*DANIEL L. GROVE, APPELLANT, *v.* JOHN MCP. BRIEN, ROBERT GILMOR, WILLIAM FOWLE, WILLIAM H. FOWLE, AND GEORGE D. FOWLE, TRADING UNDER THE FIRM OF WILLIAM FOWLE & SONS, DEFENDANTS.

Cross Suit.

ROBERT GILMOR, COMPLAINANT, *v.* DANIEL L. GROVE, JOHN MCP. BRIEN, WILLIAM FOWLE, WILLIAM H. FOWLE, AND GEORGE D. FOWLE, TRADING UNDER THE FIRM OF WILLIAM FOWLE & SONS, DEFENDANTS.

Where a manufacturer upon the upper waters of the Potomac shipped five hundred kegs of nails to Alexandria, taking from the master of the canal-boat a receipt saying that the nails were "to be delivered to Fowle & Sons in Alexandria, for the use of Robert Gilmor of Baltimore," and on the same day sent a letter to the consignees, advising them that the goods were consigned for the use of Gilmor, such delivery and bill of lading operated as a transfer of the legal title to Gilmor, who was in fact the consignor.

The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage.[1]

Therefore, the kegs of nails in the hands of Fowle & Sons were not subject to an attachment by the creditors of the manufacturer; nor had Fowle & Sons any valid lien upon them for previous advances to him. The title to the nails had passed to Gilmor before they came into the possession of Fowle & Sons.

In this case the manufacturer acted *bona fide*, in the transfer of the goods, for the purpose of securing a pre-existing debt to Gilmor. This being so, there was no necessity for Gilmor's expressing his assent to the transfer, in order to the vesting the title. The manufacturer was a competent witness.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria.

It was a controversy respecting the right to certain kegs of nails, which were in the hands of William Fowle & Sons, in Alexandria.

On the 14th of March, 1843, the following was the position of the several parties who had any concern in the matter.

John McPherson Brien carried on an extensive iron concern upon the waters of Antieatam Creek, in Maryland, near the Potomac River above Harper's Ferry. He was indebted to Robert Gilmor of Baltimore, to Daniel L. Grove of Alexandria, and to William Fowle & Sons of the same place. To the last-mentioned house he had been in the habit of sending nails from the foundry, and upon the preceding 21st of February had written the following letter:

[1] DISTINGUISHED. *The Bark Carlotta*, 9 Ben., 16. CITED. *Lawrence* v. *Minturn*, 17 How., 107; *The Bermuda*, 3 Wall., 553; *Halliday* v. *Hamilton*, 11 Id., 564; *The Vaughan and Telegraph*, 14 Id., 266.

"*Antieatam, February* 21, 1843.

"MESSRS. WM. FOWLE & SONS:—

*430] "Gentlemen,—Your account of sales, &c., has been examined *and found correct, and charges for your commission, &c., made in my books accordingly.

"The water I learn will be put into the canal in a day or two, when I shall embrace the first opportunity to forward you the nails you have ordered.

"Yours, most respectfully,

"JNO. MCP. BRIEN."

In this state of affairs, Brien made a shipment by one of the canal-boats, and took the following receipt:—

"Received, March 14, 1843, of John McP. Brien, 500 kegs of nails, to be delivered to William Fowle & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order.

"GEORGE H. SHARPLESS,
For ISAAC SHARPLESS."

Upon the same day the following letter was written, which, it appeared by the testimony, was not mailed at Mr. Brien's post-office, but brought down the canal by the boatman, and mailed at Georgetown, on the 20th. It was received by Fowle & Sons on the 21st.

"To MESSRS. WM. FOWLE & SONS:—

"Gentlemen,—We have this day shipped on board of Capt. Sharpless' boat, and consigned to you, for the use of Robert Gilmor, Esq., Baltimore, 500 kegs nails, viz., 27 3*d.*, 34 4*d.*, 68 6*d.*, 99 8*d.*, 107 10*d.*, 58 12*d.*, 22 20*d.*, and 17 30*d.* nails; 22 2*d.*, 7 8*d.*, and 15 10*d.* brads; 10 8*d.* and 12 10*d.* fencing, which we hope will arrive in good order. You will please pay Capt. Sharpless his freight, and oblige yours, respectfully,

"JNO. MCP. BRIEN,
Per JAS. S. PRIMROSE.

"*March* 14, 1843."

Postmarked, "Georgetown, D. C., March 20."

Upon the preceding 23d of January Grove had filed a bill (the origin of all these legal proceedings) against Brien and Fowle & Sons, stating that Brien was indebted to the complainant in the sum of $1089.50, and praying that an attachment might issue against his funds and effects in the hands of Fowle & Sons. As soon as the nails arrived, viz., on the 20th of March, the marshal served the attachment and subpœna.

It may be here stated, that Gilmor obtained leave of the court to be made a defendant, and afterwards filed his answer and cross-bill.

*It is not necessary to state the progress of the suit through all its details. The parties all answered, and much testimony was taken, including that of Brien, which was objected to by the counsel for Grove. Proper parties were also made in place of some who had died. [*431

Fowle & Sons in their answer set forth their previous dealings with Brien, the letter (above inserted) of the 21st of February, and claimed that Brien was indebted to them on account of prior transactions, for which balance so due they had a lien on the nails.

The answer of Gilmor, and his cross-bill, state substantially the same facts, and, after referring to the attachment of the nails in controversy by Grove, say,—That John McP. Brien was indebted to Robert Gilmor, (besides other large indebtedness,) in the amount of a draft for $4,405.40, which was drawn by Brien on Gilmor and by him accepted, and at maturity paid by Gilmor, at the request and solely for the use of Brien. That previous to the shipment of the said nails, it was agreed between Brien and Gilmor, that Brien should ship to Gilmor the 500 kegs of nails, on account of, and to be applied in part liquidation of, such pre-existing debt.

It then proceeded to state the shipment, and claimed the nails as his property.

The answer of John McP. Brien to the original and cross-bills neither admits nor denies his indebtedness to Grove, as charged in his original bill, but calls for proof. He states his indebtedness to Gilmor, as alleged in the cross-bill, and admits that, according to a previous agreement between himself and Gilmor, and in consideration of such pre-existing indebtedness, he shipped the 500 kegs of nails in controversy, on the 14th of March, 1843, to the care of Wm. Fowle & Sons. That by letter dated the 14th of March, 1843, he advised said Wm. Fowle & Sons, that the said nails, a particular description of which is contained in the letter, were forwarded to them, for the use of Robert Gilmor, of Baltimore, and also inclosed them the receipt or bill of lading of the common carrier, to whom the said nails were delivered, which expressed that the same were shipped for the use of Robert Gilmor, and denies all fraud, combination, &c.

Grove answered the cross-bill, stating his ignorance generally of the facts, calling for proof, and charging that the consignment for Gilmor's use, if made, was fraudulent, &c., &c.

The result of the evidence in the suit may be stated to establish the debt of Brien to Gilmor, to Grove, and to Fowle & Sons, and the question was which creditor had the preference. The account of the sale of the nails was thus presented by Fowle & Sons.

*432] *It will be perceived that their prior debt is not brought into the account.

"Sales 500 casks nails, received from the Antieatam Iron-Works, for account and risk of whom it may concern.

"*Account of the sale of the nails by William Fowle & Sons.*

1845.			
Nov. 8.	R. Crupper, 100 casks, 10,000lbs. at $4\frac{1}{8}$, 6 months' credit, . .	$ 412.50	
1846.			
Oct. 27.	James Green, 400 casks, 40,000lbs. at $3\frac{1}{2}$, 6 months' credit, . .	1,400.00	
			$1,812.50
	Charges.		
1843.			
Mar. 18.	Paid freight on 500 kegs nails,	$75.00	
	Interest on $75 till sales are due,	17.54	
	Wharfage, $5; drayage, $3.75,	8.75	
	Storage, at $\frac{3}{4}$ cents per cask per month, ...	152.25	
	Labor, receiving, piling, and delivering, ...	5.00	
	Cooperage, ...	4.25	
	Fire Insurage, 5.100 per $100 a month and policy, $1, . .	42.00	
	Commission and guarantee, 6 per cent., ...	108.75	
			413.54
	Net proceeds average cash, February 7–10th, 1847, ...		$1,398.96

E. E.

"Wm. Fowle & Sons.

"*Alexandria, October 28th*, 1846."

On the 31st day of October, 1846, the Circuit Court passed the following decree.

"*Final Decree.*

"And now here, at this day, to wit, at a court continued and held for the district and county aforesaid, the 31st day of

October, 1846, came the parties aforesaid by their solicitors, and these causes being set for hearing, and coming on to be heard this 31st day of October, 1846, upon the original, amended, and cross-bills, demurrer, answers, general replication, depositions, exceptions, agreements of counsel, interlocutory decrees and orders, and other papers, and it appearing to the court that all the parties defendant to said original, amended, and cross-bills *had duly answered [*433 the same, and the arguments of counsel being heard, the court doth order, adjudge, and decree, that the amount of sales by the defendants, William Fowle & Sons, of the nails in controversy, made under an order in these causes of May term, 1844, not having been excepted to, be and the same is hereby confirmed. And the court proceeding first to decide upon the original bill filed by the complainant, Daniel L. Grove, doth adjudge, order, and decree, that the resident defendants, William Fowle & Sons, had not, at the filing of the said original bill, or at any time since, in their hands any property, effects, or money belonging to the said non-resident defendant, Jno. McP. Brien; and do further adjudge, order, and decree, that said original bill be dismissed, and that the said Daniel L. Grove do pay to the defendants thereto their costs in that behalf expended.

"And the court proceeding now to consider and decide upon the cross-bill, filed by the said Robert Gilmor in this cause, doth adjudge, order, and decree, that the said Robert Gilmor recover of the said John McP. Brien the sum of four thousand four hundred and five dollars and forty cents, the amount of the draft in the said cross-bill mentioned, with interest thereon from the 4th day of March, 1843, till paid; to be credited, however, by the sum of one thousand eight hundred and twelve dollars and fifty cents, as of the 14th day of March, 1843; the said sum of $1812.50 being the gross amount of the sales of the said five hundred kegs of nails, as shown by the account of sales of the said William Fowle & Sons above mentioned; and the court doth further order and decree, that the said William Fowle & Sons, out of the said one thousand eight hundred and twelve dollars and fifty cents, the proceeds of the sales of said nails in their hands, retain the sum of four hundred and thirteen dollars and fifty-four cents, in discharge and payment of the freight on the shipment of said nails, for storage, insurance, commission on sales, and the other items of charge against the said nails set forth in their said account of sales; and the court doth further adjudge, order, and decree, that the said William Fowle & Sons are not entitled to any lien on the said nails, or their proceeds, for the

sum of $334.60 claimed by them to be due as a general balance of account on previous transactions between them and the said John McP. Brien. The court doth further adjudge, order, and decree, that William Fowle, William H. Fowle, and George D. Fowle, composing the firm of William Fowle & Sons, pay over to the said Robert Gilmor the sum of one thousand three hundred and ninety-eight dollars and ninety-six cents, being the balance of the sales of the *said nails in their hands, after deducting the said sum of $413.54 in manner aforesaid. And the court further adjudge, order, and decree, that the said Robert Gilmor recover of the defendants to said cross-bill his cost against them in that behalf expended.

*434]

"From which decree the complainant, Grove, in the original bill, and a defendant in the cross-bill, prays an appeal to the Supreme Court of the United States, which is granted, upon his giving bond and security in the sum of $2500, to be approved by the court or one of the judges thereof."

Upon this appeal, the case came up to this court.

It was argued by *Mr. Davis*, for the appellant, and *Mr. Francis L. Smith*, and *Mr. Meredith*, for the appellee.

The points raised by *Mr. Davis*, upon which the decision of the court turned, were the following:

If the deposition of Brien be admitted, still, on consideration of the whole evidence, the case of the answer and cross-bill is not proved.

(*a.*) The deposition is silent as to the alleged "previous agreement;" nor is any communication with Gilmor prior to the attachment shown.

(*b.*) The statement of the consideration is defective,—as in the cross-bill,—being merely his drawing on Gilmor, who accepted and paid the draft; "in consideration of which draft and other indebtedness," &c.

5. He then states, 1st, that he shipped 500 kegs of nails to Fowle & Sons, for use of Gilmor; 2d, that he took the annexed receipt; 3d, that the letter of March 14, 1843, was written by his authority. What that letter contained does not appear. If it be supposed to be the one produced by Fowle & Sons, then,—

1. It is not proved, and so cannot be read against any but Fowle & Sons.

2. If it be read against the complainants, it did not reach Fowle & Sons till after the attachment, and was not mailed till the day of the attachment.

It is not shown that the receipt ever left Brien's posses-

sion prior to the attachment or prior to his deposition. 9 Leigh, 181.

It is submitted that these facts, if believed, do not amount to a transfer of the title to the nails to Gilmor, prior to the attachment. *Tiernan* v. *Jackson*, 5 Pet., 597–599; *Williams* v. *Everett*, 14 East, 582; *Grant* v. *Austen*, 3 Price, 58; *Scott et al.* v. *Porcher*, 3 Meriv., 652, 663, 664; Story on Agency, § 377, note 3; *The Frances*, *French's Claim*, 8 Cranch, 359, *363; 3 Cond. R., 224; and *Dunham and Randolph's claim*, 8 Cranch, 354, 358; 3 Cond. R., 222, 223; *The Constantia*—Henrickson, 6 Rob. Adm., 321; Abbott on Ship., 328, 329, (5th Am. ed.) § 6; *The Venus*, 3 Cond. R., 181 (note 2); 2 Kent's Com., 532, 533, note *a* (3d ed.); 3 Barn. & A., 321. [*435

The receipt is not a bill of lading; or if it be one, the mere taking it does not change the property, nor the mere indorsement, without delivery of it. Abbott on Ship., 329, 330; *Mitchel* v. *Ede*, 3 Perry & D., 513; S. C., 11 Ad. & Ell., 888; 1 Bos. & P., 563; 1 Pet., 386.

But, in fact, the deposition shows that these nails were consigned generally to Fowle & Sons on their order; that the consignment for use of Gilmor is an afterthought, to cover the property from attachment, and a device frequently resorted to by Brien for such purposes; and that Brien's deposition is unworthy of credit.

The counsel for the appellee, after examining the evidence to prove that the nails were shipped by Brien to pay a pre-existing debt to Gilmor, made the following points.

If, then, as we insist, the evidence just alluded to proves that the nails were shipped under a special contract between Brien and Gilmor, in consideration of a pre-existing debt, due from the former to the latter, they became the property of Gilmor, on the 14th day of March, 1843, and are not liable to the lien of an attaching creditor, and on this ground the attachment of Grove must fail. Story on Agency (ed. 1839), § 362, and cases cited in note 2; *Weymouth* v. *Boyer*, 1 Ves., 416; *Coxe et al.* v. *Harden et al.*, 4 East, 211; *Burn* v. *Carvalho*, 4 Myl. & C., 690; *Wood* v. *Roach*, 2 Dall., 180; 1 Yeates, (Pa.), 177.

In view of these positions, we further submit, that immediately upon the receipt of the nails by Sharpless, the common carrier, and his signing the bill of lading, expressing on its face that they were to be delivered to Wm. Fowle & Sons, for the use of Robert Gilmor of Baltimore, the absolute title to the nails vested in Gilmor, and their delivery to Sharpless, the

carrier, operated in law as a delivery to Gilmor. The rule is the same whether the goods be sent from one inland place to another, or beyond sea. Holt on Shipping, 359; Story on Agency, § 361, and cases there cited; 2 Kent Com. (ed. 1847), part 5, p. 499; *Smith* v. *Bowles*, 2 Esp. Cas., 578; *Atkin* v. *Barnwick*, 1 Str., 165; *Evans* v. *Martlett or Martell*, 1 Ld. Raym., 271, and also reported in 12 Mod., 156, and in 3 Salk., 290, which is strongly analogous to the case at bar;
*436] *Dawes* v. *Peck*, 8 T. R., 330; *Allen* v. *Williams*, 12 Pick. (Mass.), *297; *Buffington et al.* v. *Curtis et al.*; 15 Mass., 528, and cases there cited; *Ludlowe* v. *Bowne*, 1 Johns. (N. Y.), 15; *Potter* v. *Lansing*, Id., 215; *Summeril* v. *Elder*, 1 Binn. (Pa.) 106; *Griffith* v. *Ingledew*, 6 Serg. & R. (Pa.), 429; *King* v. *Meredith*, 2 Campb., 639; *Copeland* v. *Lewis*, 2 Stark. N. P., 33; *Howland* v. *Harris*, 4 Mason. 502.

The letter of advice from Brien to Wm. Fowle & Sons was a declaration of trust, and an irrevocable appropriation of the nails for the use of Robert Gilmor. *Walter et al.* v. *Ross et al.*, 2 Wash. C. C., 288; *Sharpless* v. *Welch et al.*, 4 Dall., 279; *Row* v. *Dawson*, 1 Ves. Sr., 331; *Stevenson* v. *Pemberton*, 1 Dall., 4; *Corser* v. *Craig*, 1 Wash. C. C., 424; 2 Story Eq. Jur., 1044, 1045.

The letter of advice to Fowle & Sons, the consignees, connected with the execution of the bill of lading and the delivery to the carrier for the use of Gilmor, amounts to such an assignment and transfer of the property in the nails to Gilmor, or to his use, as to protect them effectually against the claims of any attaching creditor. They amount to an order drawn on the whole fund. *Mandeville* v. *Welch*, 5 Wheat., 277–286; Story Conflict of Laws, p. 324, § 396; Bac. Abr. (Gwillim's ed. 1846), 381, and cases there cited; 2 Kent. Com. (ed. 1847), 548, 549; *Lickbarrow* v. *Mason*, 2 T. R., 63; *Nathan* v. *Giles*, 5 Taunt., 558; *Meyer* v. *Sharpe*, Id., 79; S. C., 1 Marsh., 233; *Wright* v. *Campbell*, 4 Burr., 2051; *Cuming* v. *Brown*, 9 East, 506; *Newsom* v. *Thornton*, 6 Id., 16; *Gardner* v. *Howland*, 2 Pick. (Mass.), 599; *Peters* v. *Ballistier*, 3 Id., 495; *Hodges* v. *Harris*, 6 Id., 359; *Rowley* v. *Bigelow*, 12 Id., 307; *Dawes* v. *Cope*, 4 Binn. (Pa.), 258; *Chandler* v. *Belden*, 18 Johns. (N. Y.), 157; *Bholen et al.* v. *Cleveland et al*, 5 Mason, 174; *Wilmshurst* v. *Bowker*, 7 Man. & G., 882; *Conard* v. *Atlantic Ins. Co.*, 1 Pet., 419; *Wakefield* v. *Martin*, 3 Mass., 558; Holt on Shipping, p. 362, § 4, p. 365, § 8, p. 373, § 15, p. 374, § 16, p. 377, § 19.

Notice of acceptance by Gilmor was not necessary, the goods having been shipped to pay a precedent debt. *Ander-*

son v. *Van Alen*, 12 Johns. (N. Y.), 343; *Wheeler* v. *Wheeler*, 9 Cow. (N. Y.,) 34; *Holland* v. *Dale*, 1 Ala., 263.

The attaching creditor can occupy no better footing than the absent defendant. *Wilson* v. *Davisson*, 5 Munf. (Va.), 178; *United States* v. *Vaughan*, 3 Binn. (Pa.), 394.

The rights of parties arising from the shipment of the nails should, we suppose, be governed by the local law of the state of Maryland, where the shipment was made. Story's Conflict of Laws, §§ 397, 398, 399; *Black et al.* v. *Zacharie & Co.*, 3 How., 484. These cases establish that an assignment of personal *property, which is valid by the laws [*437 of the country where it is made, is binding everywhere. Adopting the course which was pursued in *Black* v. *Zacharie*, the appellee Gilmor took the depositions of Messrs. Glem and Brent, two eminent counsellors, who gave an opinion that the letter of advice from Brien to Wm. Fowle & Sons, and the carrier's receipt, according to the course of decision of the Court of Appeals of Maryland, vest an absolute right to the nails in controversy in Robert Gilmor. In support of their opinions, they refer to the cases of *Powell* v. *Bradlee*, 9 Gill & J. (Md.), 220, and 2 Harr. & M. (Md.), 453.

The claim of Wm. Fowle & Sons cannot be sustained, because no account has been filed showing the balance claimed by them, and further, that they have only asked relief by their answer. A cross-bill was necessary. *Talbot* v. *McGee*, 4 Mon. (Ky.), 379; *Pattison* v. *Hull*, 9 Cow. (N. Y.), 747.

The nails were not shipped, as Wm. Fowle & Sons suppose, to answer their order of the 21st of February, 1843, but for the benefit of Gilmor, in the manner stated.

The nails were appropriated, (and the evidence thereof accompanied the property,) by Brien to Gilmor, before they came to the possession of Fowle & Sons, and therefore their lien for a general balance does not attach. *Ryberg et al.* v. *Snell*, 2 Wash. C. C., 294; Abbott on Shipping (ed. 1829), 389; *Walker* v. *Birch*, 6 T. R., 262.

Being shipped under a special contract, the nails are not subject to any intervening lien. Story on Agency, § 362; and *Weymouth* v. *Boyer*, before cited.

The bill of lading for the nails, signed by the carrier, being produced by Gilmor, the legal presumption arises that it was delivered to him; either by the carrier or by the consignees, Wm. Fowle & Sons.

John McP. Brien is a competent witness, he has no interest in the result of the suit, he stands in mutual regard between Grove and Gilmor, and his legal interest is equally balanced. A witness who is liable to both parties is competent for either

Stewart v. *Stocker*, 1 Watts (Pa.), 135; *Sommer* v. *Sommer*, Id., 303; *Bailey* v. *Chapell*, 1 Harr. (Del.), 449; *Eldridge* v. *Wadley*, 3 Fairf. (Me.), 371–373; *Blaisdell* v. *Cowell*, 2 Shep. (Me.), 370; *Sherron* v. *Humphreys*, 2 Green (N. J.). 217; *Prince* v. *Shephard*, 9 Pick. (Mass.), 176; *Emerson* v. *The Prov. Man. Co.*, 12 Mass., 237; *Stump* v. *Roberts*, 1 Cook (Tenn.), 440; *Harwood* v. *Murphy*, 4 Halst. (N. J.), 215; *Nessly* v. *Swearingen*, Add. (Pa.), 144; *Evans* v. *Hettich*, 7 Wheat., 453; *Kirk* v. *Hodgson*, 2 Johns. (N. Y.) Ch., 550; Richardson, 268.

*438] A cross-bill was Gilmor's proper, indeed only, remedy. The *nails were attached and in the hands of a court of equity, and how else could he claim and litigate his right to the property? Story Eq. Pl. from § 319 to § 403 inclusive; 1 Smith Ch. Pr., 449, 460, 461, 462, 463.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of this District, in which a bill was filed by the complainant for the purpose of enforcing the collection of a debt due from John McP. Brien, a non-resident, out of goods belonging to him within the District, in the hands of William Fowle & Sons, the consignees. It was defended by Fowle & Sons, on the ground that they had a lien upon the goods. They also set up, that the property was claimed by R. Gilmor, a merchant in Baltimore. The bill was afterwards amended, making Gilmor a defendant, who answered, setting up his title to the property; and also filed a cross-bill against the complainant, Fowle & Sons, and Brien, setting forth the same title, and praying that the proceeds, the property in the mean time having been sold, might be paid over to him. The defendants put in several answers to the bill; but, upon the view we have taken of the case, it is unnecessary to refer to them particularly.

The facts disclosed which it is material to notice are, that Brien, being indebted to Gilmor, on the 14th of March, 1843, shipped to Fowle & Sons 500 kegs of nails, the property in question, for the purpose of securing such indebtedness, and took from the master of the boat the following receipt or bill of lading:—"Received, March 14, 1843, of John McP. Brien 500 kegs of nails, to be delivered to William Fowle & Sons, Alexandria, D. C., for the use of Robert Gilmor, Esq., Baltimore, in good order." And on the same day sent a letter directed to the consignees, advising them that the goods were consigned for the use of Gilmor; and which was received about the time of the arrival of the goods.

Upon these facts, the court below dismissed the original bill of complainant, with costs, and decreed the proceeds of the property to Gilmor, deducting freight and charges.

The case is here on an appeal by the complainant in the original bill.

We are of opinion, that the decree of the court below was right, and should be affirmed.

The delivery of the goods by Brien to the master, and the bill of lading taken in the name of Gilmor, for the purpose of securing to him an existing indebtedness, operated as a transfer of the legal title; and the shipment, therefore, was not only in *fact, but in judgment of law, for and on his account. Gilmor was the consignor. [*439

The effect of a consignment of goods, generally, is to vest the property in the consignee; but if the bill of lading is special to deliver the goods to A for the use of B, the property vests in B, and the action must be brought in his name in case of loss or damage. (3 Salk., 290; 1 Ld. Raym., 271; 3 Barn. & Ald., 382; 1 Binn. (Pa.), 109; Abbott on Ship., 216 and note; Long on Sales, 293, Boston ed.)

If the person to whom the goods are ordered to be delivered, is only an agent of the shipper, he has no property in them, and cannot maintain an action against the master for not delivering them, (Abbott, 216; 1 Campb., 369,) nor for damage for negligence of the carrier. (3 Barn. & Ald., 382.) And if the goods are shipped at the risk of the consignor, though the freight is payable by the consignee, the property remains in the former. (Abbott, 216; 1 Johns. (N. Y.), 229.)

These cases, and others that might be referred to, show that the five hundred kegs of nails in the hands of Fowle & Sons were not subject to the attachment of the complainant for the liabilities of Brien, their debtor, as the title to the property had already passed to the defendant, Gilmor; and, also, that Fowle & Sons had no valid lien upon them as consignees for previous advances to Brien by the delivery to the master; as they were only agents to receive the goods on commission for sale, and were advised by the bill of lading and correspondence, that they were shipped for and on account of Gilmor. Though the goods were delivered by Brien to the master for consignment, they were delivered as the property of Gilmor, and under circumstances, as we have seen, that had the effect to invest him with the title. His right, therefore, was prior in point of time to any lien that might have been acquired, either by the complainant or Fowle & Sons, in consequence of Brien's indebtedness, upon the strictest principles of law; and as to the equities, it was but a race of diligence among the

several creditors of a failing debtor to see which should get the first security for their debts.

An objection was made on the argument, that there was no evidence that Gilmor had assented to the transfer of the property to him as security for his demand against Brien, until after the levy of the complainant's attachment.

The original bill was amended, making him a defendant, and in his answer he sets up that the transfer was made in pursuance of a previous agreement between him and Brien, in part liquidation of his indebtedness.

*440] *We are inclined to think this part of the answer is responsive to the bill, and there is no evidence in the case contradicting it in this respect. Though the bill is brief and meagre in the statement of the case which it presents, and has not incorporated in it the amendment making Gilmor a defendant; yet, from the nature of the charge against him, and ground for making him a party, it would seem necessarily to call upon him to set forth his claim to the property in dispute.

But it is unnecessary to place the answer to the objection on this ground. In the absence of all evidence to the contrary, in case of an absolute assignment of property by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it.

This principle was recognized and applied by this court in the case of *Tompkins* v. *Wheeler*, 16 Pet., 106, and had been before in *Brooks* v. *Marbury*, 11 Wheat., 96. No expression of assent, the court say, of the person for whose benefit the assignment is made, is necessary to the vesting the title, as the creditor is rarely unwilling to receive his debt from any hand that will pay him.

It was also objected, that Brien was an incompetent witness for Gilmor, on the ground of interest; but it is apparent that he had no interest in the suit, for in any event the property would be applied to the discharge of debts against him, and whether in favor of one or the other was, in point of interest, a matter of indifference to him.

In any view, therefore, that can be properly taken of the case, we are of opinion the decree of the court below was right, and should be affirmed.

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 Columbia, holden in and for the County of Alex-

andria, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

---

*THOMAS C. SHELDON AND ELEANOR SHELDON, HIS WIFE, APPELLANTS, *v.* WILLIAM E. SILL, APPELLEE. [*441

Courts created by statute can have no jurisdiction but such as the statute confers.[1]

Therefore, where the third article of the Constitution of the United States says that the judicial power shall have cognizance over controversies between citizens of different states, but the act of Congress restrains the Circuit Courts from taking cognizance of any suit to recover the contents of a chose in action brought by an assignee, when the original holder could not have maintained the suit, this act of Congress is not inconsistent with the Constitution.

A debt secured by bond and mortgage is a chose in action.

Therefore, where the mortgagor and mortgagee resided in the same state, and the mortgagee assigned the mortgage to the citizen of another state, this assignee could not file his bill for foreclosure in the Circuit Court of the United States.[2]

THIS was an appeal from the Circuit Court of the United States for the District of Michigan, sitting in equity.

The appellee was the complainant in the court below. The bill was filed to procure satisfaction of a bond, executed by the appellant, Thomas C. Sheldon, and secured by a mortgage on lands in Michigan, executed by him and Eleanor his wife, the other appellant. The bond and mortgage were dated on the 1st of November, 1838, and were given by the appellants, then, and ever since, citizens of the state of Michigan, to Eurotas P. Hastings, President of the Bank of Michigan, in trust for the President, Directors, and Company of the Bank of Michigan.

The said Hastings was then and ever since has been a citizen of the state of Michigan, and the Bank of Michigan was a body corporate in the same state.

On the 3d day of January, A. D. 1839, Hastings, President

---

[1] CITED. *Daniels* v. *Railroad Co.*, 3 Wall., 254; *The Assessors* v. *Osbornes*, 9 Wall., 575; *Case of the Sewing Machine Cos.*, 18 Wall., 577.

[2] DISTINGUISHED. *Ober* v. *Gallagher*, 3 Otto, 205. FOLLOWED. *Merserman* v. *Werges*, 1 McCrary, 534. EXPLAINED. *Deshler* v. *Dodge*, 16 How., 631. CITED. *White* v. *Vermont &c. R. R. Co.*, 21 How., 576; *Walker* v. *Powers*, 14 Otto, 248.