plaintiff in error, so far as his third plea applies to the first count in this declaration.

This court is of opinion, that there is no error in the judgment of the circuit court, either in sustaining the demurrers to the several pleas filed in that court to the first count in the declaration, or in admitting the note, in the declaration mentioned, to be given in evidence to the jury, on the trial of the issue of fact. This opinion renders it unnecessary to examine the decision of the circuit court, as it respects the pleas to the other counts, since, should their decision respecting the pleas to those counts even be deemed erroneous, their judgment will stand.

Judgment affirmed, with damages, at the rate of six per cent. per annum, and costs.

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*36] *Bank of Alexandria *v.* Herbert. (*a*)

Trustees in insolvency.

The trustee of an insolvent debtor, in the district of Columbia, represents the creditors of the insolvent, and can take advantage of a defect in a mortgage, of which the insolvent himself could not.[1]

This was an appeal from the Circuit Court for the district of Columbia, sitting in chancery, at Alexandria.

A bill in chancery was brought by W. Herbert, junior, trustee for the creditors of John Potts, an insolvent debtor, under the act of congress for the relief of insolvent debtors within the district of Columbia, against the Bank of Alexandria, to recover the proceeds of a tract of land, the property of Potts, which had been sold by consent, and the money deposited in the bank. This land had been conveyed by Potts to Ludwell Lee, in trust to secure the payment of money borrowed of the bank by Potts, but the deed of mortgage had not been recorded within the time limited by the law of Virginia, which governs this case, and which declares that all deeds of mortgage whatsoever, although good between the parties, shall be void as to creditors and subsequent purchasers without notice, unless they be recorded within eight months after their date.

Swann, for the appellants.—Although the deed to Lee would be void as to a subsequent purchaser for valuable consideration, without notice, yet it is not void as to Herbert, who is the trustee of Potts under the insolvent law for the district of Columbia. (2 U. S. Stat. 237.) A trustee under that law is like an assignee under a commission of bankruptcy in England. He stands merely in the place of the insolvent; he takes the estate as the insolvent held it; he is bound by the same equity, and liable to the same obligations. Cooper's B. L. 128, 307, 2 Ves. 633; 1 Atk. 94, 162; *Taylor* v. *Wheeler*, 2 Vern. 564, 609; *Russel* v. *Russel*, 2 Bro. C. C. 269. The deed to Lee being good against Potts, is equally valid against Herbert.

*37] **Taylor*, contrà.—No English authority can apply directly to this case. Potts remained in possession ten years after the deed to Lee,

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(*a*) February 14th, 1814. Absent, Washington, Justice.

[1] And see Casey *v.* Cavaroc, 96 U. S. 487.

and until his insolvency and the execution of the deed to Herbert, when he delivered to Herbert the possession.

But the deed is void as to creditors as well as purchasers, and creditors are not affected by notice, although purchasers are. The fact that Herbert had notice does not appear; but if it did, he represents the creditors; and their rights are his. If there had been no deed to Herbert, the creditors might have obtained a decree, in their own names, to vacate the deed to Lee and compel a sale.

But if this cause depends upon the decisions under the bankrupt law, yet the assignee of a bankrupt represents the creditors, and can take advantage of defects which the bankrupt himself could not. Cooper 307. In the case of *Taylor* v. *Wheeler*, 2 Vern. 564, it does not appear that the creditors had a right to avail themselves of the defect in the mortgage. If Herbert represents the creditors, the fourth section of the statute of Virginia is conclusive. (1 P. P. Rev. Co. 157.) If he does not represent the creditors, then all the provisions of the insolvent law are of no avail. If the deed cannot be set aside by a bill in the name of the trustee, the judgment-creditors may file a bill in their own names and set it aside.

Swann, in reply.—The assignee of a bankrupt also represent the creditors, but yet it has been decided (1 Atk. 94), that although creditors might vacate a deed, yet an assignee could not. The case of *Taylor* v. *Wheeler* is very strong. The mortgage was void at law, for want of a surrender of the copyhold in due time, yet it was decreed, that it should be made good against the assignee of the mortgagor, who, it was admitted, represented the creditors. But the chancellor said, that the complainant also was *a creditor, and had trusted to this particular fund, but the others were general creditors; and upon that distinction, his decree seems to be founded. The reason of that case is precisely applicable to the present. The bank lent the money upon the credit of this very security. [*38

February 16th, 1814. MARSHALL, Ch. J., delivered the opinion of the court, as follows:—In this case, a bill was brought in the circuit court for the county of Alexandria, by William Herbert, jr., trustee for the creditors of John Potts, an insolvent debtor, against the Bank of Alexandria, to recover the proceeds of a tract of land, the property of Potts, which had been sold by consent, and the money deposited in bank. This land had been conveyed by Potts to the bank, to secure the payment of a sum of money borrowed by him, but the deed of mortgage had not been recorded until eight months after its date had elapsed. The law of Virginia, which governs this case, declares all deeds of mortgage whatsoever, though good between the parties, to be void as to creditors and subsequent purchasers, without notice, unless they be recorded within eight months from the date. The question is, whether this mortgage can be set up in favor of the bank against the trustee for the creditors? The circuit court decreed in favor of the trustee, and from that decree there is an appeal to this court.

For the appellant, it is contended, that the trustee may be assimilated to the assignees of a bankrupt, and he has adduced some cases from the books showing that, in England, a deed declared to be void in law has been supported against the assignees, in favor of the particular creditor who holds a lien upon it.

The resemblance between the trustee for the estate of an insolvent debtor, in the district of Columbia, and the assignees of a bankrupt is admitted; yet a clear distinction exists between the cases cited at bar and
*39] *that before the court. In those cases, the deed was declared void, without any view to creditors. In this case, the deed is declared void for the particular benefit of creditors. To set up this deed against the creditors, would be to defeat the very object for which the law was made. The counsel for the appellant is well apprised of this distinction, and though he claims for his clients the benefit of this deed against the trustee, he admits that it could not be sustained against the creditors suing in their own names.

In reason, there can be no difference between this suit, which asserts the right of the creditors, in the mode prescribed by law, and an assertion of that right in their own names. Nor does the law distinguish between them. The cases cited did not turn on any distinction between the rights of the assignee and the creditors, but on the preference which ought to be given to him who has trusted on the credit of the particular fund over those who had trusted the general fund. The decree is affirmed, with costs.

Decree affirmed.

Marcardier *v.* Chesapeake Insurance Company.

Marine insurance.—Total loss.—Memorandum articles.—Charter-party.

Where a technical total loss is sought to be maintained, upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. Therefore, in a cargo of a mixed character, no abandonment for mere deterioration in value, during the voyage, can be valid, unless the damage on the memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles.[1]

Where the general owner of a ship retains the possession, command and navigation of the same, and contracts to carry a cargo on freight, for the voyage, the charter-party is to be considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership.[2] In such case, the general owner is also owner for the voyage; consequently, if he be the master of the vessel, he is incapable of committing barratry.

Error to the Circuit Court for the district of Maryland. The facts of this case were thus stated by Story, J., in delivering the opinion of the court:

This is an action on a policy of insurance, underwritten by the defendants, on the 29th of October 1806, for $31,000, upon any kind of lawful goods on board the brig Betsey, whereof Alexander McDougal was then
*40] *master, on a voyage at and from New York to Nantes. McDougal was the general owner of the brig, and on the 1st day of October 1806, by a charter-party of affreightment, made with the plaintiff, granted and to freight let, to the plaintiff, the said brig, excepting and reserving her cabin, for the use of the master and mate, and for accommodation of

[1] See Morean *v.* United States Ins. Co., 1 Wheat. 219; s. c. 3 W. C. C. 256; Humphreys *v.* Union Ins. Co., 3 Mason 429; Robinson *v.* Commonwealth Ins. Co., 3 Sumn. 220; Great Western Ins. Co. *v.* Fogarty, 19 Wall. 640.

[2] Reed *v.* United States, 11 Wall. 601; Leary *v.* United States, 17 Id. 611; Shaw *v.* United States, 93 U. S. 235.