The Merrimack.

Prize of war.

Goods purchased by British merchants, before the war between the United States and Great Britain, in pursuance of orders from American citizens, shipped to the agent of the British merchants, in the United States, also an American citizen, "on account and risk of an American citizen," and no circumstances of fraud or unfairness appearing in the transaction—were vested in the American citizens at the time of the shipment, and are not liable to condemnation, although the vessel sailed from England, after the declaration of war was known there. Restitution.

But if goods be purchased as above, though the accompanying invoices, bills of lading, and letters be addressed by the British consignors to the American citizens for whom the purchase was made, and all concur to show the property to be in them, yet, if these documents are enclosed in a letter from the consignors to their agent in the United States, though an American citizen, directing him not to deliver the goods, in case of the existence of certain circumstances, nor until he should have received payment from the consignees in cash—the property in the said goods continued in the British consignors, at the time of capture. Condemnation.[1]

Goods by the same ship, purchased as above, and consigned to the agent of the consignors, being an American citizen, in whose name also the bill of lading was made out, but the bill of parcels and invoice in the name of the American merchants for whom the purchase was made; the shipment also being expressed to be on their account, though the goods are spoken of in the letter of the consignors as British property—vested in the American merchants at the time of shipment. The circumstance that the goods continue, during the whole voyage, at the risk of the shippers is immaterial. Restitution.[2]

This was an appeal from the decree of the Circuit Court for the district of Maryland. The following are the material facts of the case:

The ship Merrimack, owned by citizens of the United States, sailed from Liverpool for Baltimore, a few days after the declaration of war by the United States against Great Britain, was known in that country, having on board a cargo of goods, shipped by British subjects, and consigned to citizens of the United States. On the 25th of October 1812, she was captured, in the Chesapeake bay, between Annapolis and Baltimore, by the private armed vessel Rossie, Joshua Barney, commander.

The goods, being libelled as prize in the district *court of Maryland, were severally claimed by sundry citizens of the United States. [*318 These several claims, and the circumstances connected with them, respectively, were thus stated by Marshall, Ch. J., in delivering the opinion of the court:

1. William & Joseph Wilkins, merchants, of Baltimore, claimed the goods contained in eleven cases and one bale, marked W. J. W. These goods were made up for them, in pursuance of their orders, before the war was known in Great Britain, by a manufacturing company, one member of which, Thomas Leich, resided in Leicester, in Great Britain, and the other, Edward Harris, was an American citizen, residing in the United States. The bill of parcels was in the name of Messrs. William & Joseph Wilkins; this paper also served for an invoice, and there was no other on board for these goods. The bill of lading was in the name of Edward Harris, who was the consignee. The goods were accompanied by a letter from Thomas Leich to Edward Harris, dated Leicester, the 29th of July 1812, in which he says, "With this you will receive bill of lading of eleven cases of worsted and

[1] The St. Joze Indiano, 1 Wheat. 268.

[2] The Mary and Susan, 1 Wheat. 25; The Sally Magee, 3 Wall. 451.

cotton hosiery, for Messrs. W. & J. Wilkins, Baltimore, and with insurance to 892*l.* 5*s.* It is a large sum, but, from what I can learn, they are very respectable. Indeed, Mr. Brown of the house of Chancellor & Co. came with him, and seemed almost offended, that did not send the cotton hose he ordered before, and said, he would guarantee the amount of the worsted goods, therefore, must have offended him, if did not comply. Have not sent but about half the cotton goods they ordered," &c., "informed them, that we thought it necessary to secure our property, to ship all to you, as you could prove that they were American property by making affidavit they are *bonâ fide* your property. As our orders in council are repealed, hope your
*319] government will be amicably inclined as well, and *that trade will be on regular footing again, but for fear there should be some other points in dispute, I shall send you, and our friends, through your hands, all the goods prepared for your market which you'll perceive is very large." "Hope you will approve of my sending all, and as there may have been some alterations in some of your friends, shipping them to you gives the power of keeping back to you." There was also on board, a letter dated Leicester, 22d July 1812, signed Harris, Leich & Co., and addressed to Messrs. Wm. & Joseph Wilkins, merchants of Baltimore, in which they say, "The repeal of the orders in council having been agreed on by our government, we have availed ourselves of the opportunity of sending the greater part of your spring and fall orders," &c. "As we are not certain, that your government will protect British property, we have thought it right to ship all ours, under cover to Mr. Harris, who can claim as his own *bonâ fide* property, and he, being a citizen of the United States, thought proper to use every precaution, having received some unpleasant accounts about your government having agreed on war with this country, which we hope will not be the case.

2. McKean & Woodland, citizens of the United States, claim sundry parcels of goods, part of the same cargo, as their property. These goods were purchased by Baily, Eaton & Brown, merchants, of Sheffield, in pursuance of orders from the claimants. They were shipped to Robert Holladay, also an American citizen. The bill of lading was to Robert Holladay, "on account and risk of an American citizen." The invoice was also headed to Robert Holladay. A letter from Baily, Eaton & Brown, to Samuel McKean, dated 11th July 1812, says, "A few days ago, we received a letter from Mr. Rogerson, of New York, informing us that the partnership of Messrs. McKean & Woodland was dissolved, but he does not say, whether you or Mr. Woodland continue the business, or whether both of you decline it.
*320] We have purchased about 3000*l.* sterling of goods, by order of *the late firm, and on their account, most of which have been purchased and paid for by us, from fifteen to eighteen months ago, and have been on our hands, waiting for shipment. We have this day given orders to our shipper at Liverpool, to put them on board a good American vessel, sailing for your port, with a British license; but from the uncertainty we are in respecting the particulars of your dissolution of partnership, and, in fact, not knowing whether to consign them to you or Mr. Woodland, we have finally concluded to consign them to Mr. Holladay, with whom you will be pleased to make the necessary arrangements respecting them." "We have addressed the invoice to Mr. Holladay to your care; and directly on receiving it, if he should not be in Baltimore, you will please advise him of its

arrival." The residue of the letter contains their reasons for hoping that Mr. McKean will not insist on the usual credit, but will remit immediately on receiving the goods. This request is founded on their having been so long in advance for the purchase of them. Messrs. Baily, Eaton & Brown addressed a letter to Mr. Holladay, dated the 10th of July 1812, in which they say, "Inclosed you will receive invoices of sundry goods for Messrs. McKean & Woodland, which complete their orders." They then assign the same reason for shipping the goods to Mr. Holladay, that is given in their letter to Mr. McKean; and after directing him to arrange with Mr. McKean, add, "We cannot view this consignment at all in the light of an intercepted shipment, coming within the meaning of the articles of agreement between you and us." This letter also contained a proposition for immediate remittance, founded on the time which had elapsed since the goods were purchased. This proposition, they say, is made to all their friends in the United States, and they hope none will refuse to accede to it. "But," they add, "in thus acting, we have left the matter to the free and unbiassed will of our friends, and they are certainly upon honor."

3. Messrs. Kimmel & Albert, merchants, of Baltimore, claimed seven packages of goods on board the *Merrimack, which were purchased, [*321 in pursuance of their orders, by Baily, Eaton & Baily. The invoice, bill of lading and letters, addressed (one by the consignors and the other by the shipper, who was their agent) to Messrs. Kimmel & Albert, concur in showing property in the claimants. But all these documents and letters are inclosed in a letter of the 5th of August 1812, written by Baily, Eaton & Baily to Samuel McKean. In this letter, the writers refer to a former letter of the 3d of July, in which they informed Mr. McKean that they should, on the recommendation of their general agent, Mr. Holladay, inclose their invoices and bills of lading for the adjacent country to him, and requested him to make inquiries into the circumstances of their correspondents, and be regulated, as to putting the letters, &c., into the post-office, so as to reach the persons to whom they might be addressed, by the result of those inquiries. Messrs. Baily, Eaton & Baily indulge the hope that the repeal of the British orders in council will restore peace between the two countries, in which event, McKean is still to be governed by their letter of the 3d of July. "But," they add, "if, when you receive our invoices and bills of lading, a state of war should really continue, it will be proper not to deliver these goods, until you have received the amount of the invoices from the consignees, in cash."

4. John H. Browning & Co. were also claimants of part of the cargo. This claim stood on precisely the same principles with that of Kimmel & Albert. The documents given in evidence, were, in effect, the same, and were inclosed in the same letter from Baily, Eaton & Baily to Samuel McKean.

It was contended by the captors, in the district court, that, from the papers and letters on board, it appeared, that the goods were not sold and delivered in England, so as to vest the property in the claimants, but were sent to the agents of the shippers in the United States, to be delivered or not, according to their discretion: consequently, that the property was not changed, and the goods, therefore, were liable to capture as British property.

*Restitution was decreed in the district court, and the decree was affirmed in the circuit court. An appeal was taken to this court, where the captors prayed condemnation, on the same grounds as in the courts below.

Harper, for the appellants, after stating the facts of the case, argued, that the claims of the captors to the several parts of the cargo in question all rested on the same principle, viz: That no transfer of the property had taken place at the time of the capture. The shippers were British subjects.

1st. As to the property claimed by William & Joseph Wilkins. It appears from the evidence introduced into this part of the cause, that the goods were not to be delivered to the claimants, until they had come first to the hands of the shippers' agent, who was to decide upon the solvency of W. & J. Wilkins, and to regulate himself accordingly, with regard to the delivery of the goods. He even had a power, under certain circumstances, to make them his own. W. & J. Wilkins were also to have an option, either to take the goods or not. But a more powerful argument than either is, that the shippers themselves, in their letters both to the consignee and the claimants, denominate these goods British property, and express their apprehensions that the American government will not protect it. Again, if these goods had been lost at sea, they could not have been charged to the Messrs. Wilkins, as goods sold and delivered; the loss would clearly have been the loss of the shippers. The property in this part of the cargo cannot, therefore, be considered as having been vested in W. & J. Wilkins. It was clearly in the British shippers, both at the time of shipment, and at the time of capture. The claim of the Messrs. Wilkins ought, therefore, to be rejected.

2d. As to the claim of McKean & Woodland, *Harper* stated the facts, and prayed condemnation on the general principle that the property had not been transferred.

*323] 3d and 4th. In opposing the respective claims of Kimmel *& Albert, and of John H. Browning & Co., the counsel for the captors argued on nearly the same grounds as in the case of W. & J. Wilkins; and in addition thereto, he urged the condition of payment which was annexed to these two cases, and which was to be performed before the delivery of the goods to the claimants.

He also made a second point, in regard to all the claims, viz: That, admitting the goods to have been the property of American citizens, yet, since the declaration of war was known in Liverpool, at the time of the shipment, the claimants are to be considered as having been engaged in a hostile trade, which gives the property an enemy character, and subjects it to condemnation. The shippers, on this supposition, must be looked upon as the agents of the claimants, and the acts of agents, are, in law, the acts of their principals.

Pinkney, contrà, for the claimants.—If the title of the claimants be good in equity, it is sufficient; but it is good at law, as well as in equity. In examining the several claims, I shall follow the order which has been pursued by the counsel for the captors.

First, as to the claim of W. & J. Wilkins. The invoice and bill of parcels show the purchase by the claimants. The bill of parcels is always good

evidence, in an action on a policy, to show interest. The invoice corresponds with the bill of parcels and is not contradicted by the bill of lading. Leich's letter to Harris speaks of the goods as being "for Messrs. W. & J. Wilkins." These circumstances are strongly in our favor. It has been urged, however, on the other side, that the property of the goods could not have been in the claimants, at the time of capture, because, 1st. There was a condition of payment, without complying with which, the goods were not to be delivered; and 2d, because there was a power vested in Harris, to keep back the property, in case of the insolvency of the Wilkins's. The first objection is founded on an error in fact. The objection, if applicable to the claimants of the other parts *of the cargo, is not so here. It appears, indeed, in some part of the evidence, that an inducement to prompt [*324 payment was held out to the Wilkins's, viz., an offer to allow seven per cent. discount for prompt payment; but there was no express condition of payment. The second objection, viz., that Harris was empowered to keep back the goods, in case of the insolvency of the claimants, is easily answered. Insolvency of the parties was the sole ground on which Harris could retain the goods; but this is only the same power which the shipper himself would have had, by the general law in maritime cases, if he had consigned the goods directly to the Wilkins's. It is the general law, in case of the insolvency of the consignee, that the shipper may stop the goods *in transitu in itinere*, although purchased in England, if the purchase was on credit. The intervention of Harris, in this case, merely gives a facility to the right which the shippers before possessed. *The Josephine*, 4 Rob. 21, 25.

It is also urged, that the shippers themselves, in their letters, have denominated the goods in question, British property, and expressed an apprehension that it would not be protected by the American government, and have therefore suggested to Harris, that he could swear they were his. This objection possesses little weight. A mere attempt to conceal belligerent property only deprives the party of the benefit of further proof, but is not a ground of confiscation. *The Madonna delle Gracie* (*Gregory's case*), 4 Rob. 161, 195.

2d. As to the claim of McKean & Woodland. Two objections to this claim, arising from the letter of Baily, Eaton & Brown to McKean, have been urged by the captors. 1st. The consignment to Holladay. 2d. The expectation of the shippers that McKean & Woodland would pay cash. The consignment to Holladay needs no farther explanation than is to be found in the letter which states the fact. The shippers, having heard that the partnership of McKean & Woodland was dissolved, were uncertain to which of them the consignment ought to be made, and *therefore, [*325 determined to consign the goods to Holladay. But the property vested in McKean & Woodland, notwithstanding this intermediate consignment. In a court of prize, such intermediate consignment is not considered as altering, in any degree, the nature of the case. 2d. Though the letter from the shippers requests an immediate cash payment, there is no express condition to that effect: there is merely an appeal to the justice and honor of the claimants. An additional proof that the property was in the claimants, is, that it was insured for them and not for the shippers. It appears that all the bills of lading, except that for W. & J. Wilkins, express the shipments to have been made on account and risk of American citizens gen

erally. The reason for this general mode of expression was the uncertainty of the shippers respecting the dissolution of the partnership.

3d and 4th. We now come to the claims of Kimmel & Albert, and Browning & Co., which depending on precisely the same principle, will be examined together. In these two cases only, is there an absolute condition of payment. But the goods had been regularly ordered by the claimants, long before they were shipped. They were finally shipped for them, and in pursuance of their orders. They were delivered to the master of a general ship. The invoice, bill of lading and letters, all concur in showing property in the claimants. The legal property vested in them, by the delivery of the goods to the master. The shipper, having delivered them to the master, was *functus officio*, and could not thereafter stop the goods, on any ground but the insolvency of the consignee, which is the only case of stoppage *in transitu* authorized by the common law or the law maritime. *The Aurora*, 4 Rob. 181, 219 (Conversation between Sir W. Scott and Dr. Lawrence); *The Constantia*, 6 Rob. 325–27.

Again, can a captor divest the eventual rights of citizens, or does he take the property subject to the conditions to which it would be subject in the hands of the consignor or his agent? We contend for the latter doctrine.

*326] *The rights of the citizen become absolute, upon his complying with those conditions. In the present case, if the goods had arrived at their port of destination, without capture, the title to them would have become absolute in Kimmel & Albert, upon payment to the consignor of the amount required: and, as the captor, according to our doctrine, does but stand in the place of the consignor, we contend, that the property will become equally absolute in the claimants, upon making the same payment to him.

We do not admit the doctrine, that property cannot, upon the high seas, pass, *in transitu*, so as to defeat the captors. Suppose, it had been agreed that the property should change, after it had passed a certain degree of longitude; would not the agreement be carried into effect, upon that degree of longitude being past? But it is not now necessary to contend for this doctrine, because the property in the present case, was vested in the claimants, upon the shipment, liable, however, to be divested upon a condition. There is manifest inconsistency in the English prize law. A belligerent lien will be condemned, but a neutral lien will not be protected: neutral property may become belligerent *in transitu*, but belligerent property cannot become neutral. This court will adopt the reason of the rule, but not the rule itself.

Harper, in reply.—In this case, there was no transfer of either an equitable or legal right. In the case of W. & J. Wilkins, the delivery of the goods was only to Harris; or to the master of the ship, who, by undertaking to deliver them to Harris, became his agent, and not the agent of the Wilkins's. So, with regard to the invoice, bill of lading and bill of parcels; they were all delivered, not to the Wilkins's, but to Harris or his agent, the master. No evidence of the title of W. & J. Wilkins was put in a course to reach them, but through the agency of Harris, who was not to deliver it at all, but in a certain event. The goods, although purchased by order of the claimants, were not delivered to them. The claimants could not have maintained an action for them, either at law or in equity.

The Merrimack.

*McKean & Woodland's case is still stronger against them. The business of that concern was not continued by any person. They have become insolvent. Holladay has the absolute control over the goods. He was to make arrangements with the claimants, or with McKean alone, and was to require cash.

Saturday, March 12th, 1814. (Absent, Livingston, J.) MARSHALL, Ch. J., after stating the facts relating to the several claims in this case, delivered the following opinion of the court, as to the claims of McKean & Woodland, Kimmel & Albert, and John H. Browning & Co.

1. As to the claim of McKean & Woodland. The question of property, in this case, depends on certain letters written by Baily, Eaton & Brown, which were found on board the captured vessel. A letter of the 11th of July 1812, addressed to Samuel McKean, shows in the clearest manner, that the property in dispute was purchased and shipped for McKean & Woodland, in pursuance of their orders; and accounts for assigning it to Mr. Holladay.

There is nothing in the cause which can throw the slightest suspicion on the fairness of this transaction. It, unquestionably, is, what, on the face of these letters, it purports to be, a purchase for McKean & Woodland, made in pursuance of their orders, and shipped for them to Robert Holladay, because, in the moment of shipment, information was received that their partnership was dissolved, and the shipper had no instructions in what manner to direct to them. In this situation, he considered himself as acting most certainly for their advantage, by addressing the goods to an agent residing in the same town with McKean & Woodland, who should receive them to their use. In such a case, the court is of opinion, that the property was vested in McKean & Woodland, and is, consequently, not liable to condemnation as enemy property. The sentence is affirmed.

*2. As to the claim of Kimmel & Albert. From their letter, it is [*328 apparent, that, in the event of war, Baily, Eaton & Baily reserved to themselves that power which ownership gives over goods, and instructed their agent, McKean, in what manner that power was to be exercised. There being no letter addressed to Kimmel & Albert, but under cover to McKean, it is apparent, that they were to know nothing of the shipment, unless, in the opinion of McKean, it should be prudent to make the communication; and even then, the property was to became theirs, not under the original contract, but under a new contract to be made with McKean. The delivery on board the ship, was a delivery to McKean, not absolutely for Kimmel & Albert, but for them, provided they acceded to new and distinct propositions made by Baily, Eaton & Baily. In such a case, no change of property could take place until Kimmel & Albert should accede to these new propositions; and the capture having taken place before the contract was complete, the goods must be considered as enemy property. The sentence is reversed, and the claim dismissed.

3. The claim of John H. Browning & Co. This claim stands on precisely the same principles with that of Kimmel & Albert. The documentary evidence is in effect the same, and was inclosed in the same letter from Baily, Eaton & Baily to Samuel McKean. The claim, therefore, must be dismissed. The sentence is reversed, and the claim dismissed.

JOHNSON, J., delivered the opinion of the majority of the court, as to the claim of W. & J. Wilkins, as follows :—The points of distinction between this case and that of McKean & Woodland, unfavorable to these claimants, are the following : 1. That Harris, the direct consignee, had a control given
*329] him over the goods, which authorized him, had *he thought proper, to refuse to deliver them over to the Wilkins's. 2. That Harris had also a power, under certain circumstances, to make them his own. 3. That, in the letters both to the Wilkins's and Harris, the consignor alleges as his reason for making the shipment through Harris, his fears that this government would not protect British property ; thereby, as is contended, acknowledging this property to be British. On the other hand, it is a circumstance favorable to this claim, that the original bills of parcels were made directly to the claimants, and were sent along with the shipment, as a substitute for an invoice.

It is assumed as a postulate, that a direct consignment on account of the consignee, made in pursuance of his orders, is not subject to condemnation as prize of war ; and that it is immaterial, whether it be purchased for cash or credit ; or insured in the enemy's country or elsewhere. It will, then, be enough to show, that every beneficial interest which such a shipment would vest in the consignee, was vested in the claimants in this case.

The first difficulty arises from the circumstance that the bill of lading was made out to Harris, and not to the Wilkins's, whereby the master of the ship became bound to deliver them to Harris, or his assigns. Upon a fair view of the whole transaction, this distinction will be found rather to be formal than real ; and that it produces no difference in the state of right between these parties. The interest vested in the consignee, by the delivery to the master, is not absolute to all purposes. So far as relates to the right of stoppage *in transitu*, it continues subject to the control of the consignor, and may be reduced by him into possession, before actual deliv-
*330] ery ; or the authority of the master to deliver them *according to the original bills of lading, may be countermanded, and another destination given them.

Upon comparing all the circumstances of this case, it will be found, that the transaction was so arranged as to produce no other change in the rights of the parties, than to put it in Harris's power to exercise this right of stoppage *in transitu*, in case of the insolvency of the Wilkins's. The bill of lading is made out to Harris, which gave him the right to demand the goods of the master. But the invoice, which has the additional strength of a bill of parcels, is made out to the claimants, which gave them the right to demand the goods of Harris. Both in the letter to Harris and to the Wilkins's, the shipment is declared to be on account of the latter ; and in the letter to the former, the shipper goes into a detail of his reasons for giving the claimants so large a credit. Thus, these papers, taken together, place the interest of these claimants on the same footing as if a bill of lading had been made out to Harris, for the use of the Wilkins's ; and in that case, there could have been little doubt that the claim must be sustained.

If the invoice, although made out to the claimants, had been inclosed to the direct consignee, it would have furnished a strong argument in favor of the captor. But here, the evidence of right is placed in the claimants' own hands ; thereby acknowledging their right in the goods shipped, and furnish

ing them with the means of asserting it. Thus, the shipper could never have denied the rights of the claimants in this case; for he had furnished the most direct and conclusive evidence against himself.

But it is asserted, that Harris had it in his power to make these goods his own, in defiance of the will of the claimants. If this were the fact, it would only show that, in *either view of the alternative, it was a [*331 shipment on American account, and that the shipper had parted with all his interest. But the fact is not so: and in answering this argument, we answer the remaining one also. The shipper knew what he was about. War was already probably declared, and he was aware of the crash of mercantile credit which generally follows on such an event. He also knew, that in case of asserting his right of stoppage *in transitu*, the property reverted and became British; in which case, as he expresses himself, the property might be subjected to seizure, as enemy's property. With these considerations on his mind, he makes out the bill of lading to Harris, and informs him that his object is to enable him to keep the goods back, in case of an alteration in the circumstances of the claimants: and in this case only, is the hint given him that he may claim them as his own.

It is contended, that he acknowledges, in his letter to the claimants, that the property is British. But this is an error in fact. It was necessary to assign some reason, or some excuse, for not having the bills of lading made out to the claimants themselves. And for this reason, he urges an apprehension that our government would not protect British property. But this reason could only be applicable in the event of a stoppage *in transitu;* as a direct shipment to the claimants would have left no room for such an apprehension. In the letter also to Harris, it is said, is contained an acknowledgment that the property is British. This, also, is founded in mistake; for the letter to Harris only communicates the reason which had been assigned in the other letter for having the bill of lading made out as it was. But suppose, the passage in the letter to the claimants, on this subject, had been full and explicit to the declaration of an opinion that the property continued British, although shipped on American account; yet this would have been but an expression of an erroneous opinion, and certainly ought not, so far as the interests of the claimants are concerned, to have an influence on the decision of this court.

But it is asserted, that the goods continued, on the whole voyage, at the risk of *the shippers. This may be true, and yet it does not prove [*332 enough. Had the shipment been direct to the claimants, and insurance omitted, contrary to order or custom, the shippers would have been equally liable, and yet the property would not have been subject to capture. It is enough for the purposes of the claimants, that the property in the goods had been transferred to them, independently of the control of the shipper or his agent, except so far as the right to stop *in transitu* interfered. And such was the situation of the rights of the parties in this case. The goods ordered by the claimants were shipped to an agent, for their use, subject only to a right which unqestionably, under any circumstances, existed in the shippers. In their letter to the claimants, they inclose a bill of parcels, by way of invoice, containing a positive acknowledgement of the sale to them; and the letter itself, as well as that to Harris, speaks of the goods expressly as their goods. The immediate consignee could, therefore, only

be considered as the bailee of the claimants. Nor does it appear, that a tender of the money would have been necessary to entitle them to receive the goods of Harris, as, in the letter to Harris, it is acknowledged to be a sale on credit, and particular discounts offered as an inducement for an early payment. Indeed, there are words in the letter to the direct consignee, which amount to a positive declaration that the shipments were not on his account, nor on that of the shippers, but for the use and benefit of others. "I shall send you, and our friends, through your hands, all the goods prepared for your market." By connecting these words with the bills of lading, the result is, that, although the direct consignee was entitled to demand the goods of the master, yet it was not to his own use, but to the use of the several persons on whose account they were shipped.

Decree affirmed.

Story, J., delivered the following separate opinion, as to the claim of W. & J. Wilkins—I cannot concur in the opinion of the court, just delivered, as to the claim of the Messrs. Wilkins. It is true, that the goods were purchased pursuant to the orders of Messrs. Wilkins; but I do not think
*333] that the *property, by the mere purchase, became vested in them; and the usage and course of trade is generally otherwise. The purchase was made with the money of the shipper: and until a delivery, actual or constructive, to the Messrs. Wilkins, the propriety thereof, remained completely in the shipper. The goods were also shipped as the property of the shipper, consigned to the agent of the shipper, and not to the agent of the Messrs. Wilkins, to be delivered only in case of the consignee's being satisfied of their perfect solvency. It is true, that the bill of lading purports that the goods are shipped on account and risk of the consignee; but the confidential letters explain the transaction, and show that the shipment was so made, as a cover against belligerent risks; and that the property was not intended to be changed from the British shipper, in its transit. The delivery, then, of the goods on board of a general ship, was no delivery to the Messrs. Wilkins: it was not even a delivery which vested the property of the goods in the consignee. The legal property and possession thereof still remained in the shippers; and if the goods had actually come to the hands of Mr. Harris, his possession would have been but a continuation of the possession of the shipper. In contemplation of law, the goods were as much under the control and possession of the shipper, as if he had been on board the vessel, during the voyage, or had shipped them in his own name. If they had been lost, during the voyage, the loss would have been his. He had not a mere right of stoppage *in transitu* in case of insolvency, for that can be exercised only where the property by the shipment is vested in the consignee for his own use; but he had a perfect right of countermand in all cases whatever. He might sell the property, give it a new direction, control its delivery, and, indeed, exercise all the rights of full dominion and propriety. It seems to me, that if the Messrs. Wilkins had neither a *jus ad rem*, nor a *jus in re*, and the latter only is recognised in prize courts, they could not, by subsequent acts, overreach the legal rights of the captors. At the time of the shipment and capture, it was, in my view, enemy property, liable to condemnation, having no neutral or American *onus* attached to it. It was subject to the legal claims of the creditors of the shipper; and noth-

ing existed in the Messrs. Wilkins but a mere *spes occupandi*, or, as the common law phrases it, a mere possibility, which attached *neither to [*334 the substance nor the form of the thing.

Upon what ground, then, if I am right as to the ownership of the goods, can the claim be maintained? The right of capture acts upon the proprietary interest of the thing captured, at the time of capture. It is not affected by the secret liens, or private engagments of the parties. It repudiates even the strong claim of a bottomry-bond, because it is not a *jus in re*. Can, then, a mere possibility be of more consideration in a court of prize? The absence of all authority to this effect, and the strong and emphatic language of all the cases as to secret liens, speak as powerfully as the most direct and pointed decisions against it.

There is a case cited by the court in *The Aurora*, 4 Rob. 218, where property was shipped, by a merchant in Holland, to A., a person in America, by order of B., and per account of B., but with directions to A. not to deliver it, unless satisfaction should be given for the payment; and it was held as good prize, on the ground, that the property still remained in the enemy shipper. This case I think strongly in point; and the manner in which Lawrence attempted to distinguish it from the case then on trial, shows a full concurrence in its correctness. The reasoning of the court in *The Aurora* itself, and in *The Marianna*, 6 Rob. 22, are also illustrative of the general doctrine.

On the whole, I consider that, by the doctrine of the common and the prize law, these goods were, at the time of capture, enemy property; and that the claim of the Messrs. Wilkins, ought to be rejected; and in this opinion, I have the concurrence of two of my brethren.(*a*)

Monday, March 14th. *Harper* suggested diminution of the record in the case of W. & J. Wilkins, and prayed the court to grant a writ of *certiorari* to the court below; but the court refused, the case having been argued and decided.

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*The Frances, Boyer, master: Thompson *et al.*, claimants. [*335

Prize.—Domicil.

A naturalized citizen, who, in time of peace, returns to his native country, for the purpose of trade, but with the intention of returning again to his adopted country, continuing in the former a year after the knowledge of the existence of war between the two countries, for the purpose of winding up a complicated business, and engaging in no new commercial transactions whatever with the enemy, and actually returning to his adopted country in a little more than a year after his first knowledge of the war, is to be considered as having gained a domicil in his native country; and his goods, captured after the war, liable to condemnation.[1]

Goods appearing by the ship's papers to be a consignment from alien enemies to American merchants, condemned *in toto* as prize, although further proof was offered that American merchants were jointly interested, and that they had a lien upon the goods, in consequence of advances made by them. Further proof on these points refused.

This was an appeal from the sentence of the United States' Circuit Court for the district of Rhode Island. The facts were as follows:

(*a*) Judges Washington and Todd.

[1] And see The Friendschaft, 3 Wheat. 15.