*The Mary and Susan: Richardson, Claimant.

Prize of war.

Where goods where shipped in the enemy's country, in pursuance of orders from this country, received before the declaration of war, but previous to the execution of the orders, the shippers became embarrassed, and assigned the goods to certain bankers, to secure advances made by them, with a request to the consignees to remit the amount to them (the bankers), and they also repeated the same request, the invoice being for account and risk of the consignees, but stating the goods to be then the property of the bankers, it was *held*, that the goods having been purchased and shipped in pursuance of orders from the consignees, the property was originally vested in them, and was not divested by the intermediate assignment, which was merely intended to transfer the right to the debt due from the consignees.

Appeal from the Circuit Court for the district of New York. This was a claim by Mr. Richardson for a portion of the cargo of the same ship mentioned in the preceding cause, which portion was condemned in the district and circuit courts.

The claimant, a native of Great Britain, and a naturalized citizen of the United States, was a resident merchant of Liverpool, at the breaking out of the late war, but returned to this country, in the month of May 1813, after knowledge of the capture, and pending the proceedings in the district court. The capture was made on the 3d of September 1812, within eighteen miles of Sandy Hook, in thirteen fathoms of water, where vessels are frequently passing and anchoring, and the privateer had previously spoken at sea another privateer and a pilot-boat schooner from Philadelphia. *There was also contradictory testimony as to whether the commander of [*47 the privateer had knowledge of the president's additional instructions of the 26th of August 1812, before the capture, which, as it is noticed in the opinion of the court, it is unnecessary to state. By those instructions, the public and private armed vessels of the United States were not to interrupt any 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, but were, on the contrary, to give aid and assistance to the same, in order that such vessels and their cargoes might be dealt with, on their arrival, as might be decided by the competent authorities.

Stockton, for the appellant and claimant, stated, that this was a case of *summum jus*, where the property of a citizen, shipped without knowledge of the war, upon the repeal of the British orders in council, was condemned upon the authority of *The Venus* (8 Cr. 253), and the doctrine of domicil. There is here no question of proprietary interest, or of national character, independent of this particular transaction. But unless the court thinks proper to review his decisions upon the effect of commercial domicil, the appellant is confined to three points in support of his claim: 1st. That the capture was made after the commander of the privateer had knowledge of the instructions of the 26th of August 1812. *2d. That if he had not [*48 such knowledge, condemnation cannot take place, as the capture was made subsequent to the issuing of the instructions. 3d. That the commander of the privateer is, and was, at the time of the capture, an alien enemy, and consequently, his commission is void.

1. This is a question of fact, to be determined by the weight of testimony.

2. The instructions were certainly communicated to the commander, before prize proceedings were commenced, and it was the duty of the captors, to have relinquished the property, subject to the decision of government, under the non-importation act. Capture does not vest the property of the goods in the captors, but merely authorizes them to carry in for adjudication. The prize act of the 26th of June 1812, § 6, shows that the property is not vested in them, until after condemnation. All laws take effect from their enactment, as to rights of property; and at common law, statutes take effect, by a fiction, from the first day of the session at which they are passed. The instructions, issued under the 8th section of the prize act, are legislative in their nature. Captors are the mere delegates and substitutes of the sovereign; their authority is derived from him, and must be exercised in conformity with the will of the state. 2 Azuni, pt. 2, c. 5, art. 3, § 4, 5, 7, 10. The power of the president to issue these instructions, has already been recognised by the court. The rights of war and peace depend
*49] upon the fact of the existence of a state of war and peace, *not upon the knowledge of that fact. A prize made after a declaration of war without knowledge of its existence, is good; and a prize made after the cessation of hostilities is bad, without regard to the circumstance of knowledge; unless, indeed, there be a stipulation in the treaty of peace to prolong hostilities at sea. 2 Azuni, pt. 2, c. 4, art. 1, § 9, 11.

3. The commission to Johnson, the commander of the privateer, is null. The president has been deceived in his grant; for he could never have intended to commissionate a person to commit treason against his own country. The acts of congress, during the late war, put alien enemies under restraints which are altogether opposed to the idea of the executive being authorized to delegate to them such a power as letters of marque and reprisal import.

Hoffman, for the respondents and captors. It is supposed, that the question, as to the application of the law of domicil to this case, is at rest.

Marshall, Ch. J.—The court considers that question completely settled, and not open for argument.

Hoffman.—1. As to the instructions. It is admitted, that the former decisions of the court make them obligatory. The instructions could not, in fact, have been communicated to the commander of the privateer, previous to the capture; and they are not, *ipso facto*, and *per se*, revocatory of
*50] the right to capture. *The instructions must either have been actually communicated, or the privateer must have been in port, after they were promulgated, in order to affect the right to capture. Such is the spirit of the former decisions. (Wheaton on Captures 43.) Cruisers are not to act upon informal information at sea, as they might be deceived by their rivals and competitors; in port, knowledge must be implied, in law, from the certainty, publicity and notoriety of the fact. The right of property does vest, by capture, to be subsequently consummated by condemnation; *quoad*, the belligerents, the right vests; the property of the enemy is divested as to his rights. The claimant is an enemy, *pro hâc vice.*

2. The affidavits to prove the commander of the privateer an alien enemy, were irregularly taken. The cause was open, as it were, to plea and

proof; but the further proof was confined to the communication of the instructions; and the simplicity of the prize proceedings forbids going out of the limits prescribed in the order for further proof.

Pinkney, on the same side.—The court will not regard the particular hardship of the case, but will only be anxious to administer the law of nations and of the land, as they are applicable to the rights of the parties.

1. Knowledge of the instructions was communicated to the captor, before the *deductio infra præsidia;* before the prize proceedings were commenced; before condemnation; but after the seizure, which vested an inchoate right in the captor. It is said, the written law prohibited him from making it; *but that is settled, and the court have said, the instructions were not to be likened to statutes. They are merely directory from a [*51 superior to a person in a subordinate capacity; and they must be received by him, or they cannot have the binding force of instructions; they were not law, until communicated; then only, they rise into law. It is also said, that the capture was well made, but subsequent knowledge shall overreach and vitiate it. In every case of capture of goods, in their transit to this country, after the repeal of the British orders in council, the same fact must have been known, before condemnation. The instructions inhibited the capture and interruption of American vessels coming from British ports; but the president could have no authority to divest rights once vested; and there is nothing in the instructions, to prohibit bringing in for adjudication, after the capture was made, nor to prohibit prize proceedings, after bringing in for adjudication. By the 4th section of the prize act, it is provided, "that all captures and prizes of vessels and property, shall be forfeited, and shall accrue to the owners, officers and crews of the vessels by whom such captures and prizes shall be made; and, on due condemnation had, shall be distributed," &c.; by which an inchoate right vested on the capture, to be consummated by condemnation. The prize law of France and Spain vests the property immediately; other countries require bringing *infra præsidium* and condemnation. Capture gives, everywhere, a right to privateers, though it may not give an indefeasible right to public ships. A qualified and provisional *property is vested; and it is held, both in France and England, that the crown cannot interfere to stop prize proceedings, where private [*52 parties have an interest. Admit, that no right of property is acquired, is no right acquired? Most certainly, an incipient right is acquired, to be afterwards consummated; and the instructions cannot have the effect, retroactively, to defeat the right of the captors to proceed to adjudication. The case of a treaty of peace, stated on the other side, illustrates this idea. Belief is nothing; fact is everything. The captor exercises a belligerent right; the treaty repeals his commission, and abrogates his right. Suppose, a capture made the day before the treaty is signed, does it prevent his going on and perfecting his right? Certainly not; and the same is the case with the instructions: if they do not stand in the way of the capture, they do not stand in the way of condemnation. They did not stand in the way of capture, because they were unknown; they do not stand in the way of condemnation, because that is a mere consummation of the incipient right acquired by capture.

2. The court have no right to look beyond the president's commission;

the captor stands everywhere upon it, especially, in the prize courts of the power by whom it is issued; and there is no case where the contrary was ever maintained.

Dexter, for the appellant and claimant.—1. It is said, the claimant must either prove that the privateer had been in port, or that the instructions
*53] were *actually communicated to the commander. If it were intended to make him a wrongdoer, strict proof of knowledge might be essential; without such proof, he would be excusable from paying costs and damages; but he does not thereby acquire any indefeasible right to the thing captured; and restitution must be ordered. The claimant seeks restitution only, and the first question is, whether the captor had knowledge of the issuing of the instructions, no matter how it came to him.

2. But supposing that he had not this knowledge before the seizure; it was communicated to the prize-master, while he was carrying in the ship for adjudication. He was bound by the instructions, "not to interrupt, but on the contrary, to give aid and assistance" to the ship he captured. Does the right to proceed contrary to the instructions vest at the time of boarding, or manning? It undoubtedly vested, when the ship was completely brought *infra præsidia*. But the acts done in the intermediate time between that, and the taking possession, constituted an interruption contrary to the letter and spirit of the instructions. The right acquired by the seizure was inchoate, and was sought to be consummated, after the rule of conduct prescribed by the president became known to the captor. The rule as to capture vesting the property is various and fluctuating, in different times and nations. The distinction here is, that an inchoate right may be defeated by a knowledge of the instructions subsequently communicated; but a consummated right cannot. The president has authority, both by our municipal constitu-
*54] tion and public law, to prosecute *a war lawfully declared; he may exempt this or that thing from attack or capture, by land or by sea. Suppose, an enterprise commenced, before knowledge of an order from him countermanding it, could the blockade or siege, or expedition, be continued, after such revocation became known? The captor has acquired, in the present case, no private right, which the instructions cannot defeat. Government may, by compact with foreign nations, divest inchoate rights; in a treaty of peace, restitution of captures on both sides may be stipulated.(*a*)

3. The order for further proof justifies the admission of testimony as to the alien enemy character of the commander. The president's commission is, doubtless, conclusive, wherever he acts within the authority confided to him by the laws; but he cannot commission an alien enemy, whose sovereign would have a right to punish him as a traitor; and even a naturalized citizen has no right to cruise against his native country.

February 13th, 1816. Johnson, J., delivered the opinion of the court.—It is not necessary to go into a consideration of the national character or future designs of the claimant in this case. It has been solemnly settled, and must henceforth be considered as the positive law of this court, that

(*a*) *Vide* Convention of 1800, between the United States and the French Republic; by the 30th article of which, restitution of public ships captured on both sides was stipulated.

shipments made by merchants, actually domiciled in the enemy's country, at the breaking out of a war, partake of the nature of *enemy trade, and, as such, are subject to belligerent capture. Whatever doubts may have once been entertained on this bench, with regard to the necessity or propriety of adopting the principle into the jurisprudence of this country, they are now either dissipated or discarded; and the character, views and even the subsequent acts of such a shipper, cannot vary the conclusion of law upon his claim.(a) [*55

(a) The effect of domicil, or commercial inhabitancy, upon national character, was recognised by the continental court of appeals in prize causes, during the war of the revolution. (2 Dall. 42, *Claim of Mr. Vantylengen.*) It was determined by the supreme court, during the hostilities with France, that a citizen residing in a foreign neutral country, acquired the commercial privileges attached to his domicil, and was, consequently, exempt from the operation of the law of his own country, suspending the intercourse with the French dominions. (*Murray* v. *The Charming Betsey*, 2 Cr. 65.) The national legislature have adopted the same principle in the act of the 3d of March, 1800, applying the rule of reciprocity in cases of salvage to "the vessels or goods of persons permanently resident within the territory, and under the protection, of any foreign government," &c.; and finally, before the case of *The Venus*, the supreme court applied the same principle to the law of insurance, and held a warranty of neutrality to be satisfied by the residence of the party as a merchant, in a neutral country. (*Livingston* v. *Maryland Insurance Company*, 7 Cr. 506.) This was an action on a policy of insurance, containing a warranty that the property was neutral. That warranty was determined to be satisfied, by the emigration of the party, a Spanish subject, to the United States, and residing there, before the breaking out of the war in 1804, between Great Britain and Spain, the property having been captured by a British cruiser, and condemned in the prize court at Halifax, as Spanish property. A majority of the court were of opinion, that the assured was to be considered as a merchant of the United States, whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish provinces. See also, *Arnold* v. *United Insurance Co.*, 1 Johns. Cas. 363; *Jenks* v. *Hallett*, 1 Caines 60; *Johnston* v. *Ludlow*, 2 Johns Cas. 481; s. c. 1 Caines' Cas. 29; *Duguet* v. *Rhinelander*, 2 Johns. Cas. 476.

It is much to be lamented, that we have not printed reports of the decisions in the British supreme court of prize, as many interesting points have been decided before the Lords of Appeal, of which we have no other account than occasional loose references to them. Among these is the case of Mr. Dutilh, mentioned by Dr. Robinson in *The Indian Chief*, 3 Rob. 21, which is more particularly stated by Sir John Nicholl, in a manuscript report, in the possession of the editor, of the hearing of the case of the *The Harmony*, before the Lords, 7th of July 1803. "The case of Dutilh also illustrates the present. He came over to Europe, as it is stated, in 1793, about the end of July, a time when there was a great deal of alarm on account of the state of commerce in Europe. He went to Holland, then not only in a state of amity, but also of alliance with this country; he continued there, until the French entered. During the whole time he was there, he was without any establishment. He had no counting-house; he had no contracts nor dealings with contractors there. He employed merchants there, to sell his property, paying them a commission. Upon the French entering into Holland, he applied for advice, to know what was left for him to do, under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. Dutilh applied to Mr. Adams, who advised him to stay, until he could get a passport. He continued there, until the latter end of that year, and having wound up his concerns he came away. Some part of his property was captured, before he came there. That part which was taken, before he came there, was restored to him (*The Fair American*,

*Stress has been laid, in the argument before this court, on the fact that Charles Johnson, the commander of the Tickler, is an alien enemy; but on this point we are unanimous, that it makes no difference
*57] *in the case. Admitting, that this circumstance should bear at all upon the decision of the court, the utmost that could result from it would be, the condemnation of his interest to the government as a *droit* of admiralty. The owners and crew of the Tickler are as much parties in this court as the commander, and his national character can in nowise affect their rights. But this court can see no reason why an alien enemy should not be commissioned as commander of a privateer. There is no positive law prohibiting it; and it has been the universal practice of nations to employ foreigners, and even deserters, to fight their battles. Such an individual knows his fate, should he fall into the hands of the enemy; and the right to punish in such case is acquiesced in by all nations. But, unrestrained by positive law, we can see no reason why this government should be incapacitated to delegate the exercise of the rights of war to any individual who may command its confidence, whatever may be his national character.

The only grounds, then, on which the right of restitution can be contended for in this case, arise out of the president's instructions of the 28th of August 1812. On these, three points are made: 1st. That Johnson had, in fact, or ought, from circumstances, to be presumed to have had, notice of those instructions. 2d. If he had not, at the time of the capture, yet, having received them, before the arrival of the prize in port, he was bound then to have discharged her. 3d. That notice of the instructions was, in fact,
*58] unnecessary, as the instructions of the president had, *as to the conduct of privateers, all the operation of laws.

On the second and third of these points, there exists but one opinion in this court. Although some doubt may be entertained relative to the form or nature of the notice necessary, yet we all agree, that some notice is necessary, and that notice must precede the capture. Instruction, *ex vi termini*, is individual. Instruction to A., independent of legal privity or identification, is not instruction to B. Not so with laws: their power floats on the atmosphere we breathe. Necessity, or convention, or power, has given them a legal ubiquity, co-extensive with the legislative power of the government that enacts them. Notice here is altogether unnecessary, unless made so by the law itself. It is the *sic volo, sic jubeo*, of sovereign power, of which every individual subject to its jurisdiction is presumed to have notice, though time and distance stamp absurdity on the supposition. Unquestionably, the same operation might by law have been given to instructions emanating from the president; but this has not been done: on the contrary, the clause itself which vests the power in the executive, holds out the idea of the necessity of notice. That this notice must necessarily precede or accompany capture, we are induced to infer, from this consideration. By capture, the individual acquires an inchoate statutory right, an interest which can only be defeated by the supreme legislative power of the Union. Condemnation does nothing more than ascertain that each individual case is within

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Adm. 1796) but that part which was taken, while he was there, was condemned, and that because he was in Holland at the time of the capture." (*The Hannibal and Pomona*, Lords, 1800.)

the prize act, and thus throws the individual upon his right acquired by *belligerent capture. Should the prize act, in the *interim*, be repealed, or its operation be suspended by the provisions of a treaty, there no [*59 longer exists a law to empower the courts to adjudge the prize to the individual captor. We can see nothing in the objects of the law, authorizing the president to issue his instructions, nor in the instructions themselves, which can support the idea, that that which was lawfully prize of war, at the time of capture, should cease to be so, upon subsequent notice of the instructions. Both the act itself, and the instructions, in their plain and obvious sense, may well be construed so as to arrest the arm of hostility before it has given the blow. But not only is there nothing either in the act or instructions, to which an ulterior operation can be given, but the policy of the country, as well as the fair claims of the prowess, perseverance and expenses of the individual, forbid our giving an effect either to the act or the instructions, which will deprive the captor of the just fruits of his bravery and enterprise.

The fact of notice, then, alone remains to be considered: and this must either be inferred from circumstances, or received upon the evidence of confession. On this point, computation of time becomes material. The capture was made, as we collect from the officers and crew, on the 3d of September; but as the nautical calculation of time commences at noon, this may mean on the morning of the 4th of September. The additional instructions bear date the 28th of August, and were, probably, forwarded by the mail of the 29th. It cannot, therefore, be supposed, that they were published in Philadelphia, before the 31st *of August, nor in New York [*60 before the 2d; at any rate, not before the 1st of September. This certainly leaves time enough for the information to have been communicated from New York, but renders it impossible, that it could have been received, either from the Eagle, or the pilot-boat, as they were both spoken off Charleston, and the latter was seven days out; whereas, the Tickler left St. Mary's, in Georgia, on the 24th. Whether such information was not in fact communicated off New York, is a point on which the evidence would leave us little room for a contrariety of opinion, were it not for the loss of the log-book and journal. For this circumstance, taken in conjunction with the evidence of confession, some of the court are inclined to entertain an unfavorable idea of the captor's cause. But the majority are of opinion, that they cannot attach so much importance to it. The evidence of Paine, Ferris and Warren, all officers of the privateer, and at the time of testifying, divested of all interest in the capture, positively negatives the only fact from which notice could be implied, to wit, the speaking of any vessel besides the Eagle and the pilot-boat, previous to the capture of the Mary and Susan. And this, we think, is supported by probability, when it is considered, how very few vessels, at that time, could venture to leave our ports; that there is no probability the Tickler could have ventured to lie off and on the port of New York, any length of time; and that, from her leaving the port of St. Mary's, to her arrival at New York, there elapsed no more than the ordinary time of performing that voyage. In addition to which considerations, *we cannot but think, that a copy of the journal of [*61 this voyage was, as it ought to have been, deposited in the custom-house; and this circumstance, whilst it was calculated to make the captor

less careful in preserving the original, enabled the claimant to avail himself of every advantage which could have been derived from the original.

On the evidence of confession, we are not inclined to enter into the considerations of the depositions, intended on the one hand to support, and on the other to impugn, the credibility of Waldron and Garnsey. Nothing can be more painful than the necessity of entering upon such investigations; nothing more unsatisfactory, than to found a legal decision as to the credibility of a witness upon oral testimony, unsupported by the *evidentia rei*. In this case, we are induced to conclude, that these witnesses misunderstood Johnson; that the knowledge of which the latter spoke, was that acquired subsequent to the capture; that it could not have related to any other knowledge, we think incontestible, from the single consideration that the evidence in the case proves it to have been inconsistent with the fact. It was not possible, under the circumstances of the case, that such knowledge could have been communicated, for want of the means of communication, and that it was not, is positively sworn to by three witnesses, whose testimony stands wholly unimpeached.

Sentence of the circuit court affirmed, with costs.

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*62] *The Rugen: Buhring, Claimant.

Prize.

A question of proprietary interest, and of trading with the enemy. The possession of neutral papers, however formal and regular, if colorable only, cannot affect belligerent rights.

Appeal from the Circuit Court for the district of Georgia. The Schooner Rugen and cargo were libelled in the district court for that district, as prize of war, either as belonging to the enemies of the United States, or as the property of citizens who had been trading with the enemy.

A claim was interposed by Mr. Buhring, a subject of the king of Sweden, on the ground, that both vessel and cargo belonging to him, and were *bonâ fide* neutral property. This claim was rejected by the district court; which sentence was affirmed by the circuit court, and thereupon, the claimant appealed to this court.

Charlton, for the appellant and claimant, stated, that the ship was formerly British, had been captured, condemned as prize of war, in the djstrict court, and sold by the marshal to one Bixby, who sold to Buhring, the present claimant.

1. He cited the case of *The Sisters*, 5 Rob. 141, as to the proprietary interest, and argued, that the regularity of the papers was *primâ facie* evidence of neutrality, and conclusive, unless rebutted by contradictory proof. The primitive *national character of the ship was changed by condemnation, and the sale to a neutral was legal. *The Welvaart*, 1 Rob. 104. Testimony was irregularly admitted, which was neither taken in *præparatorio*, nor found on board, nor invoked from any other captured vessel.

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2. The voyage was strictly within the range of neutral rights. If the neutral character of the ship and cargo was established, the destination was immaterial, whether to an enemy or neutral port. But the ship was, in