the district of Georgia, so far as it is inconsistent with this opinion, is reversed and annulled, and in all other things is affirmed; and the cause is remanded to the said circuit court for the district of Georgia, that further proceedings may be had therein, according to equity.

The Paulina's Cargo.

The Schooner Paulina's Cargo *v.* United States.

Forfeitures.

The 3d section of the act of congress of the 9th of January 1808, which prohibited the transshipment of goods from one vessel to another, did not include the case of a vessel lading in port, by means of river craft, &c.

The 2d section of the act of congress of the 25th of April 1808, did not require a permit to lade any vessel, nor authorize the forfeiture and condemnation of the vessel or cargo, for lading without the inspection of a revenue officer; the only penalty for such lading being the denial of a clearance.[1]

Error to the Circuit Court for the district of Rhode Island.

The schooner Paulina and cargo were seized and libelled by the collector of the port of Newport, alleging that the cargo was laden on board, within the district of Newport, between the 1st of June and the last of July, in the year 1808, in the night season, without a permit from the collector, and without the inspection of the proper revenue officers, and contrary to the 2d section of the act of congress, entitled "an act in addition to the act entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States, and the several acts supplementary thereto, and for other purposes," passed the 25th of April 1808; and contrary to the 50th section of the act to regulate the collection of duties, &c., passed the 2d of March 1799. In the district court, the vessel and cargo were both ordered to be restored.

Upon the appeal in the circuit court, the libellant had leave to amend
*53] his libel, by stating that on the waters *of Warwick bay, in the district of Rhode Island, at a place called the Fulling Mill, in Warwick, and about 120 fathoms from the landing, at sundry times, between the 1st of June and the last of July, in the year 1808, the articles constituting the cargo of the Paulina, were transshipped from a small sloop called the May Flower into the schooner Paulina, without the intervention of any other water-craft, or of any intermediate landing, with intent to be transported without the United States, contrary to the 3d section of the act of congress, entitled "an act supplementary to the act entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States," passed on the 9th of January 1808, whereby the said cargo is forfeited, &c.

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[1] The Enterprise, 1 Paine 32.