

Case No. 5,201. GALLEGO ET AL. V. UNITED STATES.
[1 Brock. 439.]¹

Circuit Court, D. Virginia.

May Term, 1820.

NONINTERCOURSE ACT—REMISSION OF FINE BY SECRETARY OF THE
TREASURY—CONSTRUCTION.

1. The power conferred on the secretary of the treasury, by the act of congress of the 2d of January, 1813 [2 Stat. 789], to remit any fine incurred by any importer of goods, wares, and merchandise, from Great Britain, which were shipped between the 23d of June and the 23d of December, 1812, if it appeared to the satisfaction of the secretary, upon petition by the claimants, that the property was, bona fide, owned by a citizen or citizens of the United States, extended to the case of a joint interest, between citizens of the United States and Great Britain, and might rightfully be exercised in favour of such joint owners, being citizens of the United States.
2. The construction of that law, was the peculiar province of the secretary of the treasury. The duty of the court was, simply to institute an inquiry into the facts of the case, and to transmit a certified statement of them, with the petition, to the secretary; and the court, in which the prosecution originated, had no authority to revise the acts of the secretary, done in execution of it.

Appeal from the district court [of the United States for the district of Virginia].

The ship John and Adam, Thomas Drake, master, arrived in the port of Norfolk, in Virginia, on or about the 21st day of October, 1812, from the port of London, whence she sailed, early in the August preceding, with a cargo of British goods, wares, and merchandise. The Ship and her cargo, were seized by the collector of the customs for the port of Norfolk, and on the 19th day of December, 1812, the attorney for the United States, filed a libel in the district court of Norfolk, against the said ship, her tackle, apparel, and furniture, and her cargo, reciting these facts, and praying the court to condemn 'them, as forfeited to the United States. The appellants, citizens of the United States, and merchants, carrying on trade at Richmond, Virginia, presented their petition to the district judge of the United States at Norfolk, stating, that they had, for several years past, had large transactions with John Gilliat of London; and that in November, 1811. a correspondence commenced

between them, for the importation of goods and merchandise, to be purchased by him in England, some on joint account, and some on the sole account of the petitioners, and shipped to the petitioners in Virginia, as soon as free intercourse between the two countries should be lawfully restored. That the said Gilliat subsequently purchased the goods and merchandise, composing the cargo of the John and Adam, but before the news of the declaration of war was received in England, and that the said goods were shipped, and did depart from the port of London, between the 23d day of June and the 23d day of December, 1812, in the John and Adam, for the port of Richmond, Virginia, and that John Gilliat, and the petitioners, were joint owners of her cargo: that the shipment of the said goods and merchandise, was nearly completed, before information of the war was received in England: that the said ship sailed from the Downs, on the 9th day August, 1812; and having arrived at the port of Norfolk, the ship and cargo was seized by the collector of the customs, and libelled by the attorney for the United States, in the district court of Norfolk, as forfeited to the United States, for an alleged breach of the laws, interdicting commercial intercourse between the United States and Great Britain: that process of monition and attachment had been issued in the said libel, by virtue whereof, the said goods and merchandise, had been attached and taken into the custody of the marshal, and had since been surrendered to the petitioners, upon giving bonds in the usual form for their appraised value, duties, &c: that the petitioners conceived themselves entitled to the benefit of an act of congress, of the 2d of January, 1813, entitled "An act directing the secretary of the treasury to remit fines, forfeitures, and penalties in certain cases," and prayed that the judge would cause an inquiry to be made into the matters aforesaid, and that the facts as they appeared upon such inquiry, might be stated and annexed to the petition, and transmitted to the secretary of the treasury, to the end, that such relief might be extended to them, as the law in such case provided. In the statement of facts, transmitted by the district judge, to the secretary of the treasury, with the petition, it was certified, that the petitioners were citizens of the United States, that the goods, &c, composing the cargo of the John and Adam, at the time of their shipment at the port of London, were the joint property of the petitioners, and John Gilliat, and that the same were shipped, and did depart from the port of London, between the 30th day of July, and the 9th day of August, 1812, and that they were not purchased on account of the petitioners, and the said Gilliat, after war was known to exist between the United States and Great Britain. The secretary of the treasury directed the remission of the fines, &c. which had been incurred by the petitioners, upon their several shares thereof, or interest therein, upon payment of costs, charges, and duties. The district court of Norfolk, after reciting that the secretary of the treasury had decided to remit the forfeiture of the goods, so far only as related to the interest of Gallego, Richard & Co., on the motion of the attorney for the United States, directed the libel to be dismissed, as to the interest of the said firm, but inasmuch as the

exact extent of that interest could not be otherwise ascertained by the court, ordered the parties to file with the clerk, the entire correspondence between themselves and Gilliat, touching the purchase, shipment, &c. of the goods in question, the invoice thereof, and a statement, verified by oath, showing in detail, what part of the goods, &c. were shipped on the sole account of Gallego, Richard & Co., and their respective interest, in those shipped on joint account. The appellants having failed to comply with this order, the court, at a subsequent term, set aside the order dismissing the libel, as to them, and decreed, ordered, and adjudged, that the whole cargo of the John and Adam be forfeited to the United States, as the property of John Gilliat or some other person or persons, subjects of Great Britain, and as such, liable to forfeiture, and condemnation to the United States. From this decree [case unreported] Gallego, Richard & Co. appealed to this court.

MARSHALL, Circuit Judge. A complexion unfavourable to the appellants has been given to this case, by their refusing, or failing, when required, to exhibit to the district court, any testimony, whatever, establishing the extent of their interest in the cargo of the John and Adam. This conduct is well calculated to impress on the mind, a suspicion that their interest was, in truth, less than the moiety which they now claim. If, when at the time sentence of condemnation was pronounced, this inquiry was open for the district court, the judge had certainly a right to expect, and it was his duty to require, full satisfaction upon it. If that subject was closed, then no inquiry ought to have been instituted; and the sentence of condemnation ought to have extended to that part of the cargo only, which was not comprehended in the remission of forfeiture, made by the secretary of the treasury, in pursuance of the act of congress of the 2d of January, 1813, 2 Story, Laws, c. 149, p. 1283 [2 Stat 789, c. 7],—the extent of which, in that view of the case, must be ascertained by the instrument itself. Upon examining the act of congress, I felt much doubt whether it applied to any case of a joint interest, between American citizens and British subjects. The case described by the act is, “goods, wares, and merchandise, owned by a citizen, or citizens of the United States”; not, “goods, &c. owned in whole, or in part

by a citizen.” The act then speaks of the time of shipment, and adds—“and the person or persons, interested in such goods, &c., or concerned in the importation thereof, have incurred any fine, &c.” “on such person or persons, petitioning for relief, &c.” “in all such cases, wherein it shall be proved to his satisfaction, that said goods, wares, and merchandise, at the time of their shipment were, bona fide, owned by a citizen, or citizens of the United States, &c.” the secretary of the treasury is directed to remit, &c. It might well be doubted, whether the power of the secretary of the treasury, is extended to any case where the specific articles are not wholly owned by citizens of the United States. But the language of the act is not free from ambiguity, and it refers to an act passed the 3d of March, 1797, 1 Story, Laws, c. 67, p. 458 [1 Stat. 506, c. 13],—which, in express terms, applies to any interest the petitioner may have. In construing the act, no reason can be perceived, for distinguishing between the interest of an American citizen, when joint and when sole; and it is an act intended for the protection of the citizen, which ought to be construed liberally, so as to effect that intention. In addition to these considerations, the act has already been construed by the district judges, I presume, from the proceedings in this case, and certainly by the treasury department, to embrace cases where American citizens are jointly concerned with British subjects. The construction put on the act by the department, entrusted with the power of remission, ought to be respected by the court I shall, therefore, consider it as comprehending this case.

I am now to inquire, whether the secretary of the treasury has remitted any ascertained portion of the cargo of the John and Adam, or has remitted an undefined interest in that cargo, leaving it to the court to ascertain its extent The act of 1813, directs the same proceedings on the petition of the party applying for relief, as are directed by the act of 1797. That act, directs the district judge, to inquire into the circumstances of the case, and to “cause the facts which shall appear on such inquiry, to be stated and annexed to the petition, and direct their transmission to the secretary of the treasury of the United States, who shall thereupon, have power to mitigate or remit,” &c. By this act, the court is to put the secretary in possession of all the facts of the case, with the petition, before he exercises the power given him by congress. The act of 1813, enacts—“and on the facts being shown on inquiry had by such judge or court, stated and transmitted as by said act,” (the act of 1797,) “is required; in all such cases, where it shall be proved to his satisfaction, &c.”—“the secretary of the treasury is directed to remit all fines, penalties, and forfeitures, that may have been incurred,” on certain conditions in the act expressed, and to direct the prosecution to cease. The legislature seems to have intended, that the act of the treasury department, should be final and conclusive, and that all the facts should be placed before him, before he performs that act Those articles, the forfeiture of which is remitted, are of course restored to the proprietor. The prosecutions, if instituted, are to cease. It would seem to be a part, and an essential part, of the duty of the secretary, to

define the articles on which this remission operates; or if it be only on a certain interest on those articles, to define that interest. If the statement of facts made by the court, did not enable the secretary to ascertain this interest, it would seem to be his duty, to require a more full statement; and the case should go back to him for a final decision. It seems to be a part of his duty, not only to say, that the forfeitures shall be remitted, but to define, with precision, the objects on which this remission shall operate. If this view of the law be correct, it would seem to follow, that the remission granted by the secretary of the treasury, ought to be construed to dispose entirely of the subject, if it can fairly be so construed. Let the remission itself, with the papers to which it refers, be considered, for the purpose of determining, whether it ascertains its own extent, or refers that point to the court.

The petition states an application on the part of the petitioners, to John Gilliat, a merchant of London, to ship goods, some on the sole account of the petitioners, and some on joint account; and that, in consequence of this application, the cargo in question was purchased, which the petition avers to have \textsterling been the sole property of Gilliat, and the petitioners. The statement, transmitted by; the judge with this petition, asserts, "that the said goods, wares, and merchandise, at the time of their shipment at the port of London, in the kingdom of Great Britain, were the joint property of the said Joseph [Gallego, John Richard, Michael Benedict Poiteaux, and John Gilliat]" The secretary of the treasury, after reciting this petition and statement, says: "and whereas, it has been proved to my satisfaction," (How proved? Certainly by the statement. The instrument refers to no other testimony, nor, does the law authorize him to receive any other,) "that part of the goods, \textsterling , were, bona fide, owned by citizens of the United States, \textsterling ." "Now, therefore, know ye that I, \textsterling , do hereby remit to the petitioners aforesaid, all the fines, \textsterling , incurred as aforesaid, on their several shares thereof, or interest therein, upon the costs and charges," \textsterling , being paid. "And do, also, direct the prosecution, or prosecutions, if any shall have been instituted for the recovery thereof, to cease on payment of the costs," \textsterling .

There is nothing in the statement of facts, which shows any right in the petitioners, to any separate part of the cargo. The words,

therefore, "their several shares thereof, or interest therein," must refer to their undivided shares or interests, not to any distinct property, they might possibly hold in severalty. The remission is to take place, not on their ascertainment of their interest or shares, but on their paying charges and duties; and the prosecutions are to be discontinued, not on their proving to the court, the extent of their interest, but on paying the costs. These circumstances, as well as the view I have taken or the duty of the treasury department, lead to the opinion, that the secretary considered the extent of the interest of the petitioners, as already established, and did not mean to institute a new inquiry into that subject. It was considered as established in the statement submitted to him by the court, which represents them to have been jointly concerned with Gilliat. Suppose the law to have required, that the prosecution should have been instituted in one court, and the petition and statement to have passed through another. Could the court in which the prosecutions were depending, have proceeded to an investigation of the extent of the interest of the petitioners, after receiving this instrument of dismissal from the treasury department? I believe it could not, if by any construction, the statement of the district court, and the act of remission, could be understood to define the extent of the remission. The whole subject passes, it is true, through the same court; but that court is to exercise different powers, in different stages of the proceeding, All which relates to the property, is to be completed before the statement is submitted to the secretary of the treasury. The secretary acts on that statement, and his acts cannot be revised by the court. Sentence reversed as to a moiety.

¹ [Reported by John TV. Brockenbrough, Esq.]