8FED.CAS.—13

Case No. 4,221.

D'WOLF v. HARRIS.

[4 Mason, 515.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1827.[2]

REPLEVIN—TAKING BY MARSHAL—ASSIGNMENT OF GOODS AT SEA—VALIDITY—POWER OF CONSIGNEE—BILL OF SALE OF SHIP—MORTGAGE—RIGHTS OF CREDITORS—REPLEVIN BY PART OWNER.

1. In replevin, upon the issue of non cepit, proof that the defendant took the goods as marshal, is sufficient proof of the caption.

2. An assignment of goods at sea, and their proceeds, if bona fide, is sufficient to pass the legal title to the goods, and also to the proceeds, so that replevin will lie for the latter.

3. An assignment may, in point of law, be good, of goods and their proceeds, though given by way of mortgage, or as security for future advances.

4. An indorsement of the bill of lading is not indispensable to perfect an assignment of goods at sea. It is sufficient, if there be a good assignment of the property by a conveyance, with apt words.

5. Where a bill of lading consigns the property to a consignee for sales and returns, he alone can indorse them, so as to convey the title. But subject to such an indorsement to a purchaser, the consignor may, by a legal conveyance, assign a legal title to them, so as to be good against his own creditors.

6. A bill of sale of a ship is good, though it do not recite the certificate prescribed by the registry act. A bill of sale of a ship and cargo, lying in port, is, as against creditors, good and valid, if bona fide made, although possession is not taken of the same by the purchaser, if such bill of sale be merely by way of mortgage or security, and not absolute, and it is pursuant to the agreement of the parties, that the mortgagor shall have the conduct and management of the voyage on which the ship is then destined.

[Cited in The Romp. Case No. 12,030; Almy v. Wilbur, Id. 256; The J. B. Lunt, Id. 7,246; Re Dalby, Id. 3,540.]

7. Where property abroad is transferred, either as security, or absolutely, it is sufficient to convey a good title to the purchaser against creditors, if the purchaser uses due diligence upon the return voyage to take possession of the proceeds, although they may be consigned to the vendor.

[Explained in The Romp. Case No. 12,030. Cited in Leland v. The Medora, Id. 8,237.]

8. What circumstances are, or are not, badges of fraud, so as to make an assignment void as to creditors.

9. Replevin will not lie by one joint owner. But the objection can only be taken by a plea in abatement, where he sues for the whole. If he sues for a moiety, the court will abate the writ ex officio. That there is another part owner is not good evidence, under the plea of property in a third person.

[Cited in Williamson v. Ringgold, Case No. 17,755.]

10. The proviso in the revenue collection act of 1799, c. 22, § 62 [1 Stat. 673], as to transfer before entry of goods, does not interfere with the general validity of such transfers. Its object is only the security of the duties due to the government, and the duties on the goods being paid, the transfer, if bona fide, is complete for all legal purposes.

[Cited in Merrill v. Dawson, Case No. 9,469; The Celestine, Id. 2,541; Ex parte Dalby, Id. 3,540.].

Replevin for twenty-three cases of silks. The defendant pleaded, 1st. Non cepit: 2d. That the said silks were the property of one George D'Wolf, and not of the plaintiff, and made an avowry for a return, stating that he attached the goods in his capacity of marshal of the district, as the property of George D'Wolf, in a suit brought by the United States against said George D'Wolf. Upon both of which pleas issue was joined.

The plaintiff gave in evidence a deed poll to him from George D'Wolf and John Smith, dated the 19th November, 1822, which was in the following words:

"To all to whom these presents shall come, George D'Wolf, of Bristol, in the state of Rhode Island, merchant and John Smith, of the same place, merchant, severally send greeting.

"Whereas the said George D'Wolf is the owner and proprietor of five eighth ports of the ship Octavia, Andrew Blanchard, master, and of her tackle, apparel, and furniture, and of her cargo, now lying in the port of New York, and bound on a voyage from thence to the Sandwich Islands, thence to Canton, and thence to a port of discharge in the United States; also of nine sixteen equal parts of the brig Quill, Lewis, master, and of her tackle, apparel, and furniture, and of her cargo, now absent on a voyage from Bristol aforesaid, to the northwest coast of America, thence to Canton, and thence to Bristol aforesaid, on which voyage she sailed on or about the seventeenth day of August, in the year one thousand eight hundred and twenty-one; and also of nine sixteen equal parts of the brig Arab, Thomas Meek, master, and of her tackle, apparel, and furniture, and of her cargo, now absent on a voyage from Boston to the northwest coast of America, thence to Canton and thence to Bristol aforesaid, on which voyage she sailed on or about the third day of December, in the year one thousand eight hundred and twenty. And whereas the said John Smith is the owner and proprietor of the remaining parts of the aforesaid ship and two brigs, and of their respective tackle, apparel, and furniture, and of their said cargoes. And whereas the said George D'Wolf is the sole owner and proprietor of the brig Friendship, Hopkins, master, her tackle, apparel, and furniture, and of her cargo, now absent on a voyage from Bristol aforesaid, to the Havana, and back to the port of New York, on which voyage she sailed on or about the seventeenth day of November instant And whereas James D'Wolf. jr. of the city of New York, merchant, hath made divers advances, and come under various responsibilities, for or on account of them, the said George D'Wolf and John Smith, individually or separately, but not jointly, in an open account between him and them separately, having an unsettled balance due from each of them to him; and whereas he the

said James D'Wolf, jr. hath consented and agreed to and with the said George D'Wolf and John Smith, individually, to make to each of them, and on their separate account, further advances, and come under further responsibilities, from time to time, as the nature and exigencies of their separate business may require, and as he the said James D'Wolf, jr. may, from time to time, arrange and agree with them individually, or either of them, so to do. For all which advances and responsibilities, of every nature and kind whatsoever, including, as well those already made or incurred, as those hereafter to be made or incurred, and also the commissions and all other expenses and charges of the said James D'Wolf, jr. in and about the same, they, the said George D'Wolf and John Smith, have severally, each one on his own account and for his separate debts or liabilities, incurred or to be incurred on his separate account, agreed to secure and indemnify the said James D'Wolf. jr. by an assignment, pledge, and hypothecation, of all and singular their separate shares and interests in the aforesaid ship and three brigs, their respective tackle, apparel, furniture, and cargoes, and the proceeds of such cargoes, in the manner herein stated and set forth.

"Now, therefore, know ye, that we, the said George D'Wolf and John Smith, in consideration of the premises, and of one dollar to us severally in hand paid by the said James D'Wolf, jr. at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have severally granted, bargained, and sold, assigned, transferred, and set over, and by these presents do severally grant, bargain, sell, assign, transfer, and set over, unto the said James D'Wolf, jr. his executors, administrators, and assigns, all and singular the aforesaid ship Octavia, and the said three brigs Quill, Arab, and Friendship, their respective bodies, tackle, apparel, furniture, boats, and cargoes aforesaid, and the proceeds and investments of such cargoes, and also all and singular our and each of our separate and individual parts, right, title, interest, claim property, and demand whatsoever, of, in, and to the same, and each and every of them, and every part thereof, to have and to hold all and singular the above granted and bargained premises unto the said James D'Wolf, jr. his executors, administrators, and assigns, to his and their own proper use, benefit, and behoof forever.

"Provided always, and these presents and the assignment, pledge, and hypothecation hereby made, are upon the express condition, that if, at any time or times hereafter, we severally, or our respective executors, administrators, or assigns, shall and do, well and truly pay, or cause to be paid, unto the said James D'Wolf, jr. his executors, administrators, or assigns, all and singular such sum or sums of money, accounts, claims, and demands, as may then be due and owing to him from us respectively, and all responsibilities and undertakings, whereby he may therein any way be bound or holden for us severally, or our own separate accounts, including therein his commissions and all other lawful charges, expenses, and interest, and interest properly chargeable thereon, then these presents are

to become null and void, but otherwise to be and remain in full force and virtue against both or either of us making default, as the case may happen to be, and in case of such default, as against both or either of us, the said James D'Wolf, jr. his executors, administrators, or assigns, shall and may, at any time or times hereafter, at his pleasure, enforce the hypothecation and pledge hereby made, by process and arrest of the said assigned premises, or any part thereof, in all courts or places whatsoever, and cause the same to be sold, and the proceeds thereof applied in satisfaction of the moneys which may then be due him from us respectively, or either of us, or for which he may then be holden or bound for us respectively, or either of us; and it is hereby expressly understood and agreed by and between us respectively, and the same James D'Wolf, jr. that all insurance, effected and to be effected upon the said vessels and cargoes, or either of them, for or on our respective accounts, shall be and enure to his benefit, and the policies thereof shall be in due form assigned to him, as an additional collateral security, and also, that he shall be at liberty, at any time or times hereafter, and he is hereby authorized by us respectively, to insure his interest in the said vessels and cargoes, any or either of them, under this assignment, and to debit us individually, in account with the premiums, which premiums are also to be protected and covered by these presents.

"But it is further also understood, that the separate interests of one of us, in the said ship, brigs, and cargoes, is not bound for the separate debts or liabilities incurred or to be incurred on account of the other, but the interest of each shall be held bound only on his own account."

The plaintiff also produced his books of account, together with his correspondence with the said George D'Wolf and John Smith, and with other persons, their agents, and proved by said accounts and correspondence, and by the testimony of his book-keeper, and by the book-keeper and agent of the said George D'Wolf, that, at the date of said deed of assignment, the said George D'Wolf was indebted to the plaintiff in the sum of $308,000, and that John Smith, at the same period, was also indebted to the plaintiff in the sum of $135,000, for advances made, and goods purchased, on their account and by their order. And the plaintiff also proved, that a large part of the outward bound cargoes of the brigs Arab and Quill, and a large part of the outward bound cargo

of the ship Octavia, were furnished by the plaintiff, and by funds advanced by him for this purchase. And the plaintiff further proved, that George D'Wolf and John Smith had constantly been indebted to him, on their individual accounts, in large sums of money, from the date of said assignment to the present time, and that the balance, at this time, due to the plaintiff from George D'Wolf, was $59,500 and upwards, and that the balance due to him from John Smith was $142,375 and upwards. He further proved, that the balances due to him from the said George and John, on said 19th day of November, 1822, had never been extinguished; and that immediately after the failure of George D'Wolf and John Smith, on the 9th day of December, 1825, he gave written notice of the aforesaid assignment, and of his claims upon the property resulting there-from, to the agent and correspondent of the said George D'Wolf and John Smith at Canton, to Messrs. Bryant & Sturgis, the owners of the brig Rob Roy, and to various other merchants in Boston, engaged in the Canton trade, and directed his agent in Boston, John A. Bacon, to be on the watch for all goods coming from Canton to Boston, consigned to John Smith and George D'Wolf, and to take possession of the same, whenever they might arrive, on the plaintiff's behalf, by virtue of said deed of assignment. The plaintiff then introduced the said John A. Bacon, as a witness, who testified, that on the 21st of August, 1826, the day of the arrival of the brig Rob Roy at Boston, with the said twenty-three cases of silk goods on board, he gave notice to the said Bryant & Sturgis, that the same were the property of the plaintiff, and claimed possession of them in his behalf, but was informed by Bryant & Sturgis, that the silks had already been attached, while yet in the harbour of Boston, by the creditors of George D'Wolf: That he, immediately after the arrival of said silks, gave notice to the collector for the port of Boston and Charlestown, that they were the property of the plaintiff, and claimed the right to enter them, in his behalf, at the custom-house in Boston, and that the said collector expressed no objection to this course, but desired, before the entry was made, to see the bills of lading and invoices of said silks, that thereupon he wrote to the plaintiff at New York, for the said bills of lading, and invoices, which he shortly after received from the plaintiff, together with the certificate of entry of the same at the custom-house in New York, and three several bonds to secure the duties upon the same, with a certificate indorsed thereon by the collector of New York, that said bonds would be considered as sufficient in New York: That thereupon the witness presented the said bills of lading, invoices, certificate of entry and bonds, to the collector of the port of Boston, and demanded possession of the silks, and was then informed by the collector, that he should cause the same to be attached at the suit of the United States, he, the said collector, having no doubt, that the same were liable for the debts of the said George D'Wolf, for duties due to the United States. The plaintiff further proved, that immediately after the arrival of said silks at Boston, in the said brig Rob Roy, the bills of lading and invoice of the same were forwarded to Bristol, in Rhode Island, and came to

the hands of the said James Bayley, who, by direction previously received from the said George D'Wolf, who was absent from the United States, forthwith transmitted them to the plaintiff at New York. The plaintiff further proved, that, immediately after receiving said bills of lading and invoice, he presented the same, together with said assignment, to the collector of the port of New York, who, without hesitation, allowed him to enter said silks as his own property, and that thereupon they were entered by the plaintiff, as his own property, at the customhouse of New York, on the 28th day of August, 1826, ten days before the same were attached by the marshal of the district of Massachusetts.

The plaintiff then proved, that said twenty-three cases of silks, replevied, were part and parcel of the proceeds of said brig Arab and said ship Octavia, and that the same were attached by the marshal of the district of Massachusetts, on the 7th day of September, 1826, by virtue of certain writs against George D'Wolf, at the suit of the United States, and that the same were detained by the said marshal until they were replevied. The said bills of lading were not endorsed by the said George D'Wolf, or in his name, to the plaintiff, but the order of said George D'Wolf to said Bayley, who was his general agent in his business during his absence, was, to deliver the same to the plaintiff upon their arrival, so that the plaintiff might receive the property on its arrival, pursuant to the said assignment.

The defendant proved, that the said silks were imported into the United States, consigned to the said George D'Wolf and John Smith, and that, at the time of the importation of said silks, said George D'Wolf and John Smith were indebted to the United States on bonds, given by them respectively, for duties, which were then due and unpaid, to an amount much exceeding the value of the silks replevied. The plaintiff offered no evidence to prove, that any bills of sale of either of said vessels, reciting the register, or other bills of sale, except said deed, were ever made by said George D'Wolf or John Smith, to the plaintiff. The defendant further proved, and it was admitted by the plaintiff, that, at the time of the execution and delivery of said deed, the ship Octavia, with her cargo on board, was lying in the port of New York, nearly ready for sea, and that the plaintiff was there and resident there, and that said

ship and cargo continued to lie at New York for the space of thirty days after the execution and delivery of the deed.

The defendant offered evidence to prove, that bills of lading of the cargo of said ship Octavia were signed by the master of the ship, and regular sets thereof were delivered by him to said George D'Wolf and John Smith, prior to her sailing from the United States, and prior to the execution and delivery of said deed, and that said sets of bills of lading were, at the time of the execution and delivery of said deed, in the hands and possession of George D'Wolf and John Smith, by which bills of lading the cargo was consigned, and was to be delivered to the master of the ship Octavia, at her port or ports of destination, for sale, exchange, and returns, and that neither of said bills of lading were ever indorsed, assigned, or delivered, by George D'Wolf and John Smith, or either of them, to the plaintiff. The defendant further proved, that no possession was taken by the plaintiff of the ship Octavia and cargo, while she lay at the port of New York, and that no notice of said deed, or of any transfer or lien on said vessel or cargo, was given by the plaintiff to the master of said vessel, or transmitted by said master, or in said vessel, to any agent or other person, at the ports or places of destination of said vessels. The defendant further proved, that the bills of lading of the silks, now in question, were never, at any time, indorsed or assigned by George D'Wolf and John Smith to the plaintiff, nor to any other person, and that, prior to the arrival of said silks, George D'Wolf had left the United States, and that said bills of lading were sent to the plaintiff by a clerk of George D'Wolf, in consequence of directions left by George D'Wolf with him, to send all papers connected with the said vessels, or their cargoes and proceeds, to the plaintiff, to be dealt with according to the assignment. And the defendant further gave in evidence, that the ship Octavia was registered at the office of the collector for the said port of Boston and Charlestown, on the 25th of June, in the year 1825, in the name of Daniel N. Maurice and said George D'Wolf, and on the 25th of August, then next following, was sold by public auction (having been previously advertised for sale in the public gazettes, as usual in such cases), to Lot Wheelwright and sons, and the bill of sale was executed to them by the said George D'Wolf: That after the said ship departed on her voyage, in 1822, from New York, she, for the first time, arrived with a cargo at said port of Boston, on the 3d of June, 1825, which cargo came consigned to George D'Wolf and John Smith, and was by them entered at the custom-house in Boston, and the duties thereupon bonded by them: That the brig Arab, mentioned in the said assignment, was registered at the custom-house in Boston on the 1st of October, 1820, in the names of George D'Wolf and John Smith and one Robert Davis; that she proceeded, in that year, on a voyage, with a cargo, to the northwest coast of America, which was there sold, together with the vessel, by the agent of George D'Wolf and John Smith, after the date of said assignment: That the brig Quill, mentioned in the said assignment, was sold, after the date of the assignment, by public

auction, in the month of November, 1823, after the usual notice of such intended sale in the public gazettes, to William Dehon, in Boston, and the bill of sale thereof executed by George D'Wolf to the said Dehon: And that the said brig Friendship, mentioned in the said assignment, was, at the date of the assignment, registered in the name of George D'Wolf, and that, while she so continued to be registered, she arrived at Boston with a cargo of merchandise, from a foreign port, consigned to George D'Wolf and John Smith, on the 3d day of May, 1824, and afterwards, with another cargo of merchandise from a foreign port, on the 3d of August of the same year, and also with another cargo of merchandise from a foreign port, on the 25th of July, in the year 1825, all of which cargoes were imported in said vessel into the port of Boston and Charlestown, under consignments to the said George D'Wolf and John Smith, and were by them and in their names entered and bonded; and that, on the 9th of December, 1825, the said brig was sold at Boston, by George D'Wolf, to one John Richards, to whom the same was transferred by George D'Wolf's bill of sale, and the vessel thereupon registered in the name of said Richards.

The plaintiff then proved, that, after the date of the assignment, in the month of March, 1823, the brig Friendship arrived at New York from Cuba, with a cargo of coffee on board, consigned to the plaintiff; that the coffee was received by the plaintiff, and sold for the sum of $31,000 and upwards, and the proceeds passed to the credit of George D'Wolf on the books of the, plaintiff: And that also, after the date of the assignment, in the month of June, 1823, the brig Quill arrived at Newport, in the state of Rhode Island, from Canton, having on board sixty-eight cases of silk goods, consigned to George D'Wolf and John Smith, who immediately gave notice thereof to the plaintiff, and forwarded the said silks to him at New York, where they were received and sold, and the proceeds passed to the credit of George D'Wolf and John Smith, on the books of the plaintiff.

And the plaintiff further proved, that, as the brig Quill had on board a certain quantity of freight for Boston, after landing said silks she proceeded to that place, with the consent and approbation of the plaintiff; that, upon her arrival in Boston, the plaintiff constantly asserted his right to her in his letters to George D'Wolf and his agents, who proposed to sell her and forward the

proceeds to the plaintiff: That, thereupon, the said brig was, with the knowledge and assent of the plaintiff, sold in Boston by George D'Wolf, and the entire net proceeds, amounting to $7,280, transmitted to the plaintiff at New York, by him received, and passed to the credit of George D'Wolf and John Smith. And the plaintiff further proved, that upon the arrival of the ship Octavia at Boston, in the month of June, 1825, he immediately repaired to Boston, in person, and there received all that part of her cargo which came consigned to George D'Wolf and John Smith, to wit, two hundred and twenty-six cases of silk goods, and forwarded the same to New York, where they were received and sold by the plaintiff, and the entire proceeds passed to the credit of George D'Wolf and John Smith: And that he, also, in said month of June at Boston, in his own person, sold the ship Octavia to one Daniel N. Maurice, for the sum of $16,000 in cash, which the plaintiff received, and passed to the credit of George D'Wolf and John Smith: That, subsequently, the said Maurice re-sold three fourths of said ship to George D'Wolf in exchange for one quarter part of a cargo of sugar put on board of her by George D'Wolf, and that, as her register was in the sole name of George D'Wolf, but one fourth part of said ship was transferred by her register to said Maurice; the other three fourths remaining in the name of George D'Wolf. And it was proved, that the plaintiff constantly exercised such diligence to secure said vessels and their cargoes, as an anxious and careful creditor would ordinarily use, and there was no proof, that, on any particular occasion, he had omitted reasonable diligence to secure the same, after the arrival of the vessels in the United States. And the plaintiff further proved, that the deed of assignment was well known by several individuals in New York, at the time of its execution, and had become a matter of notoriety, among the merchants of Bristol, and insurance companies at Boston, for a long time before the failure of George D'Wolf and John Smith; and that George D'Wolf and John Smith were in good credit both in Boston and Bristol, up to the time of their failure in the month of December, 1825, and that the various policies of insurance, effected upon said vessels and cargoes, were endorsed by said George and John to the plaintiff, with the written consent of the offices in Boston, from eight to twelve months before their failure. And the plaintiff further proved, that George D'Wolf and John Smith, although connected in many joint enterprises of business, were not, and never had been, co-partners in trade, and that their several accounts were, and always had been, separately kept on the books of the plaintiff.

Upon this evidence, J. T. Austin, for plaintiff, contended, that by the operation of the above mentioned deed of assignment, and the consequent acts of the parties, the silks in question were the property of the plaintiff, and could not be holden upon the attachment made by the marshal on behalf of the United States, as the property of George D'Wolf.

G. Blake, Dist. Atty., for defendant, contended that the deed of assignment, made by George D'Wolf and Smith to the plaintiff, was fraudulent and void in law, as against the

creditors of said D'Wolf and Smith; that it could not be considered as a bottomry bond, or contract of marine hypothecation, and although it might have been sufficient to effect a transfer of the specific vessels mentioned therein, and their cargoes, yet as the silks in question did not constitute a part of those specific cargoes, but were only purchased with the proceeds of them, the plaintiff could not recover them in this action: That if the jury should be satisfied from the evidence, that, at the time the assignment was executed, the Octavia, with her outward cargo on board, was lying in the port of New York, and remained there thirty days after that time, and that the plaintiff was, at the same time, resident there, and that the master of the Octavia had executed and delivered to D'Wolf and Smith bills of lading of her outward cargo, by which the cargo was to be delivered and consigned to the master for sales, exchange, and returns, at the ports of destination of said ship; and that the masters of the Quill, Arab, and Friendship, had, prior to the sailing of said vessels from the United States, executed and delivered to said D'Wolf and Smith similar bills of lading of their respective cargoes, consigned, and to be delivered, to their respective masters for sales, exchange, and returns, and that the same were, at the time said deed of assignment was executed, in the possession of said D'Wolf and Smith, and that neither of said bills of lading were ever delivered or transferred to the plaintiff, then that said deed of assignment was not a valid transfer of said cargoes, so as to defeat a subsequent attaching creditor having no notice of such deed; That the title to said vessels, Arab, Octavia, Quill, and Friendship, could not be transferred to the plaintiff, as against a subsequent attaching creditor, without notice, except by bill of sale reciting the register of said vessels: That if the silks in question, at the time of their importation into the United States, came consigned to said D'Wolf and Smith; and that, at the time of said importation and prior to the entry of said silks, said D'Wolf and Smith were indebted to the United States for bonds given for duties, then due and unpaid, and that the defendant attached said silks in pursuance of instructions from the collector, and by virtue of writs in favour of the United States, against said George D'Wolf, founded on such bonds; then that by virtue of the 62d section of the collection

act of the United States, passed March 2, 1799, these silks were, as to the United States, the goods of said D'Wolf and Smith, notwithstanding said deed of assignment, and were in the legal custody of the collector, and that the attachment in favour of the United States was sufficient to bar the plaintiff from maintaining this suit.

STORY, Circuit Judge, in summing up the case, said: This is an action of replevin for twenty-three cases of silks, valued at $6000. The defendant, who is the marshal of this district, has pleaded, first, non cepit; and, secondly, that the goods in question are the property of one George D'Wolf, and not of the plaintiff, and he makes an avowry for a return, stating, that the goods were attached by him, as marshal of the district, as the property of George D'Wolf, in a suit brought against him in behalf of the United States. Issue is joined between the parties upon both pleas.

The nature of the writ of replevin is such in general, that it requires the party, to maintain it, to have property in the goods, and an actual or constructive possession of them. The pleadings, however, in the present case, narrow down the case to the question of the taking of the goods, and whose property they were at the time of the attachment. Now the return of the marshal, which has been read, upon the writ of attachment, is conclusive upon the first issue, as to the taking, and establishes it beyond any possible doubt; and therefore the real question is upon the second issue, whether the property belonged to the plaintiff, so as to entitle him to maintain this action. The plaintiff claims them as the proceeds of the cargo of the ship Octavia and brig Arab, which were assigned to him by a deed of assignment, executed between himself on the one part, and George D'Wolf and John Smith on the other part, on the 19th of November, 1822, whereby he assigned the ship Octavia and cargo, and the brig Arab and cargo, and certain other vessels and cargoes, to the plaintiff, as security for certain advances made, and thereafter to be made, to them respectively, and according to their respective interests in the same, &c. &c. The first question is, as to the identity of these goods. Are they the proceeds of the cargoes of the Octavia and Arab, or either of them? If so, then the next question is, whether the plaintiff did acquire any legal title to them, as such proceeds, by virtue of the assignment above mentioned?

The first question is not much contested, and indeed seems to be made out by evidence, which, if believed, ought to be entirely satisfactory.

The second question depends upon the validity of the assignment itself, which has been controverted upon several grounds. In the first place, it is said, that assuming the assignment to be bona fide, still no legal title to these proceeds vested in the plaintiff, or could so vest. The terms of the assignment are indeed admitted to be sufficient to pass the legal title, if it could pass at all; for the words not only grant and convey the original cargoes themselves, but also the "proceeds" of them. It is unnecessary, therefore, to say, what would be the case, if the words of the assignment had been confined to a mere

conveyance of the original cargoes, although I profess to feel no difficulty on this point, considering that a grant of personal property carries with it a right to all the proceeds into which it may be afterwards converted by barter or otherwise. See Taylor v. Plumer, 3 Maule & S. 562. My judgment is clear, that at law the assignment was sufficient to carry the legal title to the proceeds. The argument is, that at law the proceeds of a cargo are incapable of being transferred; and the title is recognized only in equity. I think otherwise. A grant of goods, or of the proceeds of goods, confers on the grantee a good title at law to such proceeds, and vests a present legal interest capable of being vindicated in an action of replevin; and if there were no other objection to the assignment, this would present no obstacle to the plaintiff's recovery.

But in the next place, it is objected, that the assignment is not bona fide, but fraudulent in point of law and fact in respect to creditors. I admit, that it is not, upon its face, a bottomry instrument, or maritime hypothecation. It does not purport to contain any clause or clauses taking marine risks, or claiming marine interest. It purports to be, not an absolute and indefeasible conveyance of the vessels and the cargoes, but a conveyance of them as security for advances already made, and thereafter to be made, to the assignors respectively. It is therefore, in its nature and essence, a mortgage, or conditional grant. It is not, as has been supposed at the bar, a mere pledge or deposit if those words are to be understood in their strict meaning, but a conveyance or assignment of the goods themselves and their proceeds, as security. It is not the case of a lien, or special interest, but of a general grant, as security. Such a conveyance may be valid in point of law, although given for future advances, if it be bona fide and for a valuable consideration. This will hardly be denied, and indeed has been most solemnly settled. What then are the objections to it? It has been said, that it was fraudulent in its original concoction and intention in fact. But that point is not now insisted on. But it is still insisted, that, however innocent it may have been in intention, it is fraudulent in point of law, as to creditors. It is a case of constructive fraud. The circumstances relied upon to establish this result, I shall now proceed to consider. It is true, that the advances

made, and to be made, were very large, and indeed the whole credits exceed $300,000. But George D'Wolf and John Smith were merchants in large business at the time, in good credit, and the times of payment were necessarily indefinite, being dependent upon the success of their commercial enterprises. The assignment embraces four vessels and their cargoes, all of which, except the ship Octavia, were at the time of the assignment, on foreign voyages to the northwest coast and China. The Octavia was, at the time, in the port of New York, with a cargo on board, and then bound on a like voyage. The plaintiff was a merchant of New York, and George D'Wolf and Smith were merchants of Rhode Island. The assignment was prepared and executed by all the parties at New York.

The first objection is, that the original bills of lading of the several cargoes were not delivered over to the plaintiff at the time of the execution of the assignment, or indeed at any subsequent period, although they must be presumed to be in the possession and control of D'Wolf and Smith. The fact is so; but the argument, that the assignment was therefore void, is a non sequitur. I have already stated, that all these vessels, except the Octavia, with their cargoes, were at sea when the assignment was made. It is also material to state, that the bills of lading were upon shipments made by the owners, but consigned, not to them or their order, but to the masters of the respective vessels, or their order, for sales and returns. Without question one set of these bills remained, as is usual, in the hands of the owners, as vouchers of their interest in the shipments. And if the set so in their hands had been indorsed to a bona fide purchaser, for a valuable consideration, without notice, it might have given him a title, if it had words of sufficient legal efficacy for this purpose, which might overreach the title under this assignment. But then it must have been because the words of the endorsement were effectual as an assignment of the shipments, and the circumstances such as would justly give a legal priority. The argument at the bar, upon the nature and effect of the endorsement of a bill of lading to convey a legal title, proceeds upon a mistake. The endorsement of a bill of lading, to convey such a title, must be made by a party authorized to make it, that is, by the person, to whom, or whose order, the goods are consigned. The consignee alone, and not the owner of the goods, can convey the same by an endorsement; for the negotiability of the bill of lading is limited to the persons to whom, or whose order, it is made transferable. Now, in all these cases, the cargoes were consigned to the masters for sales and returns, and they alone were competent to convey a title by an endorsement of the bill of lading, and a purchaser, claiming a title bona fide from them, without notice, by an endorsement of the bills of lading by them, would be entitled to hold the same against every other person. The owner indeed, subject to this power of the master, in the intermediate time, to defeat the title by a bona fide endorsement, may, by an assignment on the back of the bills of lading retained by him, or by a separate instrument, convey a good title to any third person, against every person but a bona fide purchaser. But this results from his general

right and interest, as owner, and not as holder of the bills of lading. In the present case, there is no claim made by any such purchaser. It is a struggle by creditors to overturn the assignment. My opinion is, that the delivery of the bills of lading in this case, being such as I have stated, containing a consignment, not to the owners but to the masters, were not necessary to be delivered or indorsed to the plaintiff, by the owners, to perfect the title of the plaintiff to the cargoes conveyed by the assignment, if in all other respects it is valid. The circumstance is open to observation upon the point of bona fides. It is not necessarily inconsistent with good faith. It is not indispensable to convey a legal title. The fact, such as it is, is for the consideration of the jury, as far as it touches the allegation of fraud, but not as a reason for impeaching the legal validity of the assignment, upon the ground relied on at the argument.

Another objection is, that no bills of sale of these vessels were executed, reciting the registers, or change of registers, which, it is contended, is fatal to the transfer. The law is clearly otherwise. Our ship registry acts do not, like the English act, render the transfer a nullity, unless the bill of sale contains such a recital, and in all other respects the transfer conforms to the registry acts. On the contrary, they leave the transfer to have its full effect, according to the principles of the common law. The only penalty of a non-recital of the register, and a correspondent change of papers, is, that the vessel ceases to enjoy the privileges of an American ship. This is applicable to the transfers of ships in port, and a fortiori the doctrine applies to ships at sea, where, pending the voyage, a change of papers is impracticable. U. S. v. Willings, 4 Cranch {8 U. S.} 48.

Another objection relates mere especially to the transfer of the ship Octavia and cargo. At the execution of the assignment she was lying with her cargo on board, bound on a voyage, and no actual delivery or possession of them took place by the plaintiff, which, it is contended, is indispensable to perfect the title. If this objection were well founded, it would not affect the conveyance of the other vessels and cargoes, which were at sea, if the assignment were bona fide; for it may be good as to part of the property conveyed, and fail as to the residue. But let the objection itself be considered, with reference to the circumstances of this case. Whatever may be its validity, in cases of an absolute

sale of a ship and cargo while in port, the same principle does not apply generally to cases of a defeasible conveyance. The general rule, upon transfers of personal property, is, that possession should accompany and follow the deed. But if, by the terms of the contract itself, or by necessary implication, the parties agree, that the possession shall remain in the vendor, such possession is consistent with the deed, and does not avoid its operation in point of law, unless it be in fact fraudulent. Now, in cases of mortgages, like the present, the possession of the mortgagor, at least until a breach of the condition, is perfectly consistent with the terms of the deed, and the intention of the parties. Indeed the present assignment demonstrates, that the parties could have no other intent. The object is avowed on the face of the instrument. The vessels and cargoes were to be under the direction of the mortgagors, for they had a substantial, resulting interest in the voyages. The only object of the parties was to give collateral security upon the vessels and cargoes for advances. Was this a lawful intent? Clearly it was. Was the agreement of the parties, that the possession and control of the vessels and cargoes, during their voyages, should be in the mortgagors, in point of law, and of itself, a constructive fraud, however innocent the intentions of the parties might be? I answer no. It was a circumstance open to explanation. If the assignment was, in all other respects, bona fide; if the want of possession was consistent with the terms of the deed, and indeed flowed from it; if the parties acted honestly and fairly, and held out no false colours to deceive creditors; then there is nothing in this circumstance which destroys the legal validity of the assignment.

Many authorities have been cited at the bar on this point; and some of them, from the Massachusetts Reports, have been pressed upon the court, as if they justified a different doctrine. See 2 Pick. 590; 17 Mass. 110; 2 Term R. 485; 9 Johns. 337. My opinion is that they are in perfect harmony with it. But if there be any difference between them and the decisions in New York, the latter must prevail in this cause; for this is a New York transaction, and is to be judged of by the test of New York law. Without going into the authorities at large, it is sufficient to say, that one of the most recent cases, Bissel v. Hopkins, 3 Cow. 166, is directly in point.[3]

Another objection is, that the plaintiff could acquire no title to the return cargoes, or proceeds of the property passing under the assignment, because all the bills of lading therefor were made out and consigned to George D'Wolf and Smith, as owners, and not to the plaintiff. It is said that this vested the property exclusively in them. The apparent ownership, upon the bills of lading, is conclusive upon no one, unless it be in favor of a bona fide purchaser, for a valuable consideration, under the consignee, which is not the present case. If a person has bona fide parted with his interest in a shipment, by a legal conveyance, the mere fact, that on the bills of lading he remains the ostensible owner, or consignee (as indeed he usually must, where the transfer is made while the ship is at sea), will not divest the title of the purchaser. It is sufficient if, as soon as he reasonably

may after the return of the ship, he takes possession of the proceeds. In respect to the other return shipments in other vessels, if the evidence is believed, it establishes sincere and effectual diligence in obtaining the possession and sale of them. I will advert to the evidence in a summary manner. (Here the judge summed it up.) As to the twenty-three cases of silks, now in question, it is manifest, that every reasonable effort was made to take possession of them as soon as possible after their arrival in the Rob Roy at Boston. An agent was specially employed for the purpose. He gave immediate notice of the plaintiff's title at the custom-house. The bills of lading were transmitted to Bristol in Rhode Island to the agent of George D'Wolf there, who, in pursuance of an express authority for this purpose, immediately endorsed them, and sent them to the plaintiff at New York without delay. The Rob Roy arrived at Boston on the 25th of August, and on the 28th of the same month, the plaintiff applied at the custom-house at New York to have the goods entered there, having then possession of the bills of lading. So that, if the jury believe the evidence, it seems hardly possible to doubt, that there was extreme diligence in the pursuit of possession of the silks.

Another objection of a broader cast, and going to the original concoction of the assignment, is, that its object was to hold out the mortgagors as absolute owners of all the property covered by the assignment, and thereby to deceive the United States in particular, and the public at large, and that, in fact, they were so deceived, and gave credit to the mortgagors accordingly. Now, if such was the object of the parties, it was a fraudulent transaction, and as such it was void, as to all persons affected by the fraud, and especially as to creditors. On the other hand, if no false colours were held out; if the assignment was bona fide made for a valuable consideration, it would be valid, although it were given as security merely for future advances, and not as the present was, for past as well as future advances. The law does not prohibit such a transaction. How is the fact? It is said, that the assignment was concealed from the public, and that there has been gross negligence and fraud in the arrangements and management between the parties under it. That is for the consideration of the jury, under all the circumstances. As to the

concealment, there is positive testimony, that the assignment was publicly known at Bristol, for at least two years before the failure of the mortgagors, and yet that their credit was not affected by it there, either in commerce generally, or in discounts at the banks. There is also evidence of its having been known for a long time before the failure at New York and at Boston. The indorsements on the policies at Boston demonstrate the existence of such knowledge, from the times they were respectively made, to the extent of the interest thereby assigned. Yet it is in proof, and not denied, that George D'Wolf continued to have large credits afterwards at the Boston banks.

I agree to the doctrine asserted at the bar, that if there has here been a fraudulent concealment of the assignment, or gross negligence, such as establishes an original fraudulent design, the assignment is void in toto. It is void ab initio, in respect to creditors injured by the fraud, as to all the property included in it, whether there has been any concealment of the title to the twenty-three cases of silks or not, and whether, as to them, there has been due diligence in taking possession or not. But if the assignment was bona fide, mere negligence as to one particular shipment in taking possession, would not take away the title to other shipments, as to which there was due diligence. The question reduces itself, then, to a question of good faith, valuable consideration, and reasonable diligence.

Then, again, it is said, that if D'Wolf and Smith failed to make the payments stipulated in the assignment, at the times therein stated, there was a breach of the condition, and the assignment became an absolute conveyance, exactly as if it had been originally without any such condition, so that possession must be taken subsequently in the same manner, as is by law required under absolute conveyances. What would be the effect of such a breach of the condition, whether it would wholly defeat any right or title of redemption of the assignors, or whether they would still be deemed, at least in a court of equity, to possess an interest in the proceeds beyond what would be necessary to pay the debts due for advances, need not be discussed in the present case. We may here confine ourselves to the objects and intentions of the parties, as disclosed in the assignment itself. If the possession has gone accordingly, and the shipments have been left under the control of the assignors no longer than those objects and intentions required, and the whole transactions have been bona fide, there is no principle of law, which precludes the plaintiff's right of recovery. Then, again, it is said, that the assignment of the policies was not made at the time provided for by the assignment. So far as this is true, it is for the consideration of the jury; they have heard the reasons for the delay, and will form their own conclusions as to the effect of this circumstance upon the point of fraud.

Another circumstance, relied on as presumptive of fraud, is, that no notice of the assignment was given to the masters of the ships. In respect to those on the northwest coast, or in the Pacific ocean, it is not shown, that it was either practicable or important. In respect to the ship Octavia, as she was then in the port of New York, it was certainly

practicable. But if the whole management of the voyages was, by the express agreement of the parties, to remain under the control of the assignors, until the return of the ships, such notice could not have varied the case, unless so far as the want of such notice is presumptive of fraud. Other circumstances have been relied upon for the same purpose. Such as the control of George D'Wolf and Smith over all the vessels and cargoes during their voyages; the consignment of the return cargoes to them; their entry of them at the custom-houses; the circumstances connected with the sale of the ship Octavia after her return; the arbitration and award with the master of the Quill respecting his adventure. So far as these are presumptive of fraud, they are fairly before the jury, with all the explanations which belong to them. (The judge here recapitulated the evidence on these points, and left it to the jury.)

Another objection to the plaintiff's right of recovery, in this action, is, that Capt. Meek was a joint owner with the plaintiff in the twenty-three cases of silks; and in an action of replevin no recovery can be had by one part-owner, without joining all the other part-owners as plaintiff's in the suit. The doctrine is undoubtedly true, that where a personal chattel is owned by several persons, all ought to join in a writ of replevin for it; and one part-owner has no right to bring such suit severally for his own share. If he does, and the objection is taken by way of plea in abatement, the writ will abate. And if he sues for a moiety only in his writ, the court will ex officio abate it. But I am clearly of opinion, that where the action is brought for the whole chattel, the exception is pleadable in abatement only, and is not a plea to the merits; and that pleading over to the merits is a waiver of it. In this case, my judgment would be, that the exception, if it were well founded, comes too late; it is not proper evidence under either of the pleas filed by the defendant. The defendant has no right to retain the property, unless it belonged to George D'Wolf; and it is of consequence to him, if the plaintiff is part-owner only, for as against every one but the other part-owner, or some person claiming his title, he has a right to the possession of the whole. A fortiori he has against a wrong-doer. Nor do I think that the cases cited from the Massachusetts Reports contradict this doctrine.[4] And if there be any contradiction in them I should incline to follow the earlier authorities

as standing on the better legal reasoning. Still, though this is my opinion, I shall desire the jury to find this fact specially, and a special verdict for the plaintiff upon it, if Capt. Meek is a part-owner, enabling the court, however, to enter a general verdict for the plaintiff, if it shall be of opinion, that this exception cannot now prevail, and if the jury are in all other respects satisfied, that the plaintiff is entitled to recover. (The judge then summed up the facts as to the supposed joint ownership.)

The last objection, which it is necessary to notice, is that founded on the proviso contained in the 62d section of the revenue collection of 1799, c. 128. That proviso declares, "And to prevent frauds arising from collusive transfers, it is hereby declared, that all goods, wares, and merchandise, imported into the United States, shall, for the purposes of this act, be deemed and held to be the property of the persons to whom the said goods, &c. may be consigned, any sale, transfer, or assignment, prior to the entry and payment, or securing payment, of the duties on the said goods, &c. and the payment of all bonds then due and unsatisfied, by the said consignee, to the contrary notwithstanding." Upon a careful consideration of the whole section, my opinion is, that this clause has no reference whatsoever to the general question of property between vendor and vendee, and meant not to meddle with it. The sole object was the security of the duties to the government. A credit is allowed upon such duties to all importers, who have not any duty bonds due and unpaid at the time of the importation. Of persons in this predicament, payment of the duties is immediately demandable. The object of the proviso was, to prevent collusive transfers to obtain this credit, and evade this salutary restriction. The proviso was therefore intended to make the consignee, at all times, liable, as the importer and owner, so far as the duties were concerned, or, in the language of the proviso, "for the purposes of this act." Subject to this exception, the bona fide owner of the goods is entitled to vindicate his title to the same, as his lawful property, whoever the consignee may be. These are the most material considerations for the jury, upon the arguments made by the parties, and they will govern themselves accordingly.

General verdict for the plaintiff.

[NOTE. The defendant took the case on error to the supreme court, which affirmed the decision, mainly on the authority of its previous decisions in Conard v. Atlantic Ins. Co., 1 Pet. (26 U. S.) 386, and Harris v. Dennie, 3 Pet. (28 U. S.) 294. The opinion was delivered by Chief Justice Marshall. See Harris v. D'Wolf, 4 Pet. (29 U. S.) 147.]

[1] [Reported by William P. Mason, Esq.]

[2] [Affirmed in 4 Pet. (29 U. S.) 147.]

[3] See, also, the learned note of the editor, in 3 Cow. 189, where nearly all the cases are collected. Bartlett v. Williams, 1 Pick. 288; Badlam v. Tucker, Id. 389; Dawes v. Cope, 4 Bin. 258.

[4] See Hart v. Fitzgerald, 2 Mass. 509; Portland Bank v. Stubbs, 6 Mass. 422; Gardner v. Dutch, 9 Mass. 427; Page v. Weeks, 13 Mass. 199; Ladd v. Billings, 15 Mass. 15.