

THE THOMAS GIBBONS, ROCKWELL, MASTER.

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 the goods, although expressed to be on account and risk of the consignees, was shipped without previous orders or authority: that some of them were shipped under general orders (transmitted in time of peace) to ship goods: others, under particular orders given during the operation of the orders in council and the non-intercourse act; such as, 'to ship "when the trade opened," "at a proper season," "as soon as it was legal to ship to the United States," &c. and lastly, that some of them were shipped with an understanding that they were to become the property of the *citizen consignee upon arriving* at the port of destination.

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 U. 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 U. 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 right-

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fully captured
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tion of 28th
August 1812,
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chandize on
board an A-
merican ship,
without any
exception on
account of Bri-
tish propieta-
ry interest.

The commission of the *Atlas* was granted on the 24th of September, 1812, and was accompanied by a copy of the president's instruction to privateers, of the 28th of August, 1812, by which the public and private armed vessels of the United States are directed not to inter-rupt "any vessels belonging to citizens of the United States coming from British ports to the United States laden with British merchandize, in consequence of the alleged repeal of the British orders in council."

JONES, for the captors,

Contended that the ship and cargo were enemy property.

I. Constructively so, by the maritime law of nations, according to which law the hostile character is im-pressed.

1. By being placed, by the enemy's pass or license, *infra proesilium hostis*; and by the employment and course of traffic. 1 Rob. 10, 11, *The Vigilantia*.

2. By direct trading with the enemy, *flagrante bello*.

II. Actually so, with regard to a great proportion of the cargo, according to the principles of municipal law, as recognized and acted upon by prize Courts, in administering the maritime law of nations; according to which,

1. Goods shipped without previous orders or authority, although expressed to be on account and risk of the consignee, continue the property and at the risk of the enemy shipper, until accepted by the citizen consignee.

2. General orders (transmitted in time of peace) to ship goods, are, *ipso facto*, superseded, if war intervene and render the act unlawful as well as dangerous.

3. Particular orders (given during the operation of the orders in council and the non-intercourse act) to ship "when the trade opened," or "at proper seasons," or "as soon as it was legal to ship to the United

States," could not authorize a shipment, merely upon the conditional revocation of the orders in council, whilst the American non-intercourse act continued in force: *a fortiori* if war should supervene.

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4. The proprietary interest in goods shipped with an understanding that they are to become the property of the *citizen consignee*, upon arriving at the port of destination, continues in the *enemy shipper* until arrival and delivery, without regard to the terms in which the consignment is ostensibly made. 2 Rob. 111, *The Packet de Bilbao*.

That, therefore, goods captured *in itinere*, under either of the foregoing predicaments, were to be treated as the property and at the risk of the shipper, and as partaking of his national character.

The principal question, he said, which would now be agitated was, whether the instruction of the president of the United States to American privateers, of 28th August, 1812, extended to the case now under consideration. He contended that it did not: or if it did, that it could not legally avoid the capture, nor in any manner affect the rights of the captors, *quoad* the prize in question, but could only be enforced (as originally intended) by the exercise of executive discretion and authority over the *commission* of the privateer. That, according to the decision in the case of the *Sally*, *that the prize act operates as a grant from the United States to the captors*, the president could not deprive them of their rights under that act. That the power of the president to instruct must be limited by the rights so granted to the captors. That the authority with which he was invested by congress, was only given him to regulate the *conduct* of our privateersmen, and to prevent abuses—not to limit their rights already vested. That he had no general authority to limit the rights of war, as was clear from the passage of particular acts of congress investing him with the respective powers of removing British subjects, of giving licenses to depart, &c. which would have been wholly unnecessary had he possessed a general power over these matters. That the position contended for, was further supported by the terms employed in the third section of the prize act, in which the owners, &c. of privateers are required to give bond

THE to the United States that they will observe "the in-
 THOMAS structions which shall be given them *according to law*,
 GIBBON, for the *regulation of their conduct*;" also by the letter of
 ROCH- the secretary of state (Mr. Monroe) to Mr. Russell, of
 WELI, August 31st, 1812, written under the eye of the presi-
 MASTER, dent, in which the secretary says, that it was not in the
 power of the president to control the privateers, except
 by an indiscriminate revocation of their commissions.
 But,

2. That, admitting the power of the president to issue the instruction under consideration, the present case was not embraced thereby. That the property in question, having been shipped after a full knowledge of the war, could not be considered as shipped in consequence of the alleged repeal of the orders in council. That the only time in which the shipments contemplated by the instruction, could be made, was that which intervened between the repeal of the orders in council and the knowledge of the declaration of war; after which it was unreasonable to calculate on the safety of property shipped for the United States. That the ship, also, was not within the description of vessels intended by the instruction to be exempted from capture, because she was engaged in an illicit intercourse with the enemy, under an enemy passport issued after the knowledge of the war in England, and was therefore *quasi* enemy property. That, at all events, the property intended to be protected, by the instruction from capture, was *American* property, and not *British*, and therefore that, as to the latter, the capture was certainly rightful.

HARRER, *contra*.

It has been said, on the part of the captors, that the president had no authority to issue the instruction of 28th August, either on general principles, or under the prize act. We contend that his authority to issue it, may be established on either of these grounds.

1. On general principles. The president, as commander in chief of the army and navy of the United States, has, in time of war, the whole public armed force of the nation under his control. The privateers of the United States constitute a part of the public arm-

ed force: this appears from their commissions, without which they would be pirates. On general principles, therefore, the president was authorized to issue the instruction in question.

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2. By the 8th section of the prize act, the president is authorized to establish and order suitable instructions for the better governing and directing the conduct of the privateers of the United States. Now this "governing and directing" their conduct, we conceive, may be applied as well to the designation of the objects of hostility as to the mode of attack, &c. It is applicable, in our opinion, to their whole conduct.

But it is contended, that the present case is not embraced in the instruction. It is said that the ship did not sail in consequence of the repeal of the orders in council. What, then, we would ask, was the motive for sailing at the particular time this vessel sailed? What could have induced the master to sail after knowledge of the war, but a confidence that the repeal of the orders in council would have put a period to hostilities? It is well known that such a confidence did exist among the merchants in England generally, and that it continued until it was ascertained in that country that the repeal of the orders had not produced the expected effect. The act of congress of 2d January, 1813, remitting certain fines, forfeitures, &c. has fixed upon the 15th of September as the period when it was known in England that this effect had not been produced. This vessel sailed on the 16th of August preceding. We insist, therefore, that notwithstanding the existence of hostilities was known in England at the time the Thomas Gibbons sailed, yet she sailed in consequence of the repeal of the orders in council.

The expression in Mr. Munroe's letter of 31st August, was probably accidental—certainly incidental, and not a particular object of the letter.

The expression, *British merchandize*, in the instruction of 28th August, was not intended to designate the *right* of property, but the *kind of goods*. It was the policy of Government to protect British as well as Ameri-

THE can property shipped under the particular circumstances
 THOMAS mentioned in the instruction.
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 ROCK- PINKNEY, *on the same side.*
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----- The president cannot coerce the privateers of the Uni-
 ted States to do what he pleases, but he may *restrain*
 them, as he thinks proper.

It has been said that the license under which this ves-
 sel sailed, was issued after knowledge of the war in En-
 gland. This must be a mistake :—it is dated on the 21st
 of July, 1812, when the war was not known in England ;
 and it is to be presumed that it was issued at the time it
 bears date. Being issued, therefore, before knowledge of
 the war, it does not give a hostile character to the vessel.

HARPER. 'The property is vested in the captors only
 when *legally taken*, it is vested *sub modo*.

STORY, J. That is the rule as laid down in the opi-
 nion of the Court delivered this morning in the case of the
Sally : The prize act vests only property lawfully captured.

JONES, *in reply.*

The captors may be punished, if guilty ; but the cap-
 tured property must vest in them notwithstanding. The
 instruction applies only to American vessels : but the
 license, we still contend, gave the vessel in question a
 hostile character.

Where the instruction speaks of British merchandize,
 the meaning is, British merchandize belonging to *Ameri-*
can citizens. This construction is consistent with all
 the acts of congress on the subject, especially the act of
 2d January, remitting forfeitures, &c. It is consistent
 also with Mr. Russell's declarations to the British mer-
 chants. See 2d vol. of reports of committees, p. 50.

Wednesday, March 16th.

Absent MARSHALL, Ch. J. and JOHNSON, J.

STORY, J. delivered the opinion of the Court.

The ship *Thomas Gibbons*, laden with a cargo of British manufactures, on account of British and American merchants, sailed from Liverpool, in Great Britain, on the 16th August, 1812, bound for Savannah, in Georgia, and was captured on the 12th of the ensuing October, on the high seas, off Tybee light-house, by the private armed vessel *Atas*, Thomas M. Newhall, commander, and, on the same day brought into Savannah as prize of war. The ship sailed from Liverpool, under the protection of a special license, dated the 21st of July 1812, granted by lord Sidmouth, by order of the privy council, whereby the ship and cargo were protected from British capture, not only on the voyage to the United States, but also on the return voyage to Liverpool, in case the master should not be permitted to land the cargo in the United States; and the master was further allowed, in case of return, to receive his freight, and proceed in ballast to any port not blockaded.

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The commission of the *Atas* was granted on the 24th of September, 1812, accompanied by a copy of the president's instruction of the 28th of August, 1812.

A libel was filed in the District Court of Georgia, upon which regular proceedings were had against the ship, as prize of war. The respondents interposed their claims and the district attorney also interposed a claim in behalf of the United States. At the hearing, the district Court dismissed the libel of the captors, and upon appeal, the decree was affirmed in the Circuit Court.

The principal question which has been moved at bar, is, whether the capture of the ship was lawful: and that depends upon the authority of the president to issue that instruction, and upon the true construction of it, if rightfully issued.

As to the authority of the president, we do not think it necessary to consider how far he would be entitled, in his character of commander in chief of the army and navy of the United States, independent of any statute provision, to issue instructions for the government and direction of privateers. That question would deserve grave consideration; and we should not be disposed to entertain the discussion of it, unless it become unavoidable. In the

THE case at bar, no decision on the point is necessary; be-
THOMAS cause we are all of opinion that, under the eighth section
GIBBONS, of the prize act of 1812, ch. 107, the president had full
ROCK- authority to issue the instruction of the 28th of August.
WELL, That section provides, that the president shall be author-
MASTER. ized "to establish and order suitable instructions for
 the better governing and directing the conduct" of pri-
 vate armed vessels commissioned under the act, their
 officers and crews. The language of this provision is
 very general, and in our opinion it is entitled to a liber-
 al construction, both upon the manifest intent of the legis-
 lature, and the ground of public policy.

It has been argued, that privateers acquire by their commissions, a general right of capture under the prize acts, which it is not in the president's power to remove or restrain, while the commission is in force; that therefore his right to issue instructions must be construed as subordinate to the general authority derived from the commission; and that, in this view, his instructions should extend only to the internal organization, discipline and conduct of privateers.

We cannot, on mature deliberation, yield assent to this argument. It is very clear that the president has, under the prize act, power to grant, annul and revoke, at his pleasure, the commissions of privateers; and by the act declaring war, he is authorized to issue the commission in such form as he shall deem fit. The right of capture is entirely derived from the law: It is not an absolute, vested right which cannot be taken away or modified by law: It is a limited right, which is subject to all the restraints which the legislature has imposed, and is to be exercised in the manner which its wisdom has prescribed. The commission, therefore, is to be taken in its general terms, with reference to the laws under which it emanates, and as containing within itself all the qualifications and restrictions which the acts giving it existence have prescribed. In this view, the commission is qualified and restrained by the power of the president to issue instructions. The privateer takes it subject to such power, and contracts to act in obedience to all the instructions which the president may lawfully promulgate.

Public policy, also, would confirm this construction.

It has been the great object of every maritime nation to restrain and regulate the conduct of its privateers: They are watched with great anxiety and vigilance, because they may often involve the nation, by irregularities of conduct, in serious controversies, not only with public enemies, but also with neutrals and allies. If a power did not exist to restrain their operations in war, the public faith might be violated, cartels and flags of truce might be disregarded, and endless embarrassments arise in the negotiations with foreign powers. Considerations of this weight and importance are not lightly to be disregarded; and when the language of the act is so broad and comprehensive, we should not feel at liberty to narrow or weaken its force by a construction not pressed by the letter, or the spirit, or the policy of the clause. On the whole, we are all of opinion that the instruction of the president of the 28th of August, is within the authority delegated to him by the prize act.

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But it is argued, that, admitting its legal validity, this instruction cannot protect the ship and cargo from capture as prize of war, because the cargo was shipped after a full knowledge of the war, and not "in consequence of the alleged repeal of the British orders in council."

We are of a different opinion. We think that a shipment made even after a knowledge of the war, may well be deemed to have been made in consequence of the repeal of the orders in council, if made within so early a period 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. Congress have evidently acted upon this principle; and have themselves fixed the time, (the 15th of September, 1812.) before which, shipments might be reasonably made upon the faith of that presumption. *Act of 2d January 1813. ch. 149.* We are not inclined to hold a less liberal construction in favor of the acts of individuals proceeding from a confidence in the avowed intentions of the government.

It is further argued, that the ship was not within the description of vessels intended by the instruction to be exempted from capture, because she was engaged in an illicit intercourse with the enemy, under an enemy passport, and therefore was *quasi* enemy property. We

THE cannot assent to this argument. The vessels exempted
 THOMAS from capture are "vessels belonging to citizens of the
 GIBBONS, United States, coming from British ports to the United
 ROCK- States." The ship, in this case, was duly documented
 WELL, as an American, was coming to the United States, and
 MASTER. from a British port. How can it be possible to bring a
 ----- case more perfectly within the terms of the description?
 The argument proceeds upon the supposition that by the
 mere act of illicit intercourse, the property of an American
 citizen becomes divested *ipso facto*; but, in point of
 law, this is not the operation of the rule. The property is
 only liable to be condemned as enemy property, or as
 adhering to the enemy, if rightfully captured during the
 voyage. But it has never been supposed that the docu-
 mentary character of the ship itself, or the character of
 the owner, were completely changed for every other pur-
 pose. It is sufficient, however, in our opinion, that no
 such distinction as that assumed in the argument, is to
 be found in the instruction itself; and we therefore hold
 the case within the natural and ordinary import of the
 language.

It is further argued, that, at all events, the property
 intended to be protected by the instruction from capture,
 was American property, and not British property; and
 therefore that, as to the latter, the capture was right-
 ful. This is a question of some difficulty; but, on full
 consideration, a majority of the Court are of opinion
 that the instruction meant to protect all British mer-
 chandize on board an American ship, without any ex-
 ception on account of British proprietary interest. It
 was supposed that British as well as American mer-
 chants might, upon the repeal of the orders in council,
 be induced to make shipments, upon the faith that such
 repeal would suspend the further operations of hostilities.
 The government meant to reserve to themselves the
 ultimate disposal of such property, in order that they
 might restore or condemn it, as public policy or the
 national interests might require. This construction is
 supported and confirmed by the act of congress, of 13th
 July, 1813, ch. 10, which, after relinquishing all the
 right and title of the United States, to the property of
 British subjects, captured on the high seas and shipped
 from British ports since the declaration of war, express-
 ly excepts such property as had been captured in viola-

tion of the presidents instruction of the 28th of August, 1812. In giving this construction, therefore, we are satisfied that we conform to the import of the language of the instruction, and do not contravene any policy avowed by the government itself.

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On the whole, we are of opinion that the decree of the Circuit Court, dismissing the libel of the captors, ought to be affirmed, and that the cause should be remanded to the Circuit Court for further proceedings as between the United States and the Claimants.

PRINCE v. BARTLETT.

1814.

March 16th.

ERROR to the Supreme Judicial Court of Massachusetts, in an action of trover in which was involved the construction of the acts of congress, giving to the United States a right of priority in payment of the debts due by insolvent debtors.

In case of insolvency, the United States are not entitled to priority of payment, unless the insolvency be a legal and known insolvency manifested by some notorious act of the debtor pursuant to law.

The case was submitted to the Court without argument, and is fully stated in the opinion which was delivered as follows, by

DRYALL, J.

The material facts upon the record are these :

On the 4th of June, 1810, sundry goods, wares and merchandize, the property of Wellman and Ropes, were attached by the deputy of Bailey Bartlett, sheriff of the county of Essex, state of Massachusetts, by virtue of certain writs of attachment sued out by several creditors of Wellman and Ropes.

On the 18th day of September, 1810, two several executions issued on judgments recovered by the United States against Wellman and Ropes, at the September term, 1810, of the district Court held at Salem, on their joint and several bond for duties at the custom house. The actions in which these judgments in favor of the United States were rendered, were first commenced on