ants for a meditated fraud in the importation of the goods in question, which had rendered them liable to be forfeited.

It is not necessary to notice the other prayers asked, refused, and given in this case. It was argued before this court only upon the three already stated, the answers to which we have said are erroneous.

We shall, therefore, remand the cause, with an order for the reversal of the judgment, and for a *venire de novo*, that further proceedings may be had thereon in conformity with this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court affirming the judgment of the District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with *384] directions to enter a disaffirmance of the judgment of the District *Court, and to remand this cause to the said District Court, with directions to that court to award a *venire facias de novo*, and for further proceedings to be had therein in conformity to the opinion of this court.

EDMUND T. H. GIBSON, PLAINTIFF IN ERROR, *v.* BRADFORD B. STEVENS, DEFENDANT.

Where personal property is, from its character or situation at the time of the sale, incapable of actual delivery, the delivery of the bill of sale, or other evidence of title, is sufficient to transfer the property and possession to the vendee.[1]

Where articles of commerce were purchased in the state of Indiana, and the vendors, in whose warehouses they were lying, gave a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal-boats soon after the opening of canal navigation, these documents transferred the property and the possession of the articles to the purchasers.

These documents, being indorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property.[2]

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[1] CITED. *Hatch* v. *Oil Co.*, 10 Otto, 128; *Leonard* v. *Davis*, 1 Black, 483; *Merchants' &c. Bank* v. *Hibbard*, 48 Mich., 123. S. P. *Trieber* v. *Andrews*, 31 Ark., 163; *Re Batchelder*, 2 Low., 245; *Schoonmaker* v. *Vervalen*, 9 Hun (N. Y.), 138.

[2] DISTINGUISHED. *Adams* v. *Merchants' Nat. Bank*, 9 Biss., 400. FOLLOWED. *Hoyt* v. *Hartford Fire Ins.*

Therefore, an attachment subsequently issued, at the instance of a creditor of the original purchasers, which was levied upon the property in question, could not be maintained.[3]

This court will judicially recognize this branch of trade. It has existed long enough to assume a regular form of dealing, and its ordinary course and usages are now publicly known and understood.

The New York merchant stood in the position of an actual purchaser to the extent of his advances, and not in that of a factor who had made advances upon goods in his possession.

A guarantee by the first sellers that the articles should pass inspection did not change the original sale into an executory contract. It was nothing more than the usual warranty of the soundness of the goods sold.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Indiana.

It was an action of replevin brought by Gibson, a citizen of New York, against Stevens, the sheriff of Allen county, Indiana, who had in his custody sundry articles of property which he had taken by virtue of a writ of foreign attachment, issued under the state laws of Indiana.

The facts in the case were agreed upon by the counsel in the Circuit Court as follows.

Be it remembered, that at the May term of said court, A. D. 1844, the above cause was submitted to the decision of the court, without the intervention of a jury, upon the following agreed facts, to wit:—

The parties mutually agree that the following are the facts in this case:—That McQueen & McKay, citizens of the city of Detroit, state of Michigan, about the 20th of March, [*385
1844, *by false pretences, fraudulently procured the branch of the State Bank of Indiana, at Indianapolis, to loan to them the sum of about eleven thousand dollars. The money thus loaned consisted of notes of the Indianapolis branch of said State Bank of Indiana, payable to bearer, and transferable by delivery. With part of the money thus obtained, McQueen & McKay purchased of Hanna, Hamilton & Co. three hundred and fifty barrels of mess pork, for the sum of $2,908.50, and at the same time paid to the said Hanna, Hamilton & Co. the said purchase-money; and thereupon the said Hanna, Hamilton & Co. executed and delivered to the said McQueen & McKay the memorandum of said purchase, receipt, and guarantee thereto appended; which are herewith filed and marked A, and made a part of this agreement, and are in the words and figures following, to wit:—

Co., 26 Hun (N. Y.), 418. CITED. *The Thames*, 14 Wall., 106; *Forbes* v. *Boston &c. R. R. Co.*, 133 Mass., 156; *Stewart et al.* v. *Ins. Co.*, 9 Lea (Tenn.), 109.

[3] FOLLOWED. *Halliday* v. *Hamilton*, 11 Wall., 565. CITED. *Adoue* v. *Seeligson & Co.*, 54 Tex., 600, 608. S. P. *Wheeler* v. *Sumner*, 4 Mason, 183; *The Sarah Ann*, 2 Sumn., 207; *United States* v. *Delaware Ins. Co.*, 4 Wash. C. C., 418.

"*Fort Wayne, April* 4, 1844.

"Messrs. McQueen & McKay,

"Bought of Hanna, Hamilton & Co.

"350 barrels mess pork, to be delivered on board of canal-boats soon after the opening of canal navigation, at $8.31 . . . . . $2,908 50

"Received payment in full,

"HANNA, HAMILTON & CO.

"We guarantee the inspection of the above pork at Toledo, and the delivery on board of canal-boats at this place soon after the opening of canal navigation.

"HANNA, HAMILTON & CO.

"*Fort Wayne, April* 4, 1844."

The said barrels of pork were, at time of said sale to McQueen & McKay, lying in the warehouse of said Hanna, Hamilton & Co., in the town of Fort Wayne, in the state of Indiana, about twenty feet from the Wabash & Erie Canal, marked and branded "Mess Pork," together with a large number of other barrels of pork, marked and branded "Prime Pork," and "Clear Pork."

Said three hundred and fifty barrels being all the mess pork in said warehouse at that time, or at any other time since, and all the barrels marked "Mess Pork," but were not seen by McQueen & McKay. Said barrels of prime, clear, and mess pork laid in said warehouse promiscuously, and so remained up to, and at, the time of the assignment of said writing marked A; but after the assignment, and before the levying the attachment hereinafter mentioned, said Hanna, Hamilton & Co. had *shipped off all of the said barrels of pork marked and branded "Prime Pork" and "Clear Pork."

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Said McQueen & McKay, at the same time, purchased of D. & J. A. F. Nichols, of Fort Wayne, Indiana, two hundred barrels of superfine flour, for the sum of $712.50, and at the same time paid the said D. & J. A. F. Nichols the said purchase-money; and thereupon said D. & J. A. F. Nichols executed and delivered to said McQueen & McKay a memorandum of said purchase, receipt, and guarantee, in the words and figures following, to wit:—

"*Fort Wayne, April 4th,* 1844.

"Messrs. McQueen & McKay,

"Bought of D. & J. A. F. Nichols.

"Two hundred barrels of superfine flour, at $3.56¼, $712 50

"Received, Fort Wayne, April 4th, 1844, payment in full.

396 "D. & J. A. F. NICHOLS.

"Received the above flour in store, at Fort Wayne, April 4th, 1844, which we agree to deliver on board of canal-boats here, soon after the opening of the navigation, subject to the order of McQueen & McKay.

"D. & J. A. F. NICHOLS.

"We guarantee the inspection of the above flour in New York as superfine flour.

"D. & J. A. F. NICHOLS."

Which are herewith filed and marked B, and are part of this agreement. Said barrels of flour were, at the time of said sale, lying in the warehouse of said D. & J. A. F. Nichols, in the town of Fort Wayne, Indiana, on the bank of the Wabash and Erie Canal, and there remained until they were seized and taken under the attachment hereinafter mentioned. Said purchases were both made in the town of Fort Wayne, in the county of Allen, in the said state of Indiana, on the 4th day of April, 1844.

On the 17th day of April, 1844, said McQueen & McKay presented the said memorandums of purchase, receipts, and guarantees thereto appended, as above set forth, and marked A and B, to the said Gibson, in the city of New York, and requested of said Gibson an advancement upon the flour and pork therein mentioned; whereupon the said Gibson did advance to the said McQueen & McKay, on the faith of said flour and pork, and the evidences of title thereto, the sum of $2,787.50, and took from said McQueen & McKay an assignment of said *memorandums of purchase, receipts, and guarantees, respectively, indorsed on the back of each [*387 in the words and figures following, to wit:—

"Deliver the within two hundred barrels of flour to E. T. H. Gibson, or order.

"McQUEEN & McKAY."

"*New York*, *April* 17, 1844.

"Deliver the within 350 barrels of pork to E. T. H. Gibson, or order.

"McQUEEN & McKAY."

Which are also part of this agreement.

Said McQueen & McKay, at the same time, delivered to the said Gibson the original memorandums of purchase, receipts, and guarantees above set forth, and marked A and B; in whose possession they now remain.

At the same time McQueen & McKay wrote, signed, and delivered to said Gibson, the letter which is herewith filed,

marked C, and made a part of this agreement; and is in the words and figures following, to wit:—

"*New York*, 17*th April*, 1844.

"MESSRS. LUDLOW & BABCOCK, *Toledo*:—

"Gentlemen,—We have this day received an advance from E. T. H. Gibson, Esq., on the following lots of pork, which you will have the goodness to deliver to his order, and to comply with his instructions relative to the shipment, to wit:—

365 bbls. mess pork,
225 do. prime do. } from warehouse of Walker, Roger & Co.
11 do. mess do. from warehouse of Benbridge & Mix.
300 do. do. do. do. do. Hamilton & Williams.
350 do. do. do. do. do. Hanna, Hamilton & Co.
200 do. flour, from warehouse of D. & J. A. F. Nichols.

"Respectfully, Gentlemen, your obedient servants.

"McQUEEN & McKAY."

On the 18th day of April, 1844, Gibson inclosed the letter above referred to in another letter written by himself, directed to Mott & Co., at Toledo, Ohio, and mailed the same on the said 18th day of April, 1844, in the post-office in the city of New York; which said letter, with the inclosure, said Mott & Co. received by due course of mail, and handed said inclosed letter, as requested by said Gibson, to Ludlow & Babcock, at Toledo, Ohio.

*388] Said Gibson also, on the said 18th day of April, 1844, *mailed, in the post-office in the city of New York, a letter written by himself, and directed to said Ludlow & Babcock, at Toledo, Ohio, which said Ludlow & Babcock received by due course of mail; which letter is herewith filed, marked D, and made a part of this agreement; and is in the words and figures following, to wit:—

"*New York*, *April* 17, 1844.

"MESSRS. LUDLOW & BABCOCK, *Toledo*, *Ohio*:—

"Gentlemen,—I have this day made McQueen & McKay, of Detroit, an advance on twelve hundred and fifty-one barrels of pork, and two hundred barrels of flour, which is stored at different points on the line of the Wabash Canal, and which they state is to be shipped to your care, and held by you at Toledo, until you receive instructions from them respecting it. They have given me an order on you for it, which I have sent to Mott & Co. I wish you to ship the pork and flour to me immediately on its arrival at Toledo, at the lowest possible

rates of freight, and send me a bill of lading of the same. There is one lot of three hundred barrels of pork in Hamilton & Williams's warehouse, on which there is due from McQueen & McKay, on its arrival at your place, $550.00. This amount you may draw on me for, so soon as I receive bill of lading of the pork. Let me hear from you by return mail respecting it.

"I remain truly and respectfully yours.

"E. T. H. GIBSON."

At the time of the assignment of said memorandums of purchases, receipts, and guarantees, said Gibson was a commission merchant in said city of New York, in the state of New York, and it was usual and customary for commission merchants, residing and doing business in the city of New York, to make advances on Western produce, upon the assignment of the proper evidences of title thereto.

On the 23d of April, 1844, said Gibson, having on that day learned that McQueen & McKay had suffered some of their bills to be protested for non-payment, despatched one William Hoyt to the town of Fort Wayne, aforesaid, to see to the shipping of said pork and flour; and the said Hoyt arrived at said town of Fort Wayne on the 29th day of April, 1844, for that purpose, having in his possession the said writings marked A and B.

At the time of the assignment of said writings marked A and B, the said Wabash and Erie Canal was navigable at and from the said town of Fort Wayne to the said town of Toledo.

On the 27th day of April, 1844, a writ of attachment [*389
issued *from the Allen Circuit Court, in the state of Indiana, in due form of law, at the instance and in the name of the State Bank of Indiana, against the goods and chattels, lands and tenements, of the said McQueen & McKay (William McQueen and James McKay); which said writ of attachment, and all the proceedings in and about the issuing of the same, are admitted to have been regular; and the production of the same, and of the record thereof, is hereby waived.

This said writ was directed to the defendant in this suit, who then was, and still is, sheriff of said county of Allen, and came to his possession as such sheriff on the said 27th day of April, 1844; on which said 27th day of April, 1844, the sheriff aforesaid, by virtue of said writ of attachment, levied upon, seized, and took into his possession the said pork and flour described in said writings, marked A and B, the return day of which said writ has not yet elapsed. And it is also agreed, that the proceedings of the said sheriff in executing the writ of attachment were, in all respects, regular. (It is not, how-

ever, admitted by the plaintiff, that the property levied on was, at the time levied on, or at any time since, the property of the said McQueen & McKay, or that McQueen & McKay had an attachable interest therein.) And that the defendant shall have the full benefit of all the proceedings in the said attachment, in the same manner as though the record thereof was produced before this court. And it is further agreed, that the said sheriff kept and retained the possession of the said flour and pork, so levied on by said writ of attachment, until the same was replevied out of his possession, by virtue of the writ of replevin in this case. The said writ of attachment was issued and sued out for the purpose of coercing the payment of the said money, obtained by the said McQueen & McKay, as above stated.

It is further admitted by the parties, that the said pork and flour are of the value mentioned in the affidavit of William Hoyt, now on file in this court, on which said writ of replevin was issued.

The said Ludlow & Babcock were, on the 17th day of April, 1844, the forwarding merchants of the said McQueen & McKay, at Toledo, Ohio, one hundred and four miles from Fort Wayne; and that Mott & Co. were, on the same day, the forwarding merchants of said Gibson at same place, Toledo.

It was understood between the said Gibson and the said McQueen & McKay, at the time of said assignment of said writings marked A and B, that the said Gibson should sell the said pork and flour, and after retaining his said advancement
*390] and his legal commission, and interest and outlays, pay the remainder of the *proceeds of said pork and flour to said McQueen & McKay according to the usage and custom of commission merchants. The pork and flour mentioned in said writings, marked A and B, and that levied upon by virtue of said attachment, and that replevied by virtue of said writ of replevin, in this cause issued, and purchased by McQueen & McKay with the money obtained from said bank, as aforesaid, are the same pork and flour, and not other or different. The said levy, seizure, or detention of said pork and flour happened at and within the county of Allen, in the state of Indiana; a legal demand was made before the commencement of this suit, and after the said levy, upon the defendant, by said Hoyt, as the agent of said Gibson, for the said pork and flour, and the said defendant refused to surrender the same. The said Gibson was, at the time of the commencement of this suit, and still is, a citizen of the state of New York, and the defendant a citizen of the state of Indiana.

The said advancement, so made by said Gibson, corresponds

with the usual advancing rates of commission merchants in the said city of New York, at the time of said advancement.

The said writ of attachment was levied on the said property at the instance of the said branch of said State Bank of Indiana; and it was known to the State Bank of Indiana at the time of, and before, the levy of said writ of attachment, that the said loan had been procured from her said branch at Indianapolis fraudulently, by said McQueen & McKay, and that the said McQueen & McKay had invested the said money, so obtained, in the purchase of said pork and flour, and that said attachment is still pending; and that the original bills on which said money was obtained fell due after the levy under said attachment; and that none of said bills, on which said money was obtained, or any part thereof, have ever been paid, but were at maturity protested for non-payment.

It is also admitted, if the court should consider the circumstance legitimate or material, which the defendant denies, that in 1843 the said McQueen & McKay, and said Gibson, had a similar transaction in New York, in which the said McQueen & McKay acted with integrity, but with which the bank or the other parties had no connection.

Upon this case stated, the Circuit Court gave judgment for the defendant in replevin. The counsel for the plaintiff took an exception, and brought the case up to this court.

It was argued by *Mr. Romeyn* and *Mr. Wood*, for the plaintiff in error, and by *Mr. Bright* (in a printed argument), for the defendant in error.

**Points for the Plaintiff.* [*391

I. The attachment was prematurely brought. Because,—

1. The loan of its bills by the bank to McQueen & McKay was on an express agreement for credit; which agreement, if procured by fraud, was not void, but voidable, by the bank at its option. Chit. on Cont., 678; Story on Sales, §§ 420, 447, and cases cited; *Galloway* v. *Holmes*, 1 Doug. (Mich.), 336; *Rowley* v. *Bigelow*, 12 Pick. (Mass.), 307.

2. There being an express contract for a loan on time, if the bank elected to consider it fraudulent and to sue immediately, the action should have been in tort. Story on Sales, §§ 432, 434, 442, 446, and cases cited there; *Jones* v. *Hoar*, 5 Pick. (Mass.), 285; *Willett* v. *Willett*, 3 Watts (Pa.), 277; *Cary* v. *Curtis*, 3 How., 247, 248.

3. The remedy by foreign attachment in Indiana is confined to cases of debts due on contract and shown by affidavit; and the institution of such a suit was an affirmance of the contract

of loan; and, inasmuch as the stipulated term of credit had not expired, the action was prematurely brought. Code of Indiana of 1843, pp. 762, 763, 772, 773; *Lindon* v. *Hooper*, Cowp., 418; *Ferguson* v. *Carrington*, 3 Carr. & P., 457, at *Nisi Prius;* same case in Bench, 9 Barn. & C., 59. This case is cited as law by Starkie, 2 Ev., 55; 1 Chit. on Pl., 157; 1 Com. on Cont., 221; *Dutton* v. *Solomonson*, 3 Bos. & P., 585; 15 Mass., 80, note *a; Galloway* v. *Holmes*, 1 Doug. (Mich.), 334.

In the present case, the question is not whether the bank had a right to disaffirm; but whether, by bringing this action, she did not in fact affirm the express contract.

The authorities cited show the general doctrine of the common law to be, that promises in law exist only in the absence of promises in fact; that where there is an express contract, suing in assumpsit is an affirmance of it; that in those cases in which it has been held that assumpsit would lie immediately on discovery of the fraud, there was a debt due, *in præsenti*, either by an express precedent contract, or by the absence of any agreement for credit; or the contract was incapable of confirmation and absolutely void, through illegality, or as being contrary to public policy.

It is further contended, that the attachment of the pork and flour, as the property of McQueen & McKay, was an affirmance of the contract with them. *Campbell* v. *Fleming*, 1 Ad. & Ell., 40; *Selway* v. *Fogg*, 5 Mees. & W., 86; *Thompson* v. *Morris*, 2 Murph. (N. C.), 248; *Dingley* v. *Robinson*, 5 Greenl. (Me.), 127; *Hanna* v. *Mills*, 21 Wend. (N. Y.), 90; Id., 175.

*392] A party cannot claim in repugnant rights, and is concluded *by the form of his action. *Smith* v. *Hodson*, 4 T. R., 217.

4. The retention of the bills of exchange, given by McQueen & McKay, as well as the form of the action, was an affirmance of the contract of loan. *Tobey* v. *Barber*, 5 Johns. (N. Y.), 72; *Dayton* v. *Trull*, 23 Wend. (N. Y.), 346; *Thomas* v. *Todd*, 6 Hill (N. Y.), 341; *Masson* v. *Bovet*, 1 Den. (N. Y.), 74; Story on Sales, § 427.

II. The bank, under her attachment, had no right, as against Gibson, to claim the pork and flour as the specific proceeds of her bills, on the ground of the alleged fraud of McQueen & McKay in procuring them. Because,—

1. She attached it as the property of McQueen & McKay, and for the benefit of their general creditors. If trover had been brought, the alleged fraud would have been disputed.

2. Having voluntarily parted with the possession and osten-

sible ownership of her bills, she cannot claim them or their avails from a *bonâ fide* purchaser. *Parker* v. *Patrick*, 5 T. R., 175; *Mowrey* v. *Walsh*, 8 Cow. (N. Y.), 238; *Root* v. *French*, 13 Wend. (N. Y.), 572; *Hoffman* v. *Noble*, 6 Metc. (Mass.), 68; Story on Sales, § 200, and cases cited there.

III. The flour in the custody of Hanna, Hamilton & Co., and the pork in the hands of D. & J. A. F. Nichols, were the legal property of McQueen & McKay, at the time of the transfer thereof by them to Gibson, the plaintiff, and said McQueen & McKay held, at the time of the attachment, the beneficial interest only in the residue of the proceeds of sale thereof, to be made by Gibson, when the property reached him, after satisfying his advance thereon, with commissions and all other charges.

IV. McQueen & McKay acquired a vested legal title in said pork and flour, by their purchases. The bills of sale being their muniments of title, also a constructive possession thereof, the property remaining in the custody of the respective vendors, as their bailees. Because,—

1. The sale was a perfect vested sale, and not an executory agreement to sell at a future period. *Martindale* v. *Smith*, 1 Ad. & Ell. (N. S.), 389 (41 Cond. Com. Law, 595).

2. The bills of sale purport to pass a present vested interest, and they were delivered to McQueen & McKay. The payment of the purchase-money bound the bargain, and passed at once the legal title to them. *Barret* v. *Goddard*, 3 Mason, 110.

3. Whenever there is a present vested sale, valid in law, and the property sold is left with the vendor, he holds it in custody as bailee for the purchaser. *Elmore* v. *Stone*, 1 Taunt., 157; *Bailey* v. *Ogdens*, 3 Johns. (N. Y.), 416; *Dixon* v. *Yates*, 5 Barn. & Ad., 314.

*4. The pork and flour were sufficiently identified and distinguishable from all other property, there being [*393 no other pork in the warehouse, and the flour being marked. *Barret* v. *Goddard*, 3 Mason, 107; *Pleasants* v. *Pendleton*, 6 Rand. (Va.), 473; *Swanwick* v. *Sothern*, 9 Ad. & Ell., 895.

5. This construction is confirmed by the condition of the property at the time, and the general, well-established usage of trade in regard to it; which usage is to leave such produce in the warehouse till the opening of navigation, the warehouseman being in the meantime the bailee of the owner; and for the owner to get an advance thereon from the Eastern merchant, and to transfer the same to secure the advance: he to sell the same on commission.

6. The delivery on board of canal-boats provided for, was

a delivery as bailee for the purpose of transmission. The guarantee of inspection at Toledo was a warranty of quality, to be tested after sale, and it was not preliminary to the sale.

V. McQueen & McKay passed the entire legal title in said produce to the plaintiff, together with the beneficial interest, to the extent of his advance thereon, and gave him the constructive possession. Because,—

1. The condition of said produce was such as not to admit of actual delivery at the time, and it was in accordance with the course of business and the usage of trade to leave it with the warehouseman in the West.

2. The delivery order, according to the weight of authority, was sufficient of itself to pass the title to Gibson, on making the advance, before its presentment and acceptance.

3. But if not, the delivery to Gibson of the muniments of title, viz., the bills of sale, was sufficient for that purpose, especially when accompanied with a delivery order. *Hollingsworth* v. *Napier*, 3 Cai. (N. Y.), 182; *Wilkes* v. *Ferris*, 5 Johns. (N. Y.), 338; *Bailey* v. *Johnson*, 9 Cow. (N. Y.), 115; *Lucas* v. *Dorrien*, 7 Taunt., 279; *Greaves* v. *Hepke*, 2 Barn. & Ald., 131; *Pleasants* v. *Pendleton*, 6 Rand. (Va.), 473; *Ricker* v. *Cross*, 5 N. H., 571; *Ingraham* v. *Wheeler*, 6 Conn., 277; *Atkinson* v. *Maling*, 2 T. R., 465; *Brown* v *Heathcote*, 1 Atk., 162; *Gardner* v. *Howland*, 2 Pick. (Mass.), 599; Story on Sales, § 311; 2 Kent. Com., 500.

4. It was sufficient for the plaintiff to give notice of his purchases in a reasonable time to the respective bailees of the property, so as to exempt himself from the imputation of laches; which notice was given in this case. *Putnam* v. *Dutch*, 8 Mass., 290; *Meeker* v. *Wilson*, 1 Gall., 419; 5 N. H., 571; 6 Conn., 277.

*394] 5. The effect of the whole was to give the plaintiff the legal *title in the produce, and not a mere lien thereon, or a mere pledge of the property; and this is the effect whether the transfer be governed by the law of New York (which is properly applicable to it), or by the law of Indiana. Story on Conflict of Laws, §§ 316 to 325; *Black* v. *Zacharie*, 3 How., 512.

VI. If Gibson be considered as not having the entire legal title, but as a pledgee to the amount of his advances, he is *pro tanto* to be considered and protected as a purchaser. Story on Bailments, § 297; Story on Agency, § 361; *Lickbarrow* v. *Mason*, 2 T. R., 63; *Root* v. *French*, 13 Wend. (N. Y.), 572; *Holbrook* v. *Wight*, 24 Id., 169; *Hoffman* v. *Noble*, 6 Metc. (Mass.), 69; Story on Agency, § 111.

VII. The legal title of the plaintiff in said produce is not

superseded or divested by the levy of the attachment on the property. Because,—

1. The bank was not a *bona fide* purchaser. The attachment amounted only to an assignment *in invitum* by operation of law, and for the benefit of the creditors at large, as well as for the attaching creditor. Indiana Code, 1843, pp. 762–775; *Lempriere* v. *Pasley*, 2 T. R., 485; 1 Atk., 160; *Nathan* v. *Giles*, 5 Taunt., 558; *United States* v. *Vaughan*, 3 Binn. (Pa.), 394; *Ingraham* v. *Wheeler*, 6 Conn., 277; *Ricker* v. *Cross*, 5 N. H., 571; *Portland Bank* v. *Stacey*, 4 Mass., 663; *Putnam* v. *Dutch*, 8 Mass., 287; *Badlam* v. *Tucker*, 1 Pick. (Mass.), 389; *Gardner* v. *Howland*, 2 Id., 604; *Arnold* v. *Brown*, 24 Id., 95; note to *Lanfear* v. *Sumner*, 17 Mass., 114.

2. If the bank had been a *bonâ fide* purchaser of said produce of McQueen & McKay, instead of being attaching creditors, such purchase would not divest the plaintiff of his title, which is a legal title, with a constructive possession, fairly acquired and unaccompanied with any laches in notifying the bailee thereof, or in reducing the same to actual possession, according to the course of trade; such a legal title, being prior in time, is prior in right. See cases cited under last proposition; also *Caldwell* v. *Ball*, 1 T. R., 205; *Tuxworth* v. *Moore*, 9 Pick. (Mass.), 348; *Joy* v. *Sears*, Id., 4; *Turner* v. *Coolidge*, 2 Metc. (Mass.), 351; 3 Mason, 114; *Meeker* v. *Wilson*, 1 Gall., 422; *Phillemore* v. *Barry*, 1 Campb., 563.

The cases do not turn on the question of notice to an attaching creditor, but whether there has been such a delay in taking actual possession as to furnish evidence of fraud.

3. If the attachment had the character of a purchase, it would not be *bonâ fide* and without notice, within the reason of the rule, because McQueen & McKay were out of possession, actual or constructive, which put the purchaser upon inquiry, *and amounted to constructive notice of [*395 the prior legal transfer to the plaintiff. *Lucas* v. *Dorrien*, 7 Taunt., 278; 1 Gall., 422.

4. The bank, therefore, under the circumstances, took only the interest of McQueen & McKay then existing, and subject to all equitable, as well as legal, interests then outstanding against it.

VIII. The only interest of McQueen & McKay was the equitable beneficial interest in the residue of the proceeds of the produce when sold by the plaintiff on the consignment to him, after satisfying thereout his advances and charges on sales, which alone was attachable, and which did not warrant the officer in taking the property. Story on Bailments, § 353, and cases cited; *Badlam* v. *Tucker*, 1 Pick. (Mass.), 399;

Indiana Code, § 383, p. 744, and § 39, p. 770; *Evans* v. *Darlington*, 5 Blackf. (Ind.), 320.

IX. The rights of the plaintiff are not weakened by his having purchased the property out of the state of Indiana, to be sent and sold in New York, according to the course of trade. *Blake* v. *Williams*, 6 Pick. (Mass.), 307–314; *Black* v. *Zacharie*, 3 How., 514.

X. If there had been any danger that the plaintiff would have absconded with the property, to the injury of the equitable lien of the bank and other creditors, acquired by the attachment, (which is not shown or pretended,) their remedy would then have been in equity only.

XI. The warehouse receipt accompanying the transfer to Gibson was equivalent, under the usage of trade, to a bill of lading, and its transfer divested all outstanding title unknown to Gibson, whether legal or equitable. Because,—

1. Such instruments are assignable. Indiana Code, p. 576; Laws of New York of 1830, p. 203, § 5; 2 Rev. Stat., p. 60.

2. The case states that it was usual and customary to make advances on the assignment of proper evidences of title. *Noble* v. *Kennoway*, 1 Doug., 512; *Zwinger* v. *Samuda*, 7 Taunt., 265; *Lucas* v. *Dorrien*, Id., 288; *Barton* v. *Baddington*, 1 Car. & P., 207; *Keyser* v. *Suse*, Gow., 58.

The argument filed on behalf of the defendant in error was an elaborate support of the following points:—

1. If Gibson's claim be in the nature of a lien, he cannot recover, unless he, or his agent for the purpose expressly authorized, had the actual possession of the pork and flour before the attachment was levied. Under the circumstances of this case, a constructive possession cannot be conferred, for
*396] the following reasons:—1. Because the bills of parcels, &c., in this cause, do *not amount to warehouse receipts; for instance, the memorandum of Hanna, Hamilton & Co. is a mere receipted bill of parcels, and a guarantee of the inspection of the pork at Toledo; it does not even acknowledge the pork to be in store. Should the pork and flour not pass inspection, McQueen & McKay would not be bound to accept them. The bills of parcels, with their indorsements, &c., amount to nothing more than mere orders to deliver the pork and flour to Gibson; and until the Nicholses, and Hanna, Hamilton & Co., were presented with such orders, and they had accepted the same, and assented to hold the pork and flour for Gibson, as his agents, his lien could not attach; and the attachment having been sued out, and levied on the pork and flour in question before they received orders in favor of

Gibson, the attaching lien of the State Bank must prevail. 2. Although the memorandum may be considered as warehouse receipts, yet, there being no legislative enactment or usage in New York making the transfer and delivery thereof to confer a constructive possession of the pork and flour, their transfer and delivery to Gibson cannot have that effect. 3. Although, by the laws of New York, these memoranda might confer a constructive possession on Gibson, yet, as the pork and flour were, at the time of the delivery of those memoranda to Gibson, at Fort Wayne, in Indiana, the transaction must be governed by the laws of Indiana. In Indiana we have no law, or usage, giving such force to warehouse receipts.

2. Although Gibson should be regarded as an absolute purchaser, yet, as the attachment was levied upon the pork and flour before he or any agent of his had actual possession of them, Gibson cannot recover. *A fortiori* if Gibson's claim be only a lien.

3. If the pork and flour be regarded as a security to Gibson, for the repayment of the advance, nevertheless, as neither Gibson nor any agent of his had the actual possession of the pork and flour before they were attached, nor had the instruments by which his lien on the pork and flour was created been recorded in Allen county, Indiana, (the place where the pork and flour were,) within ten days, according to the Rev. Stat. of Indiana, 1843, p. 590, § 10, such assignment to Gibson is void as to the State Bank.

4. Whether Gibson's right be regarded as a lien on, or a purchase of, the pork and flour, still, as neither Gibson nor any agent of his, had the actual possession thereof, before the attachment was levied, Gibson cannot recover.

5. If Gibson be regarded a "deemed *pro tanto* purchaser," McQueen & McKay must be regarded as owners of the residue. *This condition of things necessarily makes [*397
Gibson and McQueen & McKay tenants in common of the pork and flour. If this be true, (which we regard as unquestionable, if Gibson be a "*pro tanto* purchaser,") the interest of McQueen & McKay in the pork and flour is attachable, and the officer attaching can, by virtue of the attachment, take the whole of the pork and flour, even out of the actual possession of Gibson, and deliver it over to the purchaser, and Gibson cannot replevy them from the officer or the purchaser under the attachment.

6. If Gibson's right be only a lien, although such lien may have attached on the pork and flour before the attachment of

the State Bank was levied thereon, nevertheless the interest of McQueen & McKay therein is attachable.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is one of much interest, and has been very fully argued. There is, however, but a single question in it, and that is, whether the property in dispute was transferred to the plaintiff in error, and vested in him, by the indorsement and delivery of the warehouse documents in the manner stated in the record.

The fact that McQueen & McKay by fraudulent means obtained the money from the bank, with which they purchased the pork and flour, is not material in the decision of this question. The bank in these proceedings does not claim the property as its own, upon the ground that it was purchased with money fraudulently obtained from it. If it had intended to assert its title as owner, it should have proceeded by some appropriate action to recover the property itself, or the value of it in damages. But the bank presents itself in the character of a creditor, seeking to collect its debt by an attachment against the property of its debtor. And the claims of both parties, plaintiff and defendant, rest upon the admission that the pork and flour were the property of McQueen and McKay, and had been left by them in the custody of the warehousemen as their bailees.

We are not, therefore, called upon to decide whether the owner of money fraudulently obtained from him can follow the proceeds in the hands of a *bona fide* purchaser without notice, and in the usual course of trade. As this question is not in the case, we forbear to examine it, although it was discussed in the argument at the bar. We must not, however, be understood as intimating that, if this point had arisen, the judgment of the court would have been different from that which we are about to give.

*398] * The case as it comes before us in substance is this: The pork and flour were purchased by McQueen & McKay, at Fort Wayne, in the state of Indiana, on the 4th of April, 1844. The articles were in the warehouses of the respective vendors at the time of sale, and the purchasers took from each of them a written memorandum of the sale, with a receipt for the money, and an engagement to deliver them on board of canal-boats soon after the opening of canal navigation. There was also a written guarantee from the respective vendors, that the articles sold should pass inspection. By the order of McQueen & McKay they were to be sent by canal-

boats to Ludlow & Babcock, their agents at Toledo, in the state of Ohio, to be held by them until they received orders from McQueen & McKay.

The documents executed by the warehousemen, herein before mentioned, transferred the property and the possession of the pork and flour to McQueen & McKay, and the vendors from that time held it for them, and as their bailees.

Being thus in possession, McQueen & McKay afterwards, on the 17th of April, in the city of New York, in consideration of the advance of money mentioned in the statement of the case, delivered to Gibson, the plaintiff in error, the evidences of title which they had received from the vendors, indorsing thereon an order upon them to deliver the property to Gibson. They at the same time delivered to Gibson a letter to Ludlow & Babcock, their agents at Toledo, stating that they had received an advance from Gibson upon this property, and directing them to deliver it to him, and to comply with his orders.

Gibson was a commission merchant residing in New York, and it is admitted that this transaction with McQueen & McKay was in the usual course of his business. On the 27th of April, ten days after this transfer, the property was seized by the defendant in error, as sheriff, under an attachment issued on the same day at the suit of the bank, to obtain satisfaction for the debt due to it from McQueen & McKay. At the time of the attachment, the pork and flour still remained in the warehouses at Fort Wayne, and neither the warehousemen nor the attaching creditor had notice of the transfer to Gibson. The agent despatched by him arrived two days afterwards, and claimed the property. The sheriff refused to deliver it up, and this action of replevin was thereupon brought to recover it.

In examining the question between these parties, it is proper to say, that, if the fact had not been admitted that the dealing between McQueen & McKay and the plaintiff was in the usual course of trade, the court would yet have felt itself bound to take judicial notice of it. Apart from the [*399
fraud imputed to *McQueen & McKay, of which Gibson had no knowledge, the statement of facts in this case describes the usual course of the great inland commerce by which the larger part of the agricultural productions of the valley of the Mississippi find their way to a market. It has existed long enough to assume a regular form of dealing, and it embraces such a wide extent of territory, and is of such general importance, that its ordinary course and usages are now publicly known and understood; and it is the duty of the court to recognize them, as it judicially recognizes the general and established usages of trade on the ocean. For if, by any de-

cision of this court, doubt should be thrown upon the validity and safety of a contract fairly made according to the usages of this trade, and in the ordinary course and forms of business, the want of confidence would seriously embarrass its operations, to the injury of all connected with it, and would certainly be not less injurious to the agriculturist and producer than to the merchant and trader.

The transaction, therefore, being in the usual course of trade, and free from all suspicion of bad faith on the part of the plaintiff, the question to be decided is, what was the legal effect of the indorsement and delivery of the warehouse documents, in consideration of the advance of money he then made to McQueen & McKay? In the opinion of the court, it transferred to him the legal title and constructive possession of the property; and the warehousemen from the time of this transfer became his bailees, and held the pork and flour for him. The delivery of the evidences of title and the orders indorsed upon them was equivalent, in the then situation of the property, to the delivery of the property itself.

This mode of transfer and delivery has been sanctioned in analogous cases by the courts of justice in England and this country, and is absolutely necessary for the purposes of commerce. A ship at sea may be transferred to a purchaser by the delivery of a bill of sale. So also as to the cargo, by the indorsement and delivery of the bill of lading. It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. But the subject came before this court in the case of *Conard* v. *The Atlantic Insurance Co.*, in 1 Pet., 445, where this symbolical delivery was fully considered and sustained. The same principle was decided in the case of *Brown* v. *Heathcote*, 1 Atk., 160; *Greaves* v. *Hepke*, 2 Barn. & Ald., 131; *Atkinson* v. *Maling*, 2 T. R., 465; *Wilkes and Fontaine* v. *Ferris*, 5 Johns. (N. Y.), 335; *Pleasants* v. *Pendleton*, 6 Rand. (Va.), 473; *Ingraham* v. *Wheeler*, 6 Wend. (N. Y.), 277; *Ricker* v. *Cross*, 5 N. H., 571; *Gardner* v. *Howland*, 2 Pick. (Mass.), 599; *2 Kent Com., 499; Story on Sales, § 311. The rule is not confined to the usages of any particular commerce, but applies to every case where the thing sold is, from its character or situation at the time, incapable of actual delivery. The contract between the plaintiff and McQueen & McKay having been made in New York, the articles in the warehouses at Fort Wayne were incapable of actual delivery; consequently, the delivery of the evidences of title, with the order to the bailees indorsed on them, passed the title and possession to the plaintiff.

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It is true there is no formal assignment indorsed on the

warehouse document. But the technical rules of common law conveyances and transfers of property had never been applied to mercantile contracts made in the usual course and forms of business. The indorsement of the delivery order upon these evidences of his title, like the indorsement upon a bill of lading, sufficiently manifests the intention of the parties that the title and possession should pass to Gibson. And when that intention is evident from the language of the written instruments and the nature and character of the contract, it is the duty of the court to carry it into execution without embarrassing it with needless formalities. A contrary rule would most commonly defeat the object which both parties designed to accomplish, and believed they had accomplished, by the instruments they executed.

Nor, as respects the legal title, can there be any distinction between the advance made by Gibson, and the case of an actual purchaser. To the extent of his advances he is a purchaser, and the legal title was conveyed to him to protect his advances. It is not like the lien of a factor, who makes advances for his principal upon goods in his possession. But even in that case the property cannot be withdrawn from his hands until his advances are repaid. But in the case before us, the title of Gibson is not a mere lien. The legal title, the right of property, passed to him, and McQueen & McKay retained nothing but an equitable interest in the surplus, if any remained after satisfying the claims of Gibson. The case of *Conard* v. *The Atlantic Insurance Company*, before referred to, was the case of a loan of money upon a respondentia bond upon a cargo at sea, secured by an assignment on the bill of lading, and in that case the court said,—"It is true that, in discussions in a court 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." 1 Pet., 441.

*The guarantee that the articles should pass inspection does not affect the character of the transaction, [*401 nor convert it into an executory contract. It is nothing more than the usual warranty of the soundness and quality of the thing sold, which is taken by the purchaser in every sale of personal property when he does not choose to take the risk upon himself.

It appears that the attachment was laid before the warehousemen received notice of the transfer to Gibson. Undoubtedly it was his duty to use reasonable diligence in giv-

ing notice both to them and the agent at Toledo. And negligence in this respect on his part would be regarded as evidence of fraud, and might moreover put in jeopardy his right of property, if it passed into the hands of a *bonâ fide* purchaser without notice, and in the usual course of trade. But in this case there has been no unreasonable delay. The notice was promptly given, and the receipt of it by the bailees was not necessary to complete his title. As between him and the creditors of McQueen & McKay, the property and possession vested in him at the time of the transfer and delivery of the documents. The cases before referred to establish this principle.

Neither is the equitable interest of McQueen & McKay in the surplus (if any remain) material to the decision. This equitable interest is no doubt liable to attachment by the laws of Indiana. But that liability will not authorize the attaching creditor to take the property out of the hands of the legal owner, before his claims upon it are discharged. The equity of redemption upon a mortgage of real property is liable to attachment. But it will scarcely be contended, that the attaching creditor, or a purchaser under the attachment, or the officer levying it, could maintain an ejectment against a mortgagee in possession, or in any other way interfere with his possession, when holding it as security for money due him. The same rule applies to a mortgagee of personal property holding the legal title and possession to secure his advances.

Upon the whole, therefore, we think there is error in the judgment of the Circuit Court, and that it must be reversed.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Indiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this
*402] cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein in conformity to the opinion of this court.

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