to produce any alteration in it. The application, therefore, for further proof is rejected, and the sentence of the circuit court affirmed, with costs.

Decree affirmed.

The Mary, Stafford, Master.

War.—Withdrawing funds.—Further proof.

This was an appeal from the sentence of the United States Circuit Court for the district of Rhode Island. (Reported below, 8 Gallis. 620.)

The following is a statement of the facts connected with the case: General Garret Visscher, alias Fisher, a native of the state of New York, entered into the British army, before the revolution, and having obtained the rank of lieutenant-general, died in England, rich, intestate and without issue, leaving a large number of relatives, citizens of the state of New York, residing at or near Albany. Mr. *Nanning J. Visscher, one of the number, went to England, and met with no obstruction in obtaining letters of administration, and possessing himself of the estate to the amount of 150,000*l.* sterling. In August 1812, he set himself in motion to return to the United States, and did return, leaving Mr. Harman Visger, his agent, in England, to transmit the property to the United States, for the use of those concerned. Harman Visger, finding that he could not remit to this country, in the course of exchange, without great loss, invested a large sum in goods, of the growth and manufacture of Great Britain, and to transmit a part of them to the United States, hired, on freight, the brig Mary, an American registered vessel belonging to J. B. Kennedy, of South Carolina. The brig being at the port of London, was sent to Bristol, in July 1812, to take on board this cargo. She arrived off that place, according to her log-book, on the 23d of the same month. On the 30th, an embargo was laid in England, on account of the war; and on the 1st of August, the custom-house mark of stop was put on the Mary. Having been detained, some time, by the embargo, she sailed from Bristol, with the cargo on board, on or about the 15th day of August 1812, bound to New York. Soon after she put to sea, she sprang a leak, and on the 21st day of August 1812, put into Waterford, in Ireland, to repair. Requiring a complete repair, her cargo was relanded and stored in the King's store-houses, and she was repaired by the freighter, at an expense of 1700*l.* sterling; to secure which he took from the captain a bottomry-bond. On the 7th of April 1813, the Mary sailed from Waterford; having cleared out for Newport, in Rhode Island, in order to avoid the blockade which was supposed to exist as to New York. Before sailing, a British license of the description usually denominated a Sidmouth license, was obtained for her from the king's privy council, by Mullet, Evans & Co., subjects of the king of Great Britain. The license ran in their name, and purported to be a renewal of a similar license granted on the 8th of July 1812. She had no license from the American government. On the 23d of April 1813, she was captured on the high seas, by the American privateer Paul Jones, and sent into Newport, with a single prize-master on board, the master being left in command of the vessel and in possession of the ship's papers. On her arrival at Newport, she was libelled *by the captors, as being and bearing [*389 [*390

enemy property, and also by the United States for a breach of the non-intercourse acts. The claimants made application to the secretary of the treasury, and he, under the act of January 2d, 1813, "directing the secretary of the treasury to remit fines, forfeitures and penalties, in certain cases," remitted the forfeitures and penalties accruing to the United States.

The brig's papers were regular, proving her to be an American registered vessel. The invoices and bill of lading stated her cargo to be shipped by Harman Visger, on account of the heirs of General Fisher, citizens of the United States, and consigned to Peter Remsen & Co., New York, to account with Nanning J. Visscher, administrator, or with Barent Bleecker, Esq., of Albany, agent for the heirs. The invoices were all dated 13th August 1812. The bill of lading had no date; but by its reference to the invoices, the shippers had given it the semblance of the same date.

War was declared by the United States against Great Britain on the 18th of June 1812, and the fact was known in London on the 26th of July following; the news was stated on that day, in the public gazette in London, to have been received in Liverpool on the 18th of the same month. The claimant was in England, when the Mary sailed, and for some time after, and made no attempt to countermand the voyage. Insurance was obtained in England, freight paid, as well as license and brokerage money, and the exportation duties, before the Mary sailed.

The brig and cargo were acquitted in the district court, but condemned in the circuit court; and from the decree of the latter, the claimants appealed.

Stockton, for the claimants.—It is contended, on the part of the appel-
*391] lants: *1. That the cargo in question having been purchased by citizens of the United States, either before the war was actually declared, or before that event was known in England, and with the sole intent of transferring American funds in England to the United States, the shipment was no act of illegal trading with the enemy, and no cause of forfeiture. 2. That the act of congress of 2d January 1813, authorizes this importation, and by legal construction, amounts to a license for this vessel and cargo. 3. That the circumstance of the vessel's sailing with a Sidmouth license, is no cause of forfeiture. 4. That the capture by the privateer was altogether unwarranted by its commission, and expressly against the instructions of the President of the United States; and therefore, that the property ought to be restored, with damages and costs.

As to the first point, the withdrawing of funds, we contend, that a person found in a foreign country, at the time of the breaking out of a war between that country and his own, has a right to do everything necessary to enable him to return to his own country with his effects. This doctrine is supported by weighty authorities, and is founded on principles of reason and justice. It is, besides, an act of sound policy in a nation, to permit its own citizens to withdraw their funds from the hostile country; it is taking from the enemy's means of carrying on the war and adding to its own. According to the old rule on this subject, the withdrawing of funds from the enemy's country was a matter of right; but the modern rule of the court of admiralty has determined it to be a matter of favor merely. If it be a matter of favor, we conceive it is such a favor as both reason and policy

would direct, in a case like this, to be granted. See *The Madonna delle Gracie*, 4 Rob. 161, 195 ; Chitty's Law of Nations 19, 20 ; *The Dree Gebroeders*, 4 Rob. 191, 232 ; *Bell* v. *Gilson*, 1 Bos. & Pul. 345 ; *The Betty Cathcart*, 1 Rob. 184, 220.

2. As to the act of the 2d January 1813 (2 U. S. Stat. 789). This act amounts to a license from the *American government. The remission of the forfeitures incurred by a violation of the non-intercourse laws, [*392 is to be considered as legalizing voyages made under circumstances like those of the present case. The act ought to be liberally construed. It cannot be supposed, that the United States meant to remit the penalties accruing to them for the violation of the non-intercourse laws, in order to benefit the privateersmen : the remission was intended exclusively for the benefit of the owners ; against whose claim the legislature supposed the non-intercourse law to be the only bar.

Again, the act of 2d January must have been known in Ireland long before the Mary sailed from Waterford for the United States. She may, therefore, be considered as having sailed from that port under the faith of this act, as she had commenced her voyage from Bristol between the periods specified therein. The act of 13th July 1813, relinquishing the claims of the United States, &c., does not favor the claim of the captors, inasmuch as it relinquishes only the property of British subjects, not captured in violation of the instructions of the 28th August 1812 ; whereas, the property in the present case belonged to Americans.

The Mary sailed from Bristol, or, at all events, from London, which is to be considered as the *terminus à quo* of the voyage, in consequence of the repeal of the British orders in council ; and is, therefore, to be considered as embraced in the president's instruction to privateers of 28th August 1812.

3. The Sidmouth license is no cause of condemnation, inasmuch as the original license was obtained, before the war was known in England, and the second was merely a renewal of the first ; the British government conceiving themselves bound, in honor and good faith, to renew it. There is no analogy between the present case and that of *The Julia*, decided yesterday (*ante*, p. 181). In that case, the license was granted, *flagrante bello*, in order to neutralize belligerent property. But here, the granting of the license was only an act of justice, which the British government conceived themselves bound to perform.

*The act of congress of July 6th, 1812, § 6 (2 U. S. Stat. 780), [*393 allows passports to be given for the safe transportation of any ship or other property belonging to British subjects, and then in the United States. This is just what the British government have done in the case of the Mary ; the granting of the license was merely a reciprocity of good offices on their part.

But admitting this to be a case of sailing under the flag and pass of the enemy, still, the vessel only, and not the cargo, would be liable to condemnation. As to this distinction between the ship and goods sailing under the enemy's flag, see Chitty's Law of Nations, p. 58. *The Vrow Elizabeth*, 5 Rob. 2.

4. This capture was illegal ; being altogether unwarranted by the commission of the privateer, and directly in the face of the president's instruction of 28th August 1812. This instruction prohibits the capture of " vessels

belonging to citizens of the United States, coming from British ports to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council." These were the precise circumstances of the vessel in question. The capture was, therefore, illegal. That the president had a right to issue the instruction under consideration, cannot admit of doubt. By virtue of his office, he is commander-in-chief of the army and navy of the United States; and, as such, 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 that public armed force. The president was, therefore, authorized to issue this instruction. 2 Azuni 355.

From the preceding considerations, we trust the court will feel itself justified in reversing the sentence of the circuit court.

J. Woodward, contrà.—If the character of the Mary was, *primâ facie*, belligerent, she must be condemned; no latent equities *can save her. *394] That such was her character, appears clearly from the examination *in præparatorio;* and a vessel must be acquitted or condemned, generally, according as her character appears upon that examination. The license was for a British or American cargo. The presumption is, that it was British. It was certainly British fabric. No American orders had been given for the goods. The whole appeared as British property, and at the risk of British subjects. If a vessel sails under such circumstances, she sails at her peril. *The Marianna*, 6 Rob. 24; *The Tobago*, 5 Ibid. 194; 6 Ibid. 134.

But admitting, for argument's sake, that the property is, as the claimants contend, American property, still, the transaction now under consideration was a withdrawing of funds from the enemy's territory, after a full knowledge of the war, without the license of the American government; and therefore, subjected the property so withdrawn, to capture and condemnation as prize of war. The property in question was certainly British, long after the knowledge of the war in England; and the purchase of it by an American citizen, in the territory of the enemy, was an illicit trade, which is, of itself, cause of condemnation. That the property was British, for a considerable time after the war was known in England, appears from the dates of the invoices. They are all dated 13th August 1812; from which circumstance (there being no bills of parcels), it is to be inferred, that the purchase of the goods was made on that day; whereas, the war was known in England, at all events, on the 26th of July preceding, and is stated to have been known in Liverpool on the 18th. We contend, however, that this property was British, not only until the 13th of August, the time of the purchase, but that it is, at this day, strictly British property, under color of an American name.

It does not appear from the record, that the Mary sailed from London to Bristol, with a view to the prosecution of the voyage to the United States. But if she did, there was an opportunity for countermanding the *voyage, after it was known that war had been declared; and such *395] countermand ought to have been given. If it might have been, and was not, the doctrine of putting in motion does not apply to the present case. The claimants were clearly *in delicto*, and no presumption can be made in their favor.

This voyage was in violation of the non-intercourse laws of the United States; and on that ground also, the property is liable to condemnation.

With regard to trading with the enemy, we contend, that not only the purchase of hostile goods, in the enemy country, but also the payment, in that country, of freight, license and brokerage money, and of the exportation duties, amount to a trading with the enemy; and that every trading with the enemy is illegal. *The Hoop*, 1 Rob. 165, 196; *The Juffrow Margaretha*, cited in the same case, p. 181, note (Am. ed.); *The Dree Gebroeders*, 4 Ibid. 191, 232. Several cases have been thought to favor an opposite doctrine; but the case now under consideration does not, we conceive, come within the principle of any one of them. The first is the case of *The Packet de Bilboa*, 2 Rob. 111, 133. But there, the vessel sailed before the war. The Mary, on the contrary, sailed with full knowledge of the war. The next case is that of *The Abby*, 5 Rob. 251. The same distinction exists here, as in the last-mentioned case. The case of *Bell* v. *Gilson*, 1 Bos. & Pul. 345, has been overruled in the case of *Potts* v. *Bell*, 8 T. R. 548.

As to the license, it does not appear that any was granted on the 8th of July. The recital of such an one in the subsequent license, is no evidence. The license in question, therefore, although it purports to be a renewal of a former one, is a license *de novo*, obtained with a full knowledge of the war; and is, therefore, cause of condemnation.

Pinkney, in reply.—This is neither a case of trade with the enemy, nor of domicil. Visscher had not acquired a British character by either of these means. [*396

It is not a case of *trading*, within the opinion of this court in the case of *The Rapid* (*ante*, p. 155). Visscher, the present claimant, was not domiciled in England. He returned to the United States, almost immediately upon hearing of the war. He arrived long before the cargo. The transaction commenced, and the goods in question were purchased, before the war was or could have been known in England. No criminality can possibly be attached to the transaction; and therefore, it cannot be a ground of forfeiture. This is the language of the English decisions on this subject.

It is admitted, that if this enterprise had not been undertaken before knowledge of the war, and if some material part of it had not been actually carried into effect; if it had been entirely a new undertaking, and not with the view of withdrawing funds, it would have been a case within the rule of the law of nations, which prohibits trade with an enemy. But where the goods have been purchased, before the war, as here, the case neither comes within that rule, nor within the decisions of the English court of admiralty. Sir W. Scott admits that such goods may be withdrawn. *The Juffrow Catharina*, 5 Rob. 141.

But if the court should be of opinion, that this case comes within the general rule prohibiting trade with the enemy, still it will be recollected, that that rule admits of relaxation, under peculiar circumstances; and we conceive that the circumstances of the present case, if of any, will justify such relaxation. The putting into Waterford cannot, with any reason, be urged against us; that was an act of necessity, and was no discontinuance of the voyage; no new trading with the enemy took place there.

As to the Sydmouth license. It has already been shown, that the

original license was obtained on the 8th of July, a considerable time before
*397] information of the *war reached England. However criminal, therefore, the obtaining such a license might have been, in time of known war, in a time of supposed peace, it was perfectly justifiable and innocent: it was also absolutely necessary in the present case; the Adventure could not have proceeded without a license. The British government, was, in fact, bound to give it, by the universal custom of nations. Every nation is under a similar obligation. Our own government has authorized the president to grant such licenses.

But it has been said, that though the obtaining of the first license may be justified in this manner, yet the second, having been procured after knowledge of the war, will not admit of the same justification. Little need be added to what has already been said on this point. The second license was merely a renewal of the first: they are both, indeed, to be considered but one license. The first having been granted, the second was required, under the circumstances of this case, by the law of nations; or, if not, it was, at any rate, required by good faith. So the British government thought, and so they acted. This case is widely different from those of *The Aurora* and *The Julia*.

With regard to the president's instruction of 28th August, we contend, that the Mary comes within both the letter and spirit of that instruction. Her national character is clearly shown by her register and other documents: she is proved to be owned by J. B. Kennedy, of South Carolina: and it is clear, that she sailed on the faith of the repeal of the orders in council. The power of the president to issue instructions to the privateers of the United States, has already been considered. Congress has given him a two-fold power over this part of the armed force of the nation. He is authorized to grant and to revoke their commissions. But *omne majus continet in se minus:* he may, therefore, grant with limitation, and he may revoke in part. In issuing the instructions in question, he has done nothing more than he had full power and authority to do.

Tuesday, March 15th, 1814. (Absent, Marshall, Ch. J.) The Court
*398] made the following order:—*It is ordered, that the claimant have leave to make further proof, by affidavits, as to the following points:

1. As to his own citizenship.

2. As to the names of the heirs of General Fisher who are interested in the property, the places of their residence, and their national character.

3. As to the time when Mr. Nanning J. Visscher went to England; the objects which he had in view in going thither; how long he resided there; when the cargo claimed by him was purchased; and when he returned to the United States. And—

4. As to the instructions which the Paul Jones had on board, at the time of the capture of the Mary; and particularly, whether the instructions of the president of the 28th August 1812, had been delivered to the captain, or had come to the knowledge of the captain, at the time of the capture; or whether the Paul Jones had been in port, after the 28th of August 1812, and before the capture.

It is further ordered, that the captors be also at liberty to make further proof as to these several matters.