*John Conard *v.* Atlantic Insurance Company of New York.

Respondentia bond.—Priority of the United States.—Consignees.—Mortgages to secure future advances.—Fraud.—Exceptions.—Joint and several bond.

It is not necessary, that a *respondentia* loan should be made, before the departure of the ship on the voyage; nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. p. 436.

It matters not, at what time the loan is made, nor upon what goods the risk is taken; if the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. p. 437.

The lender on *respondentia* is not presumed to lend on the faith of any particular appropriation of the money, and if were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bonâ fide* run, upon other goods; and it was not a mere contract of wager and hazard. p. 437.

It seems, that the common and usual form of a *respondentia* bond, is that which was used in this case.[1] p. 437.

What is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128, § 65. p. 438.

It is obvious, that the latter clause of the 65th section of the act of 1799, is merely an explanation of the term "insolvency," used in the first clause, and embraces three classes of cases, all of which relate to living debtors; the case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. p. 439.

Insolvency, in the sense of the statute, relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense; it supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *v.* Hooe, 3 Cranch 73; and it was consequently held, that an assignment of part of the debtor's property, did not fall within the provision of the statute.[2] p. 439.

Mere inability of the debtor to pay all his debts, is not an insolvency, within the statute; but it must be manifested in one of the three modes pointed out in the explanatory clause of the section. p. 439.

The priority, as limited and established in favor of the United States, is not a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterward elect to take in execution, so as to prevent its passing, by virtue of such assignment, to the assignees; but it is a mere right of prior payment out of the general funds of the debtor, in the hands of the assignees; and the assignees are rendered personally liable, if they omit to discharge the debt due to the United States. p. 439.

It is true, that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law; the estate is considered as a trust, and * according to the
*387] intention of the parties, as a qualified estate and security; when the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeasible. p. 441.

It has never yet been decided by this court, that the priority of the United States will divest a specific lien, attached to anything, whether it be accompanied by possession or not. p. 441.

The case of Thelusson *v.* Smith, 2 Wheat. 396, turned upon its own particular circumstances, and did not establish any principles different from those which are recognized in this case; and it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States. p. 444.

It is not understood, that a general lien, by judgment, on lands, constitutes *per se* a property or

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[1] See Insurance Co. of Pennsylvania *v.* Duval, 8 S. & R. 138; Delaware Ins. Co. *v.* Archer, 3 Rawle 216; Niagara Ins. Co. *v.* Searle, 2 Hall 22.

[2] See note to United States *v.* Fisher, 2 Cranch 358.

right in the land itself; it only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances; but subject to this, the debtor has full power to sell or otherwise dispose of the land. p. 443.

By the well-settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsement of the bill of lading to a *bonâ fide* purchaser, for a valuable consideration, without notice of any adverse interests, the latter becomes, as against all the world, the owner of the goods; this is the result of the principle, that bills of lading are transferrible by indorsement, and thus may pass the property, p. 445.

Strictly speaking, no person but the consignee can, by any indorsement on the bill of lading, pass the legal title to the goods; but if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title, by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by indorsement on the bill of lading itself. Such an assignment by the owner, passes the legal title against his agents or factors, and creditors, in favor of the assignee. p. 445.

Mortgages may as well be given to secure future advances, and contingent debts, as those which are certain and due; the only question that properly arises in such cases, is the *bona fides* of the transaction.[1] p. 448.

Without undertaking to suggest, whether, in any case, the want of possession of the thing sold, constitutes, *per se*, a badge of fraud, or is only *primâ facie* a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. p. 449.

In cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and *à fortiori*, if flowing directly from them, has never been held to be, *per se*, a badge of fraud. p. 449.

On a trial upon the merits, it is too late to take exception to the corporate capacity of the plaintiffs to sue; this should have been done by a plea in abatement, before the trial; and the omission to do this is a waiver of the objection. p. 450.

*A joint and several bond, where it was not understood to be offered as general evidence as to all the parties to it, but only as to one of the obligors, and was connected with a title derived from that obligor; was properly permitted to go to the jury, upon proof of the execution of the bond by that obligor alone; as, under the circumstances, it was *primâ facie* evidence of his execution of the instrument. p. 451. [*388

Atlantic Insurance Co. *v.* Conard, 4 W. C. C. 664, affirmed.

ERROR to the Circuit Court for the Eastern District of Pennsylvania. This was an action of trespass, brought in the circuit court, by the Atlantic Insurance Company of New York, against John Conard, the marshal of the district of Pennsylvania, for taking and carrying away certain teas, imported from Canton into the port of Philadelphia, on board the ships Addison and Superior. Pleas, the general issue, and a special justification under a *fi. fa.*

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[1] See note to Shirras *v.* Caig, 7 Cranch 34. In Brinkerhoff *v.* Marvin, 5 Johns. Ch. 320, it was ruled, that a mortgage given to secure future advances was only a lien as against intervening incumbrances, from the time of making its advances, not from its date. But this case has lately been practically overruled by the court of appeals of New York, in Ackerman *v.* Hunsicker, 85 N. Y. 45, where it was determined, that a mortgage, duly recorded, given to secure future indorsements or advances, is entitled to a preference over subsequent judgments against the mortgagor, as well as to indorsements or advances made upon the faith thereof, subsequently to the rendition of such judgment, without notice thereof, as to those previously made; and this, without regard to the question, whether the indorsements or advances were optional or obligatory. Under such circumstances, the docketing of the judgment is not constructive notice to the mortgagee.

against the goods as the property of Edward Thomson. The suit was instituted and tried, under an agreement, which is recited in the following bond:

Know all men, by these presents, that we, the Atlantic Insurance Company of New York, are held and firmly bound unto the United States of America, in the sum of $42,000, lawful money of the United States of America, to be paid to the said United States of America, their certain attorneys, successors or assigns, to which payment, well and truly to be made and done, we bind ourselves and our successors, firmly by these presents: Sealed with our seal of incorporation, and dated this 9th day of October, in the year of our Lord 1826.

Whereas, the goods and merchandise described in an invoice, a copy of which is annexed, imported in the ship Addison, from Canton, safely arrived at the port of Philadelphia, have been levied on by the marshal of the eastern district of Pennsylvania, by virtue of an execution on a judgment in favor of the United States against Edward Thomson, of Philadelphia, as the property of the said Edward Thomson; and whereas, the Atlantic Insurance Company of New York claim to be the owners, in law or equity, of the said goods, and actually hold the bills of lading and invoice thereof, under which the said goods have been duly entered at the custom-house, and the duties thereon, secured to be paid according to law. And whereas, it has been agreed by and between the secretary of the treasury, in behalf of the United States, and the said Atlantic Insurance Company, that a suit shall be instituted by the said named company, against the said marshal, in which the sole question to be tried and decided shall be, whether the United States, or the said Atlantic Insurance Company are entitled to said goods, and the proceeds thereof; and whereas, it has been further agreed, that the said goods shall be delivered to the said Atlantic Insurance Company, without *389] prejudice to the rights of the United States, under the said *execution or otherwise; and that they shall sell and dispose of the same, in the best manner, and for the best price they can obtain therefor, and for cash, or upon credit, as they may judge expedient; and that the moneys arising from the sales thereof, deducting the duties and all customary charges and commissions on such sales, shall be deposited by the said Atlantic Insurance Company, as soon as received, from and after the sale, in the Bank of the United States, to the credit of the president of said bank, in trust, to be invested by the said president of the said bank, in the stock of the United States, in the name of the said president, in trust, so to remain, until it shall judicially and finally be decided, to whom the said goods or the proceeds thereof, do in right, and according to law belong; and on the further trust, that whenever such decision shall be made, the said president of the said bank, shall deliver the said moneys, or transfer the said stock, to the party in whose favor such decision shall be made. And whereas, in pursuance of the said agreement, the said goods have been this day delivered to the said Atlantic Insurance Company of New York, it being understood and agreed, that such delivery of the goods shall not prejudice any existing right of the said company.

Now, the condition of this obligation is such, if the said Atlantic Insurance Company of New York shall comply with the said arrangements, and well and truly sell and dispose of the said goods, and cause the moneys

arising from the sales thereof, deducting therefrom the duties, charges and commissions as aforesaid, to be deposited in the bank, in trust, according to the true intent and meaning of the above recited agreement, and for the purposes therein set forth, this obligation to be void, otherwise, to be and remain in full force and virtue.

(Signed) ARCH. GRACIE, Prest. [L. S.]

Attest—GEO. B. RAPELYE, Secretary of the Atlantic Insurance Company of New York.

The facts as they appeared by the record were as follows: On the 21st June 1825, the plaintiffs below lent to Edward Thomson the sum of $21,000, upon *respondentia*, by the Addison, for which the following bond was executed and delivered to the company:

Know all men, by these presents, that we, Edward Thomson, of the city of Philadelphia, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, of the city of New York, are held and firmly bound unto the Atlantic Insurance Company of New York, in the sum of $42,000, lawful money of the United States of America, to be paid to the said the Atlantic Insurance Company of New York, their certain attorney, successors or assigns, to which payment, well and truly to be made, we do bind ourselves and each of us, our and each of our *heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and [*390 dated this 21st day of June, in the year of our Lord 1825.

Whereas, the said the Atlantic Insurance Company of New York have this day lent and advanced to the above-named Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, the sum of $21,000, lawful money of the United States of America, upon the goods, wares and merchandise and specie, to that amount, laden or to be laden, on board the American ship, called the Addison, of Philadelphia, whereof Hidelius is master, or which may be laden on account of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, on board the said vessel, at any time during her intended voyage hereinafter mentioned. And whereas, the said vessel is now bound on the voyage at and from Philadelphia to Canton, and at and from thence, back to Philadelphia, with the usual privileges for trade and refreshments. And whereas, the said the Atlantic Insurance Company of New York are content to stand and bear the risks against which the said company usually insure by their cargo policies, on the said sum so lent and advanced on the said goods, wares, merchandise and specie, laden or to be laden on board of the said vessel as aforesaid, during the said voyage, so as the same do not exceed the term of twelve calendar months, to be computed from the day of the date of the bill of lading, viz., the 21st day of April 1825.

Now, the condition of this obligation is such, that if the said ship, laden with the said goods, wares, merchandise and specie, do and shall, with all convenient speed, proceed and sail on the said voyage from Philadelphia to Canton, and at and from thence, back to Philadelphia, and return and come to Philadelphia, having on board the above stipulated amount in value, in specie or merchandise, as the case may be, on the respective passages, both outward and homeward, to end her voyage there, by or before the end or expiration of twelve calendar months, to be computed from the date aforesaid, and that, without deviation (the dangers and casualties of the seas

excepted; and if the above-bounden Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, or either of them, or either of their heirs, executors or administrators, shall and do well and truly pay, or cause to be paid, at the city of New York, to the above-named the Atlantic Insurance Company of New York, their attorney, successors or assigns, the full sum of $21,000, lawful money as aforesaid, immediately upon the first and next return and arrival of the said *ship, at the port of Phila- *391] delphia, or at and upon the end and expiration of twelve calendar months, to be computed as aforesaid, whichever shall first happen, together with the sum of $2205, lawful money as aforesaid, that being the stipulated marine interest and premium on the said loan: or if the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, or either of them, their, or either of their heirs, executors or administrators, shall and do, immediately upon the first and next return and arrival of the said vessel, at the port of Philadelphia as aforesaid, provided such return and arrival happen within the space of twelve calendar months, to be computed as aforesaid, give security satisfactory to the said the Atlantic Insurance Company of New York, to pay, at the city of New York, to the said the Atlantic Insurance Company of New York, their successors or assigns, the said sum of $21,000, together with the said sum of $2205, within three months from the time of such return and arrival, with lawful interest thereupon, from the time of such return and arrival, and shall and do well and truly pay the same accordingly, at the expiration of the said three months; or if, in the said voyage, and before the end of the said twelve months, to be computed as aforesaid, a total loss of the said goods, wares, merchandise and specie, by the risks against which said company usually insure by their cargo policies, shall unavoidably happen, and the said Edward Thomson, Edward H. Nicoll and Floyd S. Bailey, their heirs, executors or administrators, shall and do well and sufficiently abandon, transfer and assign to the said the Atlantic Insurance Company of New York, their successors or assigns, all the said goods, wares, merchandise and specie of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, so laden, and to be carried from the said port of Philadelphia, on board the said ship, and all other goods, wares, merchandise and specie, which shall be acquired during the said voyage, by reason of, or from the proceeds of, the said last-mentioned goods, wares, merchandise and specie, and the net proceeds thereof, and well and truly do account for and pay, upon oath or affirmation, within four calendar months, to be computed from the time of such loss, to the said the Atlantic Insurance Company of New York, or their successors, a just and proportionable average on all the said specie, goods, wares and merchandise, and proceeds, if any salvage, average or allowance shall be obtained by reason of, or upon the same, notwithstanding such loss; then this obligation to be void; otherwise, to remain in full force and virtue.

It being first declared to be the mutual understanding and *agree- *392] ment of the parties to this contract, that the lenders shall not be liable for any charge, damage or loss that may arise, in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; but that the lenders shall be liable to losses and averages, and entitled to the benefit of salvage, in the same manner, to all intents and purposes, as underwriters on a policy of insurance, according

to the usages and practices in the city of New York; and that in like manner, the borrowers shall be subject to all the duties imposed on the assured, by the usual policies of insurance, and the customs and practices of the said city.

Sealed and delivered in the presence of us,

PETER MACKIE, EDWARD THOMSON, [L. S.]
CHARLES MACKIE, EDW. H. NICOLL, *per* [L. S.]
To the signature of Edward Thomson. ROBERT SMITH, att'y,
J. H. CLINCH, FRANCIS H. NICOLL, [L. S.]
H. W. NICOLL, FLOYD S. BAILEY, [L. S.]
To the three last named.

At the same time the following memorandum, bill of lading, and assignment thereon, were also executed and delivered to the company:

Whereas, it hath been agreed, that the bills of lading for the goods, specie, wares and merchandise, mentioned in the within obligation, shall be indorsed to "The Atlantic Insurance Company of New York," as a collateral security for the loan within mentioned: And whereas, it has been further agreed, that the property to be shipped homeward as aforesaid, being the proceeds of the said loan, shall be for the account and risk of us the said borrowers, or some of us; that the bills of lading therefor shall express the same, and shall also express that the said property shall be deliverable to the order of the shippers, and that the same shall be indorsed in blank, and shall be placed in the hands of the said Atlantic Insurance Company of New York, either before or on the arrival of the said ship at Philadelphia, to be held by them as a continuation of such collateral security, to the performance of which, we do bind ourselves: Now, by this instrument, it is expressly declared, that such indorsement or consignment shall not be held to exonerate the persons of the obligors, nor compel the said the Atlantic Insurance Company of New York to accept the goods and merchandise which may arrive under such bill of lading and *consign- [*393
ment, in discharge of such debt; but it shall be lawful for the said the Atlantic Insurance Company of New York, to receive and hold the said goods, specie, wares and merchandise, for the space of ninety days after their arrival at the port of Philadelphia. And in case the principal, interest and premium, in the within obligation mentioned, shall not be paid or satisfied, within the said time, to dispose of the same, at public auction, and to charge the obligors with the balance that may remain due, after deducting from the amount of said sales, the freight, duties, commissions and all other just and proper charges.

Sealed and delivered in presence of us,

PETER MACKIE, EDWARD THOMSON, [L. S.]
CHARLES MACKIE, EDW. H. NICOLL, *per* [L. S.]
To the signature of Edward Thomson. ROBERT SMITH, att'y,
J. H. CLINCH, F. H. NICOLL, [L. S.]
H. W. NICOLL, FLOYD S. BAILEY, [L. S.]
To the three last named.

Shipped in good order and condition, by Edward Thomson, in and upon the ship called the Addison, whereof Hidelius is master for this voyage, now lying in the port of Philadelphia, and bound for Canton, seven kegs containing three thousand Spanish dollars, for account and risk of the shipper, a

native citizen of the United States of America, being marked and numbered as in the margin, and are to be delivered, in the like good order and well conditioned, at the aforesaid port of Canton (the dangers of the seas only excepted), unto John R. Thomson, Esq., or to his assigns, he or they paying freight for the said goods, at the rate of nothing, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to the three bills of lading, all of this tenor and date; one of which being accomplished, the other to stand void. Dated at Philadelphia, the 21st day of April, 1825. ANDREW HIDELIUS, jr.

No. 5. [E. T.] 38 @ 44, 7 kegs, containing 3000 each.

An assignment indorsed thereon, dated the 21st June 1825, as follows:

(COPY.)

For value received, I do hereby, assign and transfer to the Atlantic Insurance Company of New York, the within bill of lading, and the specie, goods, wares and merchandise, to be procured thereon or thereby; and any
*394] return-cargo to be *obtained by the within-mentioned outward cargo and specie, or the proceeds thereof, and all the return-cargo to be taken on board the within-named ship, by or for my account, as collateral security, according to an agreement, duly executed and adjoined to a *respondentia* bond given by myself, Edward H. Nicoll, Francis H. Nicoll and Floyd S. Bailey, dated this 21st day of June, in the year of our Lord 1825, for the sum of $21,000. Witness my hand and seal, this 21st day of June 1825. EDW'D THOMSON.

PETER MACKIE, } Witnesses.
BARCLAY ARNY, }

The Addison sailed from Philadelphia for Canton, on or about the 21st April 1825.

On the 14th July 1825, the plaintiffs also lent to Edward Thomson the sum of $13,950, upon *respondentia* by the Superior, for which a similar bond, and memorandum, and a corresponding bill of lading and assignment, were executed to the lenders. The Superior sailed from Philadelphia for Canton, on or about the 6th June 1825.

There was no difference between these two operations, except this, that the entire loan of $21,000 by the Addison was paid by the company to the agents of Thomson, whereas, the loan by the Superior, was applied, with his consent, to pay a previous loan on *respondentia* by another ship of Thomson's, which had fallen due.

On the 19th November 1825, Edward Thomson, being very largely indebted to the United States upon duty bonds, and for duties on teas, not bonded, made a general assignment of all his estate and effects to Richard Renshaw and Peter Mackie, in trust for his creditors; and on the 13th March 1826, he confessed a judgment to the United States for $500,000, upon which a *fi. fa.* was issued on the same day.

In the month of March 1826, and a few days before the arrival of the Addison, the assignees of Thomson received, under a blank envelope addressed to him, a duplicate bill of lading and invoice of a shipment homeward by that vessel, for the teas in question in this suit, and delivered them to the agents of the insurance company. They were respectively dated the 22d November 1825, deliverable to the order of the shipper, at Canton, R. Fisher,

attorney for John R. Thomson, and by him indorsed in blank. The invoice stated the account and risk to be for Edward Thomson. That the teas in this invoice were the returns of the outward specie in the bill of lading assigned to the company, was proved by means of the words and figure No. 5, on the homeward invoice, and the same number and figure on the outward bill of lading; which were the means *concerted between [*395 Edward Thomson and his supercargo in Canton, to fix the identity. The original bill of lading and invoice were received by the assignees, on the arrival of the Addison, and in like manner delivered to the company. In the same month Peter Mackie, one of the assignees, received from Canton, the homeward bill of lading and invoice of a shipment of teas, &c., by the Superior, dated the 2d December 1828, deliverable to his own order; and Barclay Arny, a clerk in the service of Thomson, received a bill of lading and invoice of another shipment by the Superior, bearing the same date, and deliverable to his order. These returns, being, as was proved at the trial, purchased with the specie in the outward bill of lading by the Superior, assigned to the company, the consignees, Mackie and Arny, on the 22d March 1826, indorsed the papers to the plaintiffs; the rest of the shipment of $13,960 was expended for ship's disbursements in Canton.

Both shipments by the Addison and Superior were levied upon by the marshal, under the *fi. fa.* before mentioned, on the 15th March 1826, while the ships were below in the river, and taken into his custody, where they remained until the arrangement recited in the bond of the 9th October 1826; in consequence of which they were given up.

It further appeared upon the trial, that the Addison brought with her, addressed to Thomson, a general bill of lading for her entire cargo, deliverable to Edward Thomson or assigns, but not signed by the master; and also a general invoice, stating the cargo to be for his account and risk, and deliverable to his order. The manifest which had been made out in Canton by the agent of Thomson, stated the cargo to be consigned to Thomson, and not to order; and when the agent delivered it to the master, he told him that it was done to save him the necessity of overhauling his papers at sea, and that he might rely on it, as being correct. The master however, on receiving a letter from the assignees, upon his arriving on the American coast, examined his bills of lading, and finding that they were deliverable to order, altered his manifest in conformity. The object of these double papers, it was alleged, was to enable Thomson, after settling with the lenders on *respondentia*, as he had done upon former occasions, to cancel the particular bills and invoices; and after procuring the signature of the master to the general bill of lading, to enter the cargo as consigned to him.

The preceding statement is all that is necessary to introduce the points of evidence and law that were raised upon the record, and which came up for revision in this court.

The plaintiffs' counsel having offered, at the trial, to give evidence of the *respondentia* bond by the Addison, it was *objected to, until they [*396 had proved that the company were duly incorporated according to law. The plaintiffs' counsel then gave notice to the defendant's counsel, the district-attorney of the United States, to produce the bond of 9th October 1826; and gave in evidence the agreement of counsel for entering the action, wherein it was stated, that the question to be tried was, whether the

plaintiffs or the United States were entitled to the goods mentioned in the declaration or the proceeds thereof, and that the merits should be determined, without further form. The bond not being produced, the plaintiffs' counsel called Austin L. Sands, to prove the delivery of that bond to the district-attorney, and also its contents ; and began by asking him, if he was an agent of the Atlantic Insurance Company. To this question, the counsel for the defendant objected, and the court overruled the objection. To this opinion of the court, a bill of exceptions was tendered and sealed.

The bond of 9th October 1826, being then proved, the counsel for the plaintiffs contended, that they were authorized, without further proof, to give evidence of the *respondentia* bond, of which opinion was the court ; and to this opinion also, the defendant's counsel tendered an exception.

Mackie, the subscribing witness to E. Thomson's signature to the *respondentia* bond, memorandum, and assignment of the bill of lading, proved the handwriting of Thomson, his own attestation, and that of Charles Mackie ; and also the handwriting of Clinch and Nicoll, the other witnesses to the bond and memorandum ; who resided in New York and were not produced. The counsel for the plaintiffs then offered to read that bond in evidence, to which the counsel for the defendant objected, but the court suffered it to be read, as the several bond of Thomson ; to which opinion, an exception was also tendered.

Upon the examination of A. Hidelius, the master of the Addison, a witness produced on behalf of the defendant, the counsel proposed to ask him the following question—Did Mr. Mackie and Mr. Nicoll make out a new manifest, altering the destination of the Addison, and ask you to enter it as a true manifest at the custom-house? The question was objected to by the plaintiffs' counsel, and overruled by the court ; to whose opinion, the defendant again excepted.

The defendant's counsel proposed then to ask the same witness the following question—Did you see Mr. Mackie pay money to the pilot, for being first on board the Addison ? Which question was objected to, overruled, and the rejection excepted to in like manner.

The defendant's counsel having then produced an original letter from Thomson to Captain Hidelius, with a postscript by the assignee, giving the master a caution in regard to his *manifest, proposed to ask Peter Mackie the following question—Was the greater part of the letter now produced, signed by Edward Thomson, and countersigned by his assignees, drafted by the district-attorney ? This question was in like manner objected to, and overruled, and an exception taken.

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The same counsel proposed to ask of Barclay Arny, another witness, the following question—Do you know how the money was applied, that was borrowed on the Addison and Superior, of the plaintiffs ? This question was objected to, unless the application was with the plaintiffs' knowledge, and was overruled. To this opinion, a bill of exceptions was also tendered by the defendant.

At the close of the argument to the court and jury on the law and fact of the case, WASHINGTON, Justice, delivered the following points in charge to the jury.

1. That the bonds given by Edward Thomson to the plaintiffs, for

securing the loans of $21,000 on the cargo of the Addison, and of $13,960 on that of the Superior, are not invalid as marine contracts, for the reason alleged by the counsel for the defendant; that is to say, because in respect to the former, the loan was made after the Addison had sailed upon her voyage, and in respect to the latter, for the same reason; and because the bond was given by the said Thomson for securing a balance due by him to the plaintiffs, on account of preceding loans made to him, and not for money lent at the time the said security was given.

2. That it is no objection to the validity of the bond given for securing the loan, on the cargo of the Addison, upon the ground of usury, that such cargo was known, by the parties, at the time the said bond was given, to have been in safety at and upon the departure of the said vessel from Philadelphia; since the real question for the jury to decide in relation to that subject was, whether, upon the whole of the evidence given in the cause, the loan was bottomed upon a fair marine contract, the repayment of which was to depend upon the perils which the plaintiffs assumed to bear, or whether the contract was merely a device to cover an usurious loan. If the risk be inconsiderable, or for a part of the voyage only, and the marine interest be disproportioned thereto, these circumstances may warrant the presumption of unfair conduct, sufficient to avoid the contract. But the mere circumstance of the known safety of the cargo, at any particular period of the voyage, or of the assumed risk, is not, *per se*, an objection to the contract, on the ground of usury. If Edward Thomson was to pay interest from a period antecedent to the loan, there can be no question, but that the contract was usurious, and it would be so, although *no more than the legal rate of interest was reserved. How that fact is, the jury must decide from [*398 the evidence before them.

3. That the loan upon the cargo of the Addison, was, by the terms of the aforesaid bond, given to secure it, at the risk of the plaintiffs, during the whole voyage, notwithstanding the omission of the words "lost or not lost" in the said bond; there being other and equivalent expressions in the said instrument.

4. That the above bond, given for securing the loan made upon the cargo of the Addison, together with the memorandum indorsed on it, the bill of lading outward, and the indorsement thereon, are all to be considered as forming parts of one entire contract; and as such, they do, upon a fair and legal construction of them, cover that part of the homeward cargo, which was the investment of the outward cargo on which the loan was secured; and that the same principles are applicable to the contract in relation to the Superior. That the above instruments, taken and construed together as forming one contract, vested in the plaintiffs an equitable title to the return-cargoes of those vessels; if, upon the evidence given in the cause, the jury should be of opinion, that those return-cargoes were, in point of fact, the investment of the outward-cargoes of the Addison and Superior, respectively. And that nothing remained to be done to vest in the plaintiffs the legal right to the said property, respectively, but the delivery to them of the homeward bills of lading of the Addison's cargo, indorsed in blank, and an assignment to the plaintiffs, by Mackie and Arny, of the homeward bills of lading of the cargo of the Superior.

5. That the equitable title of the plaintiffs, so vested in them on the 19th

day of November 1825, when Edward Thomson made an assignment of all his property for the benefit of his creditors, was not defeated or affected by the right of preference, which that act gave to the United States to be first paid what was due to them by the said Thomson, and that this equitable title was converted into a legal one, by the subsequent delivery to the plaintiffs of the bills of lading, indorsed in blank, of the Addison's homeward cargo, and of the assignment by Mackie and Arny, of those of the cargo of the Superior.

6. That the actual possession of the above return-cargoes, by the masters of the Addison and Superior, until they were levied upon under executions at the suit of the United States against Thompson, is not, *per se*, in law, a badge of fraud, which ought to invalidate or effect the title of the plaintiffs to those cargoes.

7. That as to the charge of fraud, which it is insisted by the counsel for the defendants taints this transaction *throughout, that is a subject exclusively for the consideration and determination of the jury, upon the evidence laid before them; in deciding upon which, they are to observe: 1st. That actual fraud must be proved, and ought not to be presumed: and 2d, That no fraud which may have been practised, or attempted, by Edward Thomson, his masters or agents, ought to effect the validity of these contracts; unless they should be satisfied, from the evidence, that the plaintiffs in some way or other participated in the same.

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8. That if the jury should be of opinion, upon the whole of the evidence, that the transactions between the plaintiffs and E. Thomson, which constitute the basis of this action, were fair, so far as the plaintiffs were concerned in them; and that they stand clear of the imputation of usury, on the ground that interest was reserved from a period antecedent to the loan; and if further they are satisfied, that the homeward-cargoes were the proceeds of the outward-cargoes on which the securities were given; then, their verdict ought to be for the plaintiff, otherwise, not. It was further stated by the judge, that he had declined giving a construction of the 62d section of the act imposing duties, or an opinion on the question, whether, under that section, the consignee of imported goods is liable for the duties on them; considering it to be unnecessary, from the view which he had taken of the case. And in explanation of the charge, the following questions were propounded by the counsel, and answered by the court.

1. The defendant's counsel requested the court to charge the jury, that if the agreement of the plaintiffs with Edward Thomson was made with a view to deprive the United States of their duties, it was fraudulent, and the plaintiffs could not recover. To which the judge answered, that if the agreement was made with that view, such would be the legal consequence; but that he had heard no evidence to warrant that conclusion in point of fact; but that was a subject exclusively for the jury.

2. The court was asked by the same counsel, to charge, that if the contract of Edward Thomson with the defendant, was to pay more then lawful interest, during a period when there was no marine risk, the contract was usurious and void. To which the judge answered, that if the contract was a cover to charge more than lawful interest, when there was no marine risk, it was usurious and void. That he did not himself understand the entries from the plaintiffs' book, which had been given in evidence, but that the

fact upon which the question is predicated, was proper for the decision of the jury.

3. The court was then asked by the plaintiffs' counsel to charge, that the parties were at liberty to agree for a marine interest, greater than the legal rate for the time that the money *was exposed to marine risks, or the loan was at hazard, by the marine risk of the goods, on which it was made. To which the judge answered, that they certainly were. To all which the defendant's counsel excepted, and the judges sealed a bill of exceptions. [*400

Ingersoll, for the plaintiff in error, stated, that after several years of actual but concealed insolvency, Thomson owned it, on the 19th of November 1825, by the public assignment of all his property. He then was the debtor of the United States $979,102.63 for duties on his importations in the 1823-4-5, which duties were due at the importations, though bonded with credits for future payments. Such is the doctrine of the case of the *United States* v. *Lyman*, 1 Mason 482. Thus, the contest arose between the United States, who loaned these credits, and the defendant in error, who also claimed reimbursement for loans; but the fund in dispute is the only resource of the United States, while the insurance company have the other obligors, besides Thomson, on the *respondentia* bond, to look to. The United States are privileged creditors; not, as is often reputed, by prerogative, but by a lawful priority, which belongs to every sovereignty or government. Their credits on importation are loans, for which the consideration and equivalent are priority of payment, before any other creditors; and the fund in dispute proceeds from loans thus privileged. It is as just and equitable, as it is established by law, that for such loans, the government should be paid before any other creditor, no matter what security he has for his debt. This principle is the privilege of every government, and as consonant with republican as with regal sovereignty; it belongs to all codes, in all ages and countries. Thus, in England, before the statute of Acton Burnell, the crown had execution against the person and the lands of its debtors, which was not allowed to any subject at that time. Plowd. 441; 3 Co. 11; 2 Bac. Abr. 686. Government is not bound by certificate of bankruptcy, by act of limitations, or to pay costs; principles common to the American as to the English law. The crown may assign a *chose in action*, and its assignee may sue in his own name. *Rex* v. *Trine*, Cro. Jac. 179. Such was the ancient Roman law. Wood's Inst. of the Civ. Law, book 3, ch. 1, p. 141. The state was preferred for all debts, and had a lien on the property of all receivers of public funds, with the right of execution from the treasury, without any suit; which are provisions similar to those of the acts of congress. The modern civil law is the same: *fiscus semper habet jus pignoris.* Poth. *de l'hypotheque*, ch. 1, art. 3, p. 116. All are bound to pay the state before private creditors. Grotius, *de Jure Belli ac Pacis*, lib. 2, c. 1, § 6. These principles are indispensable to good government. It is neither politic, nor *permitted for the judiciary, to enfeeble by construction, what the legislature has done to establish them. Neither property nor lien is asserted for the United States, but privileges to be first paid out of the insolvent debtor's effects, before any other debtor. [*401

To the privilege, however, the United States superadd the advantage,

which the law always allows to vigilance in the pursuit of debts. On the 11th of March 1826, they obtained judgment against Thomson; on the 13th of that month and year, issued their *fi. fa.*, and on the 15th, levied it on the ships and cargoes, whose proceeds are in question. Such legal and equitable positions are immovable by any mere debtor: the defendants in error must show that Thomson had no property in the goods levied upon as his, but that it was transferred beforehand to them. This burden of proof they undertake, and to dislodge the public priority and possession, by proving property out of Thomson, and in the insurance company. They claim to be, if not owners, at least, creditors with qualified property by specific lien; having loaned money on *respondentia* bonds, secured by assignments, indorsed on the outward bills of lading.

Use, disposition, risk, profit and loss, in short, all ownership, real and ostensible, remained in Thomson, throughout. The vessels were far at sea, when the loans were made, so that it was physically impossible to appropriate the parts effected to the several loans. All the homeward documents were addressed, under seal, to Thomson, and nothing but a secret mark on one set of the double papers, enabled the assignees to deliver the respective parcels, which were levied upon by the executions of the United States, when thus symbolically and conjecturally appropriated. The contract between the insurance company and Thomson is to be gathered from the bond, the annexed memorandum, and the assignment on the outward bill of lading, all considered together as one instrument. The bond does not contain a single word or indication of transfer of property or specific lien, but the contrary; and it is well settled, that a *respondentia* bond creates no lien, but only gives personal security. *Busk* v. *Fearon*, 4 East 319; *United States* v. *Delaware Insurance Company* (4 W. C. C. 418). The memorandum annexed to the bond, is a *caveat* against the idea of property, which the lenders repel. The assignment of the bill of lading is cautiously qualified and referential, relying upon the memorandum for the meaning of the parties. By all these instruments, taken either together or separately, there is no unqualified transfer of property; no possession changed, the account and risk are kept in the borrower; no consignment to the lenders who lend their money on the promise of the borrower to place a blank bill of lading in their hands, after the voyage ends, and that and then, expressly, as no more than collateral security for the loan.

*402] *The lenders trust the borrower's covenant, throughout—no more. Usually, in case of *respondentia* loans, there is an unqualified assignment at home, and an unqualified consignment from abroad, with separate letters of advice, orders, and and an entire documentary possession in the lenders: whereas, here, the lenders shun every indication of ownership or possession, which are left with Thomson, to enable him, by false appearances of property, to get credits for duties, which the insurance company thus evade liability for. The 62d section of the act of congress (1 U. S. Stat. 675), holds the consignee liable for the duties, notwithstanding any transfers. By clandestine transfers, the lenders have a secret lien on these effects, without notice and registry, contravening all appearances, and inevitably tempting to frauds. Can an equitable right spring from so polluted a source? Can the public priority be annulled by such an equity? By mortgage, the legal title is transferred and so registered; by pawn, the thing is deposited and thus

possession changed. But in this case, all but a secret hold remained with the borrower, as the very means with which to defraud the revenue. Would chancery compel performance of such a contract? Would trover lie, at common law, for the property? Could the insurance company have taken possession of it, at any time? Could not Thomson have ordered and sent it to Europe or Australia, instead of Philadelphia? His obligation was nothing but a mere executory promise to place a blank bill of lading in the lenders' hands, which promise they had no means of compelling him to keep. Indeed, the consideration for that promise was a mere contingency, inasmuch as no debt was due, till the voyage ended: and then, by the bond, the lenders stipulate to accept satisfactory security for payment; which security, according to Arny's testimony, was always a mere negotiable note from Thomson. Such was the course of dealing uniformly. No instance ever occurred of his placing the blank bill of lading in their hands. Contracting that the returns should be consigned by Thomson's foreign agent, to his order, was contracting that the property should remain in him. Such is the universal and familiar effect of such consignments, by which most of the large British shipments to this country are regulated. Abb. by Story 240; 1 H. Bl. 359; *The St. Joze Indiano*, 1 Wheat. 208; *The Venus*, 8 Cranch 253, 275; *The Merrimack*, Ibid. 328; *The Frances*, 9 Ibid. 183. To which it may be added, that by act of congress, every manifest must designate ownership, by fixing the consignee. Section 23d of the duty act (1 U. S. Stat. 644). All bills of lading must conform to the manifest, section 30th of the same act (Ibid 649); and the property, as fixed in the consignee, remains in him notwithstanding any transfer; section *62d of the same act (Ibid. 675). Indeed, it is a principle of universal law, that possession of chattels must [*403 accompany property. *Ryall* v. *Rolle*, 1 Wils. 260; *Edwards* v. *Harben*, 2 T. R. 587; *Hamilton* v. *Russell*, 1 Cranch 316. Secret liens and clandestine titles are destructive of that free mutation of property which is vital to commerce. It is not denied, that property at sea may be transferred by the documents. But the question here is, whether a secret title, which disowns property, until third persons are involved, may be construed into force, in order to frustrate fair claims. In *Cox* v. *Harden*, 4 East 241; *The Frances*, 8 Cranch 335, and *Potter* v. *Lansing*, 1 Johns. 215, it is said, that even the account and risk, are strongly indicative of the property. In the case of the *United States* v. *Delaware Insurance Company* (4 W. C. C. 418), it was adjudged, that a bill of lading does not transfer the property, but merely gives a right to demand it; and that a bill to order, or in blank, continues the property in the shipper, till a consignee takes lawful possession of it. The argument for the United States, far from any encroachment on the settled doctrines of commercial law, or the common law, labors, on the contrary, to uphold them against a perilous innovation by construction. Furthermore, was not the question of property for the jury to determine? The written instruments on which the court determined the question, are no more than evidental of the parties' intentions, which was a matter of fact. Such was the use made of similar written instruments in the analogous cases of *Hibbert* v. *Carter*, 1 T. R. 748; *Haille* v. *Smith*, 1 Bos. & Pul. 563; *Barrow* v. *Coles*, 3 Camp. 92; *Dyer* v. *Pearson*, 3 B. & Cr. 38; *Maryland Insurance Company* v. *Ruden*, 6 Cranch 338, and *Blagg* v. *Phœnix Insur-*

ance Company, 3 W. C. C. 5. In all these cases, the court left the property as a fact for the jury to ascertain.

But conceding, for argument's sake, that this is a case of equitable lien or special property, that does not supplant the public priority. The lien of a judgment certainly does not. *Thelusson* v. *Smith*, 2 Wheat. 396. What more, in this inquiry, is a special than a general lien? Either claim is but a debt secured by a pledge; and all debts are postponed to the public privilege. The instruments relied upon, all mention collateral security, which is only title to the property, not in it; not like a mortgage, which transfers the legal right, and leaves but an equity of redemption. There was no right to take possession, much less any possession given, by these documents. The general lien of a judgment gives the right of taking possession, by means of execution: but the right in question was no more than a right of action, which the creditor had as much without it. The three exceptions stated by the court to the *general rule laid down in *Thelusson* v. *Smith*, are all possessory, viz., sale with delivery, executions executed, and mortgage. All liens are possessory—enforceable without suit. Liens for freight, general balance of factors, auctioneers, attorneys, carriers, tradesmen, material-men, for purchase-money; all depend in having hold of the thing liable to the lien; but none of them give a property in it. Indeed, the legal understanding of lien and of property, are inconsistent with each other. Loss or gain do not affect the lien-holder, but the owner of the property; to whom also, any surplus belongs, after satisfying the lien debt. In *Blaine* v. *The Charles Carter*, 4 Cranch 328, the court says, that a bottomry-bond gives no interest in the ship, but a claim upon her, which may be enforced with the dispatch of admiralty process. In *Seaman* v. *Loring*, 1 Mason 139. Judge STORY considers it of the very essence of the lien on goods, that possession accompany it. In *Hailie* v. *Smith*, 1 Bos. & Pul. 563, Ch. J. EYRE says, the goods were set apart, to remain in deposit, from which moment the property was changed. *Hibbert* v. *Carter*, 1 T. R. 745, and *Lempriere* v. *Pasley*, 2 Ibid. 485, turned on the right of possession. But a *respondentia* bond gives no lien. *Busk* v. *Fearon*, 4 East 319. There is no lien for demurrage. *Binley* v. *Gladstone*, 3 M. & S. 205; *Philips* v. *Rodie*, 15 East 547; *Ex parte Heywood*, 2 Rose 355. In *Hammonds* v. *Barclay*, 2 East 235, lien is defined to be a right to detain for debt, property placed in the creditor's possession. In *Lickbarrow* v. *Mason*, 6 East 25, it is called a qualified right, to be exercised over another's property. In *Wilson* v. *Balfour*, 2 Camp. 579, it is defined a right to hold. In *Hallet* v. *Bausfield*, 18 Ves. 188, it is called the right of a party having possession to retain it. In *Heywood* v. *Waring*, 4 Camp. 291, a right to hold. In *Wilson* v. *Heathen*, 4 Taunt. 642, lien, or the right to hold, is contradistinguished from pledge, which is said to be matter of special contract. Lien is no more than a right of set-off, being the same in equity as in law. *Lempriere* v. *Pasley*, 2 T. R. 492. It is a claim with possession, either personal, as by bond, covenant or contract; or real, as by judgment, statute or recognisance. Termes de la Ley 427. It is a right *in rem*, but not *ad rem*: a claim, with hold, but without property, in the thing held.

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Justice and necessity originated liens. Policy and convenience have increased them. But of late, courts lean against them, and will not add to their number or extent. *Rushford* v. *Hadfield*, 7 East 229. No court in

England has acknowledged a new instance of lien for the last twenty years, 9 Ibid. 426. The civil law abounds with liens, therein termed privileges; that is, prior rights of payment; such as the lien of the state for its debts, the lien of mechanics and workmen, and of lenders of money. Wood's Inst. *220. The common law, the admiralty law, and the statute law, are [*405 familiar with various liens. The right of landlords to distrain, may be considered a lien. But these privileged claims, though all specific, and affecting the property (with notice) in all hands, wherever transmitted, were never held to give or change property. Its risk, diminution, enhancement and disposition, are all the debtor's, not the creditor's; at the debtor's death, it is his assets. If Thomson had died, when he became insolvent, his administrators would have taken the fund in dispute, and must have paid the proceeds to the United States. *Fisher* v. *Blight*, 2 Cranch 390.

The whole question turns on the possession; for without possession there can be no lien. *Jones* v. *Pearle*, 1 Str. 556. *Ex parte Shank*, 1 Atk. 234; *Kruger* v. *Wilcox*, Ambl. 252; 1 Doug. 97; *McCombie* v. *Davis*, 7 East 5. Now, possession once parted with, puts an end to lien. *Sweet* v. *Pym*, 1 Ibid. 4. Indeed, actual possession, without the assertion of legal right to it, is of no avail. *The General Smith*, 4 Wheat. 438. And slight circumstances will be laid hold of, to show that the creditor does not rely on lien. *Ramsay* v. *Allegre*, 12 Wheat. 611. No possession was ever taken or asserted by the Atlantic Insurance Company. They repudiated it, together with every sign of ownership, lest they should be called on for the duties. They were content to be creditors, with mere hypothecation, without deposit or pawn. 2 Bl. Com. 159. Whether even pawn gives property, is doubtful: but it is unquestionable, that hypothecation does not. The latter gives but right of action. Wood's Inst. 219, ch. 2, b. 3. Poth. *de Bienf.* vol. 2, p. 355; *Nantissement*, ch. 1, art. 1, § 2. True, ships at sea may be delivered by bill of sale *ex necessitate* (*Atkinson* v. *Maling*, 2 T. R. 462), and cargoes may change hands by the documents; but without delivery of some kind, the whole is fraudulent and void. *Ryall* v. *Rolle*, 1 Wils. 260, and 1 Atk. 167; *Brown* v. *Heathcothe*, Ibid. 168; *Falkener* v. *Case*, 1 Bro. C. C. 125. In this case, KENYON gave up the ships, because not delivered. See his argument in *Lempriere* v. *Pasley*, 2 T. R. 485, 496. By the civil law, a chattel cannot be hypothecated or mortgaged. And as between the state and a creditor by hypothecation, the public privilege prevails. Domat, lib. 3, tit. 1, § 2, p. 356–7. In the case of *The Frances*, 8 Cranch 418, it was settled, that liens for loans, advances, general balance, or anything but freight, yield to the pre-eminent law of prize; which is, as near as may be, the principle in question. It has also been adjudged, that the lien of a foreign attachment, by which the thing attached is taken into possession, is superseded by the public priority. *Harrison* v. *Sterry*, 5 Cranch 289; *Willing* v. *Bleeker*, 2 S. & R. 221. In *Thelusson* v. *Smith*, the court, though they *mentioned mortgage as an exception to the general rule, yet do so only *obiter;* nor has it ever been adjudged, that even a mortgage [*406 will dislodge the public priority. No lien is pretended for it. But an equitable title to these funds, much better founded in justice than that of the insurance company, whose asserted lien, without possession of property, is a mischievous taint secretly affecting the right to the fund, and most disastrous in its influence on the free and fair circulation. To sustain it, judicial

legislation must add to the catalogue and character of liens, and abrogate the act of congress providing for the public priority.

The first three divisions of the charge, affirm the bonds in question, whose validity is denied, either as *respondentia* bonds, or *bonâ fide* obligations. They were executed long after the ships and cargoes were at sea, not predicated of any maritime necessity, to make provisions for foreign voyages ; but were part of a general scheme of gambling and usurious speculation. In form, character and substance, they differ from all *respondentia* bonds heretofore known. 2 Marsh on Ins. 827 ; *Pennsylvania Insurance Company* v. *Duval*, 8 S. & R. 138. It is said, in the *Consolato del Mare*, that Demosthenes gives us the form of a *respondentia* bond, precisely as used ever since. Boucher's Transl. vol. 1, ch. 6. And the principles and regulations of the Roman *pecunia trajectitia*, are familiarized by abundant publications. From no source of legitimate information, can such a contract as the present derive support. All the English authorities, Molloy, Beawes, Weskett, Postlewaite and Park, like the Roman law, concur in considering *respondentia* loans, as to begin before the voyage begins, and to be warranted only by its necessities. Roccus is explicit to the same point. (Ingersoll's Transl. note 75, p. 136.) Pothier does notice the distinction. Emerigon and Valin may perhaps be quoted as contrary, and Marshall inclines to their opinion. 2 Marsh. on Ins. 747. Bynkershoek's well-known chapter on this subject, also leaves his opinion in doubt. Quæst. Jur. Priv. lib. 3, ch. 16. But the origin and reason of the contract, argue conclusively the necessity of confining it to loans before the voyage begins, and to make it begin. Otherwise, as in this instance, the loan never was at risk, nor at sea at all, nor were any purchases made abroad with the proceeds of it. Though the terms of the bond are *at* and from Philadelphia, yet the money was not loaned, till the vessels were half way to China : and it will be as lawful to borrow money on *respondentia*, after the vessel's return, as before her departure, if such devices are sanctioned. They are mere wagers, without interest. The vessels, cargoes, voyages and risks, together with the ocean, and the foreign destination, are mere dramatic suppositions. No risk was run, to justify marine *interest. By the original doctrine, the lender at
*407] marine interest accompanied the loan in the vessel and superintended its returns : and so he must now ; not, perhaps, in person, the improvements in modern navigation have rendered his actual presence unnecessary ; but by correspondence, documents, foreign agents, supercargoes, self-appropriated consignments, and all the securities which have attended every *respondentia* loan, till these innovations were attempted. Without such precaution, it is mere trust, without other than personal security. In France, every *respondentia* contract, must be registered within ten days, on pain of nullity. The whole ground of *respondentia* is encroached on the common law ; and courts of justice should look well to the land-marks, which none but legislators should change ; and they cautiously, if at all. Otherwise, all the gambling adventures of profligate speculation will be legalized, all the wholesome restraints on usury abated. There can be no marine interest without, first, absolute need ; secondly, a want of all other means of supply ; thirdly, it must clearly appear, that the loan was applied to the very voyage created by it ; and lastly, there must be a sea voyage in which that very loan is risked. It is all *strictissimi juris*. Now, there was no consideration

for this loan, till the voyage ended, till when, the lenders insured the borrowers against all sea-risks: and those risks were half run, before the loan was made. By the law of New York, which governs this contract, the slightest infusion of usury vitiates and annuls the whole contract. *Wilkie* v. *Roosevelt*, 3 Johns. Cas. 66; *N. Y. Firemen Ins. Co.* v. *Ely*, 2 Cow. 678; *Bank of Utica* v. *Wager*, Ibid. 712; *Same* v. *Smalley*, Ibid. 770. It will be said, that this was left as a question which the jury have settled. The reply is, that though that may be so, yet the court should have also left it to the jury, to determine whether the whole transaction was not a gambling and fraudulent speculation; of which the loan, bond, supposed sea-risk, and marine interest, were but parts of the contrivance and collusion.

Of the points of evidence ruled, the 1st and 2d concern the corporate existence of the company, which not having been proved as usual, was allowed to be inferred from the circumstance of the collector's having accepted their bond, with the approbation of the district-attorney. But those officers cannot give away the rights of the government; nor should their courtesy, at all events, be construed into such concession. The 4th, 5th, 6th and 7th points respect evidence of fraud, overruled, because it was not first brought home to the insurance company. The plaintiff in error strove to prove the whole scheme, the double papers, falsified manifests, altered letters—in short, all the fraudulent manœuvres; conceiving it competent to connect the company with these acts, either afterwards or inferentially, *of which the jury were to determine. Lastly, the attempt to prove what became of the money loaned, after proof that none of it went to Thomson's pocket, was also deemed proper, as part of the whole *rerum gestarum*, for the consideration of the jury. [*408

Binney, for the defendants in error.—The record presents questions of very different degrees of importance, some of them being without the least influence on the final decision of the cause, while others must decisively rule this controversy, as they will also rule other suits now depending, and an immense amount of property. The same time and attention are not to be given to these unequal questions; but some attention is due to the least, since the counsel for the United States have raised them for discussion. It is proper first to dispose of those which have no connection with the merits of this controversy—the exceptions to evidence admitted and rejected.

1. Overruling an exception by the defendants' counsel, to a question by the plaintiffs to their witness, Mr. Sands, as to his agency in their behalf. The question was merely introductory to the inquiry, whether he had not delivered the bond of 9th October 1826 to the district-attorney. But had his agency been a material fact, he was competent to prove it. There was nothing to show that this power was conferred by writing, nor was it necessary that it should have been so conferred. A corporation may create an agent by parol, and the agent may prove it. *Nicholson* v. *Mifflin*, 2 Yeates 38; *Bank of Columbia* v. *Patterson's Administrators*, 7 Cranch 308; *Bank of United States* v. *Dandridge*, 12 Wheat. 69.

2. The objection to evidence of the *respondentia* bond, because the corporate capacity was not proved, was contrary to the agreement on which the suit was brought. The United States were precluded from questioning the plaintiff's right to sue as a corporation. They compelled the plaintiffs so

to sue, and took their bond, under their corporate name and seal, to insure the suit. The cases of *Henriques* v. *Dutch W. I. Co.*, Ld. Raym. 1535, and *Dutchess Cotton Manufactory* v. *Davis*, 14 Johns. 238, are analogous. The arrangement was at least *primâ facie* evidence of charter, upon this trial, between these parties. The objection, under any circumstances, would have been without weight; for it was a mere question of the order of proof, which the court was competent to regulate at its pleasure. The bond might as well be proved before the charter, as the charter before the bond.

3. That the bond was well proved, as the several bond of Thomson, admits of no doubt, unless it is meant to question the proof, because the witness swore to the signing, and not to the sealing. But as the bond pur-
*409] ported to be sealed and delivered, *proof of signing was sufficient to go to the jury. *Talbot* v. *Hodson*, 7 Taunt. 251; *Curtis* v. *Hall*, 1 South. 148; *Long* v. *Ramsay*, 1 Serg. & Rawle 72; Phil. on Ev. 413.

4. Overruling the question in regard to the application of the money loaned upon the Addison, was in conformity with settled law. The question of application by the borrower, did not concern the lender, by the principles of either the common or the maritime law. By the common law, the borrower was competent to dispose of it, at his pleasure. The application of a loan does not affect either the debt, or the security given for it. The maritime law, as to this species of loan, is the same. The doctrine of application arises only where the master hypothecates, not where the owner bottomries, or borrows on *respondentia*. Even in the former case, though a necessity for the advance must be shown, the application does not concern the lender, unless there be a misapplication, by collusion with him, or with his privity. 2 Emerig. 440, 502, 562; 1 Valin 454; 2 Ibid. 9, art. 7; Pothier 257; *Canizares* v. *The Santissima Trinidad*, Hopk. Adm. Dec. 35; *The Jane*, 1 Dods. 465.

The remaining exceptions to the rejection of evidence, may be dismissed with the remark, that the offered testimony concerned the acts and declarations of persons, between whom and the plaintiffs there was no privity, and after the plaintiffs' title had accrued.

The more material exceptions concern the charge of the court, in which are to be found the principles of law, by which the title of the plaintiffs to the property in question is to be maintained. The cause turns upon the decision of the court, that a contract of insurance loan, made with the owner of merchandise, after it has departed on a voyage, and reserving a marine interest, is not invalid, for that cause, as a marine contract; neither is it so, if it be a renewal of a previous loan of the same nature; and that if there was neither gambling, usury nor fraud, but the transaction was fair, and there was a real risk, the papers in question created a trust in the specie outward, and in the proceeds homeward, for payment of the loan, which gave the plaintiffs a title superior to the priority asserted for the United States. Under the facts submitted to the jury, who by their verdict have negatived all actual fraud, gambling and usury, and have affirmed the reality of the risk, and the fairness of the entire transaction, it is contended, that these contracts were valid, and passed an effectual title to the property: 1. By the common law: 2. By the maritime law.

*410] I. By the common law. Without at present giving a name to these contracts, it may be safely asserted, that all their *elements are

sanctioned by well-settled principles. The contracts involve an advance of money, at a premium beyond the rate of the statute, dependent for its return, on the result of a real risk; a risk in which the borrower had an interest to the whole extent of the loan; an assignment of the goods at risk, to secure the payment of principal and interest, on the happening of a contingency; and a continuance of the actual possession of the goods assigned, with the agents of the borrowers, until the purposes of their employment were answered, and they returned within the reach of the lender. All these features of the contract, are of indisputable legality and efficacy.

The excess of the premium, beyond the rate of the statute, has the sanction of the law, as the return of the principal, and not that of the interest only, depended upon a real and not a colorable contingency. Notwithstanding the dispositions of the courts of Westminster Hall to enforce the statute of usury, it has been settled, with the most harmonious consent, that if the principal and interest of the loan be at hazard, upon a real contingency, it is not a case for the imputation of usury. *Martin* v. *Abdee*, 1 Show. 8; *Sharpley* v. *Hurrel*, Cro. Jac. 209; *Roberts* v. *Trenayne*, Ibid. 507; *Bedingfield* v. *Ashley*, Cro. Eliz. 741; *Sayer* v. *Glean*, 1 Lev. 54; *Appleton* v. *Brian*, 1 Keble 711; *Murray* v. *Harding*, W. Bl. 859; s. c. 3 Wils. 390. It is on this principle, that contracts of *post obit* and annuity are allowed. *Batty* v. *Lloyd*, 1 Vern. 141; 2 Eq. Cas. Abr. 275; *Chesterfield* v. *Jansen*, 1 Atk. 301. Such cases are not contracts of loan, but of insurance on hazard. They are placed by the civil law in the class of aleatory contracts. They may be gambling, but cannot be usurious. In this case, they were not gambling, because the borrower had an interest in the risk, to the whole extent of the loan. This relieves the court from the embarrassment that would attend a gambling insurance. In New York, where the contract was made, such a wager is lawful. *Clendining* v. *Church*, 3 Caines 141. They follow the English doctrine, prior to the 19 Geo. II., c. 37. *Crauford* v. *Hunter*, 8 T. R. 23. Massachusetts is the other way; *Amory* v. *Gilman*, 2 Mass. 1; and Pennsylvania agrees with her. *Pritchet* v. *Ins. Co. N. A.*, 3 Yeates 461.

The assignment of a security for the repayment of the advance and interest, on the happening of the contingency, has been seriously questioned, on the very ground of the contingency. There is no authority for this. Security may be given, as well for a contingent, as for a certain debt. It does not change the nature of the hazard, or of the loan. The assignment transfers the title to a chattel, as a collateral security for the performance of the borrower's duty, if the goods escape the hazard; *and this has the sanction of law in analogous cases. It is of the very nature of bot- [*411
tomry or hypothecation, to give a mortgage upon the vessel; yet it is upon the contingency of her safety, that the loan is made returnable. The same is true of *respondentia*, by the law of France. Analogous securities have been given in England, without question. *Bedingfield* v. *Ashley*, Cro. Eliz. 741; *Batty* v. *Lloyd*, 1 Vern. 141. The lender is not obliged to run the risk of the borrower's insolvency, as well as of the seas.

The property in the goods was transferred by the assignments on the bills of lading, without delivery of actual possession, which was neither according to the agreement, nor within the power of the parties, before the

arrival in Philadelphia. They are assignments in trust, on their face, according to their agreement, and are, therefore, honest assignments, as they tell the whole truth. The counsel for the United States think they should have been unqualified or absolute, and that they are vitiated by the account and risk continuing for Thomson. Had the assignment been absolute, on its face, there must have been a purchase, or a secret trust. The lenders did not mean to be the absolute owners, nor to conceal their interest. The account and risk were to continue in Thomson, for his was to be the profit and loss; and the property was to be in the company in trust, for securing the debt. This was precisely *Haille* v. *Smith*, 1 Bos. & Pul. 570. It is perfectly immaterial, whether the assignments passed an equitable or a legal title. The circuit court thought it an equitable title only; and it certainly was a title, that *an* indorsement of the bills of lading, by the supercargo, to a *bonâ fide* purchaser, would have defeated. This, however, is owing to the confidence which the law, for the sake of commerce, authorizes a purchaser to place in this document, and not because the assignment passes the equitable title. The weight of authority and principle are in favor of its passing a legal title to the specie outward, and to the returns. 2 Holt on Ship. 72; *Meyer* v. *Sharpe*, 5 Taunt. 80; *Giles* v. *Nathan*, Ibid. 558. Beyond doubt, no substantial property was left in Thomson, that any creditor could obtain by administration, assignment or execution, except the resulting or remaining interest, after satisfaction of the bond. Whether this was legal or equitable, it is neeedless further to inquire.

The non-delivery of possession was, under the circumstances, of no effect. It was not intended to be taken by the borrower, until the voyage was at an end. This appears by the memorandum of the agreement, and answers the objection. The possession of chattels, by the assignor or his agents, after an assignment which provides for such a possession, is *per se* no objection; the possession is according to the deed. If the deed *be absolute, and
*412] purport to transfer the possession, the impossibility of taking it, by its absence at sea, for any other cause, is answer to the presumption of fraud, that might otherwise arise. *Cole* v. *Davies*, 1 Ld. Raym. 724; *Meggot* v. *Mills*, Ibid. 286; *Brown* v. *Heathcott*, 1 Atk. 160; *Flyn* v. *Mathews*, 1 Atk. 185; *Atkinson* v. *Maling*, 2 T. R. 462; *Ex parte Batson*, 3 Bro. C. C. 362; Coote on Mortgages 263–4. In this case, there was both a provision for possession by the agents of Thomson, until the return of the adventure to the United States, and an impossibility of taking possession, had the agreement called for it. It is in all respects the same case as *Bucknall* v. *Roston*, Prec. Ch. 285, in which the title of a lender, on a similar assignment for security, was traced through successive voyages, sales and shipments, during several years, and enforced against the personal representative of the borrower.

It was not for the court to let the jury decide the question of property, as inferrible from the fact of possession. The fact of possession did not stand alone, but was governed by written instruments which legally made that fact of no importance. The jury were not prevented from deciding the question of fraud, as connected with the fact of possession, but they were deprived of the right of inferring it from mere want of possession, because it was a question of law, that under such circumstances of inability, agreement and contingent debt, possession by the assignor, was not *per se* a badge of fraud.

The property then being passed to us, and passed as openly as transfers of chattels at sea are ever made, it is submitted, that the priority acts do not affect us. The case is not placed by the circuit court on the ground of lien; it need not be so placed in this court. It is of no importance, whether a general, or even specific lien, will prevail against the priority of the United States. *Thelusson* v. *Smith*, 2 Wheat. 396, is a difficult case—the case of a master, with the possession of goods, and his lien for their freight; the possession and lien of a factor for his advances and commissions, would be more difficult, if it be true, that the priority of the United States is to defeat these securities. This, it is apprehended, will never be decided. The United States have no rights but as a creditor. They derive nothing from their execution and levy on these teas. If they were not ours, by the assignment on the bill of lading, they passed to Thomson's general assignees, by his assignment of the 19th November 1825. The United States can claim only as a creditor, against the assignees, who are trustees for all the creditors, and for the government first before all; but what the assignees cannot overthrow, be it specific, or be it general lien, is secure against the government. For the present cause, this discussion is, *however, unnecessary; for here is more than lien of the highest kind; a transfer and conveyance of property, by terms of grant of the most decisive import; a mortgage or deed of trust, upon the efficacy of which to exclude the priority of the United States, this court have already passed their judgment in *United States* v. *Hooe*, 3 Cranch 73. It is a security saved also by *Thelusson* v. *Smith*. There can be no difference between a mortgage of chattels and one of land. [*413

Thus stands the case on the principles of the common law. But the point mainly and almost exclusively pressed below, was, that although this might be so, according to the rules of the common law, yet that these were loans at marine interest, a technical contract, which the maritime or universal law did not permit under the circumstances of this case. On the contrary, it is submitted that—

II. These contracts are equally effectual by the maritime and universal law. The objections urged against them are two: 1. That both the loans were made upon goods already at risk, by the departure of the ships: 2. That the loan by the Superior was applied to pay a former loan, or was, in other words, a renewed loan.

1. The first objection is supposed to be derived from the Roman law, which, it is suggested, limited this contract under the name of *pecunia trajectitia*, to such loans as were themselves to be transported, or were applied to purchase goods for transportation. The language of the digest is, "*Trajectitia ea pecunia est quæ trans mare vehitur. Cæterum si eodem loci consumatur, non erit trajectitia. Sed videndum, an merces ex ea pecunia comparatæ, in ea causa habeantur; et interest, utrum etiam ipsæ periculo creditoris navigent, tunc enim trajectitir pecunia fit.*" Digest, lib. 22, tit. 2. The Roman law upon this subject is misapprehended. Whatever is said upon this subject in the code, the foundation of that law, is as a regulation of the rate of interest, without any definition of the contract, or any limitation of it. Any contract, attended by the risk of transportation by sea, was within its principle. That which the Digest contains in regard to it, is not a limitation, but an illustration of the contract; and both in the Digest

and Novels, the illustrations given, show that the asserted limitation was unknown to the Roman law, and that any loan dependent for repayment upon the safety of goods at risk, was within the rule of *pecunia trajectitia.*

The Code, under the title *de Usuris*, does not define the contract, but limits the parties in *trajectitiis contracibus*, to twelve per cent. as the maximum interest. Under the title *de nautico fœnore*, it does not describe what shall not be a *contractus trajectitius*, but it defines the events in which maritime interest shall cease, *or shall not accrue, and in what event the creditor shall lose his money, or shall receive it though the goods be lost. The subject is left here by the Code. The description of the contract is first given in the Digest, from the works of the civil lawyers. The passage above cited is taken from Modestinus, who was of opinion, that the principle of the Code in regard to *pecunia trajectitia*, was applicable to a case in which the merchandise bought with the loan, was transported by sea at the risk of the lender. But the distinction, in the view of the Digest, was not between goods bought, and goods not bought, with the loan, but between a loan on goods transported at the risk of the lender, and a loan without any risk whatever: for this is the only sensible distinction in a title of the law which had reference to the rate of interest. It is accordingly made plain by the opinion of Scævola, Digest, lib. 22, tit. 2, § 5: *Periculi pretium est, et si conditione quamvis pœnali non existente recepturus sis quod dederis, et insuper aliquid præter pecuniam, si modo in aleæ speciem non cadat: veluti ea, ex quibus conditiones nasci solent, ut si manumittas, si non illud facias, si non convaluero, et cætera. Nec dubitabis, si, piscatori erogaturo in apparatum, plurimum pecuniæ dederim, ut si cepisset, redderet; et athletæ, unde se exhiberet, exerceretque, ut si vicisset, redderet.* If a contract by an athlete to return a loan with its interest, upon his gaining the prize, was within the rule of a *contractus trajectitius*, as is here asserted, it is obvious, that this rule comprehended a loan on goods already exposed to the risk of the sea. The same is equally obvious from the language of Paulus, Dig. lib. 22, tit. 2, § 6: *Fœnerator, pecuniam usuris maritimis mutuam dando, quasdam merces in nave pignori accepit; ex quibus, si non potuisset totum debitum exsolvi, aliarum mercium aliis navibus impositarum, propriisque fœneratoribus obligatorum, si quid superfuisset, pignori accepit.* The question he asks, and answers in the negative, is, whether the goods being lost, on which the creditor loaned specifically, and being of value equal to the loan, he could resort to the surplus of the other loans, for repayment; and nothing can show more decisively the practice of loaning on goods generally, after the modern practice, than such a question. The custom of merchants, in the time of Justinian, without doubt, embraced *respondentia* loans for successive voyages, where the goods were repeatedly changed. Novel 106. In this Constitution of the Emperor, the practice is detailed at length, and confirmed. Such a practice shows that the transportation of the specific loan, or of the specific goods bought with it, was no necessary part of the Roman law of *respondentia.* The just inference is, that it is only the element of the contract that is stated in the Digest, and not its limitation, *namely, that the goods, on the security of which, or for which, the loan is made, shall be at the risk of the lender; but not that they should be the specific loan, or its investment.

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The practice of modern nations is free from all obscurity on this head.

They sanction, with great harmony, *respondentia* loans, made after the goods are at risk. Upon this point the two distinguished commentators, Valin and Emerigon, agree. The difference between them is upon an independent point, whether a loan made after the departure of the goods, is attended by a right to participate with prior loans, as if all the lenders were co-mortgagees—a question of no application in this cause. 2 Emerig. 382, 385, 386, 484 ; 1 Valin 366 ; 2 Marsh. 747 *a ;* 2 Emerig. 401.

2. That a renewed loan, like that by the Superior, is free from objection, is clear from many authorities precisely to the point. 2 Emerig. 573 ; Pothier 259 ; 2 Valin 11, 12 ; Le Guidon 87, ch. 19 ; Ordenanzas de Bilboa, cap. 23 ; Code de Commerce, Art. 323. A shorter answer to both these objections, is, that the law of *respondentia* loans is not a universal law. The contract is not one of universal nature and form, but depending upon the pleasure of the parties, and varying in different countries, according to the prevalent sense of expediency, and the principles of the code of particular law there in force. *Rush* v. *Fearon*, 4 East 319 ; *Appleton* v. *Crowninshield*, 8 Mass. 348. No statute in this country restrains it ; it is a beneficial contract ; and all its provisions being sanctioned by the common law, that law alone is the standard of the contract in this court. Mr. Binney concluded his argument, by applying the principles contended for to the specific points of the court's charge.

Webster, also for the defendants.—The question in this case is important, but perhaps not difficult. The transaction out of which it arises, is one of a commercial character. The United States are large creditors of Edward Thomson, and they have no other hope of attaining payment but from success in this case. But the character of the case is not altered by this circumstance ; as the defendants are not answerable for the frauds of the debtor to the United States, nor for the neglect of the officers of the customs. They had no connection with the custom-house, in the course of the transaction now before the court. Nor is there anything in the argument, that the defendants have other security for the debt due to them, by a resort to the co-obligors on the *respondentia* bond ; all those persons are insolvent ; and if they were not, the defendants assert, as they of right may do, their claim to their own property.

*The United States are said to be privileged creditors. They are so, as far as the law goes, but no further. In this case, they have [*416 no privileges, and they stand in relation to the property in controversy, like any other execution-creditors of their debtor. Thomson assigned in November 1825. Alll he had passed to his assignees, and the priority of the United States exists only to payment out of the fund which passed to the assignees. The law of the United States gives an action against the assignees, but it does not prevent the property from passing under the assignment.

What is the priority which the statute gives to the United States? It is not a prerogative, superseding the titles of others to property. It does not extend the rights of creditors on property. It is, what it purports to be, a priority among creditors, a right of first payment out of the common fund. The United States are creditors, and at the head of the list ; they are *prima inter pares ;* and no more. Two propositions may be obtained :

I. The priority does not affect the transfer of property at all. It never attaches on lands or goods, as lands or goods of this debtor. It arises only: 1st. In bankruptcy; 2d. In cases of conveyances to assignees; 3d. Against executors and administrators; and in all those three cases, it attaches on the fund, and not on the specific property. It does not operate to prevent the passing of the property either to assignees in bankruptcy; or to assignees under a conveyance; or to executors and administrators. It amounts only to a right to previous payment out of the fund then in the hands of others.

The language of the statute (§ 65) fully establishes those positions—assignees in bankruptcy, assignees in insolvency, and executors and administrators, are all ranked together. What is law for the one, is law for all. The words are "the United States shall be first satisfied," obviously, out of the estate. The provision, making the persons holding the estate personally liable, is then introduced, to operate in the event of their not satisfying the debt of the United States, out of the estate of the debtor.

Now, will it be contended, that in regular bankruptcy, the United States could levy on property which had passed to the assignees, or that this could be done on the estates of insolvents, or of deceased persons in the hands of trustees or executors? The correlative words of the statute, in which priority is given to the surety who pays the debt due to the United States are, that he is to be paid "out of the estate and effects of such *insol-
*417] vent or deceased person." These words confirm the construction assumed for the defendants. The 63d section of the bankrupt act of 1799, ch. 4, also confirms this construction. It makes no new provision; but declares the payment shall be made out of the fund, and refers to the previously-existing act. It is plain, upon the fair construction of the statute, that it is priority on the fund. It says, the right shall exist, when the debtor has assigned his property. This is a different thing from saying, that his property has vested in the United States, and shall not be deemed to have passed by the assignment. It may also be well observed, that connecting the priority of the United States, with executors or administrators, who can only be responsible for the property which may come into their hands; and giving a personal action against assignees, in case of default in paying over the funds in their hands, are conclusive evidence to show that the understanding of law is, that all the property of the debtor passes by the assignment.

There is no decided case in opposition to these principles, unless that of *Thelusson* v. *Smith* may be so construed. Few cases have been presented to the consideration of courts of the United States, upon this subject. They are—

1. *Fisher* v. *Blight*, 2 Cranch 358, which decides two points. 1st. That the priority extends to debtors, generally, under the act of March 3d, 1797: 2d. That it is not in the nature of a lien on the property.

2. The *United States* v. *Hooe*, 3 Cranch 73, which decides, 1st. That priority is not a lien, a principle always to be recollected: 2d. That to create a case, where, in case of insolvency, the priority will attach, there must be an assignment of all the property of the debtor.

3. *Prince* v. *Bartlett*, 8 Cranch 431, which decides that the insolvency is not a mere inability to pay, but must be some notorious act.

4. The *United States* v. *Bryan & Woodcock*, 9 Cranch 377, which only says, the priority given by the act of 1797, does not apply to debts due before the passing of the law.

The case of *Thelusson* v. *Smith*, 2 Wheat. 396, does not apply to the present case. The sale which was made by the marshal of the United States, under the judgment against Mr. Cramond, was not objected to by the assignees. The point was not made, and the assignees suffered the estate to be turned into money, and let the parties contend afterwards for their respective rights. It is obvious, that if the assignees had objected to the sale of the estate of Mr. Cramond, by the marshal, the sale could not have been made. Suppose, the assignees had sold the land? They had the *power to sell it, and it might have been their duty to sell it. [*418 They might have been compelled to execute their trust; and they had, therefore, a right to the fund. The execution, therefore, could only, in that case, have been levied on the land with the assignees' consent.

II. The second proposition is, that notwithstanding the decision of the court in *Thelusson* v. *Smith*, it may be argued, that the provisions of the law, which gives the priority, were not intended to extend the general rights of creditors. It will scarcely be claimed, that the United States can dislodge all liens. The case of freight, the advances of a factor, insurance brokers' accounts, cannot be supposed to be affected by the law.

The argument on the other side, is, that the assignees cannot, under the injunctions of the law, pay any debt, until the United States are fully paid. This evidently is, that they are to pay out of the estate, in their hands. Now, what is the estate of the debtor in the hands of the assignees? Not the land unembarrassed; but the land subject to the liens upon it. Again, assignees do not pay prior judgments in favor of creditors. The judgment-creditor proceeds against the land, not against the assignees; and he obtains payment, not from the assignees, but from the fund raised by a sale of the land, under the execution. How is any other construction of the law practicable? The assignees take the property, subject to the lien. Does it pass free of the lien, or not, just as it may appear the United States are or are not creditors? They may not be named in the assignment at all. Again, if the United States are creditors, does the property pass free of all liens; and after paying the United States, go to the other creditors? It is true, the case of *Thelusson* v. *Smith* is sufficient for the defendants. It expressly saves the case of a mortgage.

Do the documents, or either of them, exhibited by the defendants, vest any interest in the outward cargoes of the vessels named in them, in the defendants? It is contended, that they vest a clear legal interest in the outward cargo, mentioned in the bill of lading. It should not be called the creation of a lien, but the transfer of a legal interest in the cargo. The bond creates no *lien*, it contains no words of positive conveyance. The assignment does; and by it the owner transfers the property. This might have been done by other writings. Property at sea may be legally sold, without indorsement of the bill of lading. Strictly speaking, the evidence in this case does not show an assignment of a bill of lading, such an assignment being properly by the consignee; but it shows a transfer of the goods, written on the bill of lading by the shipper, *and the admitted owner. It passes the property; nor could the consignee, by an assignment of [*419

the bill of lading, give the property to any other, because the bill carries notice of another ownership. *Barrow* v. *Coles*, 3 Camp. 92.

A bill of lading is no more effectual to pass property than any other instrument, except that it is negotiable. A buyer under it, for value, without notice, may hold against all other or intermediate rights. 2 Holt 72. Property in goods, shipped under a bill of lading, may be transferred by delivery, to a third person, without indorsement of the bill of lading; and such transfer will be good, against all the world, except the indorser of a bill of lading, for a valuable consideration. 5 Taunt. 558; Ibid. 79; 1 Marsh. 233; 4 East 211. And the property in goods, shipped under a bill of lading, may be vested in another, without either delivery or indorsement of the bill of lading; as, by an agreement between the owners of the goods and third persons, either in the character of creditors or purchasers, accompanied by acts vesting the property in the goods in such persons. 3 East 585; 4 Camp. 31; 4 East 211; 3 Chit. 40; Ibid. 350–1. This last case is thus: "Vendor did not send the bill of sale, but agreed to deliver goods; vendee accepted bills for the purchase, and before the arrival, sold the goods, and became bankrupt: *held*, that the purchaser could hold against the vendee."

Here, then, was a transfer of the interest of Thomson in the specie, and, strictly speaking, it was not a qualified, but a positive, direct and absolute transfer, as is shown by the words employed for the purpose. Its only limitation was the specification of the object for which it was made. It is a collateral security, and is just what it should be; for if it had appeared to be an absolute sale, when only security was intended, it would have worn a badge of fraud. The conveyance is made to carry a lawful agreement into effect, and the words of the assignment are full and clear, and are restrained only by the designation of the purpose.

It is hinted, that it is not to be taken as conceded, that a mortgage of of personal chattels can stand against the United States priority. The general principle is, that a mortgage of goods is like a mortgage of lands. Where there is good faith, and the thing is actually delivered, this position cannot be questioned. The 13 Eliz., ch. 5, applies both to goods and lands, and saves both, if "made upon good consideration, and *bonâ fide*." It may obstruct creditors, or delay them, and yet be good. *Meux* v. *Howell*, 4 East 1; 5 Johns. 258. It is a strong proposition, that the priority of the United States
*420] is to override mortgages of personal chattels. It may be *said to be an *ultra* principle. Goods are mortgaged, and ships are mortgaged, every day. The rule, if it exist at all, must be made general. It cannot apply only to those mortgages where possession follows, for some mortgages do not allow possession, and are good without it. Such a doctrine is alarming.

Was there a good consideration for the assignment of the specie made by Thomson to the defendants? Thomson was a borrower of the defendants' money. He had given a bond for it. Events might discharge him, but until they did, he was their debtor, and at the proper time, he must pay. This was sufficient. *United States* v. *Hooe*, 3 Cranch 73. A similiar transfer of any other goods would have been equally available to secure the bond.

There being a legal conveyance by the owners of the property to the defendants, it must be assailable on other grounds. The first objection is, that the instrument was not a *respondentia* bond, because the goods were

already on board, and the ship had sailed two months before the loan. 1. To this it is answered, that there is no law requiring the very goods and money to be put on board. The mode of transacting business of this kind has changed ; and when the money or goods may be on board, is now of no consequence. In the very form of a *respondentia* bond (2 Holt 433), the consideration is the acceptance of a bill of exchange at four months. 2. No matter whether this be a *respondentia* bond or not ; there was a transfer of all the goods, for a sufficient consideration. 3. The contract, it is said, was illegal, and therefore, everything done to carry it into effect was void. It was illegal, because it was usurious ; and usurious, because the vessel had sailed before the loan, and part of the risk and time was, therefore, gone. The vessel, it is true, had sailed, but no information had been received from her, since her sailing ; and the defendants, therefore, bore all the risk from the wharf. There is no limit, by law, to marine interest. If this was intended to be a *bonâ fide* marine risk, it is not usurious, whether the premium be high or low.

The next objection is, that the possession and appearance of property remained in Thomson. The answer to this is, that the possession of the property was in the master of the vessel. Property in the defendants was shown by the papers. But, if this had not been the fact, the consequence claimed by the United States would not follow. As between the defendants and Thomson, the property had passed to the defendants, and no change was made by the re-shipment ; John R. Thomson, at Canton, being only an agent ; the rights of the defendant could not be divested by any *act of the consignees, as he received the property for the use of the assignees of Edward Thomson ; and when the shipment was made in [*421 Canton, by the agent, the rights of the defendants were perfect against Thomson, against creditors, and all others, but a *bonâ fide* purchaser. The result of this reasoning is : the transfer and assignment of goods at sea, by a proper written instrument, for an adequate consideration, and in execution of a valid contract, gave the defendants a legal interest in the goods ; and as this transfer was on the bill of lading, so that no title by indorsement of the bill could be attained against the defendants, their title was indefeasible.

The title of the defendants was a legal title, the equitable interest remaining in Thomson. He was entitled to a proper application of the proceeds, to an account, and to profits, because the shipment was for his account and risk. When the vessel returned to the United States, the legal title was in the defendants, before as well as after the delivery of the bills of lading. Their title was not derived from the bills of lading, but from an earlier source, and the delivery of the bill of lading had no other effect but to identify the property, and to prevent any other title being acquired by purchase, under those bills. No one claims the property under the bill of lading, as purchaser. On the 19th of November, the bill of lading had not changed the property, and it still was in the defendants. It had not, and could not, have got back to Thomson, and therefore, could not pass to his assignees.

The defendants had a right to claim this property against the assignees. The United States could not, as has been shown, levy upon it ; and if the United States could, for their priority, disregard the assignment, they are

only prior creditors, and as such had no right to the property. As, if there had not been a general assignment, the general creditors could not levy upon this property; so, disregarding the assignment, if the United States claim so to do, they as creditors could not levy on it. It is contended, that goods may be mortgaged, and if the transaction is *bonâ fide*, possession need not follow, if the bargain be otherwise. Coke 264, 4th class of his cases; Prec. Ch. 285; 1 Pick. 389; 2 Ibid. 607; 5 Johns. 258; 3 Caines 166; 2 T. R. 389; 10 Ves. 139; 4 Binn. 258; *Barrow* v. *Paxton*, 5 Johns. 258; 9 Ibid. 446; *Craig* v. *Ward*, Ibid. 197; 15 Mass. 244.

Wirt, for the plaintiff, in conclusion.—On the 19th November 1825, Edward Thomson made a general assignment of all his property for the benefit of his creditors. It is, therefore, one of the cases of established insolvency, on which the priority of the United States arises. *The *422] debt to the United States was due for duties on foreign goods imported. The case then depends on the operation of the act of 2d March 1799 (1 U. S. Stat. 676), which provides, that in all cases of such insolvency, the debt due to the United States shall be first paid before any other debt.

Was there a debt due on that day to the Atlantic Insurance Company? Is it of this debt, they claim satisfaction? The statute answers, that the debt of the United States is first to be paid. By this statute, it is manifest, that the United States are preferred to all other creditors. Were the Atlantic Insurance Company creditors? If so, they are postponed to the United States.

Is a creditor by mortgage a postponed creditor within this statute? This question has never been solemnly decided by this court—either as to a real or personal mortgage. In *Fisher* v. *Blight*, 2 Cranch 358, the question did not arise. The question there was, whether the preference given to the United States extended to all persons, or was confined to a particular class of debtors, public officers and agents of the United States. In the *United States* v. *Hooe and others*, 3 Cranch 73, the question did not arise; the only point, then decided, being that a mortgage of part of a man's effects, did not establish an insolvency, within the statutes, on which the preference of the United States arose. In *Harrison* v. *Sterry*, 5 Cranch 289, the case went off on the ground that the prior assignment was a fraud upon the bankrupt laws, and did not affect the priority of the United States. In *Thelusson* v. *Smith*, 2 Wheat. 396, the question of a prior lien by mortgage did not arise. But the question of a prior lien by judgment did arise, and then the court, after quoting the words of the act of congress, say—"these expressions are as general as any that could be used, and exclude all debts due to individuals, whatever may be their dignity. The assignees are made personally responsible to the United States, if, in case of insolvency, they pay any debt previous to those due to the United States. The law makes no exception in favor of prior judgment-creditors; and no reason has been, or, we think, can be shown, to warrant this court in making one." The *United States* v. *Howland & Allen*, 4 Wheat. 108, only re-asserts the principles of former cases; and this is the last case upon the subject of these statutes.

*423] It is true, that in the argument of the former cases, it has been occasionally said at the bar, *arguendo*, that a mortgage *wou'd

defeat the priority of the United States. And in some of the cases, the court, *arguendo*, has incidentally admitted the position. These were but *dicta*. But it has never been solemnly decided by this court; and they have never been required to look solemnly at the question, with a view to its decision, by hearing an adverse argument against the proposition. They have said, that this priority is not in the nature of a lien; so as to avoid prior alienations of property by the debtor. And this admitted, he may sell it, he may part with his title to the property; and the alienation will be good.

But this is not the question. The question is whether the creation of a lien in favor of a creditor, does not leave that creditor still a creditor—the debt still a debt. And whether, if he retains this character of a creditor, down to the time of the insolvency, differing from other creditors in no other way than by having a lien for his debt; that creditor, with his lien, and that debt, be not postponed to the United States, by force of the act of 1799. It is not meant to admit, that the case before the court is the case of a mortgage. But taking it, in the first instance, in this, the strongest attitude which it is capable of assuming; the court is asked, whether under this statute, a mortgage creditor finds any protection in its terms or meaning against the priority given to the United States?

In *Thelusson* v. *Smith*, this court said, "the law makes no exception in favor of prior judgment-creditors." Does the law make any exception in favor of prior mortgage creditors? The answer must be the same, in both cases. It makes no exception in favor of any creditors. Whoever, therefore, stands in relation of a creditor to the insolvent, whoever is claiming a debt against him, is expressly postponed to the United States. The existence of a prior lien in his favor, will not protect him from this conseqnence. There was a prior lien in *Thelusson* v. *Smith*; the court decided the case upon the concession, that the judgment was a lien upon all the lands of the defendant. And when a lien is all that the creditor claims, it cannot vary the determination, that the lien is on a part of the estate instead of being on the whole. A lien upon the whole, considered merely as a lien, is precisely of the same nature with a lien upon a part. The terms general and specific lien, cheat the mind with an imaginary distinction, which has no real existence, either in law or reason. For considered in the light of a *lien* merely, the one means nothing more than a lien upon the whole; the other a lien upon a part. And it is not conceivable, that a lien upon part, can strengthen a lien upon the whole.

Now, what is a mortgage, but a lien on an estate for the security of a debt? In a court of law, it is, from its form, considered as an absolute conveyance of the estate; and the mortgagee can recover it in ejectment. But in equity, even after the day of payment has past, it is still considered as a mere security for a debt. And the Act of 1799 looks through the form, to the substance of the thing. Is the mortgagee still a creditor? The terms of the act postpone him to the United States. Is the debt for which the mortgage is given, still a debt? It is postponed to the debts of the United States. Is the mortgage, in its essence and object, anything more than a security for a debt? Is it anything more than a lien on a particular subject for a debt?

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It is objected, that the priority given to the act of 1799, is only a

priority to be paid out of the estate of the debtor: and the subject having been previously mortgaged, constitutes no part of his estate; but has become a part of the estate of the mortgagee. The answer to this is, that this is the very question in controversy. Lord HARDWICKE says expressly, "the person entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets." And again, "by a devise of all lands, tenements or hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed;" and again, "the interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore, must remain in the mortgagor." *Carbone* v. *Scarfe*, 1 Atk. 605–6. Is it not perfectly familiar to us all, that in a case of equity, a mortgage is considered as a mere security for a debt? Blackstone puts it, in this view of the case, on the same footing with a bond: a mortgage, says he, "is also landed security, as a bond is a personal security, for the money lent." 3 Bl. Com. 435.

Now, suppose a question between the United States and a prior mortgagee, to arise before a court of equity of the United States. The United States claim priority of payment out of the estate of the insolvent mortgagor, insisting that the mortgaged subject is a part of his estate. The mortgagee, on the other hand, alleges that the estate is not in the mortgagor, but in him. That the mortgagee is the owner of the property. Would not the court answer him in the language of Lord HARDWICKE, "you are not the owner; the mortgagor is the owner; the interest is in him; and the instrument you hold is not a conveyence of the estate, but a mere security upon it. It is a lien in your favor; but it leaves the ownership in the mortgagor; it leaves you still a mere creditor for a debt; holding, indeed, a lien on the estate—a lien intended to give you a preference—but that intention is defeated by a statute, which creates a preference in favor of the *425] *United States, which rides over all other liens; and considering you merely in the light of a creditor claiming a debt, must be postponed to the United States." If this would be the language of a court of equity, in such a case, in expounding and applying the statute, will the question be varied, because the construction of that statute arises before a court of law? Will the statute have a different application in one court from that which it would have in the other? In a question arising on the same statute, would a creditor be postponed in a court of equity, who would be preferred in a court of law? Would it be of any substantial use to the mortgage creditor, to prefer him in a court of law, if he must be postponed when carried before a court of equity?

The United States being remediless before a court of law, could they then, on that ground, go into a court of equity, and there strip the mortgagee of the momentary advantage which he had gained in the court of law? It is most manifest, that if the protection claimed for the mortgagee against the priority of the United States, proceeds only on the postulate that he is the owner of the mortgage subject, that postulate could not avail him before a court of equity; where it is expressly held, that he is not the owner, but that the mortgagor is the owner; the mortgagee being still a mere creditor, holding nothing more than a security on the subject for the debt; and if he be a creditor, holding merely a security, and not the owner of the property, it has never been disputed that the United States are to be preferred.

There is no hardship in the case, which does not apply with equal force to any other private creditor. Every man, like the mortgagee, trusts another on the credit of his property and means, and consequent ability to meet his engagements. It is hard upon them all, to be postponed to the government; and as hard upon the vigilant judgment-creditor as upon the mortgagee. Nor is it perceived how postponing the mortgage creditor, would tend any more to shake the confidence of man in man, and to embarrass the commercial operations of the country, than the postponement of all the other creditors. All men deal now upon an understanding, that the payment of the debts depends on the solvency of the debtor; and that in a case of established insolvency, the government has the preference. Mortgages and all other liens and preferences, would still hold between private creditors. It is only to the government, that these and all other creditors would give way. It is submitted, therefore, to the court, that if this were the case of a mortgage, the mortgagee would still be a creditor merely, and as such expressly postponed by the statute. We are dealing here with an equitable title; so the charge considers *it, and we are construing the statute with reference to such a title. [*426

But if, before a court of law, a mortgage, from its peculiar form and structure, would be considered as conveying the ownership of the property, because such a court could not look from the terms of the conveyance, to the private understanding of the parties, and that it should be a mere security for a debt, the difficulty does not exist here. Because here, upon the face of the agreement, and in its express terms, the court sees that nothing more was in the contemplation of the parties, than to create a security for a debt. At every step, it is proclaimed, that the intention of the parties looked no further than to the mere creation of a security—"a collateral security for the loan—a continuation of the collateral security for such loan." This is the express language, both of the *memoranda* on the bond, and the assignment of the bill of lading. It is not, as in the case of a mortgage, a consideration paid in the purchase of the goods; but a sum loaned, and security taken for the repayment of the loan. With this avowed, clear, continued, uniform declaration of the intention of both parties, can the court impute to them a different intention? And if their intention went no further than to create a security for a debt, does not the creation of the security leave the owner of that debt still a mere creditor? Would not the repayment of the loan, either by Thomson or his assignee, be the mere payment of a debt to a private creditor? And is not the payment of any private debt forbidden by the statute, until the debts due to the United States shall first be satisfied?

But it is argued, that although the object is admitted to be, to create a security for a debt, that security was intended to be created, and was created, by conveying to the creditor the title to the property, who thereby became the owner of it. The answer is, he is a creditor then upon the security of a fund of which he is the owner. Is not this a legal solecism? If the fund be his, he is no longer a creditor with regard to that fund; unless a man can be a creditor to himself. It is also asked, is not this the case with a mortgage? No; the moment that the mortgage is viewed in the light of a security, the ownership is at an end. In a court of equity, where it is considered in this light, we have seen, that the ownership of the

mortgagee is denied. In a court of law, the mortgage, after the day of payment is passed, is not considered as a security, but as a couveyance of the title, and then the mortgagee is held to be the owner—but not a creditor on the security of the fund. But we are yet to see a case where, before the same tribunal, a party has been considered as being at once a creditor upon the security of a fund, and the owner of that fund. He may have a
*427] *special or qualified property, as that of a bailee, which will enable him to maintain trover against him, but still he is not the owner of the fund, as against the bailor. He may have a lien, accompanied with possession, which will authorize him to hold the possession, even against the owner; but still it is a lien which he has, and nothing more; and a lien will not prevail against the United States. So, with regard to a pawn or pledge; it is, in a court of law, on the same footing with a mortgage, in that court. Before the day of payment has past, the lender on a pawn, though he has the possession, is considered as a creditor on the security of the subject pledged. When the day of payment is past, he ceases to be a creditor, and becomes the owner. The notion then of a lien on a fund, which belongs to the holder of the lien, is a legal solecism. They cannot co-exist; the character of a creditor with his lien, ceases, at the same moment when his ownership begins.

It has been already admitted, on the authority of decided cases, that the priority of the United States constitutes no lien, but leaves the power of alienation free. Is the creation of a lien an alienation, either total or partial? If a lien be an alienation, to the amount of the debt, then, to the amount of that lien, the priority of the United States cannot reach. But if such be the effect of a lien, the same effect must be produced, whether that lien be created by the act of the party, or the act of law; being in both cases a lien, the legal effect must be the same. But in the case of *Thelusson* v. *Smith* it was conceded by this court, that the judgment was a lien on all the defendant's lands. If, therefore, the effect of a lien be, to divest the estate of the debtor to the amount of that lien—to alienate that estate, and make it *pro tanto* the estate of the creditor, that effect was produced here, and the priority of the United States so far defeated. Yet it was not produced here, nor was the priority of the United States defeated, or in the slighest degree affected, by that conceded lien. Why? Because the act of congress had made no exception in favor of creditors holding a lien, or of judgment-creditors, who were conceded to be creditors holding a lien.

But if a difference should be supposed to exist between a lien created by the act of the law, and a lien created by the act of the party, and that the latter necessarily alienates the property *pro tanto*, we have a decision of this court to the contrary—a decision which marks the distinction between the creation of a lien, and the alienation of the title by the act of the party. A bottomry-bond is a contract, in the nature of a mortgage, when money is raised for the repairs of a ship, and the master or owner pledges the keel or
*428] bottom of the ship, to secure the *repayment of the money. Here, all the books concede, that there is a clear lien created by the act of the party; but does that lien produce an alienation of the property? *Blaine* v. *The Charles Carter*, 4 Cranch 332, proves the reverse; it does not pass the title, and therefore, the holder of the lien in that case, lost it by *laches*. It is merely a lien, to be enforced in a court of admiralty.

The question then returns—what was the condition of the Atlantic Insurance Company, with regard to the property, on the 19th November 1825, when the insolvency occurred, and the priority of the United States arose? Were they the owners of this property, in part or in whole, or were they merely creditors, holding a security on this property, for the satisfaction of the debts; and this merely on a par with the holder of a lien by bottomry? This depends on the construction of the documents.

1. The first document on which they rest their claim, is the *respondentia* bond. The loan on which this *respondentia* bond was given, was confessedly made two months after the vessel and cargo had sailed for China. The interest charged is marine interest, at 10½ per cent. per annum. Was the contract valid, upon the law which governs that peculiar contract? It is needless to carry the investigation to the law of Rome, and of France, with which, it is agreed, we having nothing to do. It may be remarked, however, in passing, that under these laws, it was never pretended, that this species of loan divested the borrower of his title to the property. Nothing more was ever thought of, than that he stood upon the footing of a privileged creditor; and the question was always one of mere precedence in the order of payment, which, however material among private creditors, could have been no question of lien, where the precedence of the government takes place over all others. Passing from the law of Rome and France, to our own law, none is known, which we have upon this subject, except the law of England; and with regard to that law, while the elementary writers, by their definitions and their commentaries, treat it as essential, that the loan should precede the departure of the vessel, or, at least, have been applied to the voyage, there is not a single adjudged case, which recognises a loan in such mode, for any other purpose than the purpose of the voyage.

The question is not, whether marine interest is against the statute of usury, when the principal as well as the interest is put at risk. It is conceded that it is not, *i. e.*, that such interest would not be a violation of the statute of usury. The single question on this point, made in the circuit court, was, whether, according to the law of this peculiar contract, it was not essential, that the money should have been lent for the purposes of the voyage, and under circumstances in which it *might have been applied [*429
to those purposes. Not that the lender was bound to see to the application; but that he was bound to look to the case, so far as to ascertain that the loan was made under circumstances in which it might have been so applied.

The only difference between bottomry and *respondentia* is, that the first gives a lien on the ship—the latter gives a lien on the goods. In all other respects, bottomry and *respondentia* are declared to be identical, so that a definition of the one is a definition of the other. Park. 410 (Eng. ed.) Now, what is the definition of bottomry?

2 Bl. Com. 457–8.—"Bottomry (which originally arose from permitting the master of a ship in a foreign country to hypothecate the ship, in order to raise money to refit) is in the nature of a mortgage of a ship, where the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship, part for the whole, as a security for the repayment." Park 410.—"The contract of bottomry is in the nature of a mortgage, in which the owner borrows money to enable him to fit out the

ship, or to purchase a cargo for a voyage proposed." 2 Marsh. 733.—"Bottomry is a contract in nature of a mortgage of a ship, in which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed." Again, Marsh. vol. 2, p. 736, says, "If the money was spent in the place where it was lent, it was not *pecunia trajectitia*, &c," so that, with the Romans, as with the moderns, it was of the essence of this contract, that the loan should be exposed to the perils of the sea, at the risk of the lender." In the next page (737), he says, "in bottomry, the lender furnishes the borrower with money to purchase the goods which are put in risk." And Park says, 413, 415 (4th ed.), "the lender supplies the borrower with money, to purchase those effects upon which he is to run the risk." Now, if the court say, that a man who borrows money to pay for his common purposes, and for other objects and concerns, is a borrower at *respondentia*, on a bottomry, because he puts the payment on the return of a ship from sea, with which the loan has no connection, there is an end of the objection. But there is certainly nothing in the English law, which countenances such a position.

With regard to the presumption, that the money was so applied, the United States offered to repel it, by showing that it never was so applied; but the inquiry was stopped, in the case of Arny—the court seeming to entertain the opinion, that the inquiry was immaterial. There is no English case which gives a different view of the law of *respondentia* and bottomry, from those extracted from Blackstone, Park and Marshall. The cases cited from the old English reporters, apply only to the *question of usury *430] under the statute, when the principal is put at risk. The form of the bonds, as referred to by Mr. Ingersoll, are in conformity with the law as laid down. But suppose the court to be of opinion, that the bond is free from objection on this ground, the question still is, whether this bond, on coming in with the other documents, passed the ownership of the property to the insurance company? The *respondentia* bond did not even create a lien. Park 410. A bottomry-bond creates a lien, but does not pass the title. *Blaine* v. *The Charles Carter*, 4 Cranch 332. Does the memorandum on the bond stipulate for a transfer of the title? It stipulates for all that was afterwards done, but expressly for the purpose of creating a collateral security; not for that of passing the title. Did the assignment of the outward bill of lading pass the title? That again expressly declares, that the whole object was to create a security, and to continue that security. Did the legal effect of the act reach beyond the intention of the parties? Such a construction could not be attached; the intention clearly expressed always governs the construction of the contract.

What are the authorities on this subject? Do they say, that the assign ment of a bill of lading, always produces the effect of passing the property? The assignment of a bill of lading does not always produce the same effect. It always depends on the relation of the parties, and the intent with which the act is done. It depends, says Holt, "on the mutual understanding" of the parties. 2 Holt 72. Here, the understanding is clear—it is to be done merely to create a collateral security. The modern cases in England, that have been cited as to the effect of the assignment of a bill of lading, are generally cases between the assignee of the bill and the assignees of the bankrupt; and not on the general provisions of the bankrupt law of Eng-

land. The bankrupt law of England, 5 Geo. II., c. 30, § 28, places the assignees of the bankrupt precisely on the same footing in which the bankrupt himself stood, at the moment of his bankruptcy. In cases of mutual credit, they are subject to all the set-offs to which he was subject, and to all the liens which he had created. The others represent only the private creditors, and when offered to another creditor, they are all of equal dignity; all liens, therefore, stand according to their priority. Hence, a mere agreement to assign a bill of lading, between such parties, has been held equivalent to an assignment, for the purpose of creating a preference among these equal creditors. Such was the case of *Lempriere* v. *Paisley;* the court of king's bench held, that such an agreement created a lien; and that the assignees of the bankrupt could not take *the property, without discharging the lien. 2 T. R. 455, Pigott's Arg. 489; Ashhurst 490; [*431 argument of Lord Kenyon, as cited by him, p. 493. Ashhurst calls it an equitable lien, not an equitable title; and he says, as "between the person who holds the equitable lien, and the assignees, if the lien subsists, before the bankruptcy, they shall never recover or retain the thing, without discharging the money due;" why? he gives the reason: "the party who has the equitable lien, ought not to have footing with the rest of the creditors, for whom the assignees are the trustees," &c. There, it is a question of preference of payment between creditors of equal dignity.

The case of *Atty et al., assignees Jamieson, bankrupt,* v. *Hatson,* 4 Camp. 325, is another case of preference of payment among creditors of equal degree, by force of such a lien. The case of *Olive* v. *Smith,* 5 Taunt. 56, is another, where the whole bearing of the bankrupt law is decided upon, and all these cases are found to turn on it. *Haille* v. *Smith,* 1 Bos. & Pul. 563, is another case under the bankrupt law; and there the effect of the bill of lading was expressed, and by the prior intention of the parties, it was held to transfer the property, because such was the prior intention, and that transfer was absolute.

On these bankrupt cases in England, it is proper to remark, that they are no guides for a decision under the statute of the United States. They were questions of preference between creditors of equal degree, and the question there always was, whether such a preference had been created by the bankrupt, before his bankruptcy, as gave him a preference to the other creditors. But here, under our statute, there is a creditor of the highest degree, who settles all questions of preference, as soon as he appears, by taking it himself, under the authority of the public law. These cases, therefore, are inapposite to the question before the court.

It has been already said, that in England, the effect of the assignment of a bill of lading, is not absolute, but depends on the intention of the parties. It may now be added, that there is no case in England, where the assignment of a bill of lading, or the consignment of a cargo, has been held to pass the property, but where there is a present debt, and where such consignment or assignment is made and received, as a payment *pro tanto.* Such was the case of *Hibbert* v. *Carter,* which was at first decided on that position. But afterwards, on proof that it was not the intention to pass the whole property, that decision was changed, and the ultimate recovery was, on that intention, against the indication afforded by the bill of lading. 1 T. R. 745. *Lickbarrow* v. *Mason,* 2 Ibid. 63, *is not a question between the [*432

original parties ; as to whom, it is there said, that their intention may be inquired into ; but it was the case of a purchaser, who had purchased and paid for the cargo, and took an assignment of the bill of lading to herself. The result of all the cases is, that such an assignment, as between the original parties, passes the property or not, according to the intention. And this conforms to the case of *Bucknall* v. *Roiston*, Prec. Ch. 285. This was the case of a bill of sale, which in *Haille* v. *Smith*, is said to be a different thing, from an agreement with regard to a bill of lading. This bill of sale was held, upon the intention of the parties, to amount to an equitable security ; sufficient to prevail against a general creditor, or the general creditors of the deceased, as giving a lien with regard to the specific subject, against other creditors of equal degree. Now, that the intention of the parties in this case looked no further than to the creation of a security, is averred by the holder. And when we come to look at the situation of the parties, we will find that the creation of a security by way of lien, was all that was proposed. There was no debt due—it depended on a contingency, whether there ever would be a debt. At the time of the insolvency, there was no debt. The holder of a *respondentia* bond is not considered as a creditor at all. Hence, in England, he could not prove his debt under a commission of bankruptcy, until a special statute was there made for his case. 1 Holt 424. It is not contended, that a contingent debt cannot be secured; there is no doubt, that it may. But the absolute transfer of property, so as to throw the ownership on a merely contingent creditor, is contrary to the nature of the case. The creation of a lien to meet the contingency, is natural and proper, and this is all that the parties proposed.

With regard to the return-cargo, which was the property in question, there are strong grounds for saying, that there was a marked intention to keep the property out of the lender, until the return of the vessel, and the delivery of the bill of lading. For, what he does stipulate from it, is not for a bill of lading, consigning the bill of goods to him ; but to order. Now, in whom does the property under such a title abide? Clearly in the shipper, until the title is actually delivered to order. The latter effect is a transfer only from that time, and here, not delivered till the priority of the United States had attached ; say, then, that the assignment of the outward bill, if standing alone, would have passed not only the outward cargo of specie, but the proceeds in the return-cargo ; yet that very assignment stipulated for an inward bill, to order, which threw the property upon the shipper, in Canton, who was the representative of Edward Thomson ; *and if the priority *433] of the United States could not attach before, because the property was in the company, it attached the very moment the property fell back on Thomson, with the consent of the company. While the return-cargo, then, was crossing the ocean, with a bill of lading to order, in whom was the property of that cargo? Clearly, in the shipper—charged, if you please, with an equitable lien in behalf of the company. A lien, which they could have enforced only in a court of equity, if the bill had not been delivered to their order. Because, at law, the title was manifestly in the shipper by virtue of the bill to order, for which they have stipulated.

It is not disputed, that under the authority of the decree in Prec. Ch. 289, they could have successfully enforced that lien against the other general creditors, and claimed a preference of them, by virtue of that prior lien. But could they have asserted that preference, against the United States?

Now, this case is to be considered as it stood prior to the delivery of the bill to order; because the priority of the United States arose prior to that time, and ranged through the whole period, during which the ship was crossing the ocean. If it attached, at any time during that period, it could not be dislodged by anything subsequently done, because it is to be tested only by the state of things which existed, when it arose, and when it was in full force. The trustees, under the general deed of assignment, had no power to alter the condition in which they found the property, so as to affect the priority of the United States. If they had acted ever so fairly, nothing done by them could have changed the condition of things to the prejudice of the rights of the United States. Clear of their priority by law, the United States are the first object of that trust itself; could the trustees, by any fraudulent act on their part, create a legal preference among those creditors? Whether the parties to be benefited by it were conusant of that fraud or not, it is apprehended, they could take no benefit by a fraud of the trustee. Hence, the impropriety of arresting the evidence on this subject.

The positions are again asserted, that with regard to the return-cargo, the sole subject of controversy, the legal title to that was in the shipper, that is, in Edward Thomson, by virtue of the bill to order, not yet delivered. That this being the very bill stipulated for in the assignment, the legal title was in Thomson, by the consent of the plaintiffs below, charged, at the best, with an equitable lien in their behalf. That in this condition of things, the priority of the United States fell upon the subject. *That although the equitable lien of the plaintiffs below would have prevailed against [*434 general creditors, and given the plaintiffs a preference to payment as against them; yet it is claimed, that the preference yielded to the priority of the United States; which having fastened upon the property, in its condition, could not be dislodged, by the subsequent delivery of the bills to order.

Story, Justice, delivered the opinion of the court.—This is an action of trespass *de bonis asportatis*, brought in the circuit court for the district of Pennsylvania, by the Atlantic Insurance Company, to recover against the defendant John Conard, the marshal of that district, the value of certain teas, shipped on board of the ships Addison and Superior, and levied upon by him, upon an execution in favor of the United States, against one Edward Thomson, as the property of the latter. The real question in the cause is, whether the Insurance Company or the United States, are entitled to the teas or their proceeds.

The material facts, disclosed at the trial in the circuit court, were as follows: Edward Thomson was a merchant, largely engaged in trade in the city of Philadelphia, in the year 1825; and on the 21st day of June of that year, borrowed, at *respondentia*, of the insurance company, the sum of $21,000, upon goods, &c., on board of the ship Addison, of that port, on a voyage, at and from Philadelphia, to Canton, and at and from thence, back to Philadelphia, beginning the risk, on the 21st of the preceding April, about which time the ship had sailed on the voyage. Edward Thomson had shipped on board of the Addison, for his own account and risk, for the voyage, 21,000 Spanish dollars, consigned to J. R. Thomson, his agent, and his assigns, and deliverable to him in Canton; and regular bills of lading were accordingly signed, one of which was retained by the shipper. At the time

of the execution of the *respondentia* bond, a memorandum of agreement was entered into by the parties, and an assignment made on the back of this bill of lading. The form and effect of these instruments will be matter of more particular comment hereafter. At present, it is only necessary to add, that the loan purports, on the face of the bond, to be a loan for the joint account of E. Thomson, E. H. Nicoll, F. H. Nicoll and F. S. Bailey ; but in reality, the transaction was for the use and benefit of E. Thomson, and the goods shipped in the Addison were on his sole account.

On the 14th July, of the same year, a loan was made to Edward Thomson, of $13,960, on goods on board the ship Superior, which had sailed on a similar voyage, on the 6th of June *preceding. A *respondentia* bond *435] was taken, in the same form, from the same parties, on the like voyage, with a similar memorandum of assignment of the bill of lading. The only difference between the transactions was, that this loan was applied in part payment of a former loan, made by the insurance company on another ship of E. Thomson's. On the 19th of November, E. Thomson, having become insolvent, made a general assignment of all his property to Peter Mackie and Richard Renshaw, for the use of his creditors. At this time, he was very largely indebted to the United States on duty bonds. The Addison left Canton, on her return to Philadelphia, having among her papers a bill of lading of the proceeds of the $21,000, consigned by the shipper (Mr. Fisher, attorney for J. R. Thomson), to order, in blank, and indorsed in blank by the shipper, and marked No. 5. This mark was to identify them as the proceeds of the $21,000. Mr. Fisher also gave the master a manifest, stating the cargo to be consigned to E. Thomson, and a general bill of lading of the whole cargo, consigning it to E. Thomson. The invoice and bill of lading were dated 22d November 1825. The general bill of lading was not signed. The Superior left Canton, having among her papers a bill of lading of certain articles, valued in the invoice at $3393, consigned to Peter Mackie, and also a bill of lading of certain articles, valued at $1139.86, consigned to Barclay Arny, and both dated 2d December 1825. Before the arrival of these ships in America, the United States had obtained judgment against E. Thomson, for large sums of money due upon his bonds at the custom-house. Both ships arrived in Delaware Bay, almost at the same time ; and an execution issued on behalf of the United States, on one of the judgments against E. Thomson, on the 13th March 1826, and was levied on the ships and their cargoes, on the 15th of March, while they were yet in the bay. It was under this levy, that the goods in controversy were seized by the marshal.

Two or three days before the ships came up to Philadelphia, Peter Mackie, the assignee of E. Thomson, having received duplicates of the invoice and bills of lading of the cargo of the Addison, delivered them to the agents of the insurance company, at Philadelphia ; and upon the arrival of the ship itself, handed over, to the same agent, the invoices and bills of lading, brought by the master. On the 22d of March 1836, Peter Mackie and Barclay Arny indorsed to the insurance company the invoices and bills of lading, which came to their order by the Superior. These papers came under cover to Edward Thomson, several being inclosed in the same envelope ; and Mackie allotted them to their respective owners, by means of the *436] numbers indorsed upon them. These numbers were *originally

placed upon the outward and homeward bills of lading and invoices, for the purpose of designating the proceeds of each particular shipment. It appeared, that part of the $13,960, borrowed of the insurance company on the goods in the Superior, was expended in disbursements in Canton; and the two invoices to Mackie and Arny, were consigned to them contrary to instructions; and they assigned them to the insurance company, under the belief that they were the proceeds of the outward shipment pledged for the loan. The reason assigned for there being a manifest and general bill of lading, consigning the cargo to Edward Thomson, was, to enable him to enter the cargo in his own name, after he had settled with the insurance company and paid the *respondentia* loans. The several particular invoices and bills of lading were then to be cancelled, and the master was to sign the general bill of lading, and the cargo was to be entered at the custom-house, in the name of E. Thomson. He was in the habit of taking up other large sums at *respondentia*, and this was the usual course of his arrangements in business.

Such is the general outline of the case. The loan on the shipment in the Superior, as has been already stated, differs from that on the shipment in the Addison, only in the circumstance that it was applied in discharge of a prior loan. In our judgment, that makes no difference, as to the legal rights of the parties. The borrower had a right to apply the loan in any manner he pleased; and the mode of its application, if it be otherwise *bonâ fide* and legal, does not change the posture of the rights of the lender. We shall, therefore, dismiss, at once, all further consideration of this point, and treat both cases, as if they stood on a single shipment.

Several objections have been taken to these *respondentia* bonds, to impeach their original validity. It is said, that they ought to be treated as usurious or gaming contracts; that they are not to be deemed *bonâ fide* transactions, upon real risks; but transactions void in point of law, upon their face. So far as the questions of usury or gaming, or *bona fides* upon substantial risks, are matters of fact, they were left fully open, and have been passed upon by the jury, who have found a verdict against them. So far as there are matters of law, apparent upon the record, proper to avoid the bonds, they are still open for inquiry. Two grounds have been relied on for this purpose; 1st, that the loans were made after the sailing of the ships on the voyage; and 2d, that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property, on which the risk was run. In our judgment, neither of these objections can be sustained. It is not necessary, that *a *respondentia* loan should be made before the departure of the ship on the voyage,]*437 nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. It matters not, at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made, after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. The lender is not presumed to lend upon the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided, by any misapplication of the

fund, where the risk was *bonâ fide* run upon other goods, and it was not a mere contract of wager and hazard. What could be the effect, if it were a mere wagering contract, it is unnecessary to consider; because there is the clearest proof here, that there was property on board, belonging to the borrower, and sailing on the voyage at his risk.

The form of the *respondentia* bond in the present case is, so far as we know, the common and usual form. The only deviation from the actual facts is, that it seems in some of its provisions to contemplate the voyage as not then commenced. This probably arose from using the common printed form, which is adapted to that, as the ordinary case; but it misled no one, and was certainly perfectly understood by the parties. The risk was taken for the whole voyage, precisely as if the ships had been then in port; and if, before the bonds were given, the property had been actually lost, by any of the perils enumerated in it, it is clear, that the loss must have been borne by the lenders. They could not have recovered it back, since the event was one within the scope and contemplation of the contract. The safety then of the property at that particular period does not vary the rights of the parties; and from the very nature of the transaction, it must have been utterly unknown to both, whether the ship was at the time in safety or not. They entered into the contract, upon the usual footing of policies of insurance, lost or not lost. So far as this deviation from the fact bore upon the point of the good faith and reality of the contract, as a genuine maritime loan, it was left to the jury to draw such inferences, as, upon the whole circumstances, they were warranted to draw. The charge of the learned judge, in the circuit court, was as favorable to the defence on this point, as it could be, upon the principles of law.

The next question is, in whom was the property in the shipment vested, at the time of the levy of the execution of the United States? Was it so vested in the insurance company, *either in law or equity, that they are now entitled to maintain the present suit, or in other words, to recover the proceeds in the marshal's hands? This depends upon the view taken of the objects, intentions and acts of the parties, and disclosed in the bonds, and the accompanying papers. When these are once ascertained and settled, it will not be difficult to arrive at the proper legal conclusion.

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It is contended on behalf of the United States, that no title or interest in the property shipped passed by the instruments, taken collectively, to the insurance company; that Edward Thomson remained the sole owner of the goods and their proceeds, during the whole voyage; that at most, the insurance company had but a lien upon them for the security of their debt, which was displaced by the priority of the United States; and finally, that if the insurance company had any title or interest in the property, it was not absolute, but by way of mortgage; and even this, coming in competition with the priority of the United States, by operation of law, yields to their superior privilege.

Before proceeding to the discussion of the right of the insurance company over the property in question, it may be well to consider, what is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128. Although that subject has been several times before this court, the observations which have fallen from the bar, show, that the opinions of the

court have, sometimes, not been understood according to their true import. The 65th section of the act declares, that "in all cases of insolvency, or where any estate in the hands of executors, administrators and assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, &c., shall be first satisfied; and any executor, administrator or assignee, or other person, who shall pay any debt due by the person or estate, from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions and suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper court having cognisance thereof." A subsequent clause of the same section declares, that, "the case of insolvency mentioned in this section shall be deemed to extend, as well to cases in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the *estate and effects of an absconding, concealed or absent debtor, shall have been attached [*439 by process of law, as to cases, in which an act of legal bankruptcy shall have been committed." It is obvious, that this latter clause is merely an explanation of the term "insolvency," used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. Insolvency, then, in the sense of the statute, relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense. It supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the *United States* v. *Hooe*, 3 Cranch 73; and it was consequently held, that an assignment of part of the debtor's property did not fall within the provision of the statute. So too, a mere inability of the debtor to pay all his debts is not an insolvency within the statute; but it must be manifested, in one of the three modes pointed out in the explanatory clause already referred to. That was the point, on which the case of *Prince* v. *Bartlett*, 8 Cranch 431, turned.

What, then, is the nature of the priority, thus limited and established in favor of the United States? Is it a right, which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing, by virtue of such assignment, to the assignees? Or, is it a mere right of prior payment, out of the general funds of the debtor, in the hands of the assignees? We are of opinion, that it clearly falls within the latter description. The language employed is that which naturally would be employed to express such an intent; and it must be strained from its ordinary import, to speak any other. Assuming that the words "in all cases of insolvency," indicate an entire class of cases, and that the other member of the sentence "or when any estate," &c., is to be read distributively, as has been contended for on behalf of the United States, it does not, in the slighest degree, vary the construction of the statute. It will then read, that

"in all cases of insolvency, the debt or debts due to the United States, &c., shall be first satisfied."

But how are they to be satisfied? Plainly, as the succeeding clause demonstrates, by the assignees, who are rendered personally liable, if they omit to discharge such debt or debts. To enable the assignees to pay the United States, it is indispensable, that the fund should pass to them; and if the mere priority of the United States intercepted it, or gave a right to defeat it, the object of the statute would not be accomplished. *If
*440] the legislature had intended to defeat the passing of the property to the assignees, as against debts due to the United States, the natural language in which such an intention would be clothed, would be to declare, that so far, such assignment should be void. Then, again, the very enumeration of the cases of insolvency, in all of which the assignment passes, and is to pass, the whole of the debtor's property, confirms the interpretation already asserted. They are the very cases, where, by law, there is no exception as to the extent or operation of the assignment to divest the debtor's estate. One of these is the case of a legal bankruptcy; and in the act on this subject, passed in the next session of congress, there is an express provision, in the 62d section, that "nothing contained in this law shall in any manner affect the right or preference to prior satisfaction of debts due to the United States," as secured or provided by any law heretofore passed. Yet the bankrupt act contains no exception as to the property to be passed to the assignees, in favor of any person. In the case of the *United States* v. *Fisher et al.*, 2 Cranch 358, which was decided upon great deliberation, this court held, in the construction of a similar clause in the act of the 3d March 1797, ch. 74, that "no lien is created by this law; no *bonâ fide* transfer of property in the ordinary course of business, is overruled. It is only a priority in payment, which under different modifications, is a regulation in common use; and this priority is limited to a particular state of things, when the debtor is living, though it takes effect generally, if he be dead." And this doctrine was again recognised in the *United States* v. *Hooe*, 3 Cranch 73, 90.

If, then, the property of the debtor passes to the assignees; if debts due to the United States constitute no lien on such property; if the preference or privilege of the United States be no more than a priority of satisfaction or payment out of a common fund; it would seem to follow, as a necessary consequence, that even if the teas in controversy were the property of Edward Thomson, they passed by his general assignment, in November 1825 (which is not denied to have been a *bonâ fide* and valid transaction), to his assignees, and became their property, for distribution among his creditors, and were not liable to the levy under the execution of the United States. That, however, would be a question merely between the United States and the assignees, and would in no shape help the Atlantic Insurance Company to maintain their present suit.

Then, again, it is contended on behalf of the United States, that the priority, thus created by law, if it be not of itself *a lien, is yet
*441] superior to any lien, and even to an actual mortgage, on the personal property of the debtor. It is admitted, that where any absolute conveyance is made, the property passes, so as to defeat the priority; but it is said, that a lien has been decided to have no such effect; and that in the eye of a

court of equity, a mortgage is but a lien for a debt. *Thelusson* v. *Smith*, 2 Wheat. 396, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned judge who delivered the opinion of the court in that case, is conclusive on the point of a mortgage. "The United States," said he, "are to be first satisfied; but then it must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bonâ fide* conveyance of his estate, to a third person; or has mortgaged the same to secure a debt, or if his property has been seized under a *fieri facias*, the property is divested out of the debtor, and cannot be made liable to the United States." The same doctrine may be deduced from the case of *United States* v. *Fisher*, 2 Cranch 358, where the court declared, that "no *bonâ fide* transfer of property, in the ordinary course of business, is over-reached by the statutes;" and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in *United States* v. *Hooe*, 3 Cranch 73.

It is true, that in the discussions in courts of equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law; and it is equally true in equity; for in this respect, equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate, and security. When the debt is discharged, there is a resulting trust for a mortgagor. It is, therefore, only in a loose and general sense, that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible. But it has never yet been decided by this court, that the priority of the United States will divest a specific lien, attached to a thing, whether it be accompanied by possession or not. Cases of lien, accompanied by possession, are, among others, the lien of a ship-owner to detain goods for freight, the lien of a factor on the goods of his principal for balances due him, the lien of an artisan for work and services upon the specific thing. On the other hand, there are liens, *where the right is perfect, independent of possession; as the lien of a seaman for wages, and the lien [*442 of a bottomry-holder on a ship for the sum loaned. In none of these cases, has it ever been decided, that in a conflict of satisfaction out of the thing itself, the priority of the United States cut out the lien of the particular creditor. And before such decision is made, it will deserve very grave deliberation, and a marked attention to what fell from the court, in *Nathan* v. *Giles*, 5 Taunt. 558, 574. At present, it is wholly unnecessary to decide it, for reasons which will hereafter appear.

The case of *Thelusson* v. *Smith*, 2 Wheat. 396, is not understood to justify any such conclusion. That case turned upon its own particular circumstances. A judgment *nisi* was obtained against Cramond on the 20th of May 1805, in favor of Thelusson and others. On the 22d of the same month, he executed a general assignment of all his estate to trustees, for the payment of his debts. At that time, he was indebted to the United States on several duty bonds, which became due at subsequent periods. Suits were instituted on these bonds, as they severally became due, and judgments were

obtained and executions issued against Cramond, under which, a landed estate called Sedgely, was levied upon and sold by the marshal ; and the action was brought by Thelusson and others against the marshal, to cover the proceeds of this sale in his hands. No execution had ever issued upon the judgment of Thelusson and others against Cramond, and of course, there had been no levy under that judgment, on the Sedgely estate, before or after the levy in favor of the United States. It was admitted, that in Pennsylvania, a judgment constitutes a lien on the real estate of the judgment-debtor ; and it was assumed by this court, in the argument of the cause, that the judgment of Thelusson and others bound the estate, from the 20th of May, when it was entered *nisi*, although in fact it was not finally entered, until nearly a year afterwards. The posture of the case, then, was, that of a judgment creditor seeking to recover the proceeds of a sale of land sold under an adverse execution, out of the hands of the marshal, upon the ground of his having a mere general lien, by his judgment, on all the lands of his debtor, that judgment never having been consummated by any levy on the land itself. The court decided, that the action was not maintainable. The reasons for that opinion are not, owing to accidental circumstances, as fully given as they are usually given in this court. But the arguments of the counsel point out grounds upon which it may have proceeded, without touching the general question of lien. The plaintiffs were entitled to recover only upon the ground, that they could establish in themselves a rightful title to the proceeds. Whether the land *443] *itself was rightfully sold under the execution of the United States, or any title to it passed by the sale, as against the assignees of Cramond, was not matter of inquiry in that case. However tortious or invalid it might be, still, if the plaintiffs had no title to the proceeds, they must fail in their action. Under the general assignment of the debtor, the priority of the United States attached ; and if the assignees were willing to acquiesce in the sale, the right of the United States to hold the proceeds could not be disputed by third persons. Now, it is not understood, that a general lien by judgment on land constitutes, *per se*, a property or right in land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment ; and when the levy is actually made on the same, the title of the creditor, for this purpose, relates back to the time of his judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. His title to it is not divested or transferred by the judgment, to the judgment-creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person, except such judgment-creditor ; and even against him, unless he consummates his title by a levy on the land, under his judgment. In that event, the prior levy is, as to him, void ; and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy or sale. The title to the land does not pass under it. In short, a judgment-creditor has no *jus in re*, but a mere power to make its general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of vendor or vendee, or to claim the purchase-money in the hands of the latter. It is not

like the case where the goods of a person have been tortiously taken and sold, and he can trace the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment-creditor is against the thing itself, by making that a specific title, which was before a general lien. He can only claim the proceeds of the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction. To this state of things, the language of the court in *Thelusson* v. *Smith* is to be applied, when it is said, that if the debtor's property is seized under a *fi. fa.* it is divested out of the debtor, and cannot be liable to the United States. Applying these principles to the facts of that case, it is clear, that the Sedgely estate had not been divested out of the debtor, by any execution on the judgment of Thelusson and others ; that it either remained in *the debtor, and was liable to the execution of any other of his creditors, [*444 who chose to levy upon it, subject, of course, to have his title overruled by their subsequent levy, when perfected ; or that, subject in like manner, it passed by the assignment (if that was *bonâ fide*), to the assignees ; and in their hands, the United States would have a priority of payment out of it, as general funds in their hands. The judgment-creditors, as such, had no title to any fund in the hands of the assignees, until the priority of the United States was satisfied ; for that priority does not yield to any class of creditors, however high might be the dignity of their debts.

The fact, that a judgment-creditor has a lien, does not place him in a better situation, as a creditor, over the general funds of the debtor in the hands of the assignees. If he possess such a lien, he must enforce it in the manner prescribed by law ; and if he does, that may so far affect the interest of the assignees actually subjected to such liens. But it gives him no rights to the fund, until he has perfected his lien, according to the course of the law. Until that period, he has merely a power over the property, and not an actual interest in it. This ground is alluded to in that part of the opinion of the court, where, speaking of the priority of the United States, it is said, "the law makes no exception in favor of prior judgment-creditors, &c. Exceptions there must necessarily be as to the funds out of which the United States are to be satisfied ; but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be first satisfied ; but then it must be out of the debtor's estate." The real ground of the decision, was, that the judgment-creditor had never perfected his title by any execution and levy on the Sedgely estate ; that he had acquired no title to the proceeds, as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors ; and that a mere potential lien on land did not carry a legal title to the proceeds of a sale, made under an adverse execution. This is the manner in which this case has been understood by the judges who concurred in the decision ; and it is obvious, that it established no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States ; since that priority is not of itself equivalent to a lien.

We may then dismiss any further consideration of this topic, unless it shall appear, that the right of the *respondentia* holders in the present case is reduced to a mere general lien ; and as to them, at least (however it may be as to the assignees), no legal right exists to maintain an action

for the proceeds. *The attention of the court will then be at once addressed to the question, what was the nature and extent of the interest of the insurance company in the shipments in question? It is unnecessary to discuss what would have been the rights of the parties, if the *respondentia* bonds had stood alone; for that is not the posture of this case. The whole instruments must be taken together, and construed as one entire agreement. We must then examine the memorandum, the outward bill of lading, and assignments thereon, in connection with the bond. The bill of lading purports, on its face, to be a shipment, by Edward Thomson, of seven kegs containing $21,000, for account and risk of the shipper, to be delivered at Canton, to John R. Thomson, or his assigns. By the well-settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his indorsements of the bill of lading to a *bonâ fide* purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferrible by indorsment, and thus may pass the property. It matters not, whether the consignee, in such case, be the buyer of the goods, or the factor or agent of the owner. His transfer, in such a case, is equally capable of divesting the property of the owner, and vesting it in the indorsee of the bill of lading. And strictly speaking, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title, by virtue of a mere indorsement of the bill of lading, unless he be the consignee, or what is the same thing, it be deliverable to his order; yet, by an assignment, either on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser, for a valuable consideration, by an indorsment of the bill of lading itself. Such an assignment, not only passes the legal title, as against his agents and factors, but also against his creditors, in favor of the assignee. It is unnecessary to cite particular authorities on these points. They will be found supported by the authorities cited at the argument, and by the elementary treatises of Mr. Abbott, Mr. Holt and Mr. Chitty, on this subject; and particularly by *Nathan* v. *Giles*, 5 Taunt. 558. In the present case, Edward Thomson was the owner of the goods, and the consignee was merely his factor. He, therefore, had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading, by a suitable instrument of assignment and sale, against anybody but a purchaser *without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea, and incapable of manual tradition.

*446]

The question, then, is, whether the indorsement upon this bill of lading, constitutes such an instrument? We are of opinion, that it does. It purports to be a transfer *in præsenti*; and uses the appropriate phrases of grant. The words are, "for value received, I hereby assign and transfer to the Atlantic Insurance Company of New York, the within bill of lading, and the specie, goods, &c., to be procured thereon and thereby, and any return-cargo, to be obtained, &c., by the proceeds thereof; and all the return-cargo to be taken on board the within-named ship, by or on my account, as col-

lateral security, according to an agreement duly executed, and adjoined to a *respondentia bond*," &c. (referring to the memorandum hereinafter stated). This is not a mere assignment of the bill of lading itself, operating as an equitable grant of the interest of the owner in that instrument; but it is of the goods contained in it, and the bill of lading is referred to by way of description of the subject-matter of the grant. There was a valuable consideration for it; and as Edward Thomson was the legal owner of the goods, the words "assign and transfer," are sufficient words of grant, to pass his legal title to the same, unless the operation of those words is controlled by some of the other parts of the instrument. The argument admits this; but it supposes, that the accompanying memorandum shows, that such was not the intention of the parties; and therefore, the words are to be construed according to that intention, which was to create a mere lien or equity on the part of the insurance company, on the goods.

Let us then examine the nature and scope of that memorandum. It begins, by a recital, that it hath been agreed, that the bill of lading for the goods, &c., mentioned in the *respondentia* bond, shall be indorsed to the insurance company, as a collateral security for the loan. This is carried into effect by the assignment above mentioned. It then goes on to recite, that it has been further agreed, that the property to be shipped homeward, as aforesaid, being the proceeds of the loan (thus considering the specie on board, as a substituted loan), shall be for the account and risk of the borrowers; that the bills of lading therefor shall express the same, and shall also express that the said property shall be delivered to the order of the shippers; and that the same shall be indorsed in blank, and shall be placed in the hands of the insurance company, either before or on the arrival of the said ship at Philadelphia, as a continuation of such collateral security. Now, supposing the transaction *bonâ fide*, what is there here that controls, even by way of recital, the operation of the words* of transfer? If the case were one of absolute transfer, there might be some room for doubt; but here [*447 the transfer was as collateral security. It was, therefore, a mortgage of the goods, and the returns. The shipment out and home, was, as in each case it must be, at the risk, and for the account of the shipper, subject, however, to the rights of the mortgagee; and the very provision that the bills of lading should be delivered to the order of the shipper, and indorsed in blank, and placed in the hands of the insurance company, establishes the fact, that it was the intention of the parties, that the property of the return-cargo should vest by such indorsement in them. The memorandum then proceeds to state, that it is expressly declared, that the indorsement or consignment shall not be held to exonerate the persons of the borrowers; nor compel the insurance company to accept the goods, &c., which may arrive under such bill of lading and consignment, in discharge of such debt; but that it shall be lawful for the company to receive and hold the goods, &c., for ninety days after their arrival at Philadelphia; and if the debt was not then paid, to sell the same at auction, and charge the borrowers with the balance. The plain effect of this stipulation is, to avow an explicit understanding, that the assignment of the goods should not put them at the risk of the company, but that they should be deemed collateral security only, and be sold after the limited time to discharge the debt, *pro tanto*. So far from the intention being indicated, that no property at all was to pass to the company, the

solicitude of the parties seems most carefully employed to repel the notion, that the transfer was absolute, and not by way of mortgage, as collateral security. The memorandum, therefore, confirms and does not impugn, in any degree, the natural construction of the language of the assignment indorsed on the bill of lading, as importing a present transfer. Indeed, we may go further, and assert, that the obvious intention of the parties was, to give a specific interest in the goods shipped, so as to make them secure against the claims of creditors; and that to construe the instruments to create no more than a lien, liable to be defeated by the acts of either party, or to be overreached by any privileged creditors, would be, not to follow, but to frustrate their intention. Of what use could this great apparatus of instruments, so anxiously prepared by the parties, be, if it conveyed no *jus in re*, and left the title of the insurance company to the goods, at the mercy of the creditors of Thomson, to be intercepted, at any time before it reached their hands, on its arrival? We are, therefore, of opinion, that the assignment in this case was sufficient to pass a legal title to the shipment and the proceeds thereof, against Thomson and his assignees and creditors.

If, indeed, the assignment had been of the outward shipment of *goods only, it would have carried the return-cargo, purchased with the proceeds; because the product or substitute for the original thing, by sale, or otherwise, follows the nature of the thing itself, so long as it can be ascertained as such, and becomes the property of him who was the owner, in the same quality as he held the thing. This is the general principle of law, and has been even extended to cases, where there has been a fraudulent or tortious misapplication of property. The case of *Taylor* v. *Plumer*, 3 Maule & Selw. 562, is directly in point; and contains a large collection of the authorities in the elaborate opinion of the court, pronounced by Lord Ellenborough. In this view of the matter, the only value of the homeward bill of lading would be, as a designation of the proceeds, so as to enable the company to trace and identify them. But the assignment, in terms, transfers the proceeds and returns, and cuts off all possibility of question upon this head. If, indeed, the title to the proceeds had originally been only an equitable title, and not strictly legal; yet as soon as the company had perfected that equity, by the indorsement in blank, and possession of the homeward bills of lading, their right would have been consummated at law, so as to entitle them to maintain a suit therefor. The case of *Haille* v. *Smith*, 1 Bos. & Pul. 563, was not so strong as the present; and there the court held, that the property passed, clothed with a trust for the payment of the debt.

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If this, then, be the result of the general principles of law, in cases of this nature, what is there to prevent their application to the present case? First, it is said, that this debt upon a *respondentia* bond is of too contingent a nature to uphold a mortgage, as collateral security for the payment of it. We know of no principle or decision, that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent, as those, which already exist, and are certain and due. The only question that properly arises in such cases is the *bona fides* of the transaction. Then, again, it is said, that the papers here disclose a transaction fraudulent in its own nature. But we are of opinion, that there is no necessaay implication of law, on the face of these papers, which stamps it fraudulent; for aught that ap-

pears, the agreement may have been entered into with the most sincere and scrupulous good faith ; and whether fraudulent or not in fact, was a question for the jury upon the whole evidence, which was properly left to their consideration ; and they have by their verdict negatived the fraud. The circumstance, that the goods were to be at the risk of the shippers, and on their account, does not, of itself, affect either the validity or *bona fides* of the transfer. That must ordinarily occur, where the transfer is made as collateral security, and it *was one of the leading facts in *Haille* v. *Smith*, already cited. (1 Bos. & Pul. 563.) [*449

But the main objection relied on, and which, indeed, constitutes one of the exceptions to the opinion of the circuit court is, that possession of the return shipment was not obtained, until after the levy by the United States ; and it is contended, that the want of such possession is, *per se*, a badge of fraud. The circuit court on this point decided, "that the actual possession of the above return-cargoes, by the masters of the Superior and Addison, until levied upon by execution at the suit of the United States against Thomsom, is not, *per se*, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to these cargoes." It appears to us, that this decision is entirely correct in point of law, under the circumstances of the case.

Without undertaking to suggest, whether, in any case, the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only *primâ facie* a presumption of fraud, a question upon which much diversity of judgment has been expressed ; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumptive of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. A familiar example of this doctrine is in the case of a sale of a ship or goods at sea, where possession is dispensed with, upon the plain ground of its impossibility ; and it is sufficient, if the vendee takes possession of the property, within a reasonable time after its return home. But in cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and, *à fortiori*, is flowing directly from them, has never been held, *per se*, a badge of fraud. The books are full of cases on this subject. The case of *Bucknall* v. *Roiston*, Prec. Ch. 285, runs almost upon all fours with the present. The cases of *Sturtevant* v. *Ballard*, 9 Johns. 338, and *Bissell* v. *Hopkins*, 3 Cow. 166, contain strong illustrations of the principle ; and being decisions in the very state, by whose laws the validity of the present agreement is to be tried, are of high authority. They sustain the doctrine asserted by the circuit court, in the most ample manner ; and there is a learned note by the reporter to the latter case, which embodies in an exact manner the principal authorities, English as well as American, on this subject. Now, in the case at bar, the goods, at the time of the transfer, were at sea, on a voyage, in which they were to be sold, or exchanged by the consignee, and the proceeds sent back in the same ships. It was, therefore, properly in the contemplation of the parties, and indeed, a necessary result of their stipulations, and the *goods should not be intercepted, or taken possession of, by the company, until the close of the voyage ; and that the return shipments [*450 should conform to this arrangement. There is no pretence to say, that the plaintiffs did not seek possession of the goods, within a reasonable time after

the arrival of the goods home. Their power to accomplish it was dislodged by the execution of the United States, and they obtained, as early as practicable, possession of the bills of lading, and vouchers of their rights. But so far as the want of possession was matter of evidence presumptive of fraud, it was left open to the consideration of the jury; and the grievance now is, not that it was so left, but that the court ought to have instructed the jury, as matter of law, that the want of possession, under the circumstances of the case, was, *per se*, a badge of fraud. We have already expressed an opinion, that the court were right in the instructions actually given.

Upon the whole, we are of opinion, that the directions of the court, upon the merits of the cause, at the trial, were correct in point of law; and that, consequently, there is no error in that part of the judgment.

It remains to consider, very briefly, certain exceptions taken to the testimony, in the progress of the trial. The first exception is, that the corporate capacity of the plaintiffs was not regularly proved, before the introduction of the *respondentia* bond. It is to be considered, that this was a trial upon the merits; and by pleading to the merits, the defendants necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by a plea in abatement, and his omission so to do, was a waiver of this objection. But, independently of this special ground, the very agreement in the case upon which the trial was had, as well as the admissions of the bond given to the United States, as security to refund the amount, if judgment should pass against the plaintiffs, was certainly, *primâ facie* evidence of an admission on the part of the United States, of the corporate capacity of the plaintiffs, and to throw the burden of proof on the other side.

The second exception was to the question put to Austin L. Sands, whether he was agent of the company. We see no objection to this question. It was put in a form most unexeeptionable; and it was a matter of subsequent inquiry, in what manner his agency was created; and it does not appear, from the nature of the question, whether it might not have been sufficient to establish that he was an agent *de facto*, to receive the bond. It was, indeed, but an exception to the order of proofs, where several things are to be established to lead to a result; and in what order the inquiry is to be had, is *matter of discretion in the court itself, and not of absolute right in the party. *451]

The next exception is to the allowance of the bond to go to the jury, upon proof of its execution by Thomson only. It was a joint and several bond, and if executed by Thomson alone, it might be material to the plaintiff's case. It was not introduced as general evidence, as to all the parties who were named in it, but only as to Thomson, and was connected with the title derived under him. Proof of the signature of Thomson, was, under the circumstances, *primâ facie*, evidence of his execution of the instrument.

The fourth, fifth, sixth and seventh exceptions turned altogether upon the question—whether acts and proceedings of third persons, not in privity with the insurance company, nor known to them, were evidence against them? Most clearly, they were not.

The eighth exception involves the point, whether the plaintiffs were bound to look to the application of the loan made by them? If not, the question asked was properly rejected. And we are of opinion, that the

plaintiffs had nothing to do with the application of the money ; and that when received by Thomson, he had a right to dispose of it in any manner he pleased.

Upon the whole, the judgment of the circuit court is to be affirmed, with costs.

JOHNSON, Justice.—I concur in the opinion delivered in this cause, and the rather, because I think it overturns the report of the decision in the case of *Thelusson* v. *Smith*. It would be vain, to endeavor to reconcile this decision, with that which is imputed to the case referred to. This was nothing, in its origin, but a mortgage to the Atlantic Insurance Company ; and a mortgage of a mere right, a metaphysical, transitory thing, over which the act of the party could not operate more immediately, or more forcibly, than a judgment upon land, under the laws of Pennsylvania.

But I avail myself of this occasion, and I have long wished for an opportunity to put on record some remarks upon the report of the case of *Thelusson* v. *Smith*. I have never acknowledged its authority in my circuit, on the point supposed to be decided by it ; to wit, the precedence of the debt of the United States, as to a previous judgment, in the case of a general assignment ; and I propose now to show, what I think any one may see, by a close inspection of the facts, even as stated in the report, to wit, that the question there supposed to be decided, really never was raised by the special verdict. It is true, it was argued, and no other question, judging from the report, *was argued. But when the court came to inspect the record, it must have seen, that the special verdict did not raise the question, [*452 as between the parties to that suit. And moreover, I find, that the reporter has omitted one very material fact found in the special verdict ; which was, that the United States had no interest in the issue, since their judgment had been voluntarily paid off by the assignees of Cramond, the bankrupt. I copy the special verdict entered from the original roll, which I have inspected at the present term.

The jury found, "that on the 22d of May 1805, William Cramond, of Philadelphia, merchant, stood indebted to the United States in several bonds for duties, as follows (describing the bonds, all of which were due after the date of assignment). On the respective bonds, suits were brought, judgments entered, executions issued, and a sale made of a certain real estate called Sedgely, the property of William Cramond, and the proceeds thence arising came to the hands of the defendant, John Smith, marshal of Pennsylvania district, from whom it is claimed by the plaintiffs (who are) creditors of the said William Cramond, on the following grounds : A suit was instituted by the plaintiffs, in the circuit court of the United States for the district of Pennsylvania, against the said William Cramond, as of October sessions 1802, and a judgment in the said suit, in favor of the plaintiffs, and against the said Cramond, was obtained, for $32,253, on the 20th of May 1805. On the 22d of May 1805, the said William Cramond was insolvent, and had no sufficient property to pay all his debts ; but his insolvency was not a matter of general notoriety. On the 22d day of the said month, the said William Cramond executed a general assignment of his estate and effects, bearing date the same day and year, and delivered it to the assignees therein named (*prout* assignment), being, on the said 22d of May,

unable to satisfy all his debts. The moneys in the hands of the defendants, are claimed by the assignees under the said assignment, *who have satisfied the United States the amount of the debt due the United States.* If upon the whole matter," &c., in the usual alternative form of a special verdict.

Judgment below was rendered for defendant, and it is impossible it could have been otherwise ; but not, as I conceive, upon the ground stated, since it is one which the verdict does not raise. It is true, the question was argued, but adjudications are not to have their effect from the questions argued, and the views taken by counsel in their points or briefs. There is a sensible rule laid down on this subject, in a book of grave authority, and the truth of which this court has had occasion to verify not unfrequently ; the purport of which is, that counsel ought not to move anything in arrest of jugdment, *except the roll wherein the judgment is *453] entered, or the *postea*, be in court (6 Mod. 24), and the reason assigned is, that the court may be satisfied that the matter moved in arrest of judgment is truly recited from the record ; for the court will not rely upon the allegation of counsel at the bar.

It often happens, after the most protracted discussions, that the court differ from counsel in their views of the question actually raised on the record, and on grounds which have not been argued. In the case of *Thelusson* v. *Smith*, I hold it to be incontrovertible, that the question of priority could not have been adjudicated upon, on the verdict, as set out in the record. The special verdict does not give the date of the levy, and sale by the marshal, under the judgment by the United States ; but as all Cramond's bonds to the United States fell due after the date of the assignment, it follows, that the judgment, and necessarily, all proceedings under it, were subsequent to the execution of that deed. The land levied on, therefore, had passed out of Cramond, before the judgment of the United States was obtained, and of consequence, the levy and sale under their execution was a mere nullity. Could this furnish the ground of an action for money had and received by the Thelussons, in right of a judgment prior to the consignment, against Smith, the marshal ? It obviously could not. For as against the Thelussons' rights, whatever they were, nothing had passed. The purchaser of the lands at marshal's sale, who had received nothing for the money, might have brought such an action against the marshal ; and the assignees might have sued for, and recovered, the land ; in which case, it would have been held by them, as before, subject to Thelusson's judgment. But as between Thelusson and the marshal, there was no privity of action. And this was the true ground for rendering the judgment of this court, in the suit against the marshal. It is true, the special verdict introduces the assignees into the cause, as claiming the money raised by the marshal, on the supposition, that after satisfying the United States, they succeeded to the priority of the United States. But suppose, this recovery had been had against Smith, what was there to prevent the assignees from going on at law, to recover the land of the vendee ? They were no parties to the record, and there is nothing in the pleadings, or the verdict, to show that they had intervened, or had a right to intervene, in the name of the United States. They could not maintain a right to succeed to the United States, under the provisions of the 65th section of the act of 1799 (1 U. S. Stat. 676) ; because that right is extended only to sureties upon the bond. If they had acquired any

right as against the Thelussons, it was a mere general equity, which *could only have been asserted in a court of equity. At law, in this indirect mode, it could not have been asserted, if it could have availed them at all.

I, at least, would have it understood, that I concurred in the judgment in the case of *Thelusson* v. *Smith*, on no other ground than the want of privity between the parties. Nor can I acknowledge it as authority to any other point; since the United States were satisfied, and the assignees could not be regarded in any view, at law, as succeeding to the priority of the United States, if the United States had priority; and since that priority could not come in question, in a case in which the sale of the land was a mere nullity; as is distinctly affirmed in the present decision, because the assignment divested all the interest of the insolvent, so as to place it beyond the action of the *fieri facias*, issuing on the judgment of the United States.

Judgment affirmed, with costs.

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*The President, Directors & Company of the Bank of Columbia *v.* Peter Hagner. [*455

Dependent and independent contracts.

When no specific time for the payment of money is fixed in a contract, by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. p. 463.

In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears.[1] p. 464.

Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident, the intimation of courts have strongly favored the latter construction, as being obviously the most just. p. 465.

In such cases, if either vendor or vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal. p. 465.

An averment of performance is always made in the declaration, upon contracts containing dependent undertakings, and that averment must be supported by proof. p. 465.

The time fixed for the performance of a contract, is at law, deemed its essence, and if the seller be not ready and able to perform his part of the agreement, on that day, the purchaser may elect to consider the contract at an end. But equity, which, from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed. p. 465.

It may be laid down as a rule, that at law, to entitle the vendor to recover the purchase-money,

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[1] Covenants are to be construed as dependent or independent, according to the intention of the parties, and the good sense of the case; technical words must give way to such intent. McCrelish *v.* Churchman, 4 Rawle 26; Bredin *v.* Agnew, 3 W. & S. 300; Wright *v.* Smith, 4 Id. 527. The intention is to be sought for, rather in the order of time, in which the acts are to be done, than from the structure of the instrument. Goodwin *v.* Lynn, 4 W. C. C. 714; Grant *v.* Johnson, 5 N. Y. 247. When the acts are to be performed at different times, the covenants will be construed as independent. Goldsborough *v.* Orr, 8 Wheat. 217; Philadelphia, Wilmington and Baltimore Railroad Co. *v.* Howard, 13 How. 306, So, a stipulation which goes only to a part of the consideration, will, in general, be treated as an independent covenant. Fame Insurance Co.'s Appeal, 83 Penn. St. 396.