notice of a retirement the remaining partners cannot w any point in dispute on a continuing contract of this kind without the retiring partner being released, I should still be of opinion that nothing has been waived which could have been maintained with success.

Another point was made as to the arbitration, and it was said that the selection of an arbitrator by the continuing partners alone was a departure from the terms of the **[194]** original contract. But this arbitration was only a mode of giving effect to the terms of the original contract which it was quite proper for the continuing partners to adopt; and without saying that they were bound to refer any question, they were clearly discharging their duty properly in doing so.

When two persons are of necessity left to work out a contract on which another is jointly liable with them, can it be said that the whole contract becomes void against the third partner, because those who are left to act in the business do, by referring a dispute, act in the very way prescribed by the original contract? It is clear that the retiring partner must be taken to have handed over to them, as his agents for carrying out the contract, the power of appointing an arbitrator in case of a difference arising.

The agreement of the 21st of September is said to have fettered the arbitrators in a manner not in accordance with the original contract; and it amounts no doubt to this, that the arbitrators would be bound to adopt the concession (if concession it was) on the subject of the bonus; and also the concession on the part of the company as to admitting the principle of Messrs. Croskey & Co.'s accounts.

The result, however, is that the so-called variation is nothing more than an agreement in pursuance of the original contract by which Oakford is bound. I cannot push the doctrine of *Oakeley* v. *Pasheller* to such a length as to relieve the Plaintiff under such circumstances; and the bill must therefore be dismissed with costs.

[195] SIMPSON *v.* FOGO. *Dec.* 9, 1862, *Feb.* 13, 1863.

[S. C. 1 J. & H. 18; 70 E. R. 644 (with note).]

Foreign Judgment. How far Examinable. Lex Loci. Comity of Nations.

A British ship was duly mortgaged in England, and remained in the possession of the mortgagor, who afterwards sent her to New Orleans. There she was attached by a citizen of Louisiana, a creditor of the mortgagor, in an action commenced for the recovery of his debt, not being a proceeding *in rem*. The mortgagee intervened in the action and claimed possession of the ship. The Supreme Court of Louisiana refused to recognise his title, though good by the law of England, assigning as a reason on the face of the judgment that the law of Louisiana did not recognise transfers of property in chattels without delivery of possession, that to admit the claim would be prejudicial to the citizens of Louisiana, and that the comity of nations did not extend to the case. The ship was then sold under a writ in the nature of a *fi. fa.* in the action to the Defendant in this cause, and the proceeds were applied in favour of the creditors to the exclusion of the mortgagee. The ship having been brought to England, the mortgagee, whose debt was admitted to exceed the value of the ship, filed his bill to establish his claim.

Held, that the judgment of the Court of Louisiana was examinable for error on the face of it by reason of its disregard of the comity of nations, and that the mortgagee was entitled to the ship.

Held, also, that the judgment was of the nature of a judgment *inter partes* as regarded the intervenor; but

Semble, that a foreign judgment even *in rem* may be examined and disregarded, if it appears on the face of it to have been founded on a perverse disregard of English law in a case properly subject to that law by the comity of nations.

This case, reported on demurrer, 1 J. & H. 18, now came on upon motion for decree.

By an indenture dated September 25th, 1854, Messrs. Klingender, carrying on business at Liverpool, and then the sole owners of the British ship Warbler, which was duly registered at the port of Liverpool in their names, mortgaged the ship (then at sea) and all freight on any present or future voyage, to a trustee for the Bank of Liverpool, for a balance then due to the bank, and for future advances. This mortgage was duly registered at Liverpool on the 2d October 1854. On December 4th, 1857, the mortgagors stopped payment. The ship was then on a voyage to New Orleans, where she arrived about the 21st of December 1857, then being in charge of the master and crew put in by Messrs. Klingender.

On January 6th, 1858, Messrs. Hughes & Co., citizens of Louisiana, and creditors of Messrs. Klingender, who commenced an action in the Fourth District Court of New Orleans against Messrs. Klingender for the recovery of their debt, applied for and obtained from the said Court upon the affidavit and bond required by the law of Louisiana, a writ of attachment, dated January 6th, 1858, directed to the sheriff of the parish of Orleans, and commanding him to seize and attach according to law and take into his possession the goods, chattels and effects of the Defen-**[196]**-dants in the action, if any, in the said parish, to an amount sufficient to discharge the Plaintiffs' debt and costs.

On the same day the sheriff seized the Warbler, and served a copy of a notice of seizure, addressed to the captain and owners, upon the master of the ship.

On the following day Hughes & Co. filed a petition in the said action, stating their debt at 14,520 dollars, and prayed that the Defendants might be cited and condemned to pay the amount, and that in consideration of the said affidavit and bond the attachment issued as aforesaid might be sustained and supported for a privilege on the property attached.

On January 11th an order was made by the said Court that a writ of attachment should issue in the cause, the Plaintiffs therein giving bond with good and solvent security according to law. On the same day Messrs. Hughes & Co. executed a bond in the said action to Messrs. Klingender in the sum of 24,000 dollars, to secure all damages which might be recovered against them in case the attachment should prove to have been wrongfully obtained; and a second writ of attachment thereupon issued, under which the sheriff levied on the ship already in his possession under the writ of January 6th.

By the law of Louisiana any person claiming an interest in property seized under any legal process is at liberty to intervene in the suit in which the writ has issued; and it appeared from the evidence of Mr. Bradford, a New Orleans advocate, that in the absence of any intervention by a third party in a suit of this description, any rights he might have would be unaffected by the proceedings therein; but that, if he intervened, his rights would be adjudicated upon, and he would (according to the law of Louisiana) be as completely bound as if he had voluntarily commenced the suit as Plaintiff. Mr. Bradford also stated in effect **[197]** that, by the law of Louisiana, persons in possession of a ship as owners were for all purposes deemed to be the true owners.

The Bank of Liverpool, before hearing of the proceedings in the action at New Orleans, had sent out instructions to their agent, Mr. Mure (who was the British Consul at New Orleans), to take possession of the ship by virtue of their mortgage.

On January 15th, 1858, Mure, on behalf of his employers, intervened in the action. His petition for this purpose, after stating the title of the mortgagees, and his own authority to take the possession and control of the ship, alleged that the ship had been wrongfully seized, traversed the declarations of the Plaintiffs in the action, and prayed that they might be cited to appear and answer the petition, that their petition might be dismissed, and that the possession of the ship might be ordered to be given up to him (Mure) on behalf of the mortgagees, with costs of suit, and reserving the right to sue for damages.

Before this petition came on to be heard in the Fourth District Court, several other writs of attachment had been issued against the ship by creditors of Messrs. Klingender,

some of whom claimed a privilege on the ship by reason of the character of their debts; such privilege, according to the law of Louisiana, signifying a right of satisfaction in priority to all mortgages or other claims.

By the Louisiana code, creditors holding such privileges are entitled to follow the ship in the hands of a voluntary purchaser, but in the case of a forced sale under process of law, only to follow the purchase-money, the purchaser in that case taking an irrevocable title to the ship.

The code of Louisiana confers such privileges in the following order:—1. Legal and other charges in and about the sale of a ship. 2. Debts for pilotage, wharfage and **[198]** anchorage. 3. Expenses of keeping a vessel until sale. 4. Cost of warehousing stores. 5. Maintenance of ship. 6. Wages of captain and crew on the last voyage; other charges following in a certain prescribed order.

By an arrangement between all parties concerned, it was agreed that Mure should pay certain wages which were due to the crew, and should stand in the shoes of the crew in respect to their privilege on that account, Mure acting in this matter not as the agent of the bank, but as British Consul.

On January 18th Mure made an interlocutory application for a rule to shew cause why the ship should not be delivered to him on his giving a bond to produce the ship or the value thereof, to abide the final determination of the litigation; and on January 18th, 1858, a rule was granted on this motion, reciting the facts as they were stated in the petition, and reciting that Mure had intervened in the suit on behalf of the Bank of Liverpool; that the detention of the ship in the custody of the law caused great expense; and that it was for the interest of all parties concerned that in the meantime some disposition should be made of the ship, so as to save expense, without prejudice to the ultimate rights of the contestants; and it was ordered that the parties claiming to be creditors of Messrs. Klingender, and their curator *ad hoc* (an attorney appointed by the Court to represent the Defendants in consequence of their residing out of the jurisdiction), should shew cause why the ship should not be appraised and delivered to Mure in his capacity aforesaid, on his giving a bond with surety, conditioned to produce the ship to abide the decree of the Court, or be responsible for the value thereof upon the final determination of the litigation.

On January 21st Mure presented another petition of intervention, claiming privilege in respect of the sums so paid, as before stated, for wages.

[199] On January 22d the rule of the 18th of January came on for argument, when it was made absolute so far that the parties should, within twenty-four hours, name the respective appraisers to value the ship.

On the 5th of February 1858, the rule came on for final hearing, and was dismissed with costs. The written opinion of the Court, which was filed with the judgment, was to the following effect:—

"This is a rule taken by William Mure, agent of the Bank of Liverpool, intervening in this suit and claiming the property, to shew cause why he should not be permitted to bond the property herein seized. By the Act of 1852, p. 155, amendatory of the 259th of C. P., the Defendant may, in every stage of the proceeding, have the property released upon delivering to the sheriff his obligation for the sum exceeding by one-half the value of the property attached, &c. There is no law authorising an intervenor who claims the property attached to give such bond as the Defendant can under Article 259, C. P. The case of *Park* v. *Porter*, 2 Rob. 344, presents a different state of facts from the one at Bar. In that instance the goods were consigned to a party who had made advances on them, and was in possession of a bill of lading, which is *primâ facie* evidence of ownership, and as such was entitled to the possession of the property seized. But the instrument by which the Plaintiff in this rule has offered to prove title to the property seized, and the possession thereof is nothing more than a mortgage. The mortgagee is not entitled to the possession of the property mortgaged; his right is to be paid by preference out of the proceeds of the sale of the mortgage property. For the reasons assigned, it is ordered, adjudged and decreed that the rule taken herein by William Mure on the 18th of January 1858 be dismissed with costs."

[200] On February 6th Mure moved for a new trial of the rule, but the motion was ultimately dismissed with costs by the Fourth District Court on April 26th.

Various other interventions took place in the suit, on the petitions of the captain, the crew, stevedores and other persons who claimed privilege in respect of the sums due to them on account of the ship.

On July 16th the Plaintiffs in the action obtained a rule that the Defendants and the intervenors should shew cause why the ship should not be sold, on the ground of the deterioration and expense occasioned by keeping her in the custody of the law; but the rule was dismissed with costs on June 26th, on the ground that an appeal was pending from the judgment refusing permission to Mure to bond the vessel.

On September 6th judgment was given in the action (Mure appearing on the hearing), by which the debt of Messrs. Hughes & Co. was established; and it was ordered "that the rights of all the intervenors should be reserved for further adjudication thereafter, as well as the question of privilege and rank of attachment to be established contradictorily in a *concurso* between the parties having claims against the Defendants."

On January 4th, 1859, the cause came on before the Fourth District Court, on the petition of intervention of Mure of the 15th January 1858; and on January 26th the intervention of the Bank of Liverpool was ordered to be dismissed with costs. The reasons filed with this judgment were as follows:—

"Reasons filed January 26th, 1859.—The Bank of Liverpool.—The Bank of Liverpool claimed the ownership and possession of the ship Warbler, attached by Plaintiffs in this suit as the property of Defendants. I regard the document relied on by the opponent as a mortgage for the security of a debt, and not as a bill of sale of the ship. **[201]** The instrument being regarded in this light, it follows that the opponent is a mortgage creditor and not an owner. The able and ingenious argument of opponent's counsel is fully answered by the cases reported in 7th L. R. 490, 17 L. 158, 2 Rob. 35, 4 Rob. 345, 6 Rob. 127, 11 An. 702, and 12 An. P. 521. It is therefore ordered, adjudged and decreed that the petition of intervention and third opposition of the Bank of Liverpool be dismissed with costs."

Mure's appeal from the order of the Fourth District Court of February 5th, 1858, dismissing the rule as to bonding, was heard on appeal by the Supreme Court of Louisiana, before the Chief Justice and three associate justices, and judgment was given on January 31st, 1859, as follows:—

"The Plaintiffs and others having attached the ship Warbler, of Liverpool, William Mure, as agent for the Bank of Liverpool, through his counsel, has taken a rule upon all parties to shew cause why he should not be authorised to take the ship into his possession during the pendency of this litigation, upon giving bond. He bases his application upon the allegation that during the litigation in these cases great expense will be incurred by the detention and custody of the ship, and produces an instrument executed by the owners in Liverpool, England, for the security of the bank, by which the ship is conveyed to Joseph Langton in trust, with authority to sell and pay the bank. The intervenor relies upon the cases of *Park* v. *Porter*, 2 Rob. 344, *The Ohio Insurance Co.* v. *Edmondson*, 5 L. R. 296, and Article 21 C. C., in support of the motion. The instrument produced by the Bank of Liverpool does not purport to convey the ship to the bank, but to a trustee; the bank is therefore not the owner. At common law the instrument, we suppose, would be considered as between the **[202]** parties at least to convey the legal title in the ship to Langton. The only rights the Bank of Liverpool could have would be a right in Chancery to enforce the execution of the trust. Hence the most favourable footing on which the claim of the intervenor can be placed is that of a creditor with a privilege; he has therefore no right to the possession of the property, and must enforce whatever rights he may have upon the proceeds, precisely as the attaching creditors are compelled to do. The law confers upon the Defendant only the right to set aside the attachment by giving bond: C. P. 259, Art. 1852, p. 165—it is not conferred upon the creditors. It is true the Court have allowed, under an equitable construction of the article, an intervenor having possession and claiming to be owner, to bond in order to avoid the great injury which third persons might suffer by the unjust seizure of their property.

We see no reason to adopt a construction which shall confer this right upon creditors, particularly as the Legislature has recently revised the article of the Code of Practice without extending it to other persons than Defendants. It is therefore ordered, adjudged and decreed that the judgment of the Court below be affirmed with costs."

On February 12th a writ of *fi. fa.* was issued on the judgment in the cause, by which the sheriff was commanded, "by seizure and sale of the property, real and personal, rights and credits" of Messrs. Klingender, to levy the Plaintiffs' debt and costs.

On March 4th, 1859, the cause came on for distribution of the proceeds (Mure being represented), when, it appearing that the ship had not been sold, the cause was continued indefinitely.

The vessel was put up for sale by auction under the writ on the 22d of March 1859, when the present Defendant, Fogo, by his agent, became the purchaser for 6100 dollars; **[203]** and on the same day a bill of sale was executed according to the law of Louisiana, and the purchase-money paid.

Mure, as the British Consul at the port, thereupon granted his certificate that the vessel was duly sold in accordance with the law of the said State.

The sheriff having made his return to the writ, the cause came on again before the Fourth District Court, on June 17th and 18th, for distribution of proceeds; and Mure was represented at the hearing, and claimed to be entitled to the proceeds in priority to the Plaintiffs in the action.

On January 13th, 1860, the appeal of Mure from the decree of the Fourth District Court, of January 26th, 1859, dismissing his petition of intervention, was heard and dismissed by the Supreme Court of Louisiana. The Chief Justice and four associate Justices were present. The judgment was as follows:—

"This cause was before us in January last, on the question of the right of the intervenor to bond the property attached, 14 Annual. In the present case the Bank of Liverpool, as vendee and trustee, claims the legal title of the ship. The petition of intervention was dismissed on the trial in the lower Court, and the intervenor appeals. The case merits, perhaps, a synopsis of the instrument upon which the intervention is founded. It (the instrument) is of great length, and is under seal; it is signed by the Defendants alone, and purports to have been executed on 25th day of September 1854 in consideration of 5s.; and, to secure the Bank of Liverpool, Klingender Brothers nominally sell to Joseph Langton, chief manager of said bank, his executors, &c., the ship Warbler, in trust that the same may be a continual security to the bank for the payment of costs, and for all sums of money due or to become due by said Klingender Brothers, and for loans, &c. Another clause authorises Langton, the trustee, to sell the ship; and directs him to **[204]** apply the proceeds first to costs; second, to amount due the bank; and, third, remainder to Klingender Brothers. Another clause obliges the trustees on satisfaction of the trust to reconvey. The instrument contains other covenants on the part of Klingender Brothers warranting title, relative to policies of insurance, &c., &c. The instrument is no doubt executed in conformity to the Act of Parliament and the English law—see Abbott on Shipping, pp. 29 and 30, ed. 1854. Under that law, the intervenor would have been able in the English Courts to protect himself against subsequent purchasers and creditors and the effects of bankruptcy. If it be admitted that the intervenor has such rights upon the ship by the English law, the question naturally arises, why are not those rights entitled to be respected in Louisiana, particularly as all parties to this controversy have their domicile in England, &c.? It is not surprising that the question is repeated, and that the Courts are again and again called upon to answer it. The comity of nations extends only to enforce obligations, contracts and rights, under those provisions of law of other countries which are analogous or similar to those of the State where the litigation arises. The instrument offered in evidence has no analogy to any mode known to our law of affecting personal property for the security of debts. It purports to sell to one man to protect the rights of a third person, and yet the vendor is to retain possession. The contract is not a sale nor a pledge; for there is no delivery which our law deems essential in order to perfect either contract as to third persons. As our law would not enforce a similar contract between our own citizens, if made here, it will not enforce it to defeat

rights already acquired by the attachment under our own laws. In the case of *Malcolm* v. *The Schooner Henrietta* this Court refused to recognise a mortgage upon a ship executed in the form of a conventional mortgage under our law, and declare that our law only admits of the hypothecation of **[205]** ships according to the laws and usages of commerce, 7 L. R. 488, *Ib.* 486. In the case of *Grant* v. *Fiol* it was again declared that instruments in the form of conventional mortgages on ships or vessels conferred no right or privilege whatever, 17 L. R. 160. The same doctrine was reaffirmed in *Hill* v. *Phœnix Two Boat Company*, 2d Robinson, 35, in which the Court mentions, as the only valid hypothecation, that made to secure the necessary supplies for ships which happened to be in distress in foreign ports, where the masters and owners are without credit; if assistance could not be procured by means of such instruments, the vessels and their cargoes must perish. The subject was again fully considered in the case of *Harned* v. *Churchman*, 4 Annual, 312; and it was there said, 'It is the duty of Courts in all commercial nations to extend the rule of national comity to bottomry bonds and such other maritime hypothecations as are recognised by the general assent of the commercial world. But the public policy of recognising implied hypothecations or liens, as following property from foreign countries, may well be questioned. In the case of *Wickham* v. *Levistones* the effect of a common law mortgage executed in Cincinnati, and registered in accordance with the Acts of Congress, was considered, and this Court refused to give it effect because such a mortgage is not recognised by our laws;' 11 Annual, 702. In the case of *The Succession of Broderick*, 12 Annual, 532, we refused likewise to give effect to an act purporting to be a mortgage of a steamboat, which was executed in this city, and recorded in the office of the Collector of Customs, under the Act of Congress of 29th July 1850 (9th Statutes at Large, p. 440). In the case of *Swasey & Co.* v. *Steamer Montgomery*, 12 Annual, 800, we refused to recognise a privilege created by the law of Alabama for tolls for passing a certain channel; and we then announced the general doctrine that privileges must be regulated by the law of the forum, and that none can be **[206]** claimed except such as are given by the civil code and statutes amendatory thereof. See also on this subject Abbott on Shipping, edition 1854, p. 156, and note 2, and authorities there cited; see also a similar case, stated by Savigny, 8 volume, pp. 196, 197, sec. 368, Berlin edition, C. C. 3204; No. 7; 19 Howard, 22 and 82. It may also be remarked that the hardship of the rule adopted by the Courts is not so great, when it is considered that, in case of ships, it usually happens that the parties holding liens and mortgages in the home port have had the opportunity of enforcing the same, and have voluntarily permitted the ship to depart without so doing. It may be also further remarked that the statute of 1858, p. 111, bans privileges upon ships after the lapse of six months. But in this case it is contended by the intervenor's counsel that the instrument is assimilated more to a *vente à rémeré* of our law than a mortgage, and may be upheld by our Courts in this form. The *vente à réméré*, like any other sale, is perfected as to third persons in the case of moveables by delivery (which is wanting in the instrument under consideration), and the vendee becomes the owner of the fruits and the property absolutely, if it be not redeemed at the term stipulated. Here, Langton, so far from being owner, and making the fruits his own, had only authority as an agent to sell for the payment of debts; Klingender Brothers had received no serious price, and had nothing to return as such, C. C. 2414 and 2439. The instrument cannot therefore be viewed in any other light than as a security for money. There is a prayer on the part of the appellees for an amendment of the judgment in their favour against the intervenor, so that the same shall be considered final. In order to avoid all doubt as to the effect of the judgment rendered, we will make the amendment. It is therefore ordered, adjudged and decreed by the Court that the judgment of the lower Court be so amended as to reject and bar the demand in intervention **[207]** and third opposition of the said Bank of Liverpool; and that said judgment so amended be affirmed, the Appellants paying the costs of appeal."

There is no further appeal in Louisiana from the judgments of the Supreme Court.

On March 7, 1860, judgment was given by the Fourth District Court on the question of distribution of the proceeds of the sale, and thereby the claims of certain

intervening creditors entitled to privilege under the code of Louisiana (including Mure's claim for wages) were allowed, the intervention of Mure as agent for the Bank of Liverpool was dismissed with costs, and the balance of the proceeds after payment of the privileged debts was ordered to be paid to the Plaintiffs in the action in part satisfaction of their debt, which was of greater amount.

The proceeds of the sale were applied accordingly.

The Defendant, Fogo, sent the ship with a cargo of cotton to Liverpool, where she arrived on March 22d, 1860, and on that day the ship was registered at Liverpool in his name as sole owner.

The amount due on the mortgage to the bank exceeded the value of the ship and freight. The bill filed by the public officer of the bank alleged that the Defendants, the consignee and the captain of the ship, intended to pay the freight already accrued to the Defendant, Fogo, and that Fogo intended to dispose of the ship and send her away from Liverpool without regard to the claims of the bank, and prayed an injunction to restrain the Defendants from allowing the ship to leave Liverpool, and from dealing with her without the consent of the bank, and also from collecting the freight; and that a receiver might be appointed to collect the freight. Declarations were also prayed that the **[208]** Bank of Liverpool was entitled to the ship and freight, subject only to any disbursements properly payable thereout.

Sir Hugh Cairns, Q.C., Mr. C. Hall and Mr. Milward (of the Common Law Bar), for the Plaintiff.

The sole point which arises now is that which was decided on the demurrer, whether the judgment of a New Orleans Court, founded upon a refusal to regard the *lex loci contractus*, under which the bank had acquired a valid title in England, can be regarded as conclusive in this Court. A parallel case would be this: If the Judges of Louisiana chose to disregard every will which was not holograph, would this Court consider itself bound by a judgment rejecting an English will by a domiciled Englishman executed in accordance with our law? Since the decision in our favour upon the demurrer, the position of the authorities has been changed, but not so as to affect the conclusion then arrived at.

Castrique v. *Imrie* (8 C. B. (N. S.) 1; S. C. on app. *Id.* 405) has been reversed, and I shall have occasion presently to refer to the decision of the Exchequer Chamber. But before doing so I will briefly notice some other authorities, and I will first consider what is laid down by the leading American jurist, Mr. Justice Story, in his "Conflict of Laws."

In section 102 he states the well-known rule that contracts will in general be governed by the *lex loci contractus*, and cites a judgment from which it appears that at that time the doctrine was accepted by the Courts of Louisiana. Then in the following sections he proceeds to discuss exceptions from the rule, which, however, have no application to a case like the present. For instance, he **[209]** considers the influence of the law of domicile, which need not be discussed here, inasmuch as both the mortgagors and the mortgagees were domiciled in England, and the *lex domicilii* was therefore identical with the *lex loci contractus*.

In sections 322 and 323 Story discusses the validity and priority of liens, referring the validity generally to the *lex loci contractus*, but leaving the question of priority to be governed partly by the *lex loci rei sitæ* or the *lex fori*. This case, however, is not one of mere priority attached to a conventional right, but a question of validity simply, because the bill of sale, if its validity is admitted, gives the absolute property, and therefore excludes any question of conflicting priorities.

Then in section 386 Story states the peculiar rule which the Courts of Louisiana have adopted. By their law, delivery is essential to pass title to a chattel as against creditors, and they have so far set at naught the comity of nations as to insist on applying this rule to foreign contracts, to the exclusion of the *lex loci*; and in sections 387, 390, the reasoning by which this course is attempted to be supported is extracted from a judgment of the Supreme Court of Louisiana. Mr. Justice Story then proceeds to comment on this doctrine, and pronounces it inconsistent with the universal rule. The precise point raised in that case does not occur here, because there the contest was between the law of the foreign domicile and the *lex loci rei sitæ*, and this does not

touch our case, inasmuch as the ship was not in Louisiana at the date of the bill of sale.

It being clear, therefore, according to Story's view that the law of England ought to have been applied by the Courts of Louisiana, the only remaining question would be as to the effect of a judgment based upon rejection of the English law under the circumstances of this case. **[210]** And upon this it is clear, in the first place, that this is not a judgment *in rem*, and that in cases in the nature of foreign attachment proceedings *in personam* will not be binding on the party unless the Court had rightful jurisdiction over the *res* and also over the *persona*, sect. 592 a. These being the doctrines laid down by Mr. Justice Story, let us now see what are the principles of our own Courts.

Upon the argument on the demurrer (1 J. & H. 18) the law was fully discussed, and your Honour stated the principles which governed the case, laying it down that if the averments of the bill amounted to this, that the Courts of Louisiana founded their judgment on a total disregard of the English law—the *lex loci contractus*—such a judgment, which your Honour considered as not being a judgment *in rem*, could be examined here for error on the face of it, and would not be binding on an English Court.

The same doctrine has been laid down even in the case of a judgment *in rem: Dalgleish* v. *Hodgson* (7 Bing. 495); though it is not necessary for our case to carry it so high as to say that a judgment *in rem* may be disregarded for error on the face of it. To the same effect are *Reimers* v. *Druce* (23 Beav. 145) and *Don* v. *Lippman* (5 Cl. & F. 1). It is attempted by the Defendants to give to the proceedings the colour of proceedings *in rem*. They say that the sale was at the instance of persons holding liens. But this was not so, and the sale was in fact under a *fi. fa.* equally applicable to any other goods of Messrs. Klingender, and in a suit which was a mere personal proceeding against them. It is true in a sense that we intervened, but merely to protect our interests, protesting at the same time that the Court had no jurisdiction to meddle with the ship. The judgment therefore cannot be put so high against us as a judgment *inter* **[211]** *partes* in a suit in which we were Plaintiffs. The writ under which the sale took place did not differ in any way from a *fi. fa.*, except that it included lands as well as goods, which it would not have done in England. That the proceedings were in no sense *in rem* is clear from all the authorities collected in the note to *Duchess of Kingston's case* (2 Smith's Leading Cases, 683), and those authorities also establish the proposition that a foreign judgment (even *in rem* and *a fortiori inter partes*) is examinable for error on the face of it, such as repudiation of the *lex loci contractus* in the present case.

In *Castrique* v. *Imrie* (8 C. B. (N. S.) 405) the proceeding was against the ship, and clearly *in rem;* and the Court of Exchequer Chamber was of opinion that there had been no intentional disregard of English law. In *Cammel* v. *Sewell* (3 H. & N. 617) the Court of Exchequer intimated that the proceedings were "in the nature of" proceedings *in rem* (whatever that may mean), that by the law of Norway the master had power to sell, and that the purchaser was not bound to see to the propriety of the sale. In the Exchequer Chamber (5 H. & N. 728) the case was put on a different ground, namely, that the sale was authorised on the ground of agency, whereas here it cannot be said that the sheriff was either the express or implied agent of the Bank of Liverpool. That case therefore does not touch the old established principles on the subject. [They also cited Burge's Commentaries (vol. 3, part 2, ch. 20, p. 763).]

Mr. Giffard, Q.C., Mr. Mellish, Q.C., and Mr. W. F. Robinson, for the Defendants. Three main questions present themselves for consideration:—1. Is the law of Louisiana, as it appears on the face of the judgments in this case, necessarily absurd? 2. Did the property in the ship pass by the sale to Fogo? 3. **[212]** Are the Plaintiffs bound by the fact of their intervention in the suit?

On the first point it is clear that there is no such inherent absurdity in the rule of law adopted by the Courts of Louisiana as to deprive their decisions of the conclusive weight, which, according to the comity of nations, the Courts of this country allow to foreign judgments. Their principle is that a mortgagor suffered to retain possession of a ship or other chattel shall, as between himself and his creditors, be

treated as the true owner. Is this absurd? Why, it is the very principle adopted by our Legislature in the Factors Act and in the Bill of Sales Act, and in the order and disposition clauses of the Bankruptcy Statutes. The characteristic difference between English and foreign law is that we have applied a sound principle to isolated cases, while in Louisiana and elsewhere the principle is consistently applied in all its breadth. Property in a chattel, they say, shall not pass without delivery of possession, and it would be difficult to dispute the wisdom of the rule. With respect to ships which traverse the whole globe, the prudence of such a rule is especially manifest. It was the rule in England until the passing of the Merchant Shipping Act, because a mortgage formerly required indorsement on the registry to give it validity. Now this is not needful in the case of a ship at sea, which is in consequence allowed to sail with a certificate which describes no person as owner, when the property, according to our notions, has passed to another. The doctrine, however, which we have repudiated is still the rule of every other country in the world, and this deserves to be gravely considered before charging the law of Louisiana with absurdity because it has not followed our law in departing from the universal practice.

If the judgments of these Courts are not to be condemned for palpable absurdity on the face of them, I come to another question: Is there anything in the law of **[213]** nations to bind the Courts of Louisiana to reject their own rule and to follow ours? It is not disputed that an enactment on the principle of our order and disposition clause is quite consistent with international comity. And yet what is the effect of that? A foreigner acquires, by a foreign contract, a good title to chattels remaining in the hands of an Englishman. The Englishman becomes bankrupt, and immediately our Courts disregard the title acquired by the foreigner, though by an act valid and indefeasible according to the law of his domicile, or it may be to the *lex loci contractus*, and hand over the property to the bankrupt's assignees. What is the difference between this and the action of the judicature of New Orleans? None whatever, except that we proceed on an isolated rule, and they on a general principle of which that rule is a fragment. The maxim that every sale requires delivery to complete it does away with the necessity for a reputed ownership enactment in the special case of bankruptcy, because it renders all secret sales impeachable, just as some secret sales are impeachable here. The only way in which Louisiana can protect her citizens against secret dealings is by administering to foreigners the same law which applies to natives. If an English mortgagee finds himself in consequence in a worse position than he would be in at home, it is his own fault for allowing his ship to go within a foreign jurisdiction. And it is material to observe that, even by English law, a mortgagee has not that indefeasible right which the Courts of Louisiana are charged with overriding. He may be defeated by maritime liens created by the servant of his mortgagor, as in the case of bottomry, or in respect of damage by running down another ship. So there was the common law lien for repairs overriding the claims even of mortgagees: *Williams* v. *Allsup* (10 C. B. (N. S.) 417). In addition to these various risks he also runs the hazard of finding the vessel subjected to a foreign law, which may **[214]** be less favourable to him than that of his own country. For example, the ship may visit a port where the law gives a maritime lien for repairs. So, in a converse case, the Merchant Shipping Act gives a right against an American mortgagee in respect of supplies procured, say at the Cape of Good Hope, and we do not consider that this provision is any violation of the comity of nations: *The Wataga* (1 Swab. Ad. 165). It is a mistake to say that the Courts of New Orleans refused to recognise the law of England. They did recognise it, but they applied to it a universal rule of their own, which, as between a secret mortgagee and an attaching creditor, gives priority to the latter, just as our law gives the like advantage to the assignees of a bankrupt in reputed ownership of the goods of a foreigner. Such a rule, to be of any service, must be applied equally to foreigners and natives, for the mischief of a secret sale or mortgage is the same whether it be made abroad or at home. The principle of these judgments is well expounded in the case of *M'Neil* v. *Glass* (1 Mart. (N. S.) 261).

[THE VICE-CHANCELLOR. There is a difference between allowing the title of a second purchaser to prevail in certain cases over that of a prior secret purchaser

and giving to a creditor the right to seize goods which do not belong to his debtor.]

The two cases are very analogous, as is shewn by the two statutes of Elizabeth, in which the principle is applied to purchasers and creditors on the same footing. Besides, the question is not whether the law of Louisiana is better or worse than the law of England, but whether a judgment applying it is to be treated as so absurd as to forfeit the weight which would otherwise belong to it.

If their law is not unreasonable in itself, and if they find a transfer sanctioned by a foreign law, which would **[215]** expose their subjects to the very evils which their own law was intended to guard against, they are not bound to regard the foreign rule which is thus repugnant to the policy of their own law. They may well say, "If we admit such mortgages, a foreign mortgagor may resell in Louisiana, and defraud the purchaser; and if we reject the secret mortgage in favour of a purchaser, why may we not do the same in favour of a creditor?"

To turn to the authorities: *Cammel* v. *Sewell* is a case in point. The proceedings there were not *in rem*, so far as the ship was concerned. The sale was before the litigation, which related only to the application of the purchase-money. But the right of the innocent purchaser was upheld; and it is to be noticed that by innocent purchaser is not meant a purchaser without notice. The judgment disposes of a good deal that is erroneous in Story with respect to the law of domicile, and contains several illustrations which bear strongly on this case, such as the conclusive effect against the true owner of a sale in market overt, and the seizure of the goods of a foreigner for rent due from another. *Castrique* v. *Imrie*, again, though the judgment there was *in rem*, was a still stronger case, because the French judgment which was upheld was founded on a blunder as to English law. The judgment of Baron Bramwell in the Exchequer Chamber, is distinctly in our favour, and is not rested on the fact of the proceedings being *in rem*.

[THE VICE-CHANCELLOR. Is there any special statute in Louisiana to the effect that creditors shall take priority over secret mortgagees?]

No; because their general rule rendered this unnecessary: Story's Conflict (sects. 388, 389, 391), *Olivier* v. *Townes* (14 Mart. 93).

[216] THE VICE-CHANCELLOR. Suppose they had a law that a mortgage should not be valid unless attested by three witnesses, do you say they could reject an English mortgage because there was only one?]

That would follow the analogy of the Statute of Frauds.

The rule is that a judgment *in rem* is conclusive, not only as to the thing decided, but as to the facts appearing on the face of the judgment as the grounds of the decision; and as between the parties—and the Plaintiffs here were, to all intents and purposes, parties to the litigation at New Orleans—the same principle applies to judgments *in personam*. I conclude, therefore, that there is nothing in the judgment so absurd as to justify this Court in setting it at nought.

Secondly, I ask would this Court take away from a purchaser property which has passed to him, as this ship clearly has by the law of the country where he bought it. Suppose a foreigner interested in property here, and deprived of it by a blunder of our Courts as to foreign law, he would be bound nevertheless.

The authority cited on the other side, of *Dalgleish* v. *Hodgson*, is wholly inapplicable. That was an action by an underwriter; and the question of neutrality, which had been decided in a foreign Court, was a mere collateral matter, which the judgment "*inter alios*" was brought forward to prove. No one could doubt, that in such a case the judgment, being neither *in rem* nor *inter partes*, could be examined. *Reimers* v. *Druce* is equally beside the question. It is said, this is not a judgment *in rem*. Technically, that may be true; but it is nevertheless equally conclusive, and for the same reason, that it alters the *status* of the subject-matter. Story (sects. 592, 593) speaks of **[217]** judgments not *in rem*, but analogous to judgments *in rem*, as in cases of garnishment and the like.

[THE VICE-CHANCELLOR. The precept to the sheriff was not to seize this ship, but any property of the debtors.]

That is true; but the result was a complete divesting of title to the ship according

to the law of the country, and this by the sentence of a competent Court in the presence of all parties interested.

All the authorities on the general subject are contained in the note to the *Duchess of Kingston's case* in Smith's Leading Cases, and are well summed up in *Bowen* v. *Evans* (1 Jo. & Lat. 178, 258). That was a bill to set aside a sale under the decree of the Court; and after noticing *Lloyd* v. *Johnes*, *Bennett* v. *Hamill*, *Curtis* v. *Price*, *Lightburne* v. *Smith*, the conclusion arrived at was in effect this, that a decree in presence of all parties, no matter how erroneous it may be, is just as conclusive as a judgment *in rem*. The Defendant, Fogo, is an innocent purchaser, who cannot recover his purchase-money if he loses the ship; and against such a person this Court gives no relief. It was suggested we might recover against Hughes & Co., but there was no warranty of title, and the law of Louisiana would give no such remedy. To enable us to do that, the judgment must be shewn to be bad in Louisiana, which it certainly is not, whatever may be thought of it here. Even in England there is no warranty of title on a sheriff's sale. It is to be observed also that, among the creditors who shared the proceeds of the sale, several of the earlier held valid maritime liens; and in some cases their interventions were pointed directly against the ship, just as much as in *Castrique* v. *Imrie*. In part, therefore, the proceeding was for the satisfaction of maritime liens, and was *in rem*.

[218] [THE VICE-CHANCELLOR. There were claims for wages, but our Court of Admiralty could not sell the ship for wages.]

That can be done in Louisiana, and is consistent with the general law.

It is clear, moreover, that the bank intervened voluntarily, and was in the same position as if Plaintiff in the cause, so far as the conclusive effect of the decision goes.

It is a mistake to say that the mortgage was disregarded by the sale. The claim of the mortgagees was not finally rejected until the hearing as to the distribution of the proceeds; and at the time of the sale the purchaser could not know that the proceeds would not have been handed over to the bank. The only prior decisions were, first, that the right of a mortgagee was not a right to possession, but only to a charge; and secondly, that the question of the charge should be transferred to the proceeds, and decided after the sale. According to the expert evidence, the purchaser took a perfect title under the law of Louisiana; and that Court was as much justified in disregarding a mortgage contrary to the policy of its own law as this Court was in *Hope* v. *Hope* in disregarding the action of French Courts on a question of the custody of children, which the policy of our law gives to the father.

That there is nothing unreasonable in the rule adopted in Louisiana as to possession, even according to English notions, is sufficiently exemplified by *Twine's case* (1 Smith L. Cas. 1).

The rule, moreover, is a rule of administration, like those by which priorities are fixed, and in such matters the *lex fori* prevails according to the law of nations: The Union (Lush. 128).

[219] [They also cited Story's Conflict of Laws (sects. 384, 385, 391, 550), and Burge's Commentaries (sect. 391).]

Sir Hugh Cairns, in reply. There are two fallacies in the arguments on behalf of the Defendants. First, it is said that the law of Louisiana is not repugnant to reason, and therefore must be respected. We do not allege that it is unreasonable, but we say that it ought not to have been applied to a case governed, according to the universal principle, by the *lex loci contractus*, which was the law of England. If this principle is rejected there is an end of all international law. Then the second fallacy was this: It was said that the property passed by the sentence and the sale, and that the case was analogous to *Cammell* v. *Sewell*. But this is not so. The sale was under a *fi. fa.*, and the Court guaranteed no title to the purchaser. Fogo was no party to the proceedings, and cannot plead them by way of estoppel. The sheriff only purported to sell Klingenders' interest. If a sheriff sells the goods of A. instead of the goods of B., the purchaser takes no title; and A. cannot recover against the sheriff because the sale passes no title, but must proceed in trover against the purchaser.

In *Cammell* v. *Sewell* there was this marked distinction, that an express statute gave the master power to sell for necessaries. Here it is not pretended that the

sheriff had power to sell anything more than Klingenders' interest. It is a fallacy, therefore, to say that the sale passed any property except subject to the mortgage.

Then it is said we are bound by our intervention. But it is clear our intervention was against the sale of the ship, not a mere claim to share the proceeds. The analogy insisted on of a sale under a decree does not touch us, for *Bowen* v. *Evans*, the authority relied on, went merely to **[220]** the point of irregularities in the sale, and not to a total want of jurisdiction to sell: *Townsend* v. *Warren* (1 Jo. & Lat. 231, in note) illustrates this.

There can be no question as to what the decision of the Court of Louisiana went upon. On the face of the judgments, and from the evidence on the part of the Defendants, it is clear that the Court refused altogether to recognise any mortgage which was not accompanied by possession.

It is scarcely necessary to notice the suggestion that a submission to the Louisianian doctrine would only add one more to the dangers of a mortgagee. If true, this would be no argument; but in fact the risks pointed at—bottomry and *respondentia*—are elements not of danger but of safety, and take their priority solely on that account.

Feb. 13, 1863. VICE-CHANCELLOR Sir W. PAGE WOOD. In this case the Plaintiffs, who represent the Bank of Liverpool, had in the year 1854 acquired a title to the British ship Warbler, then at sea, by an assignment in the nature of a mortgage, duly registered and unquestionably valid according to the law of this country. The mortgagors, by name Messrs. Klingender, continued to navigate the ship, which, according to the law of this country, they might do without any impeachment of the title of the mortgagees. In the course of that navigation, towards the close of 1857, the ship was sent on a voyage to New Orleans, in Louisiana, and arrived at that port in the month of December.

In January 1858 the vessel was attached by a creditor of the mortgagors, at first by way of process to found jurisdic-**[221]**-tion, and afterwards in a more formal manner, for the purpose of placing it in the hands of the law, with a view to that which ultimately took place—a sale by the sheriff. The mortgagees (the Plaintiffs) had in the meantime, and anterior to any decision with reference to the sale of the ship, sent out a power to their agent, Mr. Mure, the British Consul at New Orleans, to take possession of the ship on their behalf, which by the law of England he was entitled to do. Finding, however, the ship attached, Mr. Mure took the course which the law of Louisiana points out, and intervened in the action, presenting to the Court his title, and claiming possession of the ship. The result of this was that several hearings took place with reference to this intervention.

After presenting his petition, in which he claimed the ship, and before that was ripe for decision, Mure made an interlocutory application by way of motion, that on giving a bond to the value of the ship to abide the decision of the Court, he might be allowed to take immediate possession and carry the ship off, leaving the question ultimately to be determined on the bond. This motion was distinct from the petition of intervention by which he claimed the ship by virtue of his title as representing the mortgagees. The result of the whole case was this: That the Court of Louisiana, having heard Mure, declined to recognise any title whatever in him, and sold the ship, but sold it under process exactly analogous to our *fi. fa.*, that is to say, they sold all the right and interest of Messrs. Klingender in the ship. Apart from the intervention, there can be no doubt what the result of this state of things would be, nor is there any contest in this respect upon the pleadings. Of course, a sale of all the right and interest of the mortgagors, according to our law, would simply pass the equity of redemption subject to the mortgage; and if the ship itself was sold by any arrangement with the mortgagees, the creditors would be entitled only to the surplus which might remain after **[222]** paying the mortgage debt. That point is not unimportant to be kept in mind. Both from the form of the proceedings and from the evidence of Mr. Bradford, it is clear that the sheriff was to sell only the right and interest of the debtor; and that if Mr. Mure had not intervened, his rights would have been unaffected by the sale. Whenever, therefore, the ship came back here, the bank

would have been recognised as the owners to the extent of their mortgage, as fully as if no sale had taken place. In fact, however, Mure did intervene, and the question is how far this has rendered the sale binding against the bank? Since the argument, I have considered the authorities maturely, in order to extract the principles which govern the action of our Courts with reference to a foreign judgment of this character, supposing the conclusion to be arrived at, that it is erroneous on the face of it.

Whether this judgment does so err or not against the recognised principles of what has been commonly called the comity of nations, by refusing to regard the law of the country where the title to the ship was acquired, is one of the points which I have to consider. But I will first discuss the general question, to what extent the Courts of this country recognise the judgments of foreign tribunals. The broad principle which has been established is, I take it, this, that a good title acquired in one country shall be a good title all over the globe; that general doctrine being qualified by special rules applicable to different classes of property. As to real estate, the legal title to property throughout the globe cannot be acquired except according to the laws of that country in which the real estate is situated. Every transfer of real property is governed by the *lex loci rei sitæ*. As regards the acquisition of title to property of a moveable nature, questions sometimes arise whether the *lex loci contractus* shall prevail or the law of the domicile of the parties. In this case it is immaterial to consider that question, because the two **[223]** circumstances concur, both the place of the contract and the domicile of the parties having been British. Sometimes also the *lex loci rei sitæ* has been thought to be applicable even to moveables; but it is unnecessary here to consider whether, under any circumstances, that rule can prevail, because there can be no doubt that, if any special locality is to be ascribed to the ship at the time of the contract, it must be regarded as situated in this country. Therefore, by every possible rule that can be conceived to apply, the Plaintiffs acquired a title to the ship, which, according to ordinary jurisprudence, and the comity of nations as recognised throughout the civilised world, would have given them a title in every part of the globe. However, the ship going to Louisiana, the question has arisen how far this title can be displaced by a peculiar doctrine established by the Courts of that State? I may fairly call it a peculiar doctrine, for it is disapproved of by one of the most eminent jurists of America, Mr. Justice Story: it is referred to by Chancellor Kent or his editor in a note to his Commentaries as being so disapproved of, without any particular comment of his own: and it is also referred to unfavourably by an eminent jurist of our own country, the late Mr. Burge. The rule amounts to this: the Courts of Louisiana decline to recognise any title to a ship or any other chattel which is not acquired in the mode pointed out by their own law. They say that in adjudicating on the rights of creditors attaching property within their jurisdiction they will be governed solely by the title which appears to be acquired according to their own course of law, and will disregard all other. In this state of circumstances the difficulty becomes very great in saying how far the general principle of law which I have referred to, namely, that every person properly and righteously acquiring a title to property in one country shall hold it all over the globe, can be held to apply. The present Defendant, the purchaser at the sale in New Orleans, has acquired a title certainly good according to the law of **[224]** Louisiana as there administered; and it comes to be a contest between the prior title acquired in England, which in every country except Louisiana would be recognised, and the title acquired by the law of Louisiana in defeasance of that prior title, a contest in truth whether we are to recognise the higher paramount law which regulates the acquisition of property by way of contract, or the judgment of the Court of Louisiana, which has conferred title in the manner I am about to describe. And in the first place I should say that, in speaking of the title having been conferred by the Court of Louisiana, I do not mean to imply that there was any proceeding *in rem*. There was nothing of that kind, though there was a judgment against the claim of the present Plaintiffs. It was scarcely argued for the Defendants that there was a judgment *in rem*. What the Court did was simply to direct a sale of all the right and interest of the Klingenders; and by the intervention on behalf of the Plaintiffs, by their claiming the ship against the creditors, and protesting against this sale in due legal form, the case was brought,

as I take it, to a judgment *inter partes*, or at least it is brought so closely within the doctrines applicable to a judgment *inter partes*, that I am bound to decide this case on the assumption that there has been a plain and clear decision as between the Plaintiffs and the selling creditor adverse to the present Plaintiffs. The Defendant, the purchaser, therefore, who claims through the act of the Court, under the right of the creditor who set the Court in motion, must be regarded as claiming under the decision of the Court between adverse parties, from one of whom he derives his title.

The case is so peculiar that it is very difficult to bring it under any general head of the law on the subject of foreign judgments. The law of foreign judgments is now so well settled, especially since the case of *Ricardo* v. *Garcias*, in the House of Lords, that the general question presents no difficulty. It is now quite settled that a decision *inter partes* by a foreign **[225]** Court is conclusive between the parties and those claiming under them, in any other country, subject only to the question how far you may examine the judgment for error appearing on the face of it. In the absence of error appearing on the face of the judgment itself, with which a Court in this country can deal, the judgment is conclusive upon the merits of the matter in controversy between the two parties to the litigation. The latest case I have found is *De Cosse Brissac* v. *Rathbone* (6 H. & N. 301), in which the Court said the point was too clear for argument, and that a foreign judgment could now be pleaded in bar in a suit in this country, provided it was between the same parties and on the same subject-matter. But when that is laid down, there still remains the question how far the Courts can examine a foreign judgment with reference to anything that appears on the face of it; and there are several cases in which it has been held that the Court is at liberty to disregard a foreign judgment for error so apparent. Without enumerating them all, it is enough for the present purpose to say that a foreign judgment may be disregarded if anything manifestly contrary to natural justice, as it is called, is found on the face of the record, as in *Buchanan* v. *Rucker* (9 East, 192), where it appeared that process had not been served, except by a notice on the church door, the party not being resident on the spot or within the jurisdiction. There it was held that a judgment founded on such proceeding was not conclusive.

Again, it has been held in several cases, especially on the subject of prize (a point not unimportant in the present litigation), that any peculiar legislation of foreign countries which has not been recognised by the world at large, any peculiar legislation of their own with regard to a special subject-matter, may destroy the conclusive effect of a judgment if it appears on the face of the record as the ground of decision. For instance, it has been decided in an action on a policy effected during a war, on the footing of a declaration that the ship was neutral, that where, by the local legislation of some **[226]** one country not recognised by the other countries of Europe, ships are held to forfeit their neutrality if they contravene particular regulations not acquiesced in by the world in general, the Courts of all other countries are entitled to disregard such special regulations, and to treat even a judgment *in rem* as inoperative on the question of neutrality.

Then there is a third class of cases of which *Novelli* v. *Rossi* (2 B. & Ad. 757) is an instance. If it appears on the face of the record (the judgment not being *in rem* but in a litigation *inter partes*) that the law of this country was intended to be administered, but has been mistaken: there also the Court feels itself entitled to disregard the judgment. The error, however, must appear on the face of the judgment itself; and, subject to exceptions of this kind, the Courts have held the judgments of foreign countries to be conclusive: a rule which has been considered to apply with additional force to judgments in colonies of our own, because they are subject to a special appeal to the Privy Council. I myself have always felt bound to adhere as strongly as possible to that doctrine; and I think it only right to mention one case in which it appears that I transgressed from adhering to it too rigidly. That was in *Hunter* v. *Stewart*, in which I thought the Plaintiff was estopped from further proceedings here, he having filed a bill in respect of the same subject-matter, and praying the same relief, but on a different ground, in one of the colonies of Australia. The Lord Chancellor was of opinion that, the foundation of the claim being new, although relating to

the same subject-matter, and based on rights which the Plaintiff possessed and knew he possessed at the time he instituted the original proceedings, he might file a new bill founded on that equity of which he did not avail himself in the former suit. I only find a report of it at present in the "Law Journal" (31 L. J. (N. S.) 346) in which **[227]** the Lord Chancellor observes that one test of the bill being for the same matter would be whether an answer to the allegations in the first suit would be any answer to the allegations in the second, and, finding it would not, says: "It may be admitted that the case made by the first bill was insufficient to bind the company consistently with holding that the case made by the second bill is sufficient to bind the company; and this is the result not of new evidence, but of the allegation and proof in the second suit of an entirely different series of acts and conduct on the part of the company. It is a different equity. It is indeed true that the case made by the second bill must be taken to have been known to the Plaintiff at the time of the institution of the first, and might have been then brought forward, and it may be said, therefore, that it ought not now to be entertained; but I find no authority for this position in civil suits, and no case was cited at the Bar, nor have I been able to find any, in which a decree of dismissal of a former bill has been treated as a bar to a new suit asking the same relief, but stating a different case, giving rise to a different equity." Certainly, I had supposed (erroneously, no doubt) that the view which appears to be taken by Vice-Chancellor Wigram in a case of *Henderson* v. *Henderson* (3 Hare, 115) prevailed in reference to such a point, namely, that a person being in full possession of all his rights is not entitled to keep back some portion of them to file a bill in respect of one portion of his case, and after failing in that to file another bill with the same object in respect of the other portion, upon new and different grounds. What Vice-Chancellor Wigram says is this: "The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might **[228]** have brought forward at the time." Then he refers to bills of review, and the principle followed in that respect. That was the ground on which I thought it right to proceed. It was the same ground which was taken in the very same case of *Henderson* v. *Henderson* in the Queen's Bench by Lord Chief Justice Denman (6 Q. B. 288); and the opinion of the Lord Chief Justice is referred to with approbation in the case of *The Bank of Australasia* v. *Nias* (16 Q. B. 737), where Lord Campbell says: "In the absence of direct authority, it gives us great satisfaction to think that Lord Denman seems to have taken the same view of the subject in *Ferguson* v. *Mahon*, and still more distinctly in *Henderson* v. *Henderson*, where he intimates a clear opinion that a plea to an action on the judgment of a colonial Court ought to steer clear of an inquiry into the merits of the case, for whatever constituted a defence in that Court ought to have been pleaded there." That, no doubt, is limited to defences; and the Lord Chancellor's judgment has determined that a Plaintiff may subsequently upon different equities file two or three bills for the same subject-matter. I have thought it right to make these observations, in order that I may not appear to overstate the case as to the effect of a foreign judgment, in saying generally that a foreign judgment, except for such errors on the face of it as I have described, must be held to be conclusive.

But then occurs the peculiar case I have before me, which is that of a foreign judgment in which the Court has not mistaken our law at all, but, after distinctly stating it on the face of the judgment, has said that it disregards it for reasons which no doubt are entitled to great weight, so much so indeed as to have caused me some anxiety as to the decision of this case. For these reasons, the Court has said that in the case of a conflict between the policy of their law and that of a foreign country they **[229]** will, where the interests of their citizens require it, disregard the title acquired by foreign law in favour of their own citizens, who, according to their law, would be entitled to relief. I ought perhaps first to notice a preliminary question, whether I have a right to look at the reasons assigned by the Judges as part of the judgment. I apprehend clearly that I have. The question was gone into by the Master of the Rolls in the case of *Reimers* v. *Druce*, and having before me a transcript

of the record which contains those reasons, like the *jugemens motivés* of the French Courts, I must regard the reasons as forming a portion of the judgment itself.

Now I approach the facts which do not require to be stated much more at length than in the summary with which I commenced my judgment. The ship was attached for a large debt, being at that time undoubtedly in possession of the mortgagors and not of the mortgagees. Very soon after that, but still after it, the mortgagees attempted to obtain possession through the medium of Mure; and it is quite clear, according to the American law, that Mure might have abstained altogether, and that, if he had abstained, this difficulty would not have arisen, and the title of the Plaintiffs in this Court would have been perfectly clear. But he did intervene by two processes. The first of these (though the last decided) was an intervention by a petition setting forth the title to the ship, and praying that the Plaintiffs in the action might be decreed to answer the petition, and that it might be declared that the Petitioner was entitled, as creditor, to have the ship delivered up to him to hold and dispose of the same for the purposes of the mortgage. This was the formal intervention in the suit, and was followed a few days later by an interlocutory proceeding or motion, by which Mure claimed to have the ship delivered to him upon bond, without waiting for the final adjudication. This motion came on to be heard on **[230]** the 18th January, and a rule to shew cause was granted, which was argued and dismissed with costs on the 5th February. The Judges, in the reasons filed with this judgment, say that there is no law authorising an intervenor who claims the property attached to give such bond, and distinguish the case from one where goods were consigned to a person who had made advances on them, and was in possession of a bill of lading, and as such entitled to possession. Then they proceed thus: "But the instrument by which the Plaintiff in this rule has offered to prove title to the property seized, and the possession thereof, is nothing more than a mortgage. The mortgagee is not entitled to the possession of the property mortgaged; his right is to be paid by preference out of the proceeds of the sale of the mortgage property." For these reasons they dismiss the rule with costs.

I will pause for a moment on that judgment, which seems to me to disclose the root of the fallacy which runs through the whole course of proceeding of the Courts of Louisiana. I find the same reasoning on several other occasions when the case was brought before the Court. The Courts of Louisiana treat this mortgage title, which according to English law is recognised as an absolute right in the mortgagee entitling him to sell and not authorising anyone else to sell without his consent, as amounting to nothing more than a right to be paid out of the proceeds of a sale, without saying by whom the sale is to be conducted. They assume, in fact, that the Court has a right, as against the mortgagee (which according to English law the Court would not have), to sell the chattel itself, leaving him to be paid, if he has a title to be paid, out of the proceeds of the sale. The distinction is very important; for this reason, that all the authorities admit that, with reference to the priority of creditors, in the administration of assets, the *lex fori* prevails. When you have chattels to be sold, and assets of a testator to be distributed here in England, **[231]** they will be applied first in paying Crown debts, then judgment debts, specialty debts and simple contract debts in order, and the property would in any case be administered and the priorities settled according to the *lex fori;* but here what strikes me is this, that it was not a question of administering assets at all, but a question of property. The mortgagee, according to our law, is entitled to hold the ship against all the world; and if he says, "It is not convenient to me to sell, I shall exercise my rights as I think best," he cannot be compelled to have the property sold, and come in and make title to such portion of the assets as he can claim. That consideration displaces the whole line of argument adopted by the Louisiana Court. The view taken by the Court in the first instance, upon the claim to give bond for the ship, was founded partly on technical grounds, and partly on the reason which I have mentioned. This was followed by several other proceedings, not very material to be noticed until we come to the hearing of the 26th of January 1859, when the original petition of intervention claiming the property in the ship was adjudicated upon by the lower Court. The Judge on this occasion reiterates the fallacy already noticed. He says, "I regard the document relied on by the opponent as a mortgage for the security of a debt, and not as a bill of sale of the ship. The instrument

being regarded in this light, it follows that the opponent is a mortgage creditor, and not an owner." There, again, the Court totally refuses to recognise our law by which the bank were owners, though owners by way of mortgage; but clearly owners in the sense of being entitled to say, "No one but ourselves shall sell the ship; we are not bound to leave the ship to be sold by others, and then to claim a share of the proceeds." Those were the decisions of the Fourth District Court, and in both cases appeals were lodged.

The appeal first heard was from the order dismissing **[232]** the motion to bond the ship, as it is termed. The Supreme Court of Louisiana gave judgment on that appeal on the 31st of January 1859, and, as in the former instances, the reasons of the Judges are stated on the record. They say, "Mr. W. Mure has applied for possession of the ship on giving a bond, and bases his application upon the allegation that during the litigation great expense will be incurred by the detention and custody of the ship, and produces an instrument executed by the owners in Liverpool, England, for the security of the bank, by which the ship was conveyed to Langton as trustee for the bank, with authority to sell and pay the debt." Then they notice that the bill of sale does not purport to convey the ship to the bank, but to a trustee, and add this observation: "The bank is, therefore, not the owner. At common law the instrument, we suppose, would be considered, as between the parties at least, to convey the legal title in the ship to Langton. The only rights the Bank of Liverpool could have would be a right in Chancery to enforce execution of the trust. Hence the most favourable footing on which the claim of the intervenor can be placed is that of a creditor with a privilege; he has, therefore, no right to the possession of the property, and must enforce whatever rights he may have upon the proceeds, precisely as the attaching creditors are compelled to do." Then they assume that their law confers the right to set aside an attachment by giving bond only upon owners and not upon creditors.

Now there again the Supreme Court seems to hold what appears to me to be the fundamental fallacy which pervades the whole course of procedure. They do not look to the English law to ascertain what the rights are under a conveyance in trust to sell or by way of mortgage, but they treat the mortgagee as having only a privilege giving him **[233]** a certain degree of priority, whatever it may be, which is to be adjudged and settled according to Louisiana law. If they were right in denying the ownership, the question would resolve itself into one of priority, merely a question of the distribution of assets, in which case the Court which has the jurisdiction over the assets has the right to say that they shall be distributed according to the law of the country where the distribution is asked for. But the bank were claiming as owners, and utterly disputing the right of the Court to deal with the assets in any way.

Now I come to the decision of the main case, on the appeal from the order dismissing the petition of intervention. The case was decided by the Supreme Court on the 13th January 1860, and seems to have been heard by a full Court, and evidently from the terms of the judgment was argued at length, and received a most attentive and able consideration. I have given to this judgment the most anxious consideration. The Judges state the case thus: "The Bank of Liverpool, as vendee and trustee, claims the legal title of the ship. The petition of intervention was dismissed on the trial in the lower Court, and the intervenor appeals. The case merits perhaps a synopsis of the instrument upon which the intervention is founded." Then they say that by this instrument Klingender Brothers nominally sell to Langton, chief manager of the bank, the ship Warbler, in trust that the same may be a continual security to the bank for the money due or to become due; that Langton, the trustee, is authorised to sell the ship, and to apply the proceeds, first, to costs; secondly, to the debt due to the bank; and the remainder to Klingender Brothers; and that another clause obliges the trustee, on satisfaction of the trust, to reconvey. After this description of the deed, they proceed thus:—

"The instrument is no doubt executed in conformity to the Act of Parliament and the English law. Under **[234]** that law the intervenor would have been able in the English Courts to protect himself against subsequent purchasers, creditors and the effects of bankruptcy. If it be admitted that the intervenor has such rights upon the ship by the English law, the question naturally arises, why are not these rights entitled

to be respected in Louisiana, particularly as all parties to this controversy have their domicile in England? It is not surprising that the question is repeated, and that the Courts are again and again called upon to answer it. The comity of nations extends only to enforce obligations, contracts and rights, under those provisions of law of other countries which are analogous or similar to those of the State where the litigation arises. The instrument offered in evidence has no analogy to any mode known to our law, of affecting personal property for the security of debts. It purports to sell to one man to protect the rights of a third person, and yet the vendor is to retain possession. The contract is not a sale nor a pledge, for there is no delivery which our law deems essential in order to perfect either contract as to third persons. As our law would not enforce a similar contract between our own citizens if made here, it will not enforce it to defeat rights already acquired by the attachment under our own laws."

That sentence contains the whole principle of the judgment. There are some other reasons added, but the essence of the judgment really is this: "The law of Louisiana does not allow a mortgage, or any other dealing without delivery, to convey a right of property as between citizens of Louisiana, and therefore we will not allow any such right as against our own citizens at the instance of foreigners, although the law of the foreign country where the contract was made does give full effect to the transfer of ownership." After laying down this doctrine, the Judges discuss the authorities in their own Courts, and remark that "the hardship of **[235]** their rule is not so great when it is considered that in case of ships it usually happens that the parties holding liens and mortgages in the home port have had the opportunity of enforcing the same and have voluntarily permitted the ship to depart without so doing." They also notice an argument that the instrument was assimilated more to a *vente à réméré* of their law than a mortgage, and hold that it could not be so regarded, and could be viewed in no other light than as a security for money. In conclusion they hold that the intervenor has no right in the ship, and declare their judgment final.

Subsequently, on the distribution of the proceeds, the Courts gave no portion of the assets to the mortgagees.

That being the course of the litigation, I have to look to the evidence of what the law of Louisiana is. The judgment supplies it to a great extent, and we have also in the answer set forth certain portions of the law of Louisiana—Acts of their Legislature —which are only important on a minor part of the case, relating to priorities given to certain creditors for wharfage and anchorage, sailors' wages, &c. Besides this, we have the evidence of Mr. Bradford, which I do not think really carries the law further than the judgment of the Court itself would do. His evidence goes first to the point I have already considered, as to the effect of the intervention according to the law of the State of Louisiana, and the rest amounts to this, that, according to the law of that State relating to shipping, the persons who have possession of a ship as owners are for all purposes deemed to be the true owners. That really does not go a step beyond the law laid down on the face of the judgment. The whole question is whether the mortgagors were in possession as owners. According to English law the mortgagors have not possession of the ship as owners, they have only possession subject to the mortgage; and I do not apprehend the witness means to include persons who are merely apparent **[236]** owners, because that would extend to possession by factors, a subject with which he is evidently not dealing. The law of Louisiana, therefore, as laid down in this case, says that a mortgagee who has a perfectly good title, a complete owner according to the law of the country to which the contract belongs, ceases to be the owner the moment the vessel arrives at Louisiana, as against any creditor of his mortgagor who may attach the ship.

The case was most ably argued for the Defendants, and I was pressed very strongly with the contention that when a person is allowed to be in the management and control of property, which he holds not as absolute owner, but subject to a mortgage, there is nothing contrary to natural justice in saying that, as regards creditors and third parties, he shall be deemed owner to all intents and purposes. Reference was made to cases of reputed ownership, distresses by landlords and a variety of other illustrations; but I apprehend that the whole of this argument is beside the controversy here. If the

State of Louisiana had been minded to pass a Special Act, and to give all the world notice (as we have done in respect to reputed ownership by passing our Bankruptcy Act) that, as regards property coming within their jurisdiction, the apparent owner should (in the interest of their citizens) be treated as owner to all intents and purposes, so far at any rate as to pass the property to creditors, a very different case would be presented from that which I have to consider. This distinction is what appears to be pointed at by Mr. Justice Story, when he comments on the decisions of the Courts of Louisiana with great dissatisfaction. He says it might be very well for the Legislature to lay down some such rule, but he thinks it contrary to sound jurisprudence for a Court (in the absence of positive enactment) to say that whoever brings a chattel within their jurisdiction as apparent owner shall be deemed to be the true owner—a sweeping doctrine which would embrace the case of factors and **[237]** others of that description. He adds that a Judge so deciding displaces the title of the owner of the ship altogether by saying "that is an ownership I will not regard." That is exactly the course which the Judges have taken here. On the face of their judgment they treat the mortgagee as absolute owner according to the law of England; and then they say that coming into their State he is not to be treated as owner by their Courts.

Although this is the prevailing doctrine in Louisiana, the Judges do seem to have had some misgivings about it. I shall presently notice one remarkable exception to the general current of their decisions, *Thuret* v. *Jenkins* (7 Mart. 318; Story's Conflict, sect. 391), where the judgment seems originally to have proceeded on a class of authorities more in consonance with the general administration of the law as between the subjects of foreign countries. The history of the doctrine which has been applied in this case may be traced in the reported decisions of the Courts of Louisiana. The first class of cases they had to deal with was that of ships actually in their own ports belonging to foreigners, and properly sold according to the foreign law while lying in the ports of Louisiana. That seems to have been the first class of cases in which the rule of disregarding ownership without possession was established, and it was afterwards extended to other cases similar to the one I have before me. I have had the reports before me, and it was with reference to them that I remarked that some question had been raised whether the *lex loci rei sitæ* might not in certain cases be held to apply even to moveables. Certainly, it has been so held in Louisiana, in cases where, at the time of the transfer, the chattel has been within the actual dominion of their own State. I am not aware that any other Courts have gone so far as this; but in the present case the chattel was not brought within their dominion until the contract title had been acquired. There can be no question that the ship belonged to the Plaintiffs, to all intents and purposes, until she entered the waters of Louisiana; and to **[238]** apply the local law to such a case would be an immense extension of the principle laid down in the first instance in Louisiana.

The principle itself is considered at length in Story's Conflict of Laws (sects. 386, *et seq.*); he introduces the subject by the observation that the question has been much discussed in the Courts of Louisiana, from a supposed difference between the rule of the common law and that of the civil law. By the common law a sale of goods is or may be complete without delivery; but by the law of Louisiana delivery is necessary to complete the transfer according to the well-known rule of the civil law, "*Traditionibus et usucapionibus dominia rerum nonnudis pactis transferuntur*," and says that, on the fullest examination, and after repeated arguments, the Supreme Court of Louisiana have held the doctrine that the transfer of personal property in that State is not complete, so as to pass the title against creditors, unless a delivery is made in conformity to the laws of that State, although the transfer is made by the owner in his foreign domicile, and would be good without delivery by the laws of that domicile. Then he says that the reasoning by which this doctrine is maintained is most fully developed in a case in which a transfer of a part of a ship was made in Virginia, the ship at the time of the sale being locally at New Orleans. This was *Olivier* v. *Townes* (14 Mart. 93, 102). The reasons given in that case, by the very able Judges, are explained at length, and will be found to turn principally upon the view (for which they cite Huberus) that, in applying the common law of the comity of nations, this reservation must be understood, "*Si nullum inde civibus alienis creetur prejudicium in*

jure sibi quæsito," they say it would prejudice their citizens if the general rule of law were adopted; and they put it thus: "This city is becoming a vast storehouse for merchandise sent from abroad owned by non-residents, and deposited here for sale; and our most important commercial transactions **[239]** are in relation to property so situated. If the purchasers of it should be affected by all the previous contracts made at the owner's domicile, although unaccompanied by delivery, it is easy to see to what impositions such a doctrine would lead, to what inconvenience it would expose us, and how severely it would check and embarrass our dealings. However anxious we may be to extend courtesy and afford protection to the people of other countries who come themselves or send their property within our jurisdiction, we cannot indulge our feelings so far as to give a decision that would let in such consequences as we have just spoken of." It must be borne in mind that, in applying this reasoning to a chattel actually within the jurisdiction, and dealt with out of the jurisdiction, you have a case not nearly so strong in favour of the foreign owner as that before me, where the chattel did not enter the jurisdiction until long after the title had been acquired. Mr. Justice Story, in commenting upon that case, admits the force of the reasoning upon general principles, and says that it is competent for any State to adopt such a rule in its own legislation; and that, being made for the benefit of innocent purchasers or creditors, it could not be deemed justly open to the reproach of being founded on a narrow or selfish policy. "But," he adds, "how far any Court of Justice ought, upon its own general authority, to interpose such a limitation, independently of positive legislation, has been thought to admit of more serious question, since the doctrine which it involves aims a direct blow at the soundness of the policy on which the general rule that personal property has no locality is itself founded," and goes on to say that it is not easy to reconcile such a rule with Lord Loughborough's doctrine in *Sill* v. *Worswick* (1 H. Bl. 665). It may indeed be said that, as we may make in our country a law about the apparent ownership of the property of bankrupts, they may make a more general statute law in Louisiana that they will not **[240]** recognise ownerships of this description; but in the absence of such a law a Judge, being required to say whether A. or B. is the owner of a chattel, would, I apprehend, in every country except Louisiana, give the same answer. Then I should add that Mr. Burge takes exactly the same view in his Commentaries (vol. 3, p. 764), in which he mentions these decisions of Louisiana. He says that the decisions in which this doctrine has been established proceeded on the ground that to have given effect to the *lex loci contractus* would have prejudiced the rights of the creditors in New Orleans, and on the assumption that such cases came within the alleged exception I have before referred to. Mr. Livermore (Dissert. p. 137), also a celebrated American writer, has with great force combated the doctrine deduced from these decisions; and Mr. Justice Story strongly points out its necessary tendency to invalidate the rule that moveables have no locality. In the Commentaries of Chancellor Kent (vol. 2, p. 538) is a note —I am not quite clear whether by the learned author or his editor, but a note which states the rule of the Courts of Louisiana, and the comments of Story and Livermore, without expressing the writer's own opinion. The views therefore of the leading American authorities are by no means favourable to the peculiar doctrine of the Courts of Louisiana.

Mr. Justice Story, it will be observed, refers to the case of *Sill* v. *Worswick*, before Lord Loughborough, a judgment extremely able, though we must remember that at that time the doctrine as to foreign judgments was not so firmly settled as it is now. This perhaps explains an expression in that judgment which made me pause very much before coming to a conclusion in the case now before me. After laying down the law very clearly with regard to the domicile of the contracting parties, as that which must govern the right to personal effects—the case being one as to the effect of bankruptcy in this country in vesting the whole of the trader's property in his assignees, and enabling them to **[241]** assert a claim to property which had been recovered abroad by a creditor from the bankrupt—Lord Loughborough held that the title of the assignee ought to be recognised all over the world, and in the course of his judgment made these observations (p. 693): "I do not wish to have it understood that it follows as a consequence from the opinion I am now giving: I rather

think that the contrary would be the consequence of the reasoning I am now using, that a creditor in the foreign country, not subject to the bankrupt laws nor affected by them, obtaining payment of his debt, and afterwards coming over to this country, would be liable to refund that debt. If he had recovered it in an adverse suit with the assignees he would clearly not be liable. But if the law of that country preferred him to the assignee, though I must suppose that determination wrong, yet I do not think that my holding a contrary opinion would revoke the determination of that country, however I might disapprove of the principle on which that law so decided." Now, I confess that struck me as having a very important bearing on this case, for Lord Loughborough seems to intimate that, however plain the requirements of the comity of nations may be, he does not think he should hold that he could come to any conclusion which would authorise him to say that the right acquired under a foreign judgment was to be interfered with. However, I have the satisfaction of seeing that this point has not been altogether without consideration in a case which has been very much discussed before me, *Castrique* v. *Imrie*, though the actual decision has no immediate bearing on the present question, because clearly there the transaction was a judgment *in rem*. But there is an intimation of opinion in the Lord Chief Justice's judgment as to what the law would be under the very circumstances which have happened in the present case. The Lord Chief Justice says (8 C. B. (N. S.) 415): **[242]** "It is not disputed that a judgment *in rem* obtained without fraud and pronounced by a competent Court is generally binding upon all the world; but it is contended that in this case an exception should be made to the rule, on the ground that, it being clear that the incidents of the contract entered into by the master on behalf of his owner were to be governed by the *lex loci* of the contract (in this instance the law of England), the French Court knowingly and intentionally set that law at nought, thereby violating the comity of nations, by virtue of which alone the judgment of the tribunals of one country are respected by those of another. It is unnecessary to pronounce any decision upon the principle of law involved in this argument." [It was unnecessary for this reason that they held that the Court, though it might have mistaken the law, had not wilfully disregarded it, and that a mere mistake would not invalidate a judgment *in rem*.] "It is right to say that if it were, some members of the Court are strongly disposed to think that, even if the facts on which the argument turns were made out, it would not afford a reason for questioning the validity of a judgment *in rem*. Others on the other hand—if it could be shewn that, in a case in which the effect of the contract was to be determined by the *lex loci contractus*, a foreign Court perversely insisted on applying its own law, being in conflict with the former, thereby outraging the principle of international comity in a manner amounting in fact to a species of judicial misconduct—are by no means prepared to say that in such a case it would not be the duty of a Court in this country to refuse to recognise the binding efficacy of such a judgment, not by way of reprisal towards the foreign tribunal, but to protect our own fellow-subjects from injustice."

Those observations are made with reference to a judgment *in rem*, always a much stronger case than that of a judgment *inter partes*, because the true principle of a judg-**[243]**-ment *in rem*, I apprehend, is that large general principle which I said at the outset embraces all these cases, viz., that a person who acquires a valid title by the law of any country shall be deemed all over the world to be the owner of the subject-matter. If, therefore, the Court has absolutely the disposal of the rest, and it is in its power, as it is in the case of a judgment *in rem* in the Admiralty Court, it does not matter who is owner; all Courts assume that the matter has been fairly litigated that the persons brought before the Court had such an interest as entitled them to raise the contest, and then that judgment *in rem* binds all the world, and cannot be disputed even by strangers to the litigation. A judgment *inter partes* would not stand in so strong a position; but even on a judgment *in rem* it seems that, while some of the learned Judges thought that the fact of its being *in rem* would prevent their looking even at perversity on the face of the decision, other Judges were of opinion that, if the foreign Court did utterly disregard our proceedings, we could not allow the title of our citizens to be defeated by a decision which could only be arrived

at by a total disregard of the comity of nations, according to which the title of our own citizens would be respected. I should say with respect to an argument founded on my judgment on the demurrer in this case that my meaning has been a little misunderstood, and that I never intended to countenance any vindictive principle with regard to the conduct of another country whose Courts have refused to recognise the proceedings of our own. It is obvious that all I could mean was that our own citizens must be so far protected that they shall not be in a worse situation in Louisiana than they are in China or any other part of the civilised world. If you do find a course of proceeding there which is not recognised by any other country of the civilised world, our own citizens must be protected from the loss of their property, which would be inflicted by decisions so arrived at.

[244] The decision in *Cammell* v. *Sewell*, like that in *Castrique* v. *Imrie*, appears to me to have no bearing on the present question. The Exchequer Chamber held that the master had, by the law of Norway, a power of conveying a good title to the property in question, and therefore that the person who acquired the property in Norway from one competent to give a good title in Norway obtained a good title as against all the world. This is wholly different from the present case. Here it is admitted that the sale was under a writ analogous to a *fieri facias*. In *Castrique* v. *Imrie*, as Mr. Justice Byles points out, it was not a proceeding similar to a *fieri facias*, but a proceeding *in rem*. Here the foreign Court had no power to deal with anything that was not the property of Messrs. Klingender, the debtors, and only arrived at the conclusion that they would hand over the ship to one of their own subjects, by saying that they would disregard the right of property acquired by the bank, and treat the ship as Klingender's property, because the transfer of ownership was effected in a manner which their Courts do not recognise.

Before concluding, I must notice one other case to which I have already incidentally referred, as shewing that the Courts of Louisiana do not appear to be perfectly clear that they are right in insisting on their rule in cases where the chattel is not in their jurisdiction at the time when the foreign transfer is made; I mean *Thuret* v. *Jenkins* (7 Mart. 318, 354). There, as here, the transfer had been made while the ship was at sea. There had been no delivery, but the mortgagor retained possession and brought the ship to Louisiana. There she was attached, and the judgment was in favour of the mortgagee. The Court cited Mr. Justice Story for the proposition that by the common law of England a grant or assignment of goods and chattels is valid between the parties without actual delivery, and that the property passes immediately upon the execution of the deed, though as to creditors the title is not considered per-**[245]**-fect unless possession accompanies the deed. "This," they say, "is the principle which has regulated this Court in the decisions cited at the Bar. But the learned Judge continues, 'an exception to the rule is, where the possession of the grantor is consistent with the deed, or where the property conveyed is at the time of the conveyance abroad and incapable of delivery. In the latter case the title is complete, provided the grantee takes possession in a reasonable time after the property comes within his reach.' The laws of Louisiana do not, it is true, recognise the last exception. Property does not pass here by contracts, but by delivery *traditionibus non pactis*. If the ship had been within the State at the time of the sale the rule in *Norris* v. *Mumford* would have regulated the decision of this Court, but as at that time she was not within the State, the sale ought not to be tested by our laws. It must be by those *loci contractus* against which those of no other country ought to prevail." In another passage of the judgment the same view is still more strongly put: "In the present case the ship, the subject of the sale, was at sea, was a New York ship, and the vendors and vendee resident in New York. If, therefore, according to the *lex loci contractus*, that of the domicile of both parties, the sale transferred the property without a delivery, it did so *eo instanti* or not at all. In transferring it it did not work any injury to the rights of the people of another country, it did not transfer the property of a thing within the jurisdiction of another Government." "If two persons in any country choose to bargain as to the property which one of them has in a chattel not within the jurisdiction of the place, they cannot expect that the rights of persons in the country in which the chattel is will there be per-

mitted to be affected by their contract. But if the chattel be at sea or in any other place, if any there be, in which the law of no particular country prevails, the bargain will have its full effect *eo instanti* as to the whole world, and the circumstance of the chattel being afterwards brought into a country, according to **[246]** the laws of which the sale would be invalid, would not affect it." Every word of that applies to the case I have before me, though it is only right to add that the judgment proceeds afterwards on the ground of the impossibility of taking possession. Although I cannot say I consider it very consistent with the former decision, the Court appears to have proceeded on this distinction; the impossibility of taking possession furnished the excuse for not complying with the Louisiana rule with reference to the transfer of chattels, and it was held that the attaching creditor ought to be displaced because the transferee might perhaps have taken possession if he had had the opportunity. This reasoning does not seem very satisfactory, because I cannot see how the creditor is injured more in one case than in the other. The circumstances as to the creditor seem to be the same, the only question being who has or has not the property in the ship?

In conclusion, let me consider what the consequence would be if this special rule of the Courts of Louisiana were allowed to prevail against the rest of the world. Suppose the law of Louisiana required two witnesses to the transfer of a ship, it might be said, "It has been transferred in England, it is true, but the transfer is invalid for want of two witnesses." Perhaps you might go to another country and find that something else was necessary to be done. Possibly possession might be held insufficient without some further ceremony, and thus the chattel might belong successively to A., B., C., D. or E., according to the law which prevailed in the particular country to which the ship was sent.

I confess it seems to me that much of this error (for error I must, with all respect for the Court of Louisiana, assume it to be) has proceeded from the Court confounding two things: the question of distribution of assets and the question of the title to property, for I find that in justifying their decision in a similar case, that of *Oliver* v. *Townes*, the judgment in which is given fully in sec-**[247]**-tion 388 of Mr. Justice Story's work, they say, "What the law protects it has a right to regulate. A strong evidence of this is furnished by the doctrine in regard to successions. The general principle is that the personal property must be distributed according to the law of the State where the testator dies, but so far as it concerns creditors it is governed by the law of the country where the property is situated. If an Englishman or a Frenchman dies abroad and leaves effects here we regulate the order in which his debts are paid by our jurisprudence, not by that of his domicile."

Under these circumstances, having to come to a decision in a case which is entirely new in specie, and which will never arise, as it seems to me, in any other country in the world except Louisiana, I confess I yield to the view of that section of the Judges who considered, in the case of *Castrique* v. *Imrie*, that even a judgment *in rem* may lose its binding force where there appears on the face of it a perverse and deliberate refusal to recognise the law of the country by which title has been validly conferred. The law of England being by the comity of nations that which must govern the transfer—the transfer being in England, the parties resident here—the ship an English ship at sea on a voyage from an English port; when I find a foreign Court saying, "We will deal with that ship as the property of the person who has already transferred it," that seems to me to be so contrary to law and to what is required by the comity of nations, that I am bound to hold that the property acquired by the Bank of Liverpool must prevail against a sale made on the principle entertained by a foreign Court, that, as between mortgagors and mortgagees, the mortgagees' interest is wholly to be extinguished, and the right of the mortgagors is paramount and absolute.

There are some minor points which remain to be dealt with. There are certain other creditors besides Hughes & **[248]** Co. who had, by the law of Louisiana, a privilege, as it is called, against the ship, and among them Mr. Mure himself, acting as British Consul and not as agent for the bank, was subrogated in respect of wages which he paid to the crew. These creditors had a prior claim according to the law

of Louisiana, and it is to be observed that, had those persons sold the ship, it would have been a matter *in rem*, and the property would have passed. But clearly that was not so. The sale being at the instance of an ordinary creditor, the privileged creditors come in and claim to be first paid out of the proceeds. It appears to be proved that these creditors had privilege by the law of Louisiana, and might have arrested the ship. They were paid, and therefore, they having been paid by the Defendants who purchased the vessel, the amount so paid must be allowed.

There will, therefore, be a declaration that the mortgagees, under the indenture of the 25th of December 1854, are entitled to the ship upon the trusts therein declared in favour of the Bank of Liverpool, and also to all freight receivable since the 15th of January 1858, when Mure claimed possession, subject, both as to ship and freight, to a prior lien on the part of the Defendant, Fogo, in respect of the sums paid to the privileged creditors.

[248] NEEDHAM *v.* OXLEY. *May* 30, 1863.

[S. C. 2 N. R. 267; 9 Jur. (N. S.) 598; 8 L. T. 532; 11 W. R. 745. Approved, *Ledgard* v. *Bull*, 1886, 11 App. Cas. 649.]

Practice. Patent. Particulars of Breaches.

Particulars of breaches delivered with a view to a jury trial of a patent case in this Court are sufficient, if, taken together with the pleadings, they give the Defendant full and fair notice of the case to be made against him.

The bill in this case was filed to restrain alleged infringements of a patent taken out by the Plaintiffs for machinery for expressing liquids or moisture from substances.

[249] The bill stated that, upon an inspection of a machine supplied by the Defendant to the Westminster Brewery Company, "the Plaintiffs ascertained, as the fact is, that the said Defendant's said machine was a palpable and obvious piracy of the Plaintiffs' said invention, and a colourable imitation of their said machine; and that, in fact, the only difference between the Defendant's machine and those of the Plaintiffs' were that the Defendant had placed some wire gauze between the cloths and the slabs used in the Plaintiffs' said machine, and had bored some small holes in the said slabs. But the Plaintiffs charge that such differences were and are trifling and immaterial, and that they had themselves previously tried the use of the wire gauze, and found it useless; and that the said Defendant's said machine included and combined the following substantial ingredients combined in the Plaintiffs' said invention, and the combination whereof was new and important; that is to say, chambers in combination, ducts for drawing in the chambers, filtering medium, stand-pipes, supplying each chamber branching from the stand-pipes, and tie-rods binding the chambers together and forming one machine capable of being taken to pieces for the purpose of discharge."

A jury trial before this Court having been directed, the Plaintiffs, pursuant to the order of the Court, delivered particulars of breaches in these terms:—

"The following are the particulars of breaches, and the instances of machines constructed by the Defendant, which the Plaintiffs complain are infringements of their patent right.

"A machine or filter press for yeast, constructed by the Defendant, and supplied by him to Messrs. Thorne's Westminster Brewery, and in use there, and exhibited to the Plaintiffs in pursuance of the letter of Mr. Messiter, the Defendant's attorney, dated the 23d day of February **[250]** 1863, and being the machine in the said letter referred to.

"Also a certain other machine or press for clay, constructed by the Defendant, and supplied by him to Messrs. Granger & Co., potters, of Worcester.