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that of the circuit court. Or rather, the error which they assign is an error in the judgment of the justices, and not in the judgment of the court.

The confession of judgment only stays the service of the execution, it does not prevent its emanation. The words of the act are, that it shall be a sufficient *supersedeas* to the sheriff to forbear serving execution. The execution may issue against all, but shall not be served upon him who has confessed judgment with sureties.

*Morsell*, in reply.—The judgment confessed before the justices, by being returned to the office of the clerk of the circuit court, and there entered of record, becomes a judgment of that court; otherwise, no *scire facias* could lie to revive the judgment.

The act of assembly makes the confession of the second judgment a complete *supersedeas* to the first. No execution can issue on the first judgment, after confession of the second. The words of the act are positive. "No execution shall issue," &c.

March 8th, 1808. MARSHALL, Ch. J.—The majority of the court is of opinion, that the writ of error must be quashed, this court not having jurisdiction. The refusal of the court below to quash the execution, on motion, is by some of the judges supposed not to be a judgment to which a writ of \*328] error will lie. \*Others are of opinion, that a writ of error will lie to that decision of the court, but that this writ of error is not to the judgment of the circuit court, but to that of the justices.

Writ of error quashed.

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BLAINE *v.* The SHIP CHARLES CARTER and DONALD & BURTON,  
and others, Claimants.

*Bottomry.*

If the obligee of a bottomry-bond suffer the ship to make several voyages, without asserting his lien, and executions are levied upon the ship, by other creditors, the obligee loses his lien on the ship.<sup>1</sup>

ERROR to the Circuit Court for the district of Virginia.

Blaine libelled the ship Charles Carter, Bell, master, owned by McCawley, upon two bottomry-bonds; one executed in London, by Bell, the master, on the 14th of July 1796, and payable ten days after the arrival of the ship in Virginia; the other executed on the 27th of October 1796, by McCawley, the owner, in Virginia, where he resided, and payable in thirty days after the arrival of the ship in Europe.

The answer of McCawley admitted the truth of all the allegations of the libel; but a claim was interposed by Donald & Burton, creditors of McCawley, who had, on the 30th of November 1797, obtained judgment against him, and at whose suit, the marshal, on the 30th of December, in the same

<sup>1</sup> So, if a bottomry-bond be not enforced, *bond fide* sale, under state process. The Clar-  
ence, 1 Am. L. J. 335; s. c. 14 Law Rep. 453.  
of the contingency, it will be discharged by a

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year, had seized the ship in execution, upon several writs of *feri facias*, issued on the 7th of the same month, from the circuit court for the district of Virginia, before the warrant of arrest had issued from the district court, upon Blaine's libel. The libel was filed on the 19th of January 1798, on which day also, the warrant to arrest the ship was issued.

It appeared in evidence, that the first bottomry-bond was given by the master to Blaine, upon the first voyage \*to London, and that the consideration of that bond consisted of money paid to take up a prior [\*329 bottomry-bond given to one Robertson, and of money paid for seamen's wages, provisions, repairs, and finishing the ship, she having come out from Virginia, in a rough unfinished condition, and badly provided with sails and rigging. The money upon this bond was to be paid within ten days after the arrival of the ship in Virginia. She arrived in Virginia on the 28th of September, in the same year; after which, the agent of Blaine called for the discharge of the bond, but on failing to receive the money, did not think it necessary to arrest the vessel. Blaine was a very large creditor of McCawley, over and above the amount of the bottomry-bonds, and was authorized to receive the freights of the ship, and to apply them to his general account-current with McCawley.

The bond of the 27th of October 1796, was taken in order to secure advances made by Blaine to McCawley, to enable him to finish the ship, before she sailed on her first voyage, in March 1796, to the time of her sailing, or at any time afterwards, and to secure Blaine for money paid by him to discharge three executions which had been served upon the ship.

Between the date of the first bottomry-bond, and the filing of the libel, the ship made two voyages from England to America, and one from America to England, and the freights were received by Blaine. The district court decreed in favor of Blaine, for the whole amount of the first bottomry-bond, and for so much of the other as appeared to have been actually advanced for necessaries for the ship; but the circuit court, on the 6th of December 1799, reversed the decree, and dismissed the libel, with costs. Blaine appealed from the decree of the circuit court to this court, but the appeal was, at that time, dismissed, for want of a statement of facts made in the court below, agreeable to the 19th section of the judiciary act of 1789, c. 20 (4 Dall. 22). After the passing of the act of congress of 3d of March 1803 (2 U. S. Stat. 244), the cause was brought up again by writ of error, and was now argued upon the evidence contained in the record.

*C. Lee*, for the plaintiff in error.—The hypothecation in London was a legal lien upon the ship, and no circumstance had occurred to deprive \*the libellant of its benefit. Possession of the vessel hypothecated is never delivered to the obligee of a bottomry-bond; so that no inference of fraud can be drawn from the fact, that the possession remained with the obligor; nor was there any rule of law which required the obligee to assert his lien in any given time. This lien was prior to that of the judgment-creditors. [\*330

As to the bond of 27th October 1797, given by the owner in Virginia, it rests upon the same law as the bond of the master. An owner may borrow money on bottomry, for fitting out his ship for a voyage, and hypothecate the ship therefor. *Sharpley v. Hurrell*, Cro. Jac. 209; 2 Bl. Com. 458. A

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master, if part-owner, may take up money on bottomry, to the value of his own share, in places where the owners reside. 2 Molloy, lib. 2, c. 2, § 14, 15. Hence, it may be inferred, that any other owner may do the like. If the master may hypothecate the ship, *à fortiori*, may the owner. Park 410. The executions of Donald & Burton were void, because issued within ten days after the judgments, contrary to the act of congress. (1 U. S. Stat. 85.)

*P. B. Key*, for the defendants in error, contended: 1. That the bonds were paid off by the receipt of the freights which ought to have been applied to that purpose: 2. That there was no bottomry consideration for the second bond: and 3. That the bonds were fraudulently held up by Blaine, to give a false credit to McCawley, while Blaine was receiving the whole benefit of the vessel.

1st. With regard to the freights, he contended, that as there was no application, at the time of the receipt of them, a court ought to apply them to the discharge of the bottomry-bonds.

2d. That as Blaine was the correspondent of McCawley, and his creditor \*331] to a large amount, and the consideration \*of the bonds being charged in account, McCawley was at all events personally liable for the moneys advanced, and therefore, these moneys did not run the risk of the voyage. That the bottomry-bond of 27th October 1796, was given for moneys long before advanced, and to be advanced, and not for necessaries advanced upon the credit of this security on the ship.

3d. That his suffering the vessel to go several other voyages, after the bonds became due, was either evidence of fraud, or of a waiver of the lien on the vessel. It was absurd, to suppose, that he would risk the money a second and a third time on the vessel, without a new premium, or an insurance. It is probable, that the second bond was intended to cover the vessel, during her winter's stay in Virginia.

If the executions were improperly issued, the remedy was to move to quash them on their return. Perhaps, they were voidable, but they were not void.

March 8th, 1808. CHASE, J.,(a) delivered the opinion of the court.—The libel in this case was filed upon two instruments of writing, purporting to be bottomry-bonds, the one executed by the master in a foreign port, the other by the owner, in a port of the state of Virginia, in which state the libel was filed. The voyage of the former bond terminated in Virginia, and the vessel has since made two voyages. The latter instrument was on a voyage which terminated in London, and the vessel has since made a voyage to this country. Upon her return here, and before the warrant of the admiralty was served, the executions were levied upon her which form the groundwork \*332] of the claim interposed by Donald & Burton. \*The ship has been sold under the order of the court below, and the question is, who has the preferable claim to the money now lying in the marshal's hands?

On the validity of the bond of the master, there can be no question. It is acknowledged by counsel to possess all the requisites of a good bottomry-

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(a) MARSHALL, Ch. J., having decided the case in the circuit court, did not give an opinion here: CUSHING, J., was absent.

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bond. But it was contended, that it was satisfied by the freights, which it appears Blaine was in the receipt of ; and if not satisfied, was fraudulently upheld to the prejudice of general creditors. In addition to the objections taken to the first bond, it is further contended against the second, that it wanted a sufficient bottomry consideration, in part or in the whole. The court think it unnecessary to give a particular consideration to the several objections above stated. A satisfactory conclusion on the rights of the parties may be drawn from other principles, on the nature and effect of the contract of bottomry.

A bottomry-bond, made by the master, vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her which may be enforced with all the expedition and efficiency of the admiralty process. This rule is expressly laid down in the books, and will be found consistent with the principle of the civil law, upon which the contract of bottomry is held to give a claim upon the ship. In the case of a bottomry-bond, executed by an owner, in his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom, for it is in his power to execute an express transfer or mortgage. There is strong reason to contend, that this claim or privilege shall be preferred to every other for the voyage on which the bottomry is founded, except seamen's wages ; but it certainly can extend no further. Had the warrant of the admiralty been first served upon the ship, there might be some ground to contend, that this court ought not to divest that possession, in favor of executions served at a subsequent day, at least, to the prejudice of the bond executed by the master. But as the executions in this case were levied, before the service of the warrant, and so long after the bonds became due, the owners of the ship had lost that possession, upon which alone the warrant of the admiralty could operate, after losing the right of preference.

\*Some objections have been made to the validity of these executions, on the ground of their having issued previous to the day on [ \*333 which by law they ought to have issued. On this point, the court will give no opinion. If irregular, the court from which they issued ought to have been moved to set them aside ; they were not void, because the marshal could have justified under them, and if voidable, the proper means of destroying their efficacy, have not been pursued.

The decree of the circuit court is affirmed, and the money ordered to be paid over to the execution-creditors.

Decree affirmed.