not, however, control or restrict the prior part of the devise of "all the estate called Marrowbone," &c. Rather than that, I should suppose the former part would carry spirit and meaning to the latter. But that is not necessary now to be determined. This first point being determined in favor of the defendant, the former judgment must be affirmed.

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*Hodgson *v.* Butts.[1] [*140

Chattel-mortgage.

A mortgage of chattels, in Virginia, is void as to creditors and subsequent purchasers, unless it be acknowledged, or proved by the oaths of three witnesses, and recorded in the same manner as conveyances of land are required to be acknowledged or proved, and recorded.[2]

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in an action for money had and received, to recover from the defendant, who was master of the schooner Mississippi, the amount of freight received by him, subsequent to the mortgage of the said schooner, by R. & J. Hamilton (the former owners) to the plaintiff.

On the trial of the general issue, the plaintiff took two bills of exception, and the verdict was for the defendant.

The first bill of exceptions stated the following facts: That the plaintiff, to support his claim, produced a deed from R. & J. Hamilton, by which they bargained and sold to the plaintiff, the schooner Mississippi, then in the port of Alexandria, and the cargo of the ship Hannah, then at sea, as security to indemnify and save harmless the plaintiff, as indorser of their notes, to the amount of $10,000. If they should indemnify him within —— days after the arrival of the cargo on the ship Hannah, if it should arrive before the return of the schooner Mississippi from her then intended voyage to New Orleans; or, if the cargo of the Hannah should not arrive, before the return of the schooner, then within —— days after her return, the deed should be void: but, if they should fail to indemnify the plaintiff, within the periods mentioned, then he was to sell the cargo of the Hannah, and the schooner and cargo.

The deed also contained the following covenant: "And we do moreover bind ourselves, our executors and administrators, and also the freight and inward cargo of the said schooner Mississippi, to exonerate the said William Hodgson from," &c. "It being the true intent and meaning of these presents, to bind ourselves, our schooner called the Mississippi, her tackle, *apparel and furniture, her freight and inward cargo, and the cargo of the ship Hannah, to exonerate," &c. [*141

The execution of the deed was in the following form: "In witness whereof, the said Robert and James Hamilton have hereunto set their hands and affixed their seals, this fourth day of May 1800.

Signed, sealed and delivered, in the presence of Ch. Simms, James D. Lowry. Robt. & Jas. Hamilton. (Seal.)

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[1] See s. c., in the court below, 1 Cr. C. C. 447, 488.

[2] United States Bank *v.* Lee, 13 Pet. 107; Lee *v.* Huntoon, Hoffm. Ch. 447; Sturtevant's Appeal, 34 Penn. St. 149.

"At a court of hustings, held for the town of Alexandria, the 6th of October 1800, this bill of sale, from Robert and James Hamilton to William Hodgson, was proved to be the act and deed of the said Robert Hamilton for self and for James Hamilton, by the oaths of Charles Simms and James D. Lowry, witnesses thereto, and ordered to be recorded.

G. Deneale, Clerk."

The plaintiff also produced in evidence the register of the schooner, with an indorsement thereon in these words, "At the request of the within named Robert and James Hamilton and William Hodgson, merchants, of the town of Alexandria, I hereby certify, that the within mentioned vessel is mortgaged by the said Robert and James Hamilton to the said William Hodgson, to secure the payment of the sum of ten thousand dollars, as witness my hand, this thirteenth day of May, one thousand eight hundred.

Chas. Page, D'y Coll'r."

It was proved, that the said register, with the indorsement thereon as aforesaid, was delivered to the defendant, previous to the sailing of the said
*142] schooner. That *she sailed from Alexandria to New Orleans, about the 14th of May 1800, from New Orleans to Jamaica, and from Jamaica, she arrived at Alexandria, about the 27th of November 1800; at which time, and not before, she was put into the actual possession of the plaintiff, under a new and absolute bill of sale, executed by Robert and James Hamilton to the plaintiff, at that time. That the defendant received the freight of the cargo carried from New Orleans, at Jamaica. No evidence was adduced to show that the plaintiff had ever given notice to the defendant, that he should look to him for the freight (other than the indorsement on the register).

On the part of the defendant, evidence was adduced, to prove that R. & J. Hamilton, on the 12th May 1800, were indebted to a certain John Haynes, in the sum of $384, for wages as a seaman, previously earned; $184 of which were earned on board the said schooner, and $200 on board another of their vessels. That being so indebted, R. Hamilton, on the 13th of May 1800, gave the said Haynes an order on his brother James, then in New Orleans, stating a balance of $384 to be due to him, with some interest, and requesting his brother to pay it. That on the same day, they were indebted to the defendant, in the sum of $800, for wages due him, as master of, and disbursements on account of, the schooner, on a previous voyage, which sum R. Hamilton requested his brother James, at New Orleans, to pay, by letter of that date. That the defendant received his sailing orders and instructions from R. Hamilton, in the name of R. & J. Hamilton, on the 14th of May 1800, before he sailed from Alexandria. That the vessel was conducted entirely under the directions of R. & J. Hamilton, from the date of the mortgage, on the 4th of May 1800, until the 27th of November 1800, when she was delivered to the plaintiff.

That on the voyage from Alexandria to New Orleans, the defendant met James Hamilton, in the river Mississippi, and showed him the orders in favor of the defendant and of John Haynes, and requested payment. That James Hamilton replied, that he had no money to satisfy the said orders;
*143] that the defendant *must wait until the vessel earned enough to pay them, and desired the defendant to pay them out of the first money

the vessel should earn, by freight or otherwise. That the vessel proceeded to New Orleans, and from thence, with a cargo, to Jamaica, where the freight was received, and out of the same, the defendant paid Haynes the $384, and applied $800 to the discharge of his own claim. That the vessel then sailed from Jamaica, and arrived at Alexandria on the 27th of November 1800. That after her arrival, and after possession delivered to the plaintiff, the latter paid the expenses and disbursements of the voyage, which became due on her arrival, by the orders of the defendant. The plaintiff also insured the vessel for the said voyage, and paid the premium thereon, after her departure for New Orleans. It was also proved, that on the defendant's return to Alexandria with the vessel, and before the plaintiff took possession of her, and received his absolute bill of sale as aforesaid, the defendant rendered to, and settled with, R. & J. Hamilton, an account-current of the expenses and profits on the said voyage, in which they gave credit for the order in favor of himself, and that in favor of Haynes.

Upon this statement of the evidence, the plaintiff prayed the court to instruct the jury, that he was entitled to recover of the defendant the sum of $1184, thus admitted to have been received for freight, and applied to the discharge of the two orders; which the court refused to do, and directed the jury to find a verdict for the defendant, if they found the facts to be as stated.

The 2d bill of exceptions stated, that the plaintiff prayed the court to instruct the jury, that if they should be of opinion, from the evidence aforesaid, that the defendant received information of the mortgage from Robert Hamilton, before the schooner sailed upon the said voyage, the plaintiff was entitled to recover the said $1184; which the court also refused to do, and directed the jury, as before, that their verdict ought to be for the defendant. This case was first argued at February term 1804.

*February 27th, 1804. *E. J. Lee*, for the plaintiff in error.—The law of mortgages is the same both as to land and personal property. [*144 The case is to be considered, 1st, upon common-law principles; and 2d, upon the statute law of Virginia.

1st. That the mortgagee is the legal proprietor of the mortgaged subject; and as such, he is entitled to receive the rents and profits, after notice of the mortgage, unless the contrary be stipulated.

The mortgagee of lands leased becomes entitled to the rent, from the time of executing the conveyance; for the rents and profits, as well as the land, are liable for the debt. As soon as the conveyance is executed, the estate is, in law, vested in the mortgagee, and his power to take actual possession exists from that moment. For these principles, see Powell on Mortgages, 79, 80, 81. The mortgagee is the absolute proprietor and the true owner. *Ryall* v. *Rowles*, 1 Ves. 361.

If lands be mortgaged to one, the interest in them is in the mortgagee, before forfeiture; for he has purchased the lands upon a valuable consideration, as the law will intend; and though the mortgagor may redeem, by means of an agreement between the parties, if he does not, the estate, in law, is absolute, without any other act to be done, to pass the estate;

although the mortgagor has in him the equity of redemption. 15 Vin. Abr. 44.

A mortgage is defined to be the appropriation of a specific thing to certain purposes. It does not, in the case of a mortgage, require the delivery of the article, in order to transfer the right and title to it.

*145] *A mortgagee of real property may bring an ejectment to get possession, against any person in possession; and may also bring an action for the mesne profits; so he may bring trover for personal property, and in the estimation of his damages, a charge for the intermediate produce or profits of the article converted, would not be rejected, but would be taken into the account. So, he may bring detinue, without any proof of possession in the mortgagee.

2d. Possession, upon common-law principles, is not necessary, in order to give title in the transferree of property. It is true, that possession in the vendor, after the transfer, is *primâ facie* evidence of fraud, and this is the only effect of such possession; but as to the proof of fraud, it is not conclusive. It may be rebutted, by testimony showing the transaction *bonâ fide*. The only use in delivering possession, is to prevent strangers being deceived by a false credit, which the possession in the vendor is calculated to produce. This reason cannot be applicable, in this case, to Butts: 1. Because Butts knew of the mortgage: 2. Because the debt due to him from the Hamiltons was an antecedent debt. If the Hamiltons had been declared bankrupts, their assignees could not have claimed the vessel or the freight; because both were pledged as a security to Hodgson. See the bankrupt law of the United States. Upon common-law principles, the mortgagee must be considered as the legal proprietor of the vessel.

3d. But the act of the legislature of Virginia places the question beyond a doubt, and proves that possession is not necessary to constitute the ownership. See Virginia Laws, 157, Revised Code of 1802; 1 Wash. 177. The legal owner of the vessel is entitled to receive the freight. Marshall on In-

*146] surance, 93. *The mortgagee of a vessel, in a late case, has been considered as the owner, and as such, liable for repairs done to her before he received actual possession. 7 T. R. 306. In this case, the decision in *Chinnery* v. *Blackburne*, 1 H. Bl. 117, is not considered as correct.

The two cases of *Jackson* v. *Vernon*, 1 H. Bl. 114, and *Chinnery* v. *Blackburne*, which will be relied on by the defendant, will, upon examination, be found not to meet the question which arises in this case. In the case of *Jackson* v. *Vernon*, the question was, whether the mortgagee was liable for the repairs to the ship; it was decided, he was not, because, the mortgagor himself ordered the repairs; as the person who makes repairs on a ship, has a claim on the person ordering them, it was supposed, the credit was given to him, and upon this ground, it was held, the mortgagee was not liable.

In the case of *Chinnery* v. *Blackburne*, Merryfield acted as the owner; he navigated the vessel, and made all contracts about her, from London to Antigua. He was on board of her, on the voyage, and at Antigua, gave the command of the vessel to another master; he also insured the vessel; and at Antigua, acted personally in command of the ship. This is not like the case at bar; for in this, Hamilton did not furnish the vessel, nor man her, after the mortgage, nor did he insure her; but Hodgson did the last act.

But both cases are doubted in the case 7 T. R. 306, and by Abbott 16, who says, they do not furnish a case for the decision of the question, who is entitled to the freight, which a case of a contract made by the master in that character will; which is our case.

There is a distinction in a court of equity and a court of law, where the mortgagor acts as the master of the vessel. In the court of equity, he is considered as owner; but not so, in a court of law. Marsh. 452–3. Hamilton never acted as master.

*4th. The contract, in words, binds and includes the freight. To which it is objected, that future freight is too remote an interest to [*147 be transferred; freight, or a hope, or expectation, is such an interest as may be insured; and if insurable, it may be granted. Goods, as well as their expected produce, may be granted. Prec. in Chan. 285. It is not competent for Butts, who claims under Hamilton, to object that the freight is not included or passed by the deed. Cowp. 600.

5th. The objection, that Robert Hamilton exercised authority over the vessel, by giving instructions, is not of any weight, in the mouth of Butts; because Butts had a full knowledge of the lien of Hodgson; and also, because it does not appear that Hodgson authorized this interference. The directions of James Hamilton, that Butts was to wait until the vessel earned enough to pay him, is also without weight; because James Hamilton was ignorant of the arrangement which his partner had made; and of which Butts might have informed him; but not having done so, he is the more culpable.

6th. Hamilton had no right to appropriate the freight to any other person, than that specified in his deed of mortgage. If he had not, Butts, his servant, had not. Butts must be considered, either as the servant of Hamilton, or of Hodgson; if the servant of the former, and undertakes to act as such, he had no right to apply the money in the manner he did. If he undertook the command, as Hodgson's servant, he had no right to apply the freight to the payment of a debt due from Hamilton.

7th. Butts having accepted of the command of the vessel, with a full knowledge of the lien upon her, and her future freight, he tacitly consented to apply the freight according to the agreement between Hamilton and Hodgson; if he intended otherwise, at the *time, he has been guilty [*148 of a fraud which ought not to avail him in a court of law.

8th. The master had no lien for his $800, due for his own wages on the vessel. The mate had no lien on this vessel for $200, they being earned on board of a different vessel, and in a different voyage. The balance of the mate's wages was only $184. The mate, by accepting an order on James Hamilton, for $384, the whole of the wages due him, agreed to accept payment in a different way from the usual one; which destroys the lien on the vessel for the $184. Salk. 131. Besides, for this $184, Butts, as the master of the vessel, when it was earned, was liable; and the moment he paid that sum, the mate's lien was gone. The master has no lien on the vessel, for the wages he pays the seamen, but has on the freight, for the wages of the voyage in which the freight was earned. The mate, by assigning the bill on James Hamilton, could not assign any lien he had on the vessel.

9th. As to the justice of the case. Hodgson has paid the seamen's

wages for the voyage which earned the freight; and Butts is to receive the benefit.

Jones, contrà.—1st. As to the validity of the deed; and 2d. As to its effect, if valid.

1st. The vessel was in port at the time of the deed, and therefore (possession not having been delivered), it is void as to creditors. The possession is dispensed with, only when the vessel is at sea. *Stevens* v. *Cole*, 1 Cooke's B. L. 339; *Hall* v. *Gurney*, Ibid. 357; *Ryall* v. *Rolle*, 1 Wils. 260; and the case of *Russell* v. *Hamilton*, in this court (1 Cr. 309).

As to the act of assembly, if the deed would have been bad, without recording, there is nothing in the act to make it good. From affirmative words, a negative may be sometimes implied, but not *è converso*. The words of the act are, "all deeds of trust and mortgages whatsoever *shall *149] be void as to all creditors and subsequent purchasers, unless they shall be acknowledged or proved, and recorded according to the directions of this act:" that is to say, a deed, although good in every other respect, yet if not acknowledged or proved, and recorded, shall be void. It cannot possibly be construed, to make good a deed which would have been before fraudulent.

2d. The deed is also void, for want of containing the register according to the directions of the act of congress. (1 U. S. Stat. 294, § 14.) This act is mandatory, and if the construction of the act of assembly contended for is correct, the register is necessary; for the affirmative words of the act of congress imply a negative as strongly as the act of assembly implies an affirmative.

3d. The plaintiff waived this deed, by taking possession under a new and absolute deed of the same property, before the mortgage was forfeited, and before he had exercised any right of ownership. This new deed implies a new consideration, and that a new bargain was made, by which the old contract was waived.

4th. The consideration of the deed was indemnity. A mere possibility of suffering is not a sufficient consideration against third persons. It is only good between the parties.

II. As to the effect of the deed, if valid. The plaintiff, by the terms of the deed itself, could not meddle with the schooner, until — days after her return from her then intended voyage to New Orleans, and a failure on the part of the mortgagors to indemnify him; and his only authority then would be to sell the vessel and cargo, if not previously sold by the mortgagors. If, then, the defendant did know of the mortgage, he must be presumed to know the whole terms, and that the plaintiff could not interfere until long after his return. He also knew that, before a forfeiture of the mortgage, and while the mortgagor holds the possession, the latter is to be considered the owner. *Jackson* v. *Vernon*, 1 H. Bl. 114, and *Chinnery* v. *Blackburne*, Ibid. 117. Even in the case of lands, a mortgagor has been held to *be a freeholder, and entitled to vote at elections. And the *150] mortgagee of a leasehold estate cannot be sued by the lessor, as assignee of the lessee, until the mortgagee is in possession, although the mortgage be forfeited, and he has a right of possession. *Eaton* v. *Jacques*, Doug. 455; *Keech* v. *Hall*, Ibid. 22.

The mortgagors had a right to receive the freight, and if so, they had a right to appropriate it. The freight is not like rent, which is said to grow out of the land. It depends upon a mere personal contract. If they had received the freight, their receipt would have been good against the plaintiff.

As to the payment of the expenses of the voyage by the plaintiff, it was voluntary. He had his reasons. He made a new contract, and paid the money after he had possession under his absolute purchase of the vessel.

The extrajudicial doubts of Lord KENYON and Abbott cannot control the strong and decisive cases of *Jackson* v. *Vernon*, and *Chinnery* v. *Blackburne*.

As to the covenant respecting the freight, it is merely a personal contract, and the plaintiff trusted to the personal security of the mortgagors. Even if they had sold the inward cargo, the plaintiff could not recover against the vendees. But the freight was not even a *chose in action*; it was only a possibility; it was not in being, and therefore, not capable of a legal assignment.

Swann, in reply.—The vessel was of less value when she returned, than when she was mortgaged, by at least the difference of the freight. Hodgson paid the expenses of the voyage. It is equitable, therefore, that he should receive the freight. The defendant had no lien on the vessel or freight.

Two questions seem to arise in this cause. 1. What relation does the mortgagor stand in to the mortgagee? 2. What relation does the defendant stand in to both?

*1. By the English law, possession must accompany the deed, except as to vessels at sea. But here possession is not necessary, if the deed be proved and recorded in a certain manner. It is then as valid, to all intents and purposes, as if possession had been delivered with the deed. [*151

THE COURT said, he need not argue that point: it had been settled.(*a*)

Swann.—What, then, are the rights which it conveys? As to mortgages of lands, the law is settled; but not so in the case of a mortgage of a ship. In England, it is settled, that a mortgagee of a ship in possession, is entitled to all the rights of property: but if a vessel be mortgaged while at sea, some doubts have arisen. But here, by the statute, the deed has the same effect as if possession had been given. The mortgagee, therefore, has all the right of property; and if in the thing itself, he has it also in its profits.

But this is not a mere mortgage. It is also an assignment of the freight itself. It is said to be the general understanding, that the mortgagor shall enjoy the profits, until forfeiture, or possession given to the mortgagee. But if the mortgagor covenants expressly that the mortgagee should receive the profits, this destroys the tacit presumption that the mortgagor should receive them. At best, a mortgagor is only "like a tenant at will," and the mortgagee may put an end to his right of taking the profits whenever he pleases. He has the legal title to the rent. *Moss* v. *Gallimore*, Doug. 282. But it is said, that the freight was not *in esse*, and therefore, could not be the subject of an assignment. But if the covenant does not operate as an assignment of the freight, it is sufficient to destroy the tacit understanding, that the mortgagors were to receive and might dispose of it as they pleased.

(*a*) Probably alluding to the case of Claiborne *v.* Hill, 1 Wash. 177.

2. In what relation does the defendant stand to the other parties? Here was no fraud on him. He had notice of the mortgage, and the appropriation
*152] of the freight to secure *the plaintiff, before the vessel sailed. He took an order for his money on James Hamilton; which shows that when he sailed, he did not depend upon the profits of this voyage, as to his claim of $800. If he had any lien on the freight, it was only for his wages arising during the same voyage. If there was any fraud, it was on his side. He never disclosed his claim to the plaintiff, before he sailed, nor after his return, until the plaintiff had paid the expenses of the voyage. The record of the mortgage was notice to him, even if we had not proved actual knowledge on his part. The mortgagors and the defendant, as their agent, were trustees for the plaintiff. If a mortgagee of lands chooses to lie by, and not demand the rents, and the tenants pay them to the mortgagor, they shall be protected. But why? Because they had not notice. But if they pay the rent to the mortgagor, after notice from the mortgagee, they pay in their own wrong. This is the case of the defendant: he knew that the mortgagors had no right to appropriate the freight.

February 28th, 1804. MARSHALL, Ch. J., mentioned to the counsel, that the court had doubts whether the mortgage was not void, for want of three witnesses, under the act of assembly (Revised Code, p. 165), for regulating conveyances. They, therefore, continued the cause, to ascertain whether any, and what decisions, has been made in Virginia upon that point.

February 25th, 1805. *E. J. Lee*, for the plaintiff in error.—The question now is, is it necessary that the mortgage should be proved by three witnesses? By the second member of the 2d section of the statute to prevent frauds and perjuries, it is declared, "if a conveyance be of goods and chattels, and be not, on consideration, deemed valuable in law, it shall be taken to be fraudulent within that act, unless the same be, by will duly proved and recorded, or by deed in writing acknowledged or proved; if the same deed
*153] include lands *also, in such manner as conveyances for lands are directed to be proved and recorded, or if the conveyance be of goods and chattels only, then acknowledged or proved by *two* witnesses in the general court, or the court of the county in which one of the parties live, within eight months, or unless possession shall really and *bonâ fide* remain with the donee," &c. By this law, if the conveyance is of goods and chattels, for a consideration not deemed valuable in law, and is proved by two witnesses, or possession is with the donee, it gives a title.

From this part of the act, the natural and only inference is, that if a conveyance is for a consideration deemed valuable in law, it must be valid, and transfer property as absolutely as a conveyance for a consideration not deemed valuable, proved by two witnesses.

The latter part of this section includes a mortgage, or any other conveyance with a condition or limitation. The first branch of the 2d section declares, that all conveyances not made with a view to defraud creditors or purchasers, are good, and does not require its being recorded. The 3d section of this act refers to the first branch of the 2d section, both being taken from the statute of Elizabeth. The whole of the 4th section of the act regulating conveyances, relates to four different objects: 1st. An estate of freehold in lands; 2d. An estate of inheritance in lands; 3d. An estate for a

term of years in lands; 4th. Deeds of settlement upon marriage, wherein lands, slaves, money or other personal thing shall be settled or covenanted to be left, or paid at the death of the party, or otherwise, and all deeds of trust or mortgages whatsoever, that is, the consideration of which is marriage, or which relate to lands. These general words are to be construed as referring to the previous subject-matter of this section, and of the previous sections.

*If the act against frauds and perjuries include not this deed, then we are to inquire, what was necessary, at common law, to pass a title to property. Personal property, at the common law, might be acquired, the books say, in twelve different ways. Among them, one is by grant or contract. A contract is an agreement, upon a sufficient consideration, to do, or not to do, a particular thing. No particular form is prescribed as to making the contract, whether it must be in writing or otherwise; it is sufficient, if the contract is proved. And all persons who have notice of the contract are bound by it. If A. sell to B., verbally, in the presence of C., a horse, and C. afterwards buy the same horse of A., will it be said C.'s title is good? No, because the contract with B. transfers the property. 2 Black. Com. 447, 448. [*154

The contract for the freight is good; the law does not require a contract to pay money out of a particular fund to be recorded. The whole tenor of the act for regulating conveyances shows that it relates to real estate only, except in the single case of marriage settlements, which are specially provided for.

But there is another error apparent in the record. The plaintiff paid to the defendant the seamen's wages, upon the faith of receiving the freight. If he was not entitled to receive it, he has paid those wages by mistake, and may recover them back in this action against the defendant, to whose orders they were paid.

Swann, on the same side.—The 4th section of the act for regulating conveyances says, that all deeds of trust and mortgages whatsoever, shall be void, unless they shall be recorded according to the directions of that act; that is, in the county where the "land conveyed lieth." Where, then, is a deed of mere personal property *to be recorded? This shows, that the legislature meant only deeds of trust and mortgages of land. [*155

C. Lee, on the same side, contended, that there was no statute respecting conveyances of personal property on valuable consideration. The statute of frauds speaks only of conveyances made on consideration, not deemed valuable in law. The word good consideration, in the 3d section, means valuable consideration, otherwise it would be repugnant.

Jones, contrà.—It is contended, now, that if the mortgage is void, and the plaintiff had no right to receive the freight, he has paid the expenses of the voyage by mistake, and can recover upon that ground. But there is no evidence that the expectation of the freight was his motive for paying those expenses. On the contrary, he did not pay them, until after he had taken possession of the vessel, under a new contract, as an absolute purchaser. The record does not state how much he disbursed, and therefore, we cannot say, how much he is entitled to recover back, even if he is entitled to recover anything. But the defendant never received the money from the plaintiff

for those disbursements. It is true, he gave orders to the plaintiff to pay, but those orders were not for his own use, and he never actually received the money.

March 2d, 1805. MARSHALL, Ch. J., delivered the opinion of the court. —This suit was instituted to recover the freight of a vessel of which the plaintiff was a mortgagee. Upon inspecting the deed, which is the foundation of the action, it appears to have been admitted to record, on the oath of only two subscribing witnesses. This suggested the preliminary question, whether a deed of mortgage, so recorded, was not absolutely void as to creditors and subsequent purchasers? This question depends on the construction of two acts of the legislature of Virginia. The first is entitled "an act for regulating conveyances:" the 4th section of that act is in these words, *"All bargains, sales," &c. The first member of the sentence *156] relates to lands only; the second to marriage settlements, wherein either lands or personal estate should be settled; and the third relates to deeds of trust and mortgages. Terms descriptive of personal estate are omitted, but the word "whatsoever" would certainly comprehend a mortgage of a personal chattel, as well as of lands, if not restrained by other words manifesting an intent to restrain them.

It is argued, that this intent is clearly manifested. The whole act relates to real estate, except that part of it which respects marriage settlements. Its title is "an act concerning conveyances," and all its provisions are adapted to the conveyance of lands, except in the particular case of marriage settlements; and in that case, the act provides expressly for recording a settlement of chattels. This act, it is said, contains no "directions" for recording a deed of trust or mortgage for a personal thing, and consequently, such deed cannot be within it.

The first section of the act respects conveyances of lands only, and directs, that they shall be acknowledged or proved by the oath of three witnesses in the general court, or court of the district, county, city or corporation in which the lands lie. The second respects marriage settlements, and directs, that if lands be conveyed or covenanted to be conveyed, they shall be proved and recorded in the same manner as had been prescribed in the first section; but if only slaves, money or other personal thing be settled, the deed is to be proved and recorded before the court of the district, county, or corporation in which the party dwells, or as afterwards directed. The third section relates only to the proving and recording of livery of seisin. Then follows the fourth section, which requires, among other enumerated conveyances, that "all deeds of trust and mortgages whatsoever" shall be void as to creditors and subsequent purchasers, if not acknowledged or proved, and recorded *157] "according to the directions *of the act." There being no "directions" which are applied to mortgages, unless lands be conveyed in them, it has been argued, that such mortgages only as convey lands, are comprehended within the act.

The act, it must be acknowledged, is very obscurely penned, in this particular respect, and there is so much strength in the argument for confining it to mortgages of lands, that, if a mortgage of a personal chattel could be brought within the provisions of any other act, the court would be disposed to adopt the construction contended for.

The plaintiff insists, that such a mortgage is comprehended in the 2d section of the "act to prevent frauds and perjuries." That act avoids fraudulent conveyances; and declares, that deeds of personal chattels, not upon a valuable consideration, where the possession remains with the donor; or a reservation of interest in the donor, where possession passes to the donee, shall be fraudulent and void, unless proved and recorded according to the directions of the act. A mortgage made on a valuable consideration would be very clearly excluded from the 2d section, although the act contained nothing further on the subject. But to remove the possibility of doubt, the 3d section declares, that the act shall not extend to any conveyance made "upon good consideration and *bonâ fide*." The meaning of the word "good," in the statute of frauds, is settled to be the same with "valuable."

It is, therefore, perfectly clear, that the case is altogether omitted, or is provided for in the act concerning conveyances. In a country where mortgages of a particular kind of personal property, are frequent, it can scarcely be supposed that no provision would be made for so important and interesting a subject. The inconvenience resulting from the total want of such a provision would certainly be great; and the court, therefore, ought not to suppose the case to be entirely omitted, if there be any legislative act which may fairly be construed *to comprehend it. The act concerning conveyances, although not penned with that clearness which is to be [*158 wished, does yet contain terms which are sufficient to embrace the case, and the best judicial opinions of that state concur in this exposition of it.

Although the point was not directly decided in the case of *Hill* v. *Claiborne*, the court of appeals appear to have proceeded on this construction; and Judge TUCKER, in discussing this subject, avows the same opinion.

Upon a consideration of the acts on this subject, Butts being a creditor, it is the opinion of the court, that the deed of mortgage, in the proceedings mentioned, was void as to him.

The counsel for the plaintiff contends, that, although the mortgage deed be void, yet Hodgson is entitled to recover, because he has paid money to the order of Butts, under the mistaken opinion that he was entitled to the freight. This allegation is not made out, in point of fact. Hodgson was in possession of the vessel, as the absolute purchaser, before he paid for the disbursements he is now endeavoring to recover. It does not appear, that he paid these disbursements, in the confidence of receiving the freight, or that he was not compellable to pay them, as owner of the vessel. The freight had previously been applied by Butts, under the authority of the Hamiltons, to the payment of a debt due to himself. He had a right, as a general creditor, to retain that freight, as against the original owners, or their assignee.

The court is of opinion, that the judgment of the circuit court is to be affirmed, with costs.