

Conard Vs. Atlantic Insurance Company of New York

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SooperKanoon Citation : sooperkanoon.com/79158

Court : US Supreme Court

Decided On : 1828

Appeal No. : 26 U.S. 386

Appellant : Conard

Respondent : Atlantic Insurance Company of New York

Judgement :

Conard v. Atlantic Insurance Company of New York - 26 U.S. 386 (1828)

U.S. Supreme Court Conard v. Atlantic Insurance Company of New York, 26 U.S.
1 Pet. 386 386 (1828)

Conard v. Atlantic Insurance Company of New York

26 U.S. (1 Pet.) 386

ERROR TO THE CIRCUIT COURT FOR

THE DISTRICT OF PENNSYLVANIA

SYLLABUS

It is not necessary that a *respondentia* loan should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the

outfit of the vessel or invested in the goods on which the risk is run.

It matters not at what time the loan is made nor upon what goods the risk is taken if the risk of the voyage be substantially and really taken, if the transaction be not a device to cover usury, gaming, or fraud, if the advance be in good faith for a maritime premium, it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage.

The lender on *respondentia* is not presumed to lend on the faith of any particular appropriation of the money, and if it were otherwise, his security could not be avoided by any misapplication of the fund where the risk was *bona fide* run upon other goods and it was not a mere contract of wager and hazard.

It seems that the common and usual form of a *respondentia* bond is that which was used in this case.

What is the nature and effect of the priority of the United States under the statute of 1799, chap. 128, sec. 65.

It is obvious that the latter clause of the 65th section of the act of 1799 is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors stands wholly upon the alternative in the former part of the enactment.

Insolvency in the sense of the statute relates to such a general investment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of [*United States v. Hooe*](#), 3 Cranch 73, and it was consequently held that an assignment of part of the debtor's property did not fall within the provision of the, statute.

Mere inability of the debtor to pay all his debts is not in insolvency within the statute, but, it must be manifested in one of the three modes pointed out in the explanatory clause of the section.

The priority, as limited and established in favor of the United States, is not a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution so as to prevent its passing by virtue of such assignment to the assignees, but it is a mere right of prior payment out of the general funds of the debtor in the hands of the assignees, and the assignees are rendered personally liable, if they omit to discharge the debt due to the United States.

It is true that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt, and so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must *be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. The estate is considered as a trust, and*

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according to the intention of the parties as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible.

It has never yet been decided by this Court that the priority of the United States will divest a specific lien attached to anything, whether it be accompanied by possession or not.

The case of [*Thelluson v. Smith*](#), 2 Wheat. 396, turned upon its own particular circumstances, and did not establish any principles different from those which are recognized in this case. And it establishes no such proposition as that a specific and perfected lien can be displaced by the mere priority of the United States.

It is not understood that a general lien by judgment on lands constitutes *per se* a property or right in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests subsequent to the judgment, and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate encumbrances. But subject to this,

the debtor has full power to sell or otherwise dispose of the land.

This was an action of trespass brought in the Circuit Court for the District of Pennsylvania by the Atlantic Insurance Company of New York against John Conard, the Marshal of the District of Pennsylvania, for taking and carrying away certain teas imported from Canton into the port of Philadelphia on board the ships *Addison* and *Superior*. Pleas the general issue and a special justification under a *fi. fa.* against the goods as the property of Edward Thomson. The suit was instituted and tried under an agreement, which is recited in the following bond.

"Know all men by these presents that we, the Atlantic Insurance Company of New York, are held and firmly bound unto the United States of America in the sum of \$42,000 lawful money of the United States of America, to be paid to the said United States of America, their certain attorneys, successors, or assigns, to which payment, well and truly to be made and done, we bind ourselves and our successors firmly by these presents, sealed with our seal of incorporation and dated this 9 October in the year of our Lord 1826."

"Whereas the goods and merchandise described in an invoice, a copy of which is annexed, imported in the ship *Addison* from Canton, safely arrived at the port of Philadelphia, *have been levied on* by the Marshal of the Eastern District of Pennsylvania *by virtue of an execution on a judgment in favor of the United States against Edward Thomson* of Philadelphia *as the property of the said Edward Thomson*, and whereas the Atlantic Insurance Company of New York *claims to be the owners in law or equity of the said goods and actually holds the bills of lading and invoice thereof*, under which the said goods have been duly entered at the custom house and the duties thereon secured to be paid according to law. And whereas it has been agreed by and between the Secretary of the Treasury in behalf of the United States and the said Atlantic Insurance Company that a suit shall be instituted by the said named company against the said marshal *in which the sole question to be tried and decided shall be whether the United States or the said Atlantic Insurance Company is entitled to said goods and the proceeds thereof*, and whereas it has been further agreed that the said goods shall be delivered to the said Atlantic Insurance Company without prejudice to the rights of

the United States under the said execution

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or otherwise, and that they shall sell and dispose of the same in the best manner and for the best price they can obtain therefor and for cash or upon credit as they may judge expedient, and that the moneys arising from the sales thereof, deducting the duties and all customary charges, and commissions on such sales, shall be deposited by the said Atlantic Insurance Company as soon as received from and after the sale in the Bank of the United States to the credit of the president of said bank, in trust, to be invested by the said president of the said bank in the stock of the United States in the name of the said president in trust, so to remain until it shall judicially and finally be decided to whom the said goods or the proceeds thereof do in right and according to law belong, and on the further trust that whenever such decision shall be made, the said president of the said bank shall deliver the said moneys, or transfer the said stock to the party in whose favor such decision shall be made. And whereas, in pursuance of the said agreement, the said goods have been this day delivered to the said Atlantic Insurance Company of New York, it being understood and agreed that such delivery of the goods shall not prejudice any existing right of the said company."

"Now the condition of this obligation is such, if the said Atlantic Insurance Company of New York shall comply with the said arrangements and well and truly sell and dispose of the said goods, and cause the moneys arising from the sales thereof, deducting therefrom the duties, charges, and commissions as aforesaid, to be deposited in the bank in trust according to the true intent and meaning of the above recited agreement and for the purposes therein set forth, this obligation to be void; otherwise to be and remain in full force and virtue."

"[Signed] ARCH. GRACIE, Prest. [L.S.]"

"Attest, GEO. B. RAPELYE, Secretary of the Atlantic Insurance Company of New York."

The facts as they appeared by the record were as follows:

On 21 June, 1825, the plaintiffs below lent to Edward Thomson the sum of \$21,000 upon *respondentia* by the *Addison*, for which the following bond was executed and delivered to the company:

"Know all men by these presents, that we, Edward Thomson, of the City of Philadelphia, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, of the City of New York, are held and firmly bound unto the Atlantic Insurance Company, of New York, in the sum of \$42,000, lawful money of the United States of America, to be paid to the said *The Atlantic Insurance Company of New York*, their certain attorney, successors, or assigns, to which payment, well and truly to be made we do bind ourselves and each of us, our and each of our

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heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 21 June, 1825."

"Whereas the said the Atlantic Insurance Company of New York has this day lent and advanced to the above named Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, the sum of \$21,000, lawful money of the United States of America, upon the goods, wares, merchandise, and specie to that amount laden or to be laden, on board the American ship called the *Addison*, of Philadelphia, whereof Hidelius is master, or which may be laden on account of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey on board the said vessel at any time during her intended voyage hereinafter mentioned."

"And whereas the said vessel is now bound on a voyage at and from Philadelphia to Canton and at and from thence back to Philadelphia, with the usual privileges for trade and refreshments."

"And whereas the said the Atlantic Insurance Company of New York is content to stand and bear the risks against which the said company usually insure by their cargo policies on the said sum so lent and advanced on the said goods, wares, merchandise, and specie laden or to be laden on board of the said vessel as aforesaid during the said voyage, so as the same do not exceed the term of twelve

calendar months, to be computed from the day of the date of the bill of lading, viz., 21 April, 1825."

"Now the condition of this obligation is such that if the said ship laden with the said goods, wares, merchandise, and specie does and shall, with all convenient speed, proceed and sail on the said voyage from Philadelphia to Canton, and at and from thence back to Philadelphia, and return and come to Philadelphia having on board the above stipulated amount in value, in specie or merchandise, as the case may be, on the respective passages, both outward and homeward, to end her voyage there by or before the end or expiration of twelve calendar months, to be computed from the date aforesaid, and that without deviation (the dangers and casualties of the seas excepted), and if the above bounden Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey or either of them or either of their heirs, executors, or administrators shall and do well and truly pay or cause to be paid at the City of New York to the above named the Atlantic Insurance Company of New York, their attorney, successors, or assigns, the full sum of \$21,000 lawful money as aforesaid immediately upon the first and next return and arrival of the said

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ship at the port of Philadelphia or at and upon the end and expiration of twelve calendar months, to be computed as aforesaid, whichever shall first happen, together with the sum of \$2,205, lawful money as aforesaid, that being the stipulated marine interest and premium, on the said loan; or if the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey or either of them, their or either of their heirs, executors, or administrators, shall and do immediately upon the first and next return and arrival of the said vessel, at the port of Philadelphia as aforesaid, provided such return and arrival happen within the space of twelve calendar months, to be computed as aforesaid, give security satisfactory to the said the Atlantic Insurance Company of New York to pay at the City of New York to the said the Atlantic Insurance Company of New York, their successors or assigns, the said sum of \$21,000, together with the said sum of \$2,205, within three months from the time of such return and arrival, with lawful

interest thereupon, from the time of such return and arrival, and shall and do well and truly pay the same accordingly at the expiration of the said three months, or if in the said voyage and before the end of the said twelve months, to be computed as aforesaid, a total loss of the said goods, wares, merchandise, and specie, by the risks against which said company usually insure by their cargo policies shall unavoidably happen, and the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, their heirs, executors, or administrators, shall, and do well and sufficiently abandon, transfer, and assign, to the said the Atlantic Insurance Company of New York, their successors or assigns, all the said goods, wares, merchandise, and specie of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, so laden, and to be carried from the said port of Philadelphia, on board the said ship, and all other goods, wares, merchandise, and specie, which shall be acquired during the said voyage by reason of or from the proceeds of the said last mentioned goods, wares, merchandise, and specie, and the net proceeds thereof, and well and truly do account for and pay, upon oath or affirmation, within four calendar months, to be computed from the time of such loss, to the said the Atlantic Insurance Company of New York, or their successors, a just and proportionable average on all the said specie, goods, wares, and merchandise, and proceeds, if any salvage average or allowance shall be obtained by reason of or upon the same notwithstanding such loss, then this obligation to be void; otherwise to remain in full force and virtue."

"It being first declared to be the mutual understanding and

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agreement of the parties to this contract that the lenders shall not be liable for any charge, damage, or loss that may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade or any trade in articles contraband of war, but that the lenders shall be liable to losses and averages, and entitled to the benefit of salvage in the same manner, to all intents and purposes, as underwriters on a policy of insurance, according to the usages and practices in the City of New York, and that in like manner the borrowers shall be subject to all the duties imposed on the assured by the usual policies of insurance, and the customs

and practices of the said city."

"Sealed and delivered in the presence of us,"

"PETER MACKIE"

"CHARLES MACKIE"

"To the signature of Edward Thomson"

"J. H. CLINCH"

"H. W. NICOLL,"

"To the three last named"

"EDWARD THOMSON [L.S.]"

"EDW. H. NICOLL, per"

"ROBERT SMITH, att'y [L.S.]"

"FRANCIS H. NICOLL [L.S.]"

"FLOYD S. BAILEY [L.S.]"

At the same time the following memorandum, bill of lading, and assignment thereon were also executed and delivered to the company:

"Whereas it hath been agreed that the bills of lading for the goods, specie, wares, and merchandise, mentioned in the within obligation shall be endorsed to 'The Atlantic Insurance Company of New York' as a collateral security for the loan within mentioned: "

"And whereas it has been further agreed that the property to be shipped homeward as aforesaid, being the proceeds of the said loan, shall be for the account and risk of us the said borrowers, or some of us; that the bills of lading therefore shall express the same, and shall also express that the said property

shall be deliverable to the order of the shippers, and that the same shall be endorsed in blank, and shall be placed in the hands of the said 'Atlantic Insurance Company of New York' either before or on the arrival of the said ship at Philadelphia, to be held by them as a continuation of such collateral security, to the performance of which we do bind ourselves: "

"Now by this instrument it is expressly declared that such endorsement or consignment shall not be held to exonerate the persons of the obligors, nor compel the said 'The Atlantic Insurance Company of New York' to accept the goods and merchandise which may arrive under such bill of lading and consignment

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in discharge of such debt, but it shall be lawful for the said 'The Atlantic Insurance Company of New York' to receive and hold the said goods, specie, wares, and merchandise, for the space of ninety days after their arrival at the port of Philadelphia."

"And in case the principal, interest, and premium, in the within obligation mentioned shall not be paid or satisfied within the said time, to dispose of the same at public auction and to charge the obligors with the balance that may remain due after deducting from the amount of said sales the freight, duties, commissions, and all other just and proper charges."

"Sealed and delivered in presence of us,"

"PETER MACKIE"

"CHARLES MACKIE"

"To the signature of Edward Thomson"

"J. H. CLINCH"

"H. W. NICOLL,"

"To the three last named"

"EDWARD THOMSON [L.S.]"

"EDW. H. NICOLL, per"

"ROBERT SMITH, att'y [L.S.]"

"FRANCIS H. NICOLL [L.S.]"

"FLOYD S. BAILEY [L.S.]"

"Shipped in good order and condition by Edward Thomson in and upon the ship called the *Addison*, whereof Hidelius is master for this voyage, now lying in the port of Philadelphia and bound for Canton, seven kegs containing three thousand Spanish dollars for account and risk of the shipper, a native citizen of the United States of America, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Canton (the danger of the seas only excepted) unto John R. Thomson, Esq., or to his assigns, he or they paying freight for the said goods, at the rate of nothing, with primage and average accustomed. In witness whereof the master or purser of the said ship hath affirmed to the three bills of lading, all of this tenor and date, one of which being accomplished, the other to stand void. Dated at Philadelphia 21 April, 1825."

"ANDREW HIDEILIUS, JR."

"No. 5. [E. T.] 38 a 44, 7 kegs containing 3000 each."

An assignment endorsed thereon, dated the 21 June, 1825, as follows:

" (COPY)"

"For value received, I do hereby, assign and transfer to the Atlantic Insurance Company of New York the within bill of lading and the specie, goods, wares, and merchandise, to be procured thereon, or thereby, and any return cargo to be obtained

by the within mentioned outward cargo and specie, or the proceeds thereof, and all the return cargo to be taken on board the within named ship by or for my account, as collateral security, according to an agreement, duly executed and adjoined to a *respondentia* bond given by myself, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, dated this 21 June, 1825, for the sum of \$21,000. Witness my hand and seal, this 21 June, 1825."

"EDWD. THOMSON"

"PETER MACKIE"

"BARCLAY ARNY, Witnesses"

The *Addison* sailed from Philadelphia for Canton on or about 21 April, 1825.

On 14 July, 1825, the plaintiffs also lent to Edward Thomson the sum of \$13,960 upon *respondentia* by the *Superior*, for which a similar bond, and memorandum, and a corresponding bill of lading and assignment, were executed to the lenders. The *Superior* sailed from Philadelphia for Canton on or about 6 June, 1825.

There was no difference between these two operations except this, that the entire loan of \$21,000 by the *Addison* was paid by the company to the agents of Thomson, whereas the loan by the *Superior* was applied, with his consent, to pay a previous loan on *respondentia* by another ship of Thomson which had fallen due.

On 19 November, 1825, Edward Thomson, being very largely indebted to the United States upon duty bonds and for duties on teas not bonded, made a general assignment of all his estate and effects to Richard Renshaw and Peter Mackie in trust for his creditors, and on 13 March, 1826, he confessed a judgment to the United States for half a million of dollars, upon which a *fi. fa.* was issued on the same day.

In the month of March, 1826, and a few days before the arrival of the *Addison*, the assignees of Thomson received, under a blank envelop addressed to him, a duplicate bill of lading and invoice of a shipment homeward by that vessel for the teas in question in this suit, and delivered them to the agents of the Insurance Company. They were respectively dated 22 November, 1825, deliverable to the order of the shipper at Canton, R. Fisher, attorney for John R. Thomson, and by him endorsed in blank. The invoice stated the account and risk to be for Edward Thomson. That the teas in this invoice were the returns of the outward specie in the bill of lading assigned to the company was proved by means of the words and figure No. 5 on the homeward invoice, and the same number and figure on the outward bill of lading, which were the means concerted

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between Edward Thomson and his supercargo in Canton to fix the identity. The original bill of lading and invoice were received by the assignees on the arrival of the *Addison*, and in like manner delivered to the company. In the same month, Peter Meckie, one of the assignees, received from Canton the homeward bill of lading and invoice of a shipment of teas, &c.;, by the *Superior*, dated 2 December, 1825, deliverable to his own order, and Barclay Arny, a clerk in the service of Thomson, received a bill of lading and invoice of another shipment by the *Superior*, bearing the same date and deliverable to his order. These returns, being, as was proved at the trial, purchased with the specie in the outward bill of lading by the *Superior*, assigned to the company, the consignees Mackie and Arny, on 22 March, 1826, endorsed the papers to the plaintiffs; the rest of the shipment of \$13,960 was expended for ship's disbursements in Canton.

Both shipments by the *Addison* and *Superior* were levied upon by the Marshal under the *fi. fa.* before mentioned, on 15 March, 1826, while the ships were below in the river, and taken into his custody, where they remained until the arrangement recited in the bond of 9 October, 1826, in consequence of which they were given up.

It further appeared upon the trial that the *Addison* brought with her, addressed to Thomson, a general bill of lading for her entire cargo, deliverable to Edward Thomson or assigns but not signed by the captain, and also a general invoice stating the cargo to be for his account and risk and deliverable to his order. The manifest which had been made out in Canton by the agent of Thomson, stated the cargo to be consigned to Thomson and not to order, and when the agent delivered it to the captain, he told him that it was done to save him the necessity of overhauling his papers at sea and that he might rely on it as being correct. The captain however, on receiving a letter from the assignees, upon his arriving on the American coast, examined his bills of lading, and finding that they were deliverable to order, altered his manifest in conformity. The object of these double papers, it was alleged, was to enable Thomson, after settling with the lenders on *respondentia*, as he had done upon former occasions, to cancel the particular bills and invoices, and after procuring the signature of the captain to the general bill of lading, to enter the cargo as consigned to him.

The preceding statement is all that is necessary to introduce the points of evidence and law that were raised upon the record, and which came up for revision in this Court.

The plaintiff's counsel having offered at the trial to give evidence of the *respondentia* bond by the *Addison*, it was objected

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to until they had proved that the company were duly incorporated according to law. The plaintiff's counsel then gave notice to the defendant's counsel, the district attorney of the United States, to produce the bond of 9 October, 1826, and gave in evidence the agreement of counsel for entering the action, wherein it was stated that the question to be tried was whether the plaintiffs or the United States were entitled to the goods mentioned in the declaration or the proceeds thereof, and that the merits should be determined without further form. The bond not being produced, the plaintiffs' counsel called Austin L. Sands to prove the delivery of that bond to the district attorney and also its contents, and began by asking him if he

was an agent of the Atlantic Insurance Company. To this question the counsel for the defendant objected, and the court overruled the objection. To this opinion of the court a bill of exceptions was tendered and sealed.

The bond of 9 October, 1826 being then proved, the counsel for the plaintiffs contended that they were authorized, without further proof, to give evidence of the *respondentia* bond, of which opinion was the court, and to this opinion also the defendant's council tendered an exception.

Mackie the subscribing witness to E. Thomson's signature to the *respondentia* bond, memorandum, and assignment of the bill of lading, proved the handwriting of Thomson, his own attestation, and that of Charles Mackie, and also the handwriting of Clinch and Nicoll, the other witnesses to the bond and memorandum, who resided in New York and were not produced. The counsel for the plaintiffs then offered to read that bond in evidence, to which the counsel for the defendant objected, but the court suffered it to be read as the several bond of Thomson, to which opinion an exception was also tendered.

Upon the examination of A. Hidelius, the captain of the *Addison*, a witness produced on behalf of the defendant, the counsel proposed to ask him the following question -- did Mr. Mackie and Mr. Nicoll make out a new manifest, altering the destination of the *Addison*, and ask you to enter it as a true manifest at the Custom House? This question was objected to by the plaintiffs' counsel and overruled by the court, to whose opinion the defendant again excepted.

The defendant's counsel proposed then to ask the same witness the following question -- did you see Mr. Mackie pay money to the pilot for being first on board the *Addison*? Which question was objected to, overruled, and the rejection excepted to in like manner.

The defendant's counsel having then produced an original letter from Thomson to captain Hidelius, with a postscript by the assignee giving the captain a caution in regard to his manifest,

proposed to ask Peter Mackie the following question -- was the greater part of the letter now produced signed by Edward Thomson, and countersigned by his assignees, drafted by the district attorney? This question was in like manner objected to and overruled, and an exception taken.

The same counsel proposed to ask of Barclay Arny, another witness, the following question -- do you know how the money was applied that was borrowed on the *Addison* and *Superior* of the plaintiff? This question was objected to unless the application was with the plaintiffs' knowledge, and was overruled. To this opinion a bill of exceptions was also tendered by the defendant.

At the close of the argument to the court and jury on the law and fact of the case, Mr. Justice Washington delivered that following points in charge to the jury.

First. That the bonds given by Edward Thomson to the plaintiffs for securing the loans of \$21,000 on the cargo of the *Addison*, and of \$13,960 on that of the *Superior*, are not invalid as marine contracts for the reason alleged by the counsel for the defendant -- that is to say because in respect to the former, the loan was made after the *Addison* had sailed upon her voyage, and in respect to the latter, for the same reason, and because the bond was given by the said Thomson for securing a balance due by him to the plaintiffs, on account of preceding loans made to him, and not for money lent at the time the said security was given.

Second. That it is no objection to the validity of the bond given for securing the loan on the cargo of the *Addison*, upon the ground of usury, that such cargo was known by the parties at the time the said bond was given to have been in safety at and upon the departure of the said vessel from Philadelphia, since the real question for the jury to decide in relation to that subject was whether, upon the whole of the evidence given in the cause, the loan was bottomed upon a fair marine contract, the repayment of which was to depend upon the perils which the plaintiffs assumed to bear, or whether the contract was merely a device to cover an usurious loan. If the risk be inconsiderable or for a part of the voyage only and the marine interest be disproportioned thereto, these circumstances may warrant the presumption of unfair conduct sufficient to avoid the contract. But the mere

circumstance of the known safety of the cargo at any particular period of the voyage, or of the assumed risk, is not *per se* an objection to the contract on the ground of usury. If Edward Thomson was to pay interest *from a period antecedent to the loan*, there can be no question but that the contract was usurious, and it would be so although

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no more than the legal rate of interest was reserved. How that fact is the jury must decide from the evidence before it.

Third. That the loan upon the cargo of the *Addison* was by the terms of the aforesaid bond given to secure it at the risk of the plaintiffs during the whole voyage, notwithstanding the omission of the words "lost or not lost" in the said bond, there being other and equivalent expressions in the said instrument.

Fourth. That the above bond given for securing the loan made upon the cargo of the *Addison*, together with the memorandum endorsed on it the bill of lading outward and the endorsement thereon, are all to be considered as forming parts of one entire contract, and as such they do, upon a fair and legal construction of them, cover that part of the homeward cargo, which was the investment of the outward cargo on which the loan was secured, and that the same principles are applicable to the contract in relation to the *Superior*. That the above instruments, taken and construed together as forming one contract, vested in the plaintiffs an equitable title to the return cargoes of those vessels if upon the evidence given in the cause the jury should be of opinion that those return cargoes were in point of fact the investment of the outward cargoes of the *Addison* and *Superior*, respectively. And that nothing remained to be done to vest in the plaintiffs the legal right to the said property, respectively, but the delivery to them of the homeward bills of lading of the *Addison's* cargo, endorsed in blank, and an assignment to the plaintiffs by Mackie and Arny of the homeward bills of lading of the cargo of the *Superior*.

Fifth. That the equitable title of the plaintiffs, so vested in them on 19 November, 1825, when Edward Thomson made an assignment of all his property for the benefit of his creditors, was not defeated or affected by the right of preference which that act gave to the United States to be first paid what was due to them by the said Thomson, and that this equitable title was converted into a legal one by the subsequent delivery to the plaintiffs of the bills of lading endorsed in blank of the *Addison's* homeward cargo, and of the assignment by Mackie and Arny of those of the cargo of the *Superior*.

Sixth. That the actual possession of the above return cargoes by the masters of the *Addison* and *Superior* until they were levied upon under executions at the suit of the United States against Thomson is not *per se* in law a badge of fraud which ought to invalidate or affect the title of the plaintiff's to those cargoes.

Seventh. That as to the charge of fraud, which it is insisted by the counsel for the defendant taints this transaction throughout,

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that is a subject exclusively for the consideration and determination of the jury upon the evidence laid before it, in deciding upon which it is to observe first that actual fraud must be proved, and ought not to be presumed, and secondly that no fraud which may have been practiced or attempted by Edward Thomson, his captains or agents, ought to affect the validity of these contracts unless it should be satisfied from the evidence that the plaintiffs in some way or other participated in the same.

Lastly. That if the jury should be of opinion upon the whole of the evidence that the transactions between the plaintiffs and E. Thomson which constitute the basis of this action were fair so far as the plaintiffs were concerned in them, and that they stand clear of the imputation of usury on the ground that interest was reserved from a period antecedent to the loan, and if further it is satisfied that the homeward cargoes were the proceeds of the outward cargoes on which the securities were given, then its verdict ought to be for the plaintiff, otherwise not. It was further

stated by the judge that he had declined giving a construction of the 62d section of the act imposing duties, or an opinion on the question whether under that section, the consignee of imported goods is liable for the duties on them, considering it to be unnecessary from the view which he had taken of the case.

And in explanation of the charge, the following questions were propounded by the counsel and answered by the court.

1. The defendant's counsel requested the court to charge the jury that if the agreement of the plaintiffs with Edward Thomson was made with the view to deprive the United States of its duties, it was fraudulent, and the plaintiffs could not recover. To which the judge answered that if the agreement was made with that view, such would be the legal consequence, but that he had heard no evidence to warrant that conclusion in point of fact; but that was a subject exclusively for the jury.

2. The court was asked by the same counsel, to charge that if the contract of Edward Thomson with the defendant, was to pay more than lawful interest during a period when there was no marine risk, the contract was usurious and void. To which the judge answered that if the contract was a cover to charge more than lawful interest when there was no marine risk, it was usurious and void. That he did not himself understand the entries from the plaintiffs' books which had been given in evidence, but that the fact upon which the question is predicated was proper for the decision of the jury.

3. The court was then asked by the plaintiffs' counsel to charge that the parties were at liberty to agree for a marine interest greater than the legal rate for the time that the money

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was exposed to marine risks, or the loan was at hazard by the marine risk of the goods, on which it was made. To which the judge answered that they certainly were.

To all which the defendant's counsel excepted, and the judges sealed a bill of exceptions.

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MR. JUSTICE STORY delivered the opinion of the Court.

This is an action of trespass *de bonis asportatis*, brought in the Circuit Court for the District of Pennsylvania by the Atlantic Insurance Company to recover against the defendant, John Conard, the marshal of that district, the value of certain teas shipped on board the ships *Addison* and *Superior*, and levied upon by him upon an execution in favor of the United States against one Edward Thomson, as the property of the latter. The real question in the cause is whether the Insurance Company or the United States is entitled to the teas or their proceeds.

The material facts disclosed at the trial in the circuit court were as follows:

Edward Thomson was a merchant largely engaged in trade in the City of Philadelphia in the year 1825, and on 21 June of that year borrowed at *respondentia* of the Insurance Company the sum of \$21,000 upon goods, &c.;, on board of the ship *Addison*, of that port, on a voyage at and from Philadelphia to Canton, and at and from thence back to Philadelphia, beginning the risk on the 21st of the preceding April, about which time the ship had sailed on the voyage. Edward Thomson had shipped on board of the *Addison*, for his own account and risk, for the voyage, 21,000 Spanish dollars, consigned to J.R. Thomson, his agent and his assigns, and deliverable to him in Canton, and regular bills of lading were accordingly signed, one of which, was retained by the shipper. At the time of the execution of the *respondentia* bond, a memorandum of agreement was entered into by the parties and an assignment made on the back of this bill of lading. The form and effect of these instruments will be matter of more particular comment hereafter; at present, it is only necessary to add that that loan purports on the face of the bond to be a loan for the joint account of E. Thomson, E. H. Nicoll, F. H. Nicoll, and F. S. Bailey, but in reality the transaction was for the use and benefit of E. Thomson, and the goods shipped in the *Addison* were on his sole account.

On 14 July of the same year, a loan was made to Edward Thomson of \$13,960 on goods on board the ship *Superior*, which had sailed on a similar voyage on 6 June preceding.

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A *respondentia* bond was taken in the same form, from the same parties on the like voyage, with a similar memorandum of assignment of the bill of lading. The only difference between the transactions was that this loan was applied in part payment of a former loan, made by the Insurance Company on another ship of E. Thomson's. On 19 November, E. Thomson, having become insolvent, made a general assignment of all his property to Peter Mackie, and Richard Renshaw, for the use of his creditors. At this time, he was very largely indebted to the United States on duty bonds. The *Addison* left Canton on her return to Philadelphia, having among her papers a bill of lading of the proceeds of the \$21,000, consigned by the shipper (Mr. Fisher attorney for J.R. Thomson) to order, in blank, and endorsed, in blank, by the shipper, and marked No. 5. This mark was to identify them as the proceeds of the \$21,000. Mr. Fisher also gave the master a manifest stating the cargo to be consigned to E. Thomson, and a general bill of lading of the whole cargo consigning it to E. Thomson. The invoice and bill of lading, were dated 22 November, 1825. The general bill of lading was not signed. The *Superior* left Canton, having among her papers a bill of lading of certain articles, valued in the invoice at \$3,393, consigned to Peter Mackie, and also a bill of lading of certain articles valued at \$1,139.86, consigned to Barclay Army, and both dated 2 December, 1825. Before the arrival of these ships in America, the United States had obtained judgments against E. Thomson for large sums of money due upon his bonds at the custom house. Both ships arrived in Delaware Bay almost at the same time, and an execution issued on behalf of the United States on one of the judgments against E. Thomson on 13 March, 1826, and was levied on the ships and their cargoes on 15 March while they were yet in the bay. It was under this levy that the goods in controversy were seized by the marshal.

Two or three days before the ships came up to Philadelphia, Peter Mackie, the assignee of E. Thomson, having received duplicates of the invoice and bills of

lading of the cargo of the *Addison*, delivered them to the agents of the insurance company at Philadelphia, and upon the arrival of the ship itself handed over to the same agent the invoices and bills of lading brought by the master. On 22 March, 1826, Peter Mackie and Barclay Arny endorsed to the insurance company the invoices and bills of lading, which came to their order by the *Superior*. These papers came under cover to Edward Thomson, several being enclosed in the same envelop, and Mackie allotted them to their respective owners by means of the numbers endorsed upon them. These numbers were

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originally placed upon the outward and homeward bills of lading and invoices for the purpose of designating the proceeds of each particular shipment. It appeared that part of the \$13,960 borrowed of the insurance company on the goods in the *Superior* was expended in disbursements in Canton, and the two invoices of Mackie and Arny were consigned to them contrary to instructions, and they assigned them to the insurance company under the belief that they were the proceeds of the outward shipment pledged for the loan. The reason assigned for there being a manifest and general bill of lading consigning the cargo to Edward Thomson was to enable him to enter the cargo in his own name after he had settled with the insurance company and paid the *respondentia* loans. The several particular invoices and bills of lading were then to be cancelled, and the master was to sign the general bill of lading and the cargo was to be entered at the custom house in the name of E. Thomson. He was in the habit of taking up other large sums at *respondentia*, and this was the usual course of his arrangements in business.

Such is the general outline of the case. The loan on the shipment in the *Superior*, as has been already stated, differs from the on the shipment in the *Addison* only in the circumstance that it was applied in discharge of a prior loan. In our judgment, that makes no difference as to the legal rights of the parties. The borrower had a right to apply the loan in any manner he pleased, and the mode of its application, if it be otherwise *bona fide* and legal, does not change the posture of the rights of the lender. We shall therefore dismiss at once all further

consideration of this point and treat both cases as if they stood on a single shipment.

Several objections have been taken to these *respondentia* bonds to impeach their original validity. It is said that they ought to be treated as usurious or gaming contracts; that they are not to be deemed *bona fide* transactions upon real risks, but transactions void in point of law upon their face. So far as the questions of usury or gaming or *bona fides* upon substantial risks are matters of fact, they were left fully open, and have been passed upon by the jury, which has found a verdict against them; so far as there are matters of law apparent upon the record, proper to avoid the bonds, they are still open for inquiry. Two grounds have been relied on for this purpose: first that the loans were made after the sailing of the ships on the voyage, and secondly that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property on which the risk was run. In our judgment, neither of these objections can be sustained. It is not necessary that

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a *respondentia* loan should be made before the departure of the ship on the voyage, nor that the money loaned should be employed in the outfit of the vessel or invested in the goods on which the risk is run. It matters not at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith for a maritime premium, it is no objection to it that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. The lender is not presumed to lend upon the faith of any particular appropriation of the money, and if it were otherwise, his security could not be avoided by any misapplication of the fund where the risk was *bona fide* run upon other goods and it was not a mere contract of wager and hazard. What could be the effect if it were a mere wagering contract it is unnecessary to consider, because there is the clearest proof here that there was property on board belonging to the borrower and sailing on the voyage at his risk.

The form of the *respondentia* bond in the present case is, as far as we know, the common and usual form. The only deviation from the actual facts is that it seems in some of its provisions to contemplate the voyage as not then commenced. This probably arose from using the common printed form, which is adapted to that as the ordinary case. But it misled no one, and was certainly perfectly understood by the parties. The risk was taken for the whole voyage, precisely as if the ships had been then in port, and if before the bonds were given the property had been actually lost by any of the perils enumerated in it, it is clear that the loss must have been borne by the lenders. They could not have recovered it back, since the event was one within the scope and contemplation of the contract. The safety, then, of the property at that particular period does not vary the rights of the parties, and from the very nature of the transaction it must have been utterly unknown to both whether the ship was at the time in safety or not. They entered into the contract upon the usual footing of policies of insurance, lost or not lost. So far as this deviation from the fact bore upon the point of the good faith and reality of the contract as a genuine maritime loan, it was left to the jury to draw such inferences as upon the whole circumstances it was warranted to draw. The charge of the learned judge in the circuit court was as favorable to the defense on this point as it could be upon the principles of law.

The next question is in whom was the property in the shipment vested at the time of the levy of the execution of the United States. Was it so vested in the insurance company,

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either in law or equity, that it is now entitled to maintain the present suit, or in other words to recover the proceeds in the marshal's hands? This depends upon the view taken of the objects, intentions, and acts of the parties as disclosed in the bonds and the accompanying papers. When these are once ascertained and settled, it will not be difficult to arrive at the proper legal conclusion.

It is contended on behalf of the United States that no title or interest in the property shipped passed by the instruments, taken collectively, to the insurance company;

that Edward Thomson remained the sole owner of the goods and their proceeds during the whole voyage; that at most, the insurance company had but a lien upon them for the security of its debt, which was displaced by the priority of the United States; and finally that if the insurance company had any title or interest in the property, it was not absolute, but by way of mortgage, and even this, coming in competition with the priority of the United States by operation of law, yields to its superior privilege.

Before proceeding to the discussion of the right of the insurance company over the property in question, it may be well to consider what is the nature and effect of the priority of the United States under the statute of 1799, ch. 128. Although that subject has been several times before this Court, the observations which have fallen from the bar show, that the opinions of the Court have sometimes not been understood according to their true import. The 65th section of the act declares that

"In all cases of insolvency or where any estate in the hands of executors, administrators, and assignees shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, &c., shall be first satisfied, and any executor, administrator, or assignees or other person who shall pay any debt due by the person or estate from whom or for which they are acting previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid shall become answerable in their own person and estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid, and actions or suits at law may be commenced against them for the recovery of the said debt or debts or so much thereof as may remain due and unpaid in the proper court having cognizance thereof."

A subsequent clause of the same section declares that

"The cases of insolvency mentioned in this section 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."

It is obvious that this latter clause is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors stands wholly upon the alternative in the former part of the enactment. Insolvency then, in the sense of the statute, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. This was the language of the decision in the case of [*United States v. Hooe*](#), 3 Cranch 73, and it was consequently held that an assignment of part of the debtor's property did not fall within the provision of the statute. So too, a mere inability of the debtor to pay all his debts is not an insolvency within the statute, but it must be manifested in one of the three modes pointed out in the explanatory clause already referred to. That was the point on which the case of [*Prince v. Bartlett*](#), 8 Cranch 431, turned.

What then is the nature of the priority thus limited and established in favor of the United States? Is it a right which supersedes and overrules the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment of the assignees? Or is it a mere right of prior payment out of the general funds of the debtor in the hands of the assignees? We are of opinion that it clearly falls within the latter description. The language employed is that which naturally would be employed to express such an intent, and it must be strained from its ordinary import to speak any other.

Assuming that the words "in all cases of insolvency" indicate an entire class of cases, and that the other member of the sentence "or when any estate," &c.;, is to be read distributively, as has been contended for on behalf of the United States, it does not in the slightest degree vary the construction of the statute. It will then

read that "in all cases of insolvency, the debt or debts due to the United States, &c., shall be first satisfied."

But how are they to be satisfied? Plainly, as the succeeding clause demonstrates, by the assignees, who are rendered personally liable if they omit to discharge such debt or debts. To enable the assignees to pay the United States, it is indispensable that the fund should pass to them, and if the mere priority of the United States intercepted it or gave a right to defeat it, the object of the statute would not be accomplished.

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If the legislature had intended to defeat the passing of the property to the assignees as against debts due to the United States, the natural language in which such an intention would be clothed would be to declare that so far such assignments should be void. Then again the very enumeration of the cases of insolvency, in all of which the assignment passes and is to pass the whole of the debtor's property, confirms the interpretation already asserted. They are the very cases where by law there is no exception as to the extent or operation of the assignment to divest the debtor's estate. One of these is the case of a legal bankruptcy, and in the act on this subject passed in the next session of Congress, there is an express provision in the 62d section that "nothing contained in this law shall in any manner affect the right or preference to prior satisfaction of debts due to the United States" as secured or provided by any law heretofore passed. Yet the bankrupt act contains no exception as to the property to be passed to the assignees in favor of any person. In the case of [*United States v. Fisher*](#), 2 Cranch 358, which was decided upon great deliberation, this Court held, in the construction of a similar clause in the Act of 3 March, 1797, ch. 74, that

"No lien is created by this law; no *bona fide* transfer of property in the ordinary course of business is overruled. It is only a priority in payment, which under different modifications is a regulation in common use, and this priority is limited to a particular state of things when the debtor is living, though it takes effect generally if he be dead."

And this doctrine was again recognized in [United States v. Hooe](#), 3 Cranch 73, [7 U. S. 90](#) .

If, then, the property of the debtor passes to the assignees; if debts due to the United States constitute no lien on such property; if the preference or privilege of the United States be no more than a priority of satisfaction or payment out of a common fund, it would seem to follow as a necessary consequence that even if the teas in controversy were the property of Edward Thomson, they passed by his general assignment in November, 1825, which is not denied to have been a *bona fide* and valid transaction, to his assignees and become their property for distribution among his creditors, and were not liable to the levy under the execution of the United States.

That, however, would be a question merely between the United States and the assignees, and would in no shape help the Atlantic Insurance Company to maintain its present suit.

Then again it is contended on behalf of the United States that the priority thus created by law if it be not of itself

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a lien, is still superior to any lien and even to an actual mortgage on the personal property of the debtor.

It is admitted that where any absolute conveyance is made, the property passes so as to defeat the priority, but it is said that a lien has been decided to have no such effect, and that in the eye of a court of equity a mortgage is but a lien for a debt. [Thelluson v. Smith](#), 2 Wheat. 396, has been mainly relied on in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned judge who delivered the opinion of the Court in that case is conclusive on the point of a mortgage. "The United States," said he,

"is to be first satisfied, but then it must be *out of the debtor's estate*. If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate to a third person *or has mortgaged the same to secure a debt*, or if his property has been seized under a *fieri facias*, the property is divested out of the debtor and cannot be made liable to the United States."

The same doctrine may be deduced from the case of [*United States v. Fisher*](#), 2 Cranch 358, where the Court declared that "no *bona fide* transfer of property in the ordinary course of business is overreached by the statutes," and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in [*United States v. Hooe*](#), 3 Cranch 73.

It is true that in discussions in courts of equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute and indefeasible. But it has never yet been decided by this Court that the priority of the United States will divest a specific lien attached to a thing, whether it be accompanied by possession or not. Cases of lien accompanied by possession are among others the lien of a ship's owner to detain goods for freight; the lien of a factor on the goods of his principal for balances due him; the lien of an artisan for work and services upon the specific thing. On the other hand there are liens

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where the right is perfect, independent of possession, as the lien of a seaman for wages and the lien of a bottomry holder on the ship for the sum loaned. In none of

these cases has it ever been decided that in a conflict of satisfaction out of the thing itself, the priority of the United States cut out the lien of the particular creditor. And before such decision is made it will deserve very grave deliberation and a marked attention to what fell from the court in *Nathan v. Giles*, 5 Taunt. 558, 574. At present it is wholly unnecessary to decide it, for reasons which will hereafter appear.

The case of [*Thelluson v. Smith*](#), 2 Wheat. 396, is not understood to justify any such conclusion. That case turned upon its own particular circumstances. A judgment *nisi* was obtained against Crammond on 20 May, 1805, in favor of Thelluson and others. On the 22d of the same month he executed a general assignment of all his estate to trustees for the payment of his debts. At that time he was indebted to the United States on several duty bonds which became due at subsequent periods. Suits were instituted on these bonds as they severally became due, and judgments were obtained and executions issued against Crammond under which a landed estate called Sedgely was levied upon and sold by the marshal, and the action was brought by Thelluson and others against the marshal to recover the proceeds of this sale in his hands. No execution had ever issued upon the judgment of *Thelluson v. Crammond*, and of course there had been no levy under that judgment on the Sedgely estate before or after the levy in favor of the United States. It was admitted that in Pennsylvania, a judgment constitutes a lien on the real estate of the judgment debtor, and it was assumed by this Court in the argument of the cause that the judgment of Thelluson and others bound the estate from 20 May, when it was entered *nisi*, although in fact it was not finally entered until nearly a year afterwards. The posture of the case then was that of a judgment creditor seeking to recover the proceeds of a sale of land sold under an adverse execution out of the hands of the marshal upon the ground of his having a mere general lien by his judgment on all the lands of his debtor, that judgment never having been consummated by any levy on the land itself. The court decided that the action was not maintainable. The reasons for that opinion are not owing to accidental circumstances, as fully given as they are usually given in this Court. But the arguments of the counsel point out grounds upon which it may have proceeded, without touching the general question of lien. The plaintiffs

were entitled to recover only upon the ground that they could establish in themselves a rightful title to the proceeds. Whether the land

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itself was rightfully sold under the execution of the United States, or any title to it passed by the sale, as against the assignees of Crammond, was not matter of inquiry in that case.

However tortious or invalid it might be, still if the plaintiffs had no title to the proceeds, they must fail in their action. Under the general assignment of the debtor, the priority of the United States attached, and if the assignees were willing to acquiesce in the sale, the right of the United States to hold the proceeds could not be disturbed by third persons. Now it is not understood that a general lien by judgment on land, constitutes, *per se*, a property, or right, in the land itself. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to the judgment, and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate encumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. His title to it is not divested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor who is entitled to hold it against every other person except such judgment creditor, and even against him unless he consummates his title by a levy on the land under his judgment. In that event, the prior levy is, as to him, void, and the creditor loses all right under it. The case stands in this respect precisely upon the same ground as any other defective levy, or sale. The title to the land does not pass under it. In short, a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale into the hands of vendor or vendee or to claim the purchase money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold, and he can trace the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment creditor is against the thing itself

by making that a specific title which was before a general lien. He can only claim the proceeds of the sale of the land when it has been sold on his own execution and ought to be applied to its satisfaction. To this state of things the language of the Court in *Thelluson v. Smith* is to be applied when it is said that if the debtor's property is seized under a *fi. fa.*, it is divested out of the debtor and cannot be liable to the United States. Applying these principles to the facts of that case, it is clear that the Sedgely estate had not been divested out of the debtor by any execution on the judgment of Thelluson and others; that it either remained in

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the debtor, and was liable to the execution of any other of his creditors who choose to levy upon it, subject, of course, to have his title overruled by their subsequent levy, when perfected; or that, subject in like manner, it passed by the assignment (if that was *bona fide*) to the assignees, and in their hands, the United States would have a priority of payment out of it as general funds in their hands. The judgment creditors, as such, had no title to any fund in the hands of the assignees until the priority of the United States was satisfied, for that priority does not yield to any class of creditors, however high might be the dignity of their debts.

The fact that a judgment creditor has a lien does not place him in a better situation as a creditor over the general funds of the debtor in the hands of the assignees. If he possess such a lien, he must enforce it in the manner prescribed by law, and if he does, that may so far affect the interest of the assignees actually subjected to such lien. But it gives him no rights to the fund until he has perfected his lien according to the course of the law. Until that period, he has merely a power over the property, and not an actual interest in it. This ground is alluded to in that part of the opinion of the court, where speaking of the priority of the United States, it is said

"the law makes no exception in favor of prior judgment creditors, &c.; Exceptions there must necessarily be as to the *funds* out of which the United States are to be satisfied, but there can be none in relation to the debts due from a debtor of the

United States to individuals. The United States is to be first satisfied, but then it must be out of the debtor's estate."

The real ground of the decision was that the judgment creditor had never perfected his title by any execution and levy on the Sedgely estate, that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors, and that a mere potential lien on land did not carry a legal title to the proceeds of a sale, made under an adverse execution. This is the manner in which this case has been understood by the judges who concurred in the decision, and it is obvious that it established no such proposition as that a specific and perfected lien can be displaced by the mere priority of the United States, since that priority is not of itself equivalent to a lien.

We may then dismiss any further consideration of this topic unless it shall appear that the right of the *respondentia* holders in the present case is reduced to a mere general lien, and as to them, at least, however it may be as to the assignees, no legal right exists to maintain an action for the proceeds.

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The attention of the court will then be at once addressed to the question what was the nature and extent of the interest of the insurance company in the shipments in question. It is unnecessary to discuss what would have been the rights of the parties if the *respondentia* bonds had stood alone, for that is not the posture of this case. The whole instruments must be taken together, and construed as one entire agreement.

We must then examine the memorandum, the outward bill of lading and assignments thereon, in connection with the bond. The bill of lading purports on its face to be a shipment by Edward Thomson of seven kegs containing \$21,000, for account and risk of the shipper, to be delivered at Canton to John R. Thomson or his assigns. By the well settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the

goods, and by his endorsements of the bill of lading, to a *bona fide* purchaser, for a valuable consideration, without notice of any adverse interests, the latter becomes as against all the world the owner of the goods. This is the result of the principle that bills of lading are transferable by endorsement, and thus may pass the property. It matters not whether the consignee in such case be the buyer of the goods or the factor or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner and vesting it in the endorsee of the bill of lading. And strictly speaking, no person but such consignee can by an endorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account, and risk, although he may not pass the title by virtue of a mere endorsement of the bill of lading, unless he be the consignee, or what is the same thing, it be deliverable to his order; yet by any assignment, either on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser for a valuable consideration, by an endorsement of the bill of lading itself. Such an assignment not only passes the legal title as against his agents and factors, but also against his creditors in favor of the assignee. It is unnecessary to cite particular authorities on these points; they will be found supported by the authorities cited at the argument, and by the elementary treatises of Mr. Abbott, Mr. Holt, and Mr. Chitty on this subject, and particularly by *Nathan v. Giles*, 5 Taunt. 558. In the present case, Edward Thomson was the owner of the goods, and the consignee was merely his factor. He therefore had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading by a suitable instrument of assignment and sale against any body, but a purchaser

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without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea and incapable of manual tradition.

The question, then, is whether the endorsement upon this bill of lading constitutes such an instrument. We are of opinion that it does. It purports to be a transfer *in praesenti*, and uses the appropriate phrases of grant. The words are

"For value received, I hereby assign and transfer to the Atlantic Insurance Company of New York the within bill of lading, and the specie, goods, &c.;, to be procured thereon and thereby, and any return cargo, to be obtained, &c.;, by the proceeds thereof, and all the return cargo to be taken on board the within named ship, by or on my account, as collateral security, according to an agreement duly executed and adjoined to a *respondentia* bond &c.; [referring to the memorandum hereinafter stated]."

This is not a mere assignment of the bill of lading itself, operating as an equitable grant of the interest of the owner in that instrument, but it is of the goods contained in it, and the bill of lading is referred to by way of description of the subject matter of the grant. There was a valuable consideration for it, and as Edward Thomson was the legal owner of the goods, the words "assign and transfer" are sufficient words of grant to pass his legal title to the same unless the operation of those words is controlled by some of the other parts of the instrument. The argument admits this, but it supposes that the accompanying memorandum shows that such was not the intention of the parties, and therefore the words are to be construed according to that intention, which was to create a mere lien or equity on the part of the insurance company on the goods. Let us then examine the nature and scope of that memorandum. It begins by a recital that it hath been agreed that the bill of lading for the goods, &c.;, mentioned in the *respondentia* bond shall be endorsed to the insurance company as a collateral security for the loan. This is carried into effect by the assignment above mentioned. It then goes on to recite that it has been further agreed that the property to be shipped homeward as aforesaid, being the proceeds of the loan (thus considering the specie on board as a substituted loan) shall be for the account and risk of the borrowers; that the bills of lading therefore shall express the same and shall also express that the said property shall be delivered to the order of the shippers, and that the same shall be endorsed in blank and shall be placed in the hands of the insurance company either before or on the arrival of the said ship at Philadelphia as a continuation of such collateral security.

Now supposing the transaction *bona fide*, what is there here that controls, even by way of recital, the operation of the words

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of transfer? If the case were one of absolute transfer, there might be some room for doubt. But here the transfer was as collateral security. It was therefore a mortgage of the goods and the returns. The shipment out and home was, as in each case it must be, at the risk and for the account of the shipper, subject however to the rights of the mortgagee, and the very provision that the bills of lading should be delivered to the order of the shipper and endorsed in blank and placed in the hands of the insurance company establishes the fact that it was the intention of the parties that the property of the return cargo should rest by such endorsement in them. The memorandum then proceeds to state that it is expressly declared that the endorsement or consignment shall not be held to exonerate the persons of the borrowers, nor compel the insurance company to accept the goods, &c., which may arrive under such bill of lading and consignment in discharge of such debt, but that it shall be lawful for the company to receive and hold the goods, &c., for ninety days after their arrival at Philadelphia, and if the debt was not then paid, to sell the same at auction and charge the borrowers with the balance.

The plain effect of this stipulation is to avow an explicit understanding that the assignment of the goods should not put them at the risk of the company, but that they should be deemed collateral security only, and be sold after the limited time to discharge the debt *pro tanto*. So far from the intention's being indicated that no property at all was to pass to the company, the solicitude of the parties seems most carefully employed to repel the notion that the transfer was absolute and not by way of mortgage as collateral security. The memorandum therefore confirms, and does not impugn in any degree, the natural construction of the language of the assignment endorsed on the bill of lading as importing a present transfer. Indeed, we may go further and assert that the obvious intention of the parties was to give a specific interest in the goods shipped, so as to make them secure against the claims of creditors, and that to construe the instruments to create no more than a

lien, liable to be defeated by the acts of either party or to be overreached by any privileged creditors, would be not to follow, but to frustrate, their intention. Of what use could this great apparatus of instruments so anxiously prepared by the parties be if it conveyed no *jus in re*, and left the title of the insurance company to the goods at the mercy of the creditors of Thomson, to be intercepted at any time before it reached their hands on its arrival.

We are therefore of opinion that the assignment in this case was sufficient to pass a legal title to the shipment and the proceeds thereof against Thomson and his assignees and creditors. If, indeed, the assignment had been of the outward shipment of

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goods only, it would have carried the return cargo, purchased with the proceeds, because the product or substitute for the original thing by sale or otherwise follows the nature of the thing itself, so long as it can be ascertained as such, and becomes the property of him who was the owner in the same quality as he held the thing. This is the general principle of law, and has been even extended to cases where there has been a fraudulent or tortious misapplication of property. The case of *Taylor v. Plumer*, 3 Maul & Selw. 562, is directly in point, and contains a large collection of the authorities in the elaborate opinion of the court pronounced by Lord Ellenborough. In this view of the matter, the only value of the homeward bill of lading would be as a designation of the proceeds, so as to enable the company to trace and identify them. But the assignment, in terms, transfers the proceeds and returns and cuts off all possibility of question upon this head. If indeed the title to the proceeds had originally been only an equitable title, and not strictly legal, yet as soon as the company had perfected that equity by endorsement in blank and possession of the homeward bills of lading, their right would have been consummated at law, so as to entitle them to maintain a suit therefor. The case of *Haille v. Smith*, 1 Bos. & Pull. 563, was not so strong as the present, and there the court held that the property passed clothed with a trust for the payment of the debt.

If this, then, be the result of the general principles of law in cases of this nature, what is there to prevent their application to the present case? First it is said that this debt upon a *respondentia* bond is of too contingent a nature to uphold a mortgage as collateral security for the payment of it. We know of no principle or decision that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent debts as those which already exist and are certain and due. The only question that properly arises in such cases is the *bona fides* of the transaction. Then again, it is said that the papers here disclose a transaction fraudulent in its own nature. But we are of opinion that there is no necessary implication of law on the face of these papers which stamps it fraudulent; for ought that appears, the agreement may have been entered into with the most sincere and scrupulous good faith, and whether fraudulent or not in fact was a question for the jury upon the whole evidence which was properly left to their consideration, and they have by their verdict negatived the fraud.

The circumstance that the goods were to be at the risk of the shipper and on their account does not, of itself, affect either the validity or *bona fides* of the transfer. That must ordinarily occur where the transfer is made as collateral security, and it

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was one of the leading facts in *Haille v. Smith*, already cited. 1 Bos. & Pull. 563.

But the main objection relied on, and which indeed constitutes one of the exceptions to the opinion of the circuit court, is that possession of the return shipment was not obtained until after the levy by the United States, and it is contended that the want of such possession is *per se* a badge of fraud. The circuit court on this point decided

"that the actual possession of the above return cargoes by the masters of the *Superior* and *Addison* until levied upon by execution at the suit of the United States against Thomson is not *per se* in law a badge of fraud which ought to invalidate or affect the title of the plaintiffs to these cargoes."

It appears to us that this decision is entirely correct in point of law under the circumstances of the case.

Without undertaking to suggest whether in any case the want of possession of the thing sold constitutes *per se* a badge of fraud or is only *prima facie* a presumption of fraud, a question, upon which much diversity of judgment has been expressed, it is sufficient to say that in case even of an absolute sale of personal property, the want of such possession is not presumptive of fraud if possession cannot from the circumstances of the property be within the power of the parties.

A familiar example of this doctrine is in the case of a sale of a ship or goods at sea, where possession is dispensed with upon the plain ground of its impossibility, and it is sufficient if the vendee takes possession of the property within a reasonable time after its return home. But in cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and, *a fortiori* if flowing directly from them, has never been held, *per se*, a badge of fraud. The books are full of cases on this subject. The case of *Bucknal v. Royston*, Prec. in Chan. 285, runs almost upon all fours with the present. The case of *Sturtevent v. Ballard*, 9 John. 338, and *Bissell v. Hopkins*, 3 Cowen 166, contains strong illustrations of the principle, and being decisions in the very state by whose laws the validity of the present agreement is to be tried, are of high authority. They sustain the doctrine asserted by the circuit court in the most ample manner, and there is a learned note by the reporter to the latter case which embodies in an exact manner the principal authorities, English as well as American, on this subject. Now in the case at bar, the goods at the time of the transfer were at sea on a voyage in which they were to be sold or exchanged by the consignee and the proceeds sent back in the same ships. It was therefore properly in the contemplation of the parties, and indeed a necessary result of their stipulations that the

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goods should not be intercepted or taken possession of by the company until the close of the voyage, and that the return shipments should conform to this

arrangement.

There is no pretense to say that the plaintiffs did not seek possession of the goods within a reasonable time after the arrival of the goods home. Their power to accomplish it was dislodged by the execution of the United States, and they obtained as early as practicable possession of the bills of lading and vouchers of their rights. But so far as the want of possession was matter of evidence presumptive of fraud, it was left open to the consideration of the jury, and the grievance now is not that it was so left, but that the court ought to have instructed the jury as matter of law that the want of possession under the circumstances of the case was *per se* a badge of fraud.

We have already expressed an opinion that the court was right in the instructions actually given.

Upon the whole we are of opinion that the directions of the court upon the merits of the cause at the trial were correct in point of law, and that consequently there is no error in that part of the judgment.

It remains to consider very briefly certain exceptions taken to the testimony in the progress of the trial.

The first exception is that the corporate capacity of the plaintiffs was not regularly proved before the introduction of the *respondentia* bond. It is to be considered that this was a trial upon the merits, and by pleading to the merits the defendants necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by a plea in abatement, and his omission so to do was a barrier of this objection. But independently of this special ground, the very agreement in the case upon which the trial was had, as well as the admissions of the bond given to the United States as security to refund the amount if judgment should pass against the plaintiffs, was certainly *prima facie* evidence of an admission on the part of the United States of the corporate capacity of the plaintiffs and to throw the burden of proof on the other side.

The second exception was to the question put to Austin L. Sands whether he was agent of the company.

We see no objection to this question. It was put in a form most unexceptionable, and it was a matter of subsequent inquiry in what manner his agency was created, and it does not appear from the nature of the question whether it might not have been sufficient to establish that he was an agent *de facto* to receive the bond. It was indeed but an exception to the order of proofs, where several things are to be established to lead to a result, and in what order the inquiry is to be had is

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matter of discretion in the court itself, and not of absolute right in the party.

The next exception is to the allowance of the bond to go to the jury upon proof of its execution by Thomson only.

It was a joint and several bond, and if executed by Thomson alone, it might be material to the plaintiffs' case. It was not introduced as general evidence as to all the parties who were named in it, but only as to Thomson, and was connected with the title derived under him. Proof of the signature of Thomson was, under the circumstances, *prima facie* evidence of his execution of the instrument.

The fourth, fifth, sixth, and seventh exceptions turned altogether upon the question whether acts and proceedings of third persons not in privity with the insurance company nor known to them were evidence against them. Most clearly, they were not.

The eighth exception involves the point whether the plaintiffs were bound to look to the application of the loan made by them. If not, the question asked was properly rejected. And we are of opinion that the plaintiffs had nothing to do with the application of the money, and that when received by Thomson, he had a right to dispose of it in any manner he pleased.

Upon the whole, the judgment of the circuit court is to be

Affirmed with costs.

MR. JUSTICE JOHNSON.

I concur in the opinion delivered in this cause, and the rather because I think it overturns the report of the decision in the case of *Thelluson v. Smith*. It would be vain to endeavor to reconcile this decision with that which is imputed to the case referred to.

This was nothing in its origin but a mortgage to the Atlantic Insurance Company, and a mortgage of a mere right, a metaphysical, transitory thing, over which the act of the party could not operate more immediately or more forcibly than a judgment upon land under the laws of Pennsylvania.

But I avail myself of this occasion, and I have long wished for an opportunity to put on record some remarks upon the report of the case of *Thelluson v. Smith*. I have never acknowledged its authority in my circuit on the point supposed to be decided by it -- to-wit, *the precedence of the debt of the United States, as to a previous judgment, in the case of a general assignment*, and I propose now to show what I think anyone may see by a close inspection of the facts, even as stated in the report, to-wit that the question there supposed to be decided really never was raised by the special verdict. It is true it was argued, and no other question, judging from the report,

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was argued. But when the court came to inspect the record, it must have seen that the special verdict did not raise the question as between the parties to that suit. And, moreover, I find that the reporter has omitted one very material fact found in the special verdict, which was that the United States had no interest in the issue, since its judgment had been voluntarily paid off by the assignees of Crammond, the bankrupt. I copy the special verdict entered from the original roll, which I have inspected at the present term.

The jury found

"That on 22 May, 1805, William Crammond, of Philadelphia, merchant, stood indebted to the United States in several bonds for duties, as follows: [describing the bonds all of which were due after the date of the assignment]. On the respective bonds suits were brought, judgments entered, executions issued, and a sale made of a certain real estate called Sedgely, the property of William Crammond, and the proceeds thence arising came to the hands of the defendant John Smith, Marshal of Pennsylvania District, from whom it is claimed by the plaintiffs [who are] creditors of the said William Crammond on the following grounds: a suit was instituted by the plaintiffs in the Circuit Court of the United States for the District of Pennsylvania against the said William Crammond as of October Sessions 1802, and a judgment in the said suit in favor of the plaintiffs and against the said Crammond was obtained for \$32,253 on 20 May, 1805. On 22 May, 1805, the said William Crammond was insolvent, and had not sufficient property to pay all his debts. But his insolvency was not a matter of general notoriety. On the 22d day of the said month, the said William Crammond executed a general assignment of his estate and effects, bearing date the same day and year, and delivered it to the assignees therein named (*prout* assignment), being on the said 22 May, unable to satisfy all his debts. The moneys in the hands of the defendants are claimed by the assignees under the said assignment, *who have satisfied the United States the amount of the debts due the United States*. If upon the whole matter, . . ."

in the usual alternative form of a special verdict.

Judgment below was rendered for defendant, and it is impossible it could have been otherwise, but not, as I conceive, upon the ground stated, since it is one which the verdict does not raise. It is true, the question was argued, but adjudications are not to have their effect from the questions argued, and the views taken by counsel in their points or briefs. There is a sensible rule laid down on this subject in a book of grave authority, and the truth of which this Court has had occasion to verify not unfrequently, the purport of which is that counsel ought not to

"move anything in arrest of judgment

except the roll wherein the judgment is entered, or the *postea*, be in court, 22 Cas.B.B., and the reason assigned is that the court may be satisfied that the matter moved in arrest of judgment is truly recited from the record, for the court will not rely upon the allegation of counsel at the bar."

It often happens after the most protracted discussions that the court differs from counsel in its views of the questions actually raised on the record and on grounds which have not been argued.

In the case of *Thelluson v. Smith*, I hold it to be incontrovertible that the question of priority could not have been adjudicated upon on the verdict as set out in the record.

The special verdict does not give the date of the levy and sale by the marshal under the judgment by the United States, but as all Crammond's bonds to the United States fell due after the date of the assignment, it follows that the judgment, and necessarily all proceedings under it, were subsequent to the execution of that deed. The land levied on therefore had passed out of Crammond before the judgment of the United States was obtained, and of consequence the levy and sale under their execution was a mere nullity. Could this furnish the ground of an action for money had and received by the Thellusons, in right of a judgment prior to the consignment, against Smith the marshal? It obviously could not. For as against the Thellusons' rights, whatever they were, nothing had passed. The purchaser of the lands at marshal's sale, who had received nothing for the money, might have brought such an action against the marshal, and the assignees might have sued for and recovered the land, in which case it would have been held by them, as before, subject to Thelluson's judgment. But as between Thelluson and the marshal, there was no privity of action. And this was the true ground for rendering the judgment of this Court in the suit against the marshal.

It is true the special verdict introduces the assignees into the cause, as claiming the money raised by the marshal, on the supposition that after satisfying the

United States, they succeeded to the priority of the United States. But suppose this recovery had been had against Smith, what was there to prevent the assignees from going on at law to recover the land of the vendee? They were no parties to the record, and there is nothing in the pleadings or the verdict to show that they had intervened or had a right to intervene in the name of the United States. They could not maintain a right to succeed to the United States under the provisions of the 65th section of the Act of 1799, 3 vol. 197, because that right is extended only to sureties upon the bond. If they had acquired any right as against the Thellusons, it was a mere general equity, which

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could only have been asserted in a court of equity. At law, in this indirect mode, it could not have been asserted if it could have availed them at all.

I at least would have it understood that I concurred in the judgment in the case of *Thelluson v. Smith* on no other ground than the want of privity between the parties. Nor can I acknowledge it as authority to any other point, since the United States was satisfied, and the assignees could not be regarded in any view, at law, as succeeding to the priority of the United States if the United States had priority, and since that priority could not come in question in a case in which the sale of the land was a mere nullity, as is distinctly affirmed in the present decision, because the assignment divested all the interest of the insolvent, so as to place it beyond the action of the *feri facias*, issuing on the judgment of the United States.

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