bonâ fide purchased by the claimants, for a full and valuable consideration, without notice of the offence. Upon this ground, she was, by the decree of the district court, ordered to be restored; which decree was affirmed by the circuit court. Judge STORY's opinion in prononncing that decree, will be found in the preceding case of the *United States* v. 1960 *Bags of Coffee*. This case having been submitted upon the arguments which were had in that case—

JOHNSON, J., delivered the opinion of the court, as follows:—This case depends upon the principle established in the case against the coffee, the Bohlens, claimants.(*a*) *The decision, as in that case, was founded upon the ground of a sale to a *bonâ fide* purchaser, without notice. [*418 The decree of the circuit court of Massachusetts district, in this case, is, therefore, reversed, and the brigantine Mars adjudged forfeited to the United States.

Decree reversed.

The FRANCES, BOYER, Master: IRVIN'S claim.

Capture as prize.—Discharge of lien.

No lien upon enemy's property, by way of pledge for the payment of purchase-money, or otherwise, is sufficient to defeat the rights of the captors, in a prize court, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties.[1]

Where goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him, as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent the consignee's lien from attaching.

THIS was an appeal from the sentence of the Circuit Court of Rhode Island, condemning certain British goods, captured on board the Frances. These good were claimed by Thomas Irvin, a domiciled merchant of the United States, on the ground of lien.

Irving, for appellant: *Pinkney*, for captors.

Tuesday, March 15th, 1814. (Absent, Marshall, Ch. J.) WASHINGTON, J., delivered the opinion of the court, as follows:—Thomas Irving is a merchant of New York, and claims certain packages of merchandise consigned to him by Robertson & Hastie, and also three boxes of merchandise consigned to him by Pott & McMillan. The consignors were British subjects, residing in Great Britain, at the time that these goods were shipped, which, according to the terms of the bills of lading, were on account and risk of the shippers.

It is not pretended, that the real ownership in these goods was not vested in the consignors, enemies of the United States; but the claimant founds his pretensions on a lien created on the goods consigned by Robertson & Hastie, in consequence of an advance made to the shippers, in consideration of the consignment, by his *agent in Glasgow; and on the goods shipped by Pott & McMillan, in virtue of a general balance of [*419

(*a*) The case of the United States v. 1960 Bags of Coffee, *ante*, p. 398.

[1] The Battle, 6 Wall. 498; The Hampton, 5 Id. 372.

account due to him as their factor. To establish these claims, in point of fact, an order for further proof is asked for, and the question is, whether, if proved, the claim can, in point of law, be sustained?

The doctrine of liens seems to depend chiefly upon the rules of jurisprudence established in different countries. There is no doubt, but that, agreeable to the principles of the common law of England, a factor has a lien upon goods of his principal, in his possession, for the balance of account due to him; and so has a consignee, for advances made by him to the consignor. The consignor or owner cannot maintain an action against his factor, to recover the property so placed in his possession, without first paying or tendering what is thus due to the factor. But this doctrine is unknown in prize courts, unless in very peculiar cases, where the lien is imposed by a general law of the mercantile world, independent of any contract between the parties. Such is the case of freight upon enemies' goods, seized in the vessel of a friend, which is always decreed to the owner of the vessel. Abbott on Shipping 184. It is, to use the words of Sir W. Scott, "an interest directly and visibly residing in the substance of the thing itself." The possession of the property is actually in the owner of the ship, of which, by the general mercantile law of all nations, he cannot be deprived, until the freight due for the carriage of it is paid. He has, in fact, a kind of property in the goods, by force of this general law, which a prize court ought to respect and does respect. On the other hand, the captor, by stepping into the shoes of the enemy owner of the goods, is personally benefited by the labor of a friend, and ought, in justice, to make him the proper compensation: and on the other, the ship-owner, by not having carried the goods to the place of their destination, and this, in consequence of the act of the captor, would be totally without remedy to recover his freight against the owner of the goods.

But in cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and *420] *even upon the prize courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property and neutral claimants, have excluded such cases from the consideration of those courts. In the case of *The Tobago*, 5 Rob. 196, where an attempt was made by a Britith subject, to set up a bottomry interest in an enemy's ship, Sir W. Scott observed, that no precedents to sanction such a claim could be produced: and he very properly concluded, that this was strong evidence that it had not been the practice of the court to consider such bonds as properly entitled to its protection. And it seemed to be conceded, that, upon the same principle, the captor could not entitle himself to the advantage of such liens, existing in an enemy, upon neutral property. From this it appears, that the doctrine of the prize courts upon this subject, works against as well as in favor of captors. The case of *The Marianna*, 6 Rob. 24, avoids all the objections made to the application of the case of *The Tobago* to the present. It is precisely in point.

The principal strength of the argument in favor of the claimant in this case, seemed to be rested upon the position, that the consignor in this case could not have countermanded the consignment, after delivery of the goods to the master of the vessel; and hence it was inferred, that the captor had

no right to intercept the passage of the property to the consignee. This doctrine would be well founded, if the goods had been sent to the claimant, upon his account and risk, except in the case of insolvency. But when goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent to the consignor, at any time before actual delivery to the consignee, to countermand it, and thus to prevent his lien from attaching. Upon the whole, the court is of opinion, that, upon the reason of the case, as well as upon authority, this claim cannot be supported, and that the sentence of the court below must be affirmed with costs.

Livingston, J. (*dissenting.*)—I differ in opinion from the majority of the court. Irvin had a lien on the goods, apparent on the face of the papers. I have no difficulty in condemning the property, subject to that lien; but I cannot assent to an unqualified condemnation.

Decree affirmed.

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*The Thomas Gibbons, Rockwell, master. [*421

Privateers.—Condemnation as prize of war.

Under the 8th section of the prize act of June 26th, 1812, the president had full authority to issue the instruction of 28th August 1812.

The commissions of the privateers of the United States may be qualified and restrained by the instructions of the president.

A shipment made, even after a knowledge of the war, is to be considered as having been made in consequence of the repeal of the orders in council, if made within so early a period thereafter, as would leave a reasonable presumption, that the knowledge of that repeal would induce a suspension of hostilities on the part of the United States.

By the mere act of illicit intercourse, the property of a citizen is not divested *ipso facto;* it is only liable to be condemned as enemy property, or as adhering to the enemy, if rightfully captured during the voyage.

The president's instruction of 28th August 1812, was meant to protect all British merchandise on board an American ship, without any exception on account of British proprietary interest.

This was an appeal from the decree of the Circuit Court for the district of Georgia.

The ship Thomas Gibbons sailed from Liverpool for Savannah, on the 16th of August 1812, was captured on the 12th of October following, on the high seas, off Tybee light-house, and the same day, brought into the port of Savannah, as prize to the privateer Atas.

The ship and cargo were under the protection of a special license, dated 21st July 1812, and conceived in the usual terms of the document usually denominated the Sidmouth license, except that, in this instance, the protection was extended to the return-voyage back to Liverpool, there to discharge the cargo and receive freight, if it should be found not to be allowable for the vessel and cargo to enter the ports of the United States. The clearance from Liverpool, 13th August 1812, mentioned the ship as being released, in consequence of her license, from an embargo laid on American vessels. The cargo, shipped at Liverpool by sundry British merchants, was consigned to sundry commercial houses at Savannah, and was claimed by the respective consignees; by some, in their own behalf, and by others, in behalf of their correspondents in the interior.

From the evidence introduced into the cause, it appeared, that part of