avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition." "And that case," continues Judge BULLER, "makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For, in the latter case, the possession continuing with the vendor till such future time, or till that condition be performed, is consistent with the deed, and such possession comes within the rule as accompanying and following the deed. That case has been universally followed by all the cases since." "This," continues the judge, "has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se*, as makes the transaction fraudulent in point of *law; that is the point which we have considered, and we are all of opinion, that if there is nothing but the absolute conveyance, without the possession, that in point of law is fraudulent."[1] [*318

This court is of the same opinion. We think, that the intent of the statute is best promoted by that construction; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest, while his property is protected from creditors, will be most effectually prevented, by declaring that an absolute bill of sale is itself a fraud, unless possession "accompanies, and follows the deed." This construction, too, comports with the words of the act. Such a deed must be considered as made with an intent "to delay, hinder, or defraud creditors."

On the second bill of exceptions the court did right in refusing to give the instruction required. The question propounded seems to have been an abstract question, not belonging to the cause.

Judgment affirmed, with costs.

UNITED STATES *v.* R. T. HOOE and others.

Practice on appeal.—Statement of facts.

Under the judiciary act of 1789, in chancery cases, a statement of facts must accompany the transcript.
This provision was revived by the repeal of the act of February 1801.

THIS was a writ of error to a decree of the Circuit Court of the district of Columbia, sitting as a court of chancery.

The case was, that Colonel Fitzgerald, in the year 1794, was appointed collector of the customs for the port of Alexandria, and gave bond to the United States in the penalty of $10,000, with R. T. Hooe, as his surety, for the faithful performance of the duties of the office. In consequence of misapplication of large sums of money by the chief clerk, who was intrusted with almost the whole *management of the business, Col. Fitzgerald became deficient in his accounts with the United States to the amount of $57,000. After this fact was discovered, he executed a deed of trust, of part of his real estate, to trustees, to be sold to indemnify [*319

[1] But see Wood *v.* Dixie, 7 Q. B. 894; Martindale *v.* Booth, 3 B. & Ad. 498; Benton *v.* Thornbel, 2 Marsh. 427; Lattimer *v.* Batson, 4 B. & C. 652; Arundell *v.* Phipps, 10 Ves. 145; Eastwood *v.* Browne, 1 Ry. & Moo. 312.

Hooe from the demands of the United States against him, as security of Fitzgerald, and also to secure him against sundry notes which he had indorsed for him at the bank of Alexandria, as well as to enable him to take up further sums at the bank, as his exigencies might require. After the death of Col. Fitzgerald, the trustees advertised the property for sale, and the United States obtained an injunction to stay the sale, alleging that by the acts of congress, they were entitled to a prior lien upon the estate of their debtor; and that the deed, as to them, was fraudulent. In the court below, the claim of the United States was rested altogether upon the prior lien created by the act of congress; and the court being of opinion, that the act did not create a lien on the real estate, and that there did not appear to be any fraud in the transaction, dissolved the injunction, with costs, and ordered $10,000, part of the proceeds of the sale, to be paid into the treasury of the United States, in satisfaction of the bond in which Hooe was the surety, and the residue, after paying the notes due at bank, to be paid into the treasury of the United States, in part satisfaction of the balance due from the estate of Fitzgerald; it having been proved to the satisfaction of the court, that the money, arising from the notes discounted at the bank, had been before paid by Fitzgerald to the United States. To reverse this decree, the present writ of error was sued out by the attorney for the United States.

The decree of the court below did not state the facts upon which the decree was founded; and although the record contained the bill, answers, exhibits and all the evidence which was before the court below, yet no statement of facts, according to the provision of the judiciary act of 1789, c. 20, § 19, was made by the parties or by the court.

The Attorney-General (Mr. *Lincoln*) opened the cause on the part of
*320] *the United States, and was going on to show that the deed was fraudulent as to creditors, upon general principles of law (a ground not taken in the court below), when he was stopped by an inquiry from the court, whether there was any provision in the act concerning the district of Columbia, by which the case was taken out of the operation of the 19th section of the judiciary act of 1789, which required a statement of the facts to accompany the record. Upon recurring to the act of congress, 27th February 1801, concerning the district of Columbia, c. 86, § 8, it was found, that writs of error were to "be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is, or shall be, provided in the case of writs of error on judgments, or appeals upon orders or decrees rendered in the circuit court of the United States."

Upon which, The Court said, that the decisions on the act of 1789, § 19, had been, that unless a statement of facts appeared upon the record, they could not say there was error. *Jennings* v. *The Brig Perseverance*, 3 Dall. 337. It is true, that the act of February 13th, 1801, c. 75, § 33, remedied the evil, but that act was repealed in 1802, so that the law now stands as it did before the act of 1801. And the act concerning the district of Columbia, by saying that writs of error shall be prosecuted in the same manner as is, or shall be, provided, &c., places this case under the law of 1789. Whatever might be the present opinion of the court, if this were the first time of being called upon to give a construction to that clause of the act, yet the

question has been solemnly settled. One legislature has taken cognisance of the construction given by the court, and has provided for the case, but another legislature has repealed that provision, and thereby given a subsequent legislative construction, or, at least, shown such a legislative acquiescence under the construction which this court formerly gave to the act, as is now conclusive.

At the request of the Attorney-General, the writ of error was dismissed.(*a*)

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*Hepburn & Dundas *v.* Colin Auld. [*321

Tender.

A tender must be unconditional; a tender, accompanied by a demand for a release, before delivery of what is tendered, is bad, unless justified by the express stipulation of the parties.

This was an action of debt, brought by Hepburn & Dundas against Colin Auld, in the Circuit Court of the district of Columbia, for the penalty of an agreement, dated 27th September 1799, between the plaintiffs, merchants of Alexandria, and the defendant, as agent for John Dunlop & Co., merchants in Glasgow.

The agreement recited, that whereas, the plaintiffs had had extensive dealings with Dunlop & Co., in the course of which the former appeared to have fallen in debt to the latter, by the accounts by them exhibited, some articles of which accounts having been objected to by the plaintiffs, they had agreed with the said agent, to submit all matters in dispute to arbitration. And whereas, the plaintiffs, by an article of agreement between them and a certain William Graham, dated 12th March 1796, did covenant with him (for the consideration of $18,000 to be by him paid to him, at certain times in the said article expressed) to convey to him, the said Graham, his heirs and assigns, 6000 acres of land on the Ohio; but the said Graham failing to make the first payment upon the day stipulated, the plaintiffs considered the said contract as thereby annulled, and in consequence thereof, brought an ejectment to recover possession of the land, which they had permitted Graham to occupy, which ejectment had been abated by his death, and another ejectment had been, or was about to be, commenced.

The indenture then witnessed, that each party covenanted to furnish their accounts to the arbitrators, so as to enable them to make their award by the 1st day of January then next, being the time stipulated by the arbitration bonds. That Auld covenanted that he, or the agent of Dunlop & Co., would, on the 2d day of January then next, accept and take of the plaintiffs the amount *which should be awarded to Dunlop & Co., in [*322
bills of exchange of a certain description, or in any money which might by law be a legal tender; and on such payment being made, in either way, give the plaintiffs a full receipt and discharge of all claims and demands of Dunlop & Co. against them. That the plaintiffs covenanted, that in case

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(*a*) Congress being in session at this time, an act was introduced and passed, containing a clause similar to the 33d section of the act of 13th February 1801, respecting writs of error and appeals in cases of equity and maritime jurisdiction, &c. (2 U. S. Stat. 244).