UNITED STATES *v.* HOOE *et al.*

Priority of the United States.—Costs.

The United States have no lien on the real estate of their debtor, until suit brought, or a notorious insolvency or bankruptcy has taken place; or, being unable to pay all his debts, he has made a voluntary assignment of all his property; or, the debtor having absconded, concealed or absented himself, his property has been attached by process of law.[1]

A mortgage of part of his property, made by a collector of the revenue, to the surety in his official bond, to indemnify him from his responsibility as surety on the bond, and also to secure him from his existing and future indorsements for the mortgagor at bank, is valid against the United States, although it turns out that the collector was unable to pay all his debts, at the time the mortgage was given, and although the mortgagee knew, at the time of taking the mortgage, that the mortgagor was largely indebted to the United States.[2]

Costs are not to be awarded against the United States.

ERROR to the Circuit Court of the district of Columbia. (Reported below, 1 Cr. C. C. 116.)

Mason, attorney of the United States for that district, on the 17th of August 1801, filed a bill in equity against Robert T. Hooe, W. Herbert, John C. Herbert, and the executors, widow and heirs of Col. John Fitzgerald, late collector of the customs for the port of Alexandria, and obtained an injunction to prevent the sale of certain real *estate, in Alexandria, advertised for sale by W. and J. C. Herbert, under a deed of trust made by Fitzgerald for the indemnification of Hooe. [*74

The material facts appearing upon the record were, that Fitzgerald, upon being appointed collector, executed a bond to the United States, on the 10th of April 1794, with Hooe as surety, in the penalty of $10,000, for the faithful performance of the duties of his office. In April 1798, he was found to be greatly in arrears, and upon a final adjustment of his accounts, on the 15th of August 1799, the balance against him was $57,157. On the 16th of January 1799, Hooe having knowledge that Fitzgerald was largely indebted to the United States, but believing that he had sufficient property to discharge the debt, and Fitzgerald being desirous of borrowing money from the bank of Alexandria, to meet the drafts of the treasury of the United States, and for other purposes, made a deed of trust to W. and J. C. Herbert, reciting that Hooe had become surety for Fitzgerald in the bond to the United States, and Fitzgerald proposing, when he should wish to obtain a loan of money from the bank of Alexandria, to draw notes, to be indorsed by Hooe, whereby the latter might be liable and compelled to pay the same, and the former being desirous of securing and indemnifying Hooe from all damages, costs and charges which he might, at any time thereafter, be subject and liable to, by reason of any misconduct of Fitzgerald in the discharge of his duty as collector, or for or on account of any notes drawn by him for his particular use and accommodation, and indorsed by Hooe, and negotiated at the bank of Alexandria. The indenture then witnessed, that for those purposes, and

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(*a*) Present, MARSHALL, Ch. J., CUSHING, PATERSON, WASHINGTON and JOHNSON, Justices.

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

[2] But although the priority of the United States is subject to a specific lien upon the debtor's property, it overreaches the general lien of a judgment. Thelusson *v.* Smith, 2 Wheat. 396.

in consideration of the trusts and confidences therein after expressed, &c., and of one dollar, &c., Fitzgerald bargained and sold, &c., to the trustees, W. and J. C. Herbert, the real estate therein described, to have and to hold the same to them, and the survivor of them, &c., "in trust, to and for the uses and purposes hereinafter mentioned, and to and for no other use and purpose whatsoever; that is to say, in case he the said John Fitzgerald shall neglect any part of his duty as collector of the said port of Alexandria," &c., "or in case any note or notes so drawn, indorsed and negotiated
*75] at the bank of Alexandria, for the particular use *and accommodation of him the said John Fitzgerald, shall not be taken up and discharged by him, when the same shall become payable; that in either case, as soon as any demand shall be made upon him the said R. T. Hooe," &c., "for the payment of any sum or sums of money which ought to be paid by the said John Fitzgerald," &c., then the trustees should, upon notice given them by Hooe of such demand, proceed to sell the property for ready money, and after paying the expenses of sale, should pay and satisfy the sum or sums of money so demanded of Hooe, either as security for Fitzgerald's due and faithful execution of the office of collector of the said port of Alexandria, or as indorser of any note or notes so drawn by Fitzgerald, "and negotiated at the bank of Alexandria for the particular accommodation of the said John Fitzgerald; and lastly, to pay over to him the surplus. And in further trust, that if Fitzgerald should duly keep Hooe indemnified, &c., and should duly pay the several notes which should be so drawn by him, and indorsed by Hooe, and negotiated at the said bank, "for the particular accommodation of him the said John Fitzgerald, as the same shall become payable," then the trustees should reconvey, &c.

Hooe had indorsed Fitzgerald's notes at the bank to a large amount, and at the time of his death, there were unpaid two notes of $1000 each, and one of $1800, one of which for $1000, together with interest upon the whole, amounting to $288.94, was afterwards paid by Mr. Keith, one of the executors, in order to prevent a sale of the property under the trust. There was also evidence tending to show that the money borrowed from the bank upon Hooe's indorsement, was applied in discharge of warrants drawn by the treasury upon Fitzgerald.

Fitzgerald died in December 1799, having by his will directed his real estate to be sold for the payment of his debts. There was no positive evidence of his insolvency.

The bill charged, that he died insolvent, and that the United States had a right, in preference to all others, to apply his property to the discharge of the debt, and if there should be a deficiency, to resort to the surety for the
*76] balance, so far as the penalty of the bond would justify; *and that the deed of trust was fraudulent as to the United States.

On the 1st of May 1802, the injunction was dissolved by consent, and an interlocutory decree entered, ordering the trustees to pay the proceeds of the sale into court, subject to future order touching the contending claims of the United States and Hooe.

At November term 1802, the court passed the following decree. "The objects of the bill filed in this cause were to set aside a deed, executed on the 16th of January 1799, by John Fitzgerald to William Herbert and John Carlyle Herbert, conveying certain property therein mentioned, in trust, for

the purpose of indemnifying Robert Townsend Hooe, as indorser of certain notes negotiable in the bank of Alexandria, and as surety of John Fitzgerald, in his office of collector of the port of Alexandria; to oblige the said trustees to account with the United States for the said real property, and to compel the executors to account for the personal estate of the said John Fitzgerald, and to pay the same to the United States towards the discharge of the balance due from him; and further to restrain and enjoin the said trustees from making sale of the said real property.

"An injunction for the said purpose was granted by one of the judges of this court, in vacation; and afterwards, viz., at April term 1802, after the appearance of the defendants, who were of full age, an agreement was made, and entered on the records and proceedings of this court, to the following effect, viz., that so much of the former order of this court as restrained the defendants, W. Herbert and John C. Herbert, from selling the property in the deed of trust, in the bill mentioned, be discharged; and it was further decreed and ordered, that the said trustees should pay the proceeds arising from the sale of the said property, or of any part thereof, into this court, subject to the future order of the court, touching the contending claims of the United States and of R. T. Hooe, one of the defendants to the said bill: And now, at November term 1802, the said cause came *on, by consent of parties, and by order of the court, on the bill, and on the [*77 answers of the defendants (those of the infants being taken by their guardians, appointed for that purpose), and on the exhibits in the said bill and answers referred to, and on those afterwards admitted, and the arguments of counsel being heard in the said cause, and the same being by the court fully considered: It is the opinion of the court, that the deed of trust, in the said bill mentioned, was made *bonâ fide*, and for a valuable consideration, and was fairly executed by the said John Fitzgerald, to indemnify and save harmless the said R. T. Hooe from all loss and damage, by reason of his indorsement of several notes, negotiated at the bank of Alexandria, amounting to the sum of $3800, to enable the said John Fitzgerald to pay that sum to the United States; which appears to have been paid accordingly; and also, to indemnify and save harmless the said R. T. Hooe against all loss and damage, by reason of his having become bound in a bond, in the penalty of $10,000, payable to the United States, as security for the said John Fitzgerald's faithful performance and due discharge of the office of collector of the customs in the district of Alexandria. That there does not appear to have been any fraud in the said parties, or either of them, and that the said deed is not invalidated by any law of the United States.

"It is, thereupon, by this court, decreed and ordered, that the bill in this cause, as to all the defendants, except R. T. Hooe, W. Herbert and J. C. Herbert, be retained for the further order and decree of this court, and that as to the said defendants, R. T. Hooe, W. Herbert and J. C. Herbert, the said bill be dismissed, with costs to the said defendants. And as to the money which has arisen from the sale of the said real property, the net amount of which is $14,318.66, after deducting the charges of the sale, and which has been, by the order of this court, deposited by the clerk thereof in the bank of Alexandria; this court doth decree and order, that the said clerk do pay the sum of $4318.66, part thereof, to the said trustees, W. Herbert and J. C. Herbert, to be by them applied to the discharge *of [*78

the sum of $3127, due upon certain notes negotiated in the bank of Alexandria, on which the said R. T. Hooe was an indorser for the said John Fitzgerald; and also to the repayment to the executors of the said John Fitzgerald, of the sum of $1185, advanced and paid by them to the bank of Alexandria, for and on behalf of the said R. T. Hooe, in part payment of the notes negotiated in the said bank for the said John Fitzgerald, and indorsed by the said R. T. Hooe, which it was intended the said R. T. Hooe should be indemnified against by the said deed; and the residue, if any there should be, of the said sum of $4318.66, to be paid by the said clerk into the treasury of the United States, in discharge of so much of the balance due from the estate of the said John Fitzgerald; and that as to the residue of the proceeds of the said sale, being the sum of $10,000, the said clerk do pay the same into the treasury of the United States, expressly in discharge of the said sum of $10,000, for which the said R. T. Hooe is bound in the bond, which, in the said bill and answers is referred to, and to go also in discharge of so much of the claim of the United States against the said John Fitzgerald, and the same is decreed and ordered accordingly.

To reverse this decree, a writ of error issued returnable to February term 1803, which was dismissed, for want of a statement of the facts upon which the decree was founded. (1 Cr. 318.)

The November term 1802, of the circuit court, at which the original decree was entered, being continued by adjournment to April 1803, *Mason*, after the dismissal of the writ of error, moved the court below to make a statement of the facts upon which the decree was founded, to be sent up with a new writ of error; and urged, that as it was, in contemplation of law, the same term in which the decree was made, it was competent for the court to open it for that purpose. But the court, being of opinion, that by the writ of error, the record was completely removed, *and the decree thereby made absolute, refused to make the statement.

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A new writ of error was sued out by the United States, returnable to February term 1804; upon the return of which—

Swann, for the defendant in error, contended, that the late act of congress of 3d March 1803 (2 U. S. Stat. 244), did not apply to this case, because it was passed after the final decree rendered; and that the court was still precluded from looking into this case, and correcting the errors in the decree, if any such existed, without a statement of the facts upon which the decree was founded; but—

By the Court.—The words of the act are, "that from all final judgments or decrees, rendered or to be rendered, in any circuit court," "in any cases of equity," &c., "an appeal shall be allowed," "subject to the same rules, regulations and restrictions, as are prescribed in case of writ of error." A perfect analogy exists between the cases of appeals and of writs of error, as to the time in which they may be granted, and the judge who can grant the one, may allow the other. The act of congress comprehends past cases as well as future.

The cause was continued for argument, and at this term (Saturday, February 23d, 1805), was argued by *Mason*, for the United States, and by *C. Lee* and *Swann*, for the defendants in error.

Mason, after observing that the evidence did not support the allegation that the money borrowed of the bank, upon Hooe's indorsements, was applied to the use of the United States, contended, 1. That the deed was fraudulent as to all the world, because it empowered Fitzgerald to borrow money *upon it, for his own use, while it protected the property from his creditors. 2. That Hooe has no preference to the United States; [*80 and even if the deed was not fraudulent as to all the world, yet Hooe stands in such a situation that he must be postponed to the United States and all other creditors.

1. Hooe admits that he had notice of Fitzgerald's default, to at least the amount of $30,000, but the exact amount is unimportant. And although, in his answer, he gives an opinion as to the value of Fitzgerald's estate, at the date of the deed, yet he admits, that such as it then was, it now is, excepting any depreciation which it may have suffered.

The deed, inasmuch as it contains a power to raise money upon it, in future, for his own use, is a deed in trust for himself, and therefore, fraudulent, upon general principles of law. His power to borrow money upon it, is unlimited by anything but the value of the property and the good will of Hooe; and the money thus raised upon it might have been applied exclusively to his own use. The words of the statute of 13 Eliz. c. 5, which have, in substance, been inserted into the Virginia code of laws, are large enough to take in this case; and the cases decided under it clearly apply to the present deed. Indeed, that part of the statute which makes such deeds void as to creditors, is no more than a declaration of the pre-existing rule of the common law. 2 Bac. Abr., tit. Fraud; 2 Com. Dig., tit. Covin.

The 5th sign of fraud mentioned in *Twyne's Case*, 3 Co. 81 *b*, is, that there "was a trust between the parties; for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud." And it is unimportant, whether the trust be expressed or implied. Every gift made on a trust is out of the proviso of the act. Here, it was part of *the trust, that Fitzgerald [*81 should raise money upon the deed, to his own use; and a deed which covers the property from his creditors, and gives the grantor the whole benefit and use of it, is the very kind of deed which the statute meant to avoid. If, then, the deed is void as to creditors, Fitzgerald is dead, and the United States must be preferred in payment.

2. Hooe cannot be preferred to the United States, in consequence of this deed, even supposing it not to be fraudulent under the statute of Elizabeth, but must be postponed to the United States and all other creditors. This case stands on the same ground as a bond given for duties, in which case it is enacted by the act of 4th of August 1790, § 45 (1 U. S. Stat. 169), that "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States, on any such bond, shall be first satisfied." The insolvency here mentioned, means an inability to pay all his debts, and is so expounded by the act of 2d of May 1792, § 18 (1 U. S. Stat. 263), in which it is "declared, that the cases of insolvency in the said 44th (45th) section mentioned, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or

her creditors, or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed."

A voluntary assignment, for the benefit of his creditors, made by a debtor, unable to pay all his debts, is one of the cases in which the United States are to have a preference. The word "voluntary" does not mean, without consideration, but without compulsion of law, as in cases under a bankrupt law. A deed made to secure a just debt may, in this sense of the
*82] word, be a voluntary deed of assignment. The instant a man *makes such a voluntary assignment, the preference of the United States attaches, if, upon subsequent inquiry, it shall appear that he is unable to pay all his debts. The act of 2d of March 1799, § 65 (1 U. S. Stat. 676), has the same words, explanatory of the term insolvency, with those of the 18th section of the act of 1792. (Ibid. 263). The legislature did not mean to confine it to cases of insolvency, under a bankrupt or insolvent law of any of the states, or of the United States, nor to voluntary conveyances of all the property of a debtor, for the benefit of his creditors.

In the present case, all the property remains in the same state in which it was at the time of the deed, and it is not contended, that it is sufficient to pay all the debts; for if it is, Hooe can receive no injury; but if it is insufficient, then he can derive no benefit, until the United States are first satisfied.

We do not contend that the United States had a lien upon the property. That is a distinct question, and has been decided by this court, at the present term, in the case of *United States* v. *Fisher et al.* (2 Cr. 358.) But it is right, that the interest of all should prevail over that of an individual.

We admit, that Fitzgerald had the right to sell and alien the property, but it does not follow, that he could, by a mortgage, or an assignment, prefer a particular creditor to the United States. The object of the legislature was, that if a man is unable to pay all his debts, and attempts to give a particular preference, his hand shall be stopped, until the debt due to the United States shall be satisfied. If it turn out that he was actually insolvent, the United States, and not the individual creditor, shall have the preference.

The object of the deed is, that if Fitzgerald's estate should be insufficient
*83] to pay all his debts, Hooe shall be preferred. *But the act of congress says, that in that event, the United States shall be preferred. The deed and the act are inconsistent with each other, and the deed must yield to the act. Among individual creditors, he had a right to prefer one over another, and such deeds would have been effectual, saving the priority of the United States.

This question is the same as if it had arisen upon a bond given for duties; for by the act of 3d of March 1797, § 5 (1 U. S. Stat. 515), it is enacted, "that where any revenue officer, or other person, hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent," &c., "the debt due to the United States shall be first satisfied; and the priority hereby established, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof," &c., "as to cases in which an act of legal bankruptcy shall be committed."

This is a voluntary assignment, and Fitzgerald died insolvent. It is not necessary that he should have been so, at the time of executing the deed.

If he become so afrerwards, and before the trust is executed, it is sufficient. It is the intention of the law, if there is an actual insolvency, that all priorities should yield to that of the United States. The United States, therefore, have a right to the whole of Fitzgerald's estate, in the first place; and if that is insufficient to pay the debt, they may resort to Hooe for the whole penalty of the bond, if necessary.

C. Lee and *Swann*, contrà, contended, 1st. That the deed was made *bonâ fide*, and for a valuable and good consideration, and therefore, valid upon general principles both of law and equity. 2d. That it was not invalidated by any statute of the United States.

*1. Indemnity is a good consideration, within the statute of Eliz. *Worseley* v. *Demattos*, 1 Burr. 474, to the whole of which case the attention of the court is requested, because, in almost every part, it is applicable to the present. [*84

The deed was also *bonâ fide*. There is no evidence that Hooe knew of Fitzgerald's inability to pay his debts, at the date of the deed. Indeed, there is no positive evidence of the insolvency of the estate, even at this moment. It has none of the marks of fraud mentioned in *Twyne's Case*. 1. It is only for a part, perhaps, not a third part, of his estate. 2. Although Fitzgerald remained in possession, yet, it being real estate, possession was no mark of fraud, and could not deceive and defraud others, because the deed must of necessity be upon record. 3. It was not made secretly. 4. It was not made pending any process against Fitzgerald. 5. Here was no secret trust for the benefit of the grantor. 6. It contains no unusual clauses in support of its honest and fair intentions, which, Lord Coke says, always induce suspicion.

The whole evidence in the case shows, that the only intention of the parties was that which is expressed fully and fairly in the deed. He had a right to indemnify Hooe, at the time of giving the bond, and it can make no difference, whether he executed the deed at that time or afterwards; the consideration was equally good at one time as at the other. It could be no fraud in Hooe, to wait for security as long as he thought himself safe; and it could be no fraud in Fitzgerald, to give a security, which he was bound in honor and conscience to give, whenever it should be demanded.

Mason, in answer to a question from the Chief Justice, whether there was any act of congress which subjected the lands of the debtors of the United States to a specific lien, said, he knew of none, unless it was the act of 11th July 1798, § 15. (1 U. S. Stat. 594.) But in the present case, Fitzgerald, by his will, charged his lands with the payment of his debts; and if he had not, they would have been liable to an *elegit*.

*Chief Justice.—I have considered the act of 1798; it only creates a lien when a suit is commenced. [*85

Monday, February 25th, 1805. Marshall, Ch. J.—I am directed by the court to inform the counsel in this case, that they do not wish to hear any argument from the counsel of the defendants in error, upon the general question of fraud, being satisfied on that point. The court also wishes to draw the attention of the counsel, to the question, whether there is any evidence of Fitzgerald's insolvency in the record.

Mason, for the United States.—The deed in this case is contingent; the power to the trustees to sell is contingent. They can only sell, to indemnify Hooe. Until he is damnified, they have no power to sell. The rents, issues and profits, are to be taken by Fitzgerald only; and the legal estate being in the trustees, the property is protected from the *elegit* of the creditors. Suppose, the property conveyed to be double the value of Hooes' claim, the residue would be protected from creditors, and would still be a fund from which Fitzgerald might draw supplies to himself. But the insolvency mentioned in the act of congress, means an inability to pay his debts, in contradistinction to an insolvency under a bankrupt law, or an insolvent act.

A voluntary deed, in the act, means a deed by a person unable to pay all his debts, made without coercion of law, to give a preference to some of his creditors. It is not necessary, that it should be a conveyance of all his effects. Suppose, he should make three separate deeds; one, to one of his creditors, for one-third of his estate; a second, to another creditor, for another third of his estate; and a third deed, to a third creditor, for the residue. The two first deeds would not be less fraudulent than the third, be-
*86] cause they conveyed only a part of the estate. *The decree of the court below is erroneous, because the answers and evidence specified the estate and effects of Fitzgerald, and the court ought to have ascertained the value, and from thence inferred his insolvency. An insolvency so ascertained would have been such an insolvency as would have given the United States a preference.

As to the question, whether the insolvency appears upon the record, the bill charges the fact, and none of the answers or depositions denies it. A comparison of the balance due with the effects and estate disclosed in the answers, affords the strongest corroboration ; and even Hooe, in his answer, does not deny a knowledge of it. But whether he knew it or not, it is sufficient, if we establish the existence of the fact; for in all cases, "where any revenue officer," "indebted to the United States," "shall become insolvent," "the debt due to the United States shall be first paid."

C. Lee and *Swann*, contrà.—The insolvency contemplated by congress means a legal insolvency, not a mere incapacity to pay, unattested by some notorious act of failure, such as a voluntary assignment of all the effects for the benefit of creditors, or the closing of doors to prevent process being served, &c. The cases provided for by the act are, 1. If the debtor "shall become insolvent." 2. Where the estate of a deceased debtor "shall be insufficient to pay all the debts." 3. Where "a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof." 4. Where "the estate and effects of an absconding, concealed or absent debtor, shall be attached."

The 1st case is that of legal and public insolvency, where the estate and
*87] effects are assigned by law. If it *meant every case where a man was actually incapable of paying all his debts, it would frequently look back and undo all the negotiations of an extensive trade, for many years ; for it often happens, that a merchant continues in business and credit, long after his capacity to pay all his debts has ceased. Besides, it would have been unnecessary for the legislature to add expressly the case of a voluntary assignment, where there was an inability to pay all the debts, if

such inability alone was within the meaning of the words "shall become insolvent."

2. The case of a deceased debtor, whose estate shall be insufficient to pay all the debts, would also have been included in the term insolvent, if it is to have so large and loose a construction as is contended for by the counsel for the United States.

3. And so would be the case of a voluntary assignment. But it is said, that the present deed is such a voluntary assignment as is contemplated in the act. The words of the act are, "a debtor not having sufficient property to pay all his debts," that is to say, the whole of whose property shall be insufficient to pay all his debts, "shall make a voluntary assignment thereof," that is, of the whole of his property. The assignment contemplated in the law must, therefore, mean an assignment of the whole; but this is only an assignment of a part, certainly, not so much as half his property, and is, therefore, a complete answer as to that point.

4th. The fourth case is of an attachment of the estate and effects of an absconding, concealed or absent debtor, and does not absolutely require an insolvency, or even an inability to pay all the debts; but is a case of suspicion, in which a public act has been done and suffered, giving notice of the insolvency, if it really exists. Even supposing, then, that Fitzgerald was actually unable to pay all his debts at the time of executing this deed of trust (which fact, however, does not appear), yet, as his property was not divested by act of law, nor by such a voluntary assignment as is contemplated by the act of congress, the priority of the United States had not attached, *so as by any possibility to avoid the deed of trust. This construction of the act of congress is warranted by the decision of a very respectable circuit court of the United States, in the case of *United States* v. *King*, Wall. C. C. 13. [*88

The United States are plaintiffs in equity for an injunction, and the burden is on them to prove all the material allegations of their bill. It is on them to prove the insolvency, not on us to disprove it. If, then, the deed is not fraudulent in itself, nor made void by any act of congress, the judgment of the court below was correct, and ought to be affirmed.

Wednesday, February 27th, 1805. Marshall, Ch. J., delivered the opinion of the court.

The first point made in this case, by the attorney for the United States, is, that the deed of the 16th of January 1799, is fraudulent as to creditors generally. It is not alleged, that the consideration was feigned, or that there was any secret trust between the parties. The transaction is admitted to have been, in truth, what it purports to be; but it is contended, that the deed, on its face, is fraudulent as to creditors.

The deed is made to save Hooe harmless on account of his having become the security of Fitzgerald to the United States, and on account of notes to be indorsed by Hooe for the accommodation of Fitzgerald in the bank of Alexandria. These are purposes for which it is supposed this deed of trust could not lawfully have been executed; and the deed has been pronounced fraudulent under the statute of 13th of Elizabeth.

That statute contains a proviso, that it shall not extend to conveyances made upon good consideration, and *bonâ fide*. *The goodness of the consideration, in the case at bar, has been admitted; but it is alleged, [*89

that the conveyance is not *bonâ fide ;* and for this, *Twyne's Case* has been principally relied on. But in that case, the intent was believed by the court to be fraudulent, and in this case, it is admitted not to have been fraudulent. It is contended, that all the circumstances from which fraud was inferred in that case, are to be found in this ; but the court can find between them no trait of similitude. In that case, the deed was of all the property ; was secret ; was of chattels, and purported to be absolute, yet the vendor remained in possession of them, and exercised marks of ownership over them. In this case, the deed is of part of the property ; is of record ; is of lands, and purports to be a conveyance which, according to its legal operation, leaves the property conveyed in possession of the grantor. In the case of *Hamilton* v. *Russell* (1 Cr. 310), this court declared an absolute bill of sale of a personal chattel, of which the vendor retained the possession, to be a fraud. But the difference is a marked one between a conveyance which purports to be absolute, and a conveyance which, from its terms, is to leave the possession in the vendor. If, in the latter case, the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor, until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right. That the grantor is to receive the rents and profits until the grantee shall become entitled to demand the money which the deed is intended to secure, is a usual covenant.

That the property stood bound for future advances is, in itself, unexceptionable. It may, indeed, be converted to improper purposes, but it is not positively inadmissible. It is frequent, for a person who expects to become more considerably indebted, to mortgage property to his creditor, as a security for debts to be contracted, as well as for that which is already due. All the covenants in this deed appear to the court to be fair, legitimate and consistent with common usage. It will barely be observed, that the validity of this conveyance is to be tested by the statutes of Virginia, which embrace this subject. But this is not mentioned as having any influence in this case.

*90] *The second point for which the plaintiffs contend is, that this is a case in which the priority of payment claimed by the United States in cases of insolvency, intervenes and avoids the deed. This claim is opposed on two grounds. It is contended, 1st. That at the time of making this deed, Fitzgerald was not insolvent in point of fact ; and 2d. That this deed was not a transaction which evidences insolvency under the act of congress.

In construing the statutes on this subject, it has been stated by the court, on great deliberation, that the priority to which the United States are entitled does not partake of the character of a lien on the property of public debtors. This distinction is always to be recollected.

In the case at bar, it will be observed, on the first objection made by the defendants, that the insolvency, which is the foundation of the claim, must certainly be proved by the United States. It must appear, that at the time of making the conveyance, Fitzgerald was "a debtor not having sufficient property to pay all his debts." The abstract from the books of the treasury is undoubtedly complete evidence so far as it goes ; but it is not intended to show the state of Fitzgerald's accounts in January 1799. If that had been its object, it would have credited him for the bonds then reported to be on hand. If the case turned entirely on this point, the court would probably

send it back for further explanation respecting it. But this would be unnecessary, as it is the opinion of the court, that the decree is right, however this fact may stand.

If a debtor of the United States, who makes a *bonâ fide* conveyance of part of his property for the security of a creditor, is within the act which gives a preference to the government, then would that preference be in the the nature of a lien, from the instant he became indebted; the inconvenience of which, where the debtor continued to transact business with the world would certainly be very great.

*The words of the act extend the meaning of the word insolvency to cases where "a debtor, not having sufficient property to pay all his [*91 debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors." The word "property" is unquestionably all the property which the debtor possesses; and the word "thereof" refers to the word "property" as used, and can only be satisfied by an assignment of all the property of the debtor. Had the legislature contemplated a partial assignment, the words "or part thereof," or others of similar import, would have been added. If a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance. But where a *bonâ fide* conveyance of part is made, not to avoid the law, but to secure a fair creditor, the case is not within the letter or the intention of the act.

It is observable, that the term insolvency was originally used, and the subsequent sentence is designed to explain the meaning and intent of the term. The whole explanation relates to such a general divestment of property, as would, in fact, be equivalent to insolvency in its technical sense. It is the opinion of the court, that there is no error in the decree of the circuit court, and that it be affirmed.

After the opinion was given, it was stated, that the court below had decreed the United States to pay costs, and it was suggested, that that circumstance might have escaped the notice of this court, in affirming the decree generally.

Mason observed, that costs were only given by statute, and that the United States are not bound by a statute, unless they are expressly named in it. That there was no means of compelling the United States to pay them.

Marshall, Ch. J.—That would make no difference, because we are to presume they would pay them, if bound by law so to do.

**Mason.*—There is no precedent of a judgment against the United States for costs. In the case of the *United States* v. *La Vengeance*, [*92 3 Dall. 301, the decree of the circuit court was affirmed, with costs. But the next day the Chief Justice directed the words "with costs" to be stricken out, as there appeared to have been some cause for the prosecution. But he observed, in doing this, the court did not mean to be understood as at all deciding the question, whether, in any case, they could award costs against the United States, but left it entirely open for future discussion.

March 6th. The Court directed the decree of the court below to be affirmed, except as to costs, and reversed so much of the decree as awarded the United States to pay costs, and directed that no costs be allowed to either party in this court.

Peyton *v.* Brooke.[1]

Costs of execution.

In Virginia, if the first *ca. sa.* be returned *non est*, the second may include the costs of issuing both.

This case came before the court, upon a bill of exceptions to the opinion of the Circuit Court of the district of Columbia, for the county of Alexandria, upon a motion for execution on a forthcoming bond, taken under the act of assembly of Virginia. Rev. Code, p. 309.

The bond, upon which the motion was made, recited a *ca. sa.* against Peyton, in favor of Brooke, for $525 and 624 pounds of tobacco, at thirteen shillings and four pence per hundred weight, and marshal's fees and commissions, and all costs, $19.96, amounting in the whole to $578.82. The execution on which the bond was taken was for $525 and $20, and 624 pounds of tobacco, at thirteen shillings and four pence per hundred weight.

*93] *The whole amount of costs taxed on the original judgment was $20.12, and 602 pounds of tobacco, including the costs of issuing an execution. The bond was taken upon an *alias ca. sa.*, the first having been returned *non est*. The first execution was for $525, and $20.12, and 602 pounds of tobacco. The execution upon which the bond was taken included 22 pounds of tobacco (the clerk's fees for issuing the *alias ca. sa.*), and did not include 12 cents, part of the costs taxed upon the original judgment.

The plaintiff, in the court below, released 44 pounds of tobacco, the costs of issuing both executions, and the court below gave judgment for the plaintiff. The defendant brought his writ of error.

Wednesday, February 27th, 1805. The Court called for statements of the case, agreeable to the rule of the court.

Swann, for the defendant in error, said, he had supposed the rule to extend only to plaintiffs in error. The court said, they expected them from both sides. No statements were prepared.

Marshall, Ch. J.—We wish to give general notice to the gentlemen of the bar, that unless statements of the case are furnished, according to the rule, the causes must either be dismissed or continued.

Jones, for the plaintiff in error.—There are two objections to the proceedings of the court below. 1st. That the *alias capias* and the bond include 22 pounds of tobacco for the clerk's fee, in issuing the *alias capias*. 2d. That the *alias capias* does not include 12 cents, taxed as part of the costs on the original judgment.

For this variance between the bond and the original judgment, the court

*94] below ought not to have awarded *execution upon the bond, but ought to have quashed both the bond and the execution upon which it was

[1] See s. c., in the court below, 1 Cr. C. C. 96, 128.