completely proved; and therefore, the decree of restoration must be affirmed.

With respect to the duties, we are all of opinion, that the decree of the courts below was erroneous. Where goods are brought by superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right to duties. If, however, such goods are afterwards sold, or consumed, in the country, or incorporated into the general mass of its property, they become retroactively liable to the payment of duties. In the present case, if the goods had been specifically restored, and afterwards withdrawn from the United States by the claimants, they would have been exempt from duties. But having been sold, by order of the court, for the general benefit, the duties indissolubly attached, and ought to have been deducted from the proceeds, by the courts below. The decree in this respect must be reversed.

Decree reversed.

The Nereide, Bennett, Master. (*a*)

Neutral property.

The stipulation in a treaty, "that free ships shall make free goods," does not imply the converse proposition, that "enemy ships shall make enemy goods."[1]

The treaty with Spain does not contain, either expressly or by implication, a stipulation that enemy ships shall make enemy goods.

The principle of retaliation or reciprocity, is no rule of decision in the judicial tribunals of the United States.

A neutral may lawfully employ an armed belligerent vessel, to transport his goods; and such goods do not lose their neutral character, by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of the resistance.[2]

This was an appeal by Manuel Pinto, from the sentence of the Circuit Court for the district of New York, affirming *pro formâ* the sentence of the district court, which condemned that part of the cargo which was claimed by him. The facts of the case are thus stated by the Chief Justice, in delivering the opinion of the court:

*389] *Manuel Pinto, a native of Buenos Ayres, being in London, on the 26th of August 1813, entered into a contract with John Drinkald, owner of the ship Nereide, whereof William Bennett was master, whereby the said Drinkald let to the said Pinto, the said vessel to freight, for a voyage to Buenos Ayres and back again to London, on the conditions mentioned in the charter-party. The owner covenanted that the said vessel, being in all respects seaworthy, well manned, victualled, equipped, provided, and furnished with all things needful for such a vessel, should take on board a cargo to be provided for her, that the master should sign the customary bills of lading, and that the said ship, being laden and dispatched, should join and sail with the first convoy that should depart from Great Britain for Buenos Ayres: that on his arrival, the master should give notice thereof to the agents or assigns of the said freighter, and make delivery of the cargo, according to bills of lading; and that the said ship, being in all respects

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(*a*) March 6th, 1815. Absent, Todd, Justice.

[1] The Cygnet, 2 Dods. 299.

[2] The Atalanta, 3 Wheat. 409; 5 Id. 433.

seaworthy, manned, &c., as before mentioned, should take and receive on board, at Buenos Ayres, all such lawful cargo as they should tender for that purpose, for which the master should sign the customary bills of lading: and the ship, being laden and dispatched, should sail and make the best of her way back to London, and on her arrival, deliver her cargo according to the bills of lading. For unloading the outward and taking in the homeward cargo, the owner agreed to allow ninety running days, and for unloading the return-cargo, fifteen running days. The owner also agreed, that the freighter, and one other person whom he might appoint, should have their passage, without being chargeable therefor. In consideration of the premises, the freighter agreed to send, or cause to be sent, alongside of the ship, such lawful goods as he might have to ship, or could procure from others, and dispatch her therewith, in time to join and sail with the first convoy, and on her arrival at Buenos Ayres, to receive the cargo according to bills of lading, and afterwards to send alongside of the ship a return-cargo, and dispatch her to London, and on her arrival, receive the cargo according to bills of lading, and to pay freight as follows, viz: for the outward cargo 700*l.*, together with five per cent. primage, to be paid on signing the bills of lading, and for the homeward or return-cargo, at the rate mentioned in the charter-party. He was also to advance the master, at *Buenos Ayres, [*390
such money as might be necessary for disbursements on the ship. It was provided, that all the freight of the outward cargo, except on the goods belonging to the freighter, which should not exceed 400*l.*, should be received by the owner, on the bills of lading being signed; and in case of the loss of the ship, such freight should be his property; but if she arrived safe back, with a full cargo, then the freighter should be credited for the excess of the said freight, over and above the sum of 700*l.* A delay of ten running days, over and above the time stipulated, is allowed the freighter, he paying for such demurrage at the rate of 10*l.* 10*s.* per day.

Under this contract, a cargo, belonging in part to the freighter, in part to other inhabitants of Buenos Ayres, and in part to British subjects, was taken on board the Nereide, and she sailed, under convoy, some time in November 1813. Her license, or passport, dated the 16th of November, states her to mount ten guns, and to be manned by sixteen men. The letter of instructions from the owner to the master is dated on the 24th of November, and contains this passage: "Mr. Pinto is to advance you what money you want for ship's use, at River Plate, and you will consider yourself as under his directions, so far as the charter-party requires."

On the voyage, the Nereide was separated from her convoy, and on the 19th of December 1813, when in sight of Madeira, fell in with, and after an action of about fifteen minutes, was captured by the American privateer The Governor Tompkins. She was brought into the port of New York, where vessel and cargo were libelled; and the vessel and that part of the cargo which belonged to British subjects were condemned, without a claim. That part of the cargo which belonged to Spaniards was claimed by Manuel Pinto, partly for himself and partners, residing in Buenos Ayres, and partly for the other owners, residing in the same place. On the hearing, this part of the cargo was also condemned. An appeal was taken to the circuit court, where the sentence *of the district court was affirmed *pro formâ*, and [*391
and from that sentence, an appeal has been prayed to this court.

Hoffman, of New York, for the appellee.—It is true, this vessel was armed, but Pinto had no agency in arming her. She was an armed vessel, as early at least as May 1811, before the war between the United States and Great Britain. It is true, she sailed with convoy, but this she was obliged by law to do. It is true also, that she resisted the capturing vessel; but neither Pinto, who was a passenger on board, nor any other neutral passenger, gave any aid in the engagement.

The claim of Pinto, in behalf of himself, his father and sister, who were jointly interested with him in the business which he carried on, in his own name, was of three descriptions of goods. 1st. Of goods of which they were the sole owners. 2d. Of goods of which they owned one undivided moiety, the other being owned by British merchants. 3d. Of goods in which they claimed an interest of one-fourth, the residue being British property.

As to this last claim, he is charged with *mala fides*, because, in his examination *in præparatorio*, he stated, without qualification, that he was the owner of one-fourth part of those goods, whereas, in his claim and test-affidavit he states the fact to be, that he had agreed with certain British merchants, that if they would give him ten per cent. upon the sales, he would select for them such goods as would sell, at Buenos Ayres, at an advance of 150 per cent. upon their cost and charges; that he selected these goods, under that contract; that his commissions would have amounted to one-fourth of the original cost, and to that extent, he believed himself interested therein. There was no attempt to impose upon the court, he voluntarily explained the nature of his interest; if he was mistaken as to the legal effect of such a contract, yet no improper motive can be attributed to him.

*392] *Neither Pinto, nor any person connected with him, joined in the battle. If he had done so, he might have been considered as taking part in the war, and thereby excluding himself from the protection to which he is now entitled by the law of nations. He remained in the cabin, during the whole engagement, and had no concern whatever in the defence of the ship. It is true, that he states upon his examination *in præparatorio*, "that he belonged to the ship at the time of her capture, and had control of said ship and cargo." But his answers were written by the commissioner, and he, being a foreigner, probably did not observe the force of the expression. The nature of his control is explained by all the other circumstances of the case, to be a control within the limits of the charter-party. It is evident, he could have no lawful control over the management of the ship, from the time of her sailing from London, until her arrival at Buenos Ayres. The letter of instructions from the owner of the ship to the master, shows that the master was under the direction of Pinto, so far only as the charter-party required.

It has been heretofore said, that Pinto had acquired a hostile character arising from domicil. There is, however, no ground for such a pretence. It is true, that in the charter-party, he is said to be "of Buenos Ayres, but now residing in the city of London;" and in his examination *in præparatorio*, he states "that for seven years last past, he has lived and resided in England and Buenos Ayres." But he, at the same time, states, that he is a native of Buenos Ayres, that he now lives there, and has generally lived

there for 35 years, and has been admitted a freeman under the new government of Buenos Ayres. Even if he had acquired a domicil in England, which is not true, yet he had turned his back on that country and was on his voyage home. *Somerville* v. *Somerville*, 5 Ves. jr. 787. Pinto's test-affidavit shows particularly, that his birth, residence and commercial establishment had always been at Buenos Ayres, except during his occasional temporary absences in his commercial pursuits. The test-affidavit is always good evidence in prize causes. The party is obliged to put in his claim, upon oath, and it is to be taken as true, until contradicted by better evidence.

*The court is now for the first time called upon to decide the question, whether neutral property forfeits its character of neutrality, by being put on board an armed ship of the enemy? The general rule is, that the property of a friend, in a hostile vessel, is not liable to condemnation. There are but two exceptions to the neutral right to trade. 1. He shall not carry contraband of war. 2. He shall not violate a blockade. If the sailing in an armed vessel of the enemy had been also an exception, it would unquestionably have been noticed by some writer upon the law of nations. But no such exception is to be found in the books. If such be the doctrine, what degree of force will be sufficient to forfeit the neutral character of the goods? If she carried a single musket, the principle must be the same as if she mounted fifty cannon. And sailing under convoy, would be still more clearly within the rule. [*393

Vattel, lib. 3, c. 5, § 75, lays down the general principle thus: "Since it is not the place where a thing is, which determines the nature of that thing, but the quality of the person to whom it belongs; things, belonging to neutral persons, which happen to be in an enemy's country, or the enemy's ships, are to be distinguished from those belonging to the enemy." No hint is given, that a distinction is to be taken between the armed and unarmed ships of the enemy. Again, in lib. 3, c. 7, § 116, he says, "the effects of neutrals, found in an enemy's ship, are to be restored to the owners, against whom there is no right of confiscation." See also Duponceau's Bynkershoek 102, 108; 2 Azuni 194; Chitty 111; Ward 21; Mr. Jefferson's letter to M. Genet, 24th January 1793, among our own state papers, in the department of state.

This court will not, in contradiction to all these authorities, *make a new exception to the rights of neutral commerce. The policy of this country is to extend, not to impair them. A neutral aids the belligerent much more, by carrying belligerent property, than by employing a belligerent vessel to carry neutral goods; yet the neutral vessel, carrying the belligerent goods, is always restored, and with freight, unless she forfeit her neutral character by her hostile conduct. The neutral character may be forfeited by fraudulent conduct of the master; by violation of blockade; by carrying contraband goods; by false destination, and by resisting search. These are the only exceptions to the general rule that the property of a friend must be restored. But there must be an actual or an implied connivance between the master of the vessel, and the neutral owner of the goods, in order to subject the neutral cargo to condemnation for the acts of the master. *The Mercurius*, 1 Rob. 67 (Am. ed.); *The Columbia*, Ibid. 130; *The Jonge Tobias*, Ibid. 277; *The Shepherdess*, 5 Ibid. 234. In the case of [*394

The Maria (the Swedish convoy), the merchant vessels had received orders from the convoy, to resist search.

The unneutral character of a master shall not forfeit neutral property on board a neutral vessel. Can you then punish the innocent neutral for the legal exercise, by the hostile master of a belligerent vessel, of his rights of war? If this property is to be condemned, it must be on the ground of resistance; for it is understood, that it has been decided by this court, that shipping neutral property on board an armed neutral vessel even, will not subject it to condemnation. If resistance be not the ground on which condemnation is claimed, then, in a case where no resistance is made, if neutral property be found on board an enemy's ship, armed merely for resisting the piratical boats of South America, it is liable to condemnation.

It is true, that a neutral cannot lawfully rescue his ship, captured by a belligerent, because he has redress by the law of nations, if he has been improperly captured. *The Dispatch*, 3 Rob. 227 (Am. ed.); *The Maria*, 1 Ibid. 287. But here, the force was not used by a neutral. The ship-owner and the master were open and avowed enemies, and as such had a perfect
*395] right to defend their *ship by force. It was a lawful force. *The Catharina Elizabeth*, 5 Rob. 206.

But it will be said, that the right to search is impaired. The right of search is applicable only to a neutral ship. In case of a belligerent ship, the right of search is superseded by the right of capture. The privateer had a right to capture the Nereide, but, strictly speaking, had no right to search her. Pinto, by placing his goods on board a hostile ship, made them certainly liable to capture, although not to condemnation. He gave us the right of capture, in lieu of the right of search. The putting of neutral goods on board an armed vessel of the enemy, is analogous to the placing them in a fortified town. If they are placed there, before investment, they are not liable to condemnation, if captured; but if placed there, after investment, they are liable.

But it will be contended, that the 15th article of the treaty of 1795, between Spain and the United States (8 U. S. Stat. 146), has altered the rule of the law of nations on this subject, and that neutral Spanish goods, found on board an enemy's ship, are liable to condemnation as enemy's goods. The words of the article are, "And it is hereby stipulated, that free ships shall also give freedom to goods; and that everything shall be deemed free and exempt, which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either; contraband goods being always excepted."

It, will be contended, that if free ships make free goods, enemy's ships must make enemy's goods. But we contend, that although, by the treaty, free ships make free goods, yet the rule of the law of nations still remains in full force, that free goods, found in an enemy's ship, are also free. Nothing but an express stipulation in a treaty can deprive the Spanish subject of his rights under the law of nations; the treaty contains no such express
*396] stipulation. The article stipulated does *not necessarily imply its converse; the two rules are not inconsistent with each other. The neutral nation is entitled to the benefit of both. Ward 145.

In some of our treaties, will be found express stipulations as to both

points ; in others, as to one of the points only ; which fact shows that the two propositions are not considered as inseparable. The treaty of 1782, with Holland, adopts both rules—free ships are to make free goods, and hostile ships, hostile goods. So also does the convention of 1809 with France. (8 U. S. Stat. 184.)

As to the Spanish ordinance of Spain, cited in 2 Azuni 139, which declares even the goods of Spanish subjects to be good prize, if found on board an enemy's ship, it is a mere municipal regulation, and does not appear to have been adopted in practice against the citizens of the United States, even if it were in its terms applicable to them. It is said, that Spain would condemn our goods, found on board her enemy's ships, and therefore, upon the principle of reciprocity, we ought to condemn her goods, found on board the ships of our enemy. But the principle of reciprocity applies only to the case of salvage. It is not a rule of the law of nations, as to prize of war.

The proprietary interest of Pinto, his father and sister, and of the other merchants of Buenos Ayres in whose behalf he has interposed a claim, cannot be disputed. Their national character is clearly made out. The goods are not liable to forfeiture, either on account of his residence in London, or the character of the ship, or the opposition which she made, or by the treaty of Spain, or the principle of reciprocity. They ought, therefore, to be restored ; and without payment of the duties, inasmuch as it was not a voluntary importation.

Dallas, contrà, for the captors, contended, that there was evidence tending to show that Pinto had caused the ship to be armed, and had caused sundry British passengers to be taken on board, some of whom fought in the battle. That he had acquired *a British character by domicil ; [*397 and that he had not renounced that character, by turning his back on England, inasmuch as he meant to return. That Pinto must be considered as the owner of the vessel for the voyage, and as having a control over her in regard to her resistance.

He admitted, that neutrals have a right to carry on their accustomed trade, in the usual manner, and to employ the merchant vessels of the enemy for that purpose ; but not to arm a hostile vessel, nor to hire a hostile vessel already armed.

He divided his argument into three points : 1. That the property cannot be restored, without further proof, both on the subject of domicil, and on that of proprietary interest. And that, under the circumstances of this case, Pinto is not entitled to time for further proof. 2. That by force of the treaty between Spain and the United States, taken in connection with the existing law of Spain, the property is liable to condemnation. 3. That a neutral cannot lawfully hire an armed vessel of our enemy, and in the course of that trade, engage in battle with the United States.

I. As to further proof respecting his domicil. In his examination *in præparatorio*, he states, that for the last seven years, he resided in England and Buenos Ayres. This fact stood unexplained upon the record, for nearly a month. He then states in his test-affidavit, that he was then a resident of Buenos Ayres, where he had generally resided for 35 years ; but says nothing in explanation of his former assertion, that he had resided the last

seven years in England and Buenos Ayres. Why did he not state how long he had resided in each place? This leaves a doubt, which the court would permit him to explain, if he stood fair in court. The charter-party also states him to be then a resident in England.

*398] *Then, as to his proprietary interest, he first swears that he is the sole owner; but afterwards contradicts himself, and says he made a mistake, and that his father and sister are jointly interested with him in the property. Again, he first states the printing apparatus to be his property, and afterwards admits that it belonged to British subjects. With regard to the one-fourth which he claimed of sundry parcels of goods, he first swears that it belongs to him absolutely, and afterwards states that he was only entitled to a commission upon the sales of them. So also, with regard to an invoice of buttons; he first claimed them as his own, and afterwards disclaimed them as British property. Again, his testimony is contradicted by Puzey, his confidential clerk, who testifies that part of the property claimed by Pinto, belonged to the government of Buenos Ayres. It is certain, then, that the evidence is not clear in his favor, as to his domicil, and as to his proprietary interest.

Is he entitled to further proof? He has hired an armed vessel of the enemy, which has fought an American vessel, and would have captured her, if she had been able. There is no case in which restitution has been awarded, under such circumstances. Suppose, an American frigate had captured a British frigate, laden with specie belonging to the Spanish government, would it have been restored? How was it in the case of the Peacock and the Epervier?

Pinto chartered the whole ship. He permitted everything to be put on board; the hostile property as well as the neutral. He was to receive freight for the hostile property, and a higher freight, on account of the armament. He knew, that if this armament was employed to protect the neutral property, it would protect the hostile also. He impliedly undertook that the enemy's property should be protected. He was, therefore, interested in so doing, and identified his interest with that of the belligerent. The armament was clearly intended to be used against the Americans, as

*399] all the cruizers of France *had been driven from the ocean, and never appeared in those southern latitudes.

He says in his examination, that he was interested in the vessel and cargo and freight; and in a subsequent answer, he states that he had the control of the ship and cargo. It is clear, therefore, that he participated in the belligerent character, and is not entitled to further proof. See *The Atalanta*, 6 Rob. 460.

II. As to the effect of the Spanish treaty, in connection with the existing law of Spain. The treaty says that "free ships shall make free goods." This implies the converse proposition, that hostile ships shall make hostile goods. This treaty followed the memorable discussion which took place between this government and Genet, in 1793. At that time, we had a treaty with Prussia (8 U. S. Stat. 90, art. 12), which contains the same stipulation that free ships shall make free goods; but is silent as to the converse proposition. The two treaties are to be construed alike. Genet complained, that we permitted the British to take French goods out of our vessels. Mr. Jefferson was one of the negotiators of that treaty, and it is clear, that he understood it as implying that enemy ships should make enemy goods. See

his letters, as secretary of state, to Mr. Genet, of the 24th July 1793, and to Mr. Morris of the 16th of August 1793. The administration of our government constituted, at that time, perhaps, as wise a cabinet as ever existed. This treaty was their act. The proper construction must be, that the converse rule is implied. Ward 144, 145.

But when the treaty is taken in connection with the existing law of Spain, at the time of making the treaty, there can be no doubt. By that law, enemy ships make enemy goods. 2 Azuni 139. The Mr. Debron there mentioned was a Spaniard. There were two ordinances, one in 1704, the other in 1718. They are referred to in 2 Valin 252, lib. 3, tit. 9, art. 7. As to these ordinances, it is singular, that they do not say that the goods of a friend, in an enemy's ship, shall be liable to confiscation; but that the goods of a Spanish subject, in an enemy's ship, *shall be so liable. This, however, implies the other proposition; for if the goods of their own [*400 subjects were so liable, the goods of a friend would, *à fortiori*, be liable. It is said, that these ordinances have not been enforced against us. But we are not bound to show that fact. It is sufficient for us, that the law exists. Reciprocity is the permanent basis of the law of nations.

III. If a neutral hire an armed vessel of our enemy, and with armed force resist our belligerent rights, he forfeits his neutral character. A neutral may pursue his accustomed trade, in his usual manner; but the law of nations allows nothing further. It has been said, that the only test of neutrality is impartiality to the belligerents. This is true only in a national point of view. But when individuals are concerned, a very different test applies. (See the case of *The Tulip*.) A neutral cannot justify furnishing one belligerent with transports, by furnishing them to the other also. (See Vattel, lib. 3, ch. 7, § 109, 110, where will be found the whole doctrine of the law of nations on this subject.)

The general rule is, that nothing shall be done by a neutral to invigorate the belligerent. A right of peaceful commerce is not a right to set forth a warlike expedition. On that principle, a government might be neutral, and all its subjects belligerent. The words of the elementary writers are to be construed according to the subject upon which they treat. They all speak of a peaceable merchant vessel, not an armed vessel. Neutrals, says Sir W. Scott, may trade in the same manner as before the war, provided they take no direct part in the contest. It is not necessary to show, that the party actually put a match to the guns. This vessel was forced into action by Pinto; at all events, she *was brought into action by means of Pinto. [*401 He had a direct part in the contest.

The authority cited from Bynkershoek is in our favor, if we interpret the words according to the subject-matter. He says, a neutral may let as well as hire a vessel, but it must be a lawful letting and hiring. He did not mean to say, that a neutral may carry on a peaceful trade, in hostile manner. In the next sentence, he says, you may employ the vessel and the labor of the belligerent. It is clear, that he means an unarmed vessel.

What are the rights of the belligerent in regard to the neutral? He may search the vessel, the cargo and the papers. We have reason to complain of a neutral who puts a cargo like this (a great part being belligerent), on board a belligerent armed vessel, whereby our right of search is eluded, without a battle. A neutral may, indeed, if he can, elude the right of

search, by superior sailing, but he cannot lawfully prevent it by force. In the case cited from 5 Rob. 206, there is not evidence that the vessel was armed. If the fact had been so, it would undoubtedly have been mentioned by the reporter or the judge. Their silence shows that it was not armed.

The slightest recourse to belligerent force, in support of neutral rights, is fatal. A neutral vessel may arm, but she cannot resist belligerent rights. A neutral must not, directly or indirectly, contribute to the force of an enemy. In *The Maria*, 1 Rob. 287, it is decided, that resistance of the convoy ship, is the resistance of the whole convoy ; and that the resistance of the ship affects the cargo.

In the case of *The Elsebe*, 5 Rob. 174 (Eng. ed.), one of the questions was, whether the cargoes, belonging to subjects of the Hans Towns, laden on board Swedish vessels, and sailing under Swedish convoy, were liable to condemnation ? the convoying ships having resisted search by the British fleet. It was contended on their behalf, that they were not involved *402] in the penalties of Swedish resistance, *which was an act of the Swedish government, and did not bind the subjects of other powers ; that the proprietors of these cargoes were not privy to this fact ; and that the masters of the vessels were not the agents of the cargoes, so as to bind them. Sir William Scott, after stating that there was in the charter-party, an express stipulation that the ship should sail with convoy, says, "But I will take the case, on the supposition that there was no such engagement. The master associates himself with a convoy, the instructions of which he must be supposed to know ; he puts the goods under unlawful protection, and it must be presumed, that this is done with due authority from the owners, and for their benefit. It is not the case of an unforeseen emergency, happening to the ship at sea, where the fact itself proves the owners to be ignorant and innocent ; and where the court has held, that being proved innocent by the very circumstances of the case, they shall not be bound by the mere principle of law, which imposes on the employer a responsibility for the acts of his agent. On the contrary, it is a matter done antecedently to the voyage, and must, therefore, be presumed to be done, on communication with the owners, and with their consent ; and the effect of this presumption is such, that it cannot be permitted to be averred against ; inasmuch as all the evidence must come from the suspected parties themselves, without affording a possibility of meeting it, however prepared. The court has, therefore, thought it not unreasonable, to apply the strict principle of law, in a case not entitled to any favor, and holds, as it does in blockade cases of that description, that the master must be taken to be the authorized agent of the cargo, that he has acted under powers from his employer, and that, if he has exceeded his authority, it is barratry, for which he is personally answerable, and for which the owner must look to him for idemnification. I pass over many considerations which have been properly pressed in argument ; but I cannot omit to observe, that this is not merely a question arising on a single fact of limited consequence ; it is a pretension of infinite importance, and of great extent, being nothing less than an opposition to the general law of search, by which, if it could, in one instance, be admitted, the whole provisions of the law of nations on that head might be effec- *403] tually defied ; *for if this principle could be maintained, by an interchange of convoys, the whole unlawful business might be carried on with

security. To put the goods of one country on board the ships of another, would be a complete *recipe* for the safety of the goods, with a trifling alteration, easily understood, and easily practised, while the mischief itself would exist in full force."

The same principle was afterwards advanced by the Danish government, in relation to American ships, sailing under British convoy, and acquiesced in by the American government. See the letter from our minister, Mr. Irvin, to the secretary of state, of June 23d, 1811, and the letter from the Swedish minister, Rosencrantz, to Mr. Irvin, of the 28th of June 1811. State Papers, p. 224, 235.

A neutral cannot employ the force of his own government, nor that of another neutral, much less than that of a belligerent, to protect himself from search. If you cannot make use of the convoy, you cannot take the guns of that convoy and protect yourself. It is not the modification of the force, but the force itself, that is unlawful. If a neutral, insured as such, range himself under convoy, the policy is vacated.

This case is not like that of neutral goods put into a fortified town, before investment: it is more like that of goods placed there, after investment. They were put on board, with a full knowledge that the vessel would be invested (if a land term may be permitted in speaking of a naval transaction), that is, that she would be liable to search.

Pinkney, on the same side, contended, that this property ought to be condemned upon three grounds: 1. The treaty with Spain; 2. The principle of reciprocity; and 3. The conduct of Pinto in hiring an armed vessel of the enemy, which made resistance.

*I. As to the Spanish treaty. It contains the stipulation that "free ships shall make free goods," and it does not negative the converse [*404 proposition, that enemy ships shall make enemy goods. Hence, we are at liberty to give the stipulation its full extent and scope. This principle was first attempted to be established by Holland, immediately after the treaty of Munster. They sought to establish by treaty, that the flag should communicate its character to the cargo. This was the original form of the proposition. It necessarily involved the principle, that hostile ships should make hostile goods. How preposterous would it be, to say, that neutral ships should make neutral goods, but enemy's ships should not make enemy's goods.

It is the universal understanding among nations, that the two propositions are mutually connected, and the one implies the other. It might have been necessary, in the outset, to express both, but when the principle was generally understood, that necessity ceased. The United States had no interest in extending the range of the principle; and in all her treaties, except those with Spain and Prussia, she has stipulated for both parts of the rule. There is no reason, either in the commercial or belligerent policy of the United States, which should induce her to stop short with the proposition, that free ships should make free goods, and not go on to adopt the converse.

Spain had no motive to adopt the principle, with the limitation under consideration. In her treaties with France, Holland and England, she adopts the principle in its whole extent. She took it with the qualification that neutrals should not put their goods on board a belligerent vessel. In her

treaty with England, she expresses only the converse, viz., that "enemy ships shall make enemy goods." It has been said, that she limited the principle, by acceding to the armed neutrality; but that was a mere ephemeral act, and its validity depended upon an event which never happened—the accession of England.

*405] II. As to the law of Spain and the principle of reciprocity. *In the ordinance of 1702, it appears to be her favorite principle, that "enemy ships shall make enemy goods." In the ordinance of 1718, the same principle is adopted, and ordered to be carried into execution. These ordinances were re-enacted in 1739, 1756, 1779, 1794 and 1796. The treaty now under consideration was wedged in between two of these ordinances; those of 1794 and 1796. Is it impossible, that Spain, the declared enemy of neutral rights, meant to recognise a principle like this, which had never before been taken under the protection of any nation? Are we to suppose, that Spain, by this treaty, meant to abandon her own local law? Spain has had this principle in abhorrence. By her ordinance of 1718, she says, that if any part of the cargo is hostile, it shall communicate its character to the ship and all the residue of the cargo. This principle cannot be understood but in the manner for which we contend. By the law of Spain, therefore, this property would be liable to condemnation. By the rule of reciprocity, it ought to be condemned here.

But it is objected, that the Spanish law has never been enforced against us. It is sufficient for us to show that it exists. In the absence of contrary proof, the presumption is, that it has been executed. It is said also, that the rule of reciprocity applies only to the case of re-capture and salvage. But Sir W. Scott, in *The Santa Cruz* (1 Rob. 53, Am. ed.), says, that "this principle of reciprocity is by no means peculiar to cases of re-capture: it is found also to operate in other cases of maritime law: at the breaking out of a war, it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore, if the enemy restores. It is a principle sanctioned by the great foundation of the law of England, *Magna Charta* itself; which prescribes, that at the commencement of a war, the enemy's merchants shall be kept and treated as our own merchants are treated in their country."

*406] *The principle of reciprocity has been distinctly recognised and adopted by the law of Spain. Holland remonstrated, but Spain answered, that Holland had not resisted the maritime principles of England. The same answer was received from France, when we complained of the Berlin and Milan decrees. The British orders in council also were founded upon the same principle. Great Britain attempted to justify them, by the assertion that we acquiesced in the Berlin and Milan decrees. The assertion was not true; but it shows that Great Britain acknowledged the rule of reciprocity, as a rule of the law of nations.

III. As to the armament and resistance. The undisputed facts are, that Pinto hired the whole vessel, and took in goods on freight, for his own benefit. That the vessel was armed, sailed, resisted and was captured.

It is contended, that he could lawfully do all this. If he could, he was a "chartered libertine." Can a neutral surround himself "with all the pomp and circumstance of war?" The idea of our opponents exhibits a *discordia rerum*—an incongruous mixture of discordant attributes; a centaur-like

figure—half man, half ship ; a phantastic form, bearing in one hand the spear of Achilles, in the other, the olive branch of Minerva ; the frown of defiance on her brow, and the smile of conciliation on her lip, entwining the olive branch of peace around the thunderbolt of Jupiter, and hurling it, thus disguised, indiscriminately, at friends and foes.

From the authorities cited on the other side, an inference is attempted to be drawn, that a neutral may lawfully employ an armed merchant vessel of the enemy, to transport his goods. But none of those authorities speak of an armed vessel. Such a vessel, unquestionably, has power to make captures. If she has a commission, the captures are for her own benefit ; if she has no commission, she captures for the crown. Her prizes are *droits* of admiralty. It is true, that if she sail without a pass, or some document to show her national character, she would be considered as a pirate ; but this vessel had a British pass. If all neutrals may *lawfully hire such [*407
vessels, the ocean may be covered with them, and they might more effectually aid the enemy than his own navy.

Bynkershoek says, the neutral must do nothing to the prejudice of the belligerent. It is incumbent, therefore, upon Pinto, to show that he did us no prejudice, by chartering such an armed vessel. We say, he thereby infringed our right of search. It is said, that the right of search is a right to search the ship only. But why search the ship ? To see what sort of a cargo she has. The cargo, therefore, must be searched as well as the ship. A neutral cannot carry contraband goods, nor violate blockade, nor carry his own property, if it be the produce of his estate in the enemy's country. To prevent this, the belligerent has a right to stop and search his cargo. In this case, it is the hostile character of the vessel, which constitutes the offence, inasmuch as it prevented our right of search.

In the case of *The Elsebe*, the cargo was forfeited, by sailing under convoy, which resisted search. Pinto falls by the fate of war. He identified himself with a hostile armament ; he knew the necessary consequence of his act ; he knew it would be the duty of the ship to resist ; and that resistance would be made, if there should be any chance of escape thereby. He must be either at peace or war. He cannot claim the advantages of both conditions, at the same time.

Emmet, in reply, after removing the objections which had been raised as to the British domicil of Pinto, and as to some variations between his testimony *in præparatorio* and his test-affidavit, &c., observed—

As to the treaty with Spain, that the maxim "free ships shall make free goods," does not imply the converse, that hostile ships shall make hostile goods. There is certainly no necessary connection between the two maxims, nor have they ever been supposed to be necessarily connected. The one is the claim of a neutral, the other of a belligerent. What is the rule of justice ? That free ships should make free goods, and that free *goods, [*408
in belligerent ships, should be free also. Whenever the two maxims have been connected in a treaty, it has been where one of the maxims was important to one of the parties, as a neutral nation, and the other, to the other party, as a belligerent nation.

In the treaty of the armed neutrality, in 1780, the interest of the Dutch was to have the benefit of both maxims. The Dutch idea, however, was

discarded by the northern confederacy, and the two maxims completely separated. The Empress of Russia, in her manifesto of the 26th of February 1780, declaring the principles which she intended to follow, states this principle in the following words, "That the effects belonging to the subjects of the said warring powers shall be free, in all neutral vessels, except contraband merchandise." But she says nothing respecting neutral goods found on board belligerent vessels. It cannot be supposed, that she meant to surrender her neutral rights, by mere implication. The principle is expressed in nearly the same words, in the treaty of armed neutrality of 1780; nothing is there said respecting neutral goods in belligerent vessels. The King of Prussia, however, in his answer to the Russian manifesto, explicitly claims the freedom of neutral goods, on board belligerent ships, as well as of belligerent goods, on board of neutral ships. These facts show that, in the general understanding of all Europe, the two maxims were entirely distinct and independent. See also Marten's Law of Nations, translated by Cobbett, 318. The United States did not exist as a nation, until after the two maxims were thus completely separated.

Only three of the treaties by the United States have been produced on the other side. There are, in fact, eight in which the principle is mentioned. 1. The treaty with France of the 6th of February 1778 (8 U. S. Stat. 24), which expressly adopts both maxims; the United States having, in that instance, yielded to the belligerent claim of France. 2. The treaty with Holland of the 8th of October 1782 (Ibid. 40). 3. The treaty with Sweden of 3d April 1783 (Ibid. 64), adopts only the maxim that free ships shall make free goods. 4. The treaty with Prussia of 1785 (Ibid. 90), which adopts the principle free ships, &c., only. 5. The treaty *with Morocco, 1787 (Ibid. 101), which stipulates that free ships shall make free goods, and that neutral goods on board of belligerent vessels shall also be free. This latter stipulation was necessary, inasmuch as the Barbary powers pay little respect, in practice, to the law of nations. 6. The treaty of 1795, with the Dey of Algiers (Ibid. 132), which adopts the maxim, free ships, free goods. 7. The treaty with Spain of 1795 (Ibid. 146), adopts the same maxim. 8. The treaty with Tripoli, of 1796 (Ibid. 154), adopts the same maxim, and further stipulates that neutral goods shall be free, in belligerent vessels. It was not necessary that such a stipulation should be inserted in the treaty with Spain, because Spain knew the law of nations and professed to respect it.

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If there be no doubt, then, as to the construction to be given to the Spanish treaty, there is no necessity to discuss the ordinance which is supposed to be connected with it. The principle which they call the rule of reciprocity, ought more properly to be called the rule of retaliation. But there is no such ordinance of Spain as is pretended. The ordinance applies only to Spanish goods, found on board the vessels of the enemy, and was a mere temporary provision, to continue only during the war. It appears by the extract from D'Habreu, found in 2 Azuni 139, that the liability of the goods of neutrals, found on board the vessels of the enemy, depended upon treaties and not upon that ordinance.

The rule of retaliation is not a rule of the law of nations. The violation of the law of nations by one nation, does not make it lawful for the offended nation to violate the law in the same way. It is true, that states may resort

to retaliation, as a means of coercing justice from the other party. But this is always done as an act of state, and not as the mere result of a judicial execution of the law of nations. It is the effect of policy, not of law. Such were the measures adopted by the orders in council of Great Britain, and the offensive decrees of France, and of other nations under the control of France, which have been mentioned on the other side. The government of a state always undertakes to punish the violation *of its rights, and it chooses its own means. But the tribunals of justice must decide according to law. [*410

The cases alluded to by Sir W. Scott, in *The Santa Cruz*, are cases in which the government could lawfully exercise its discretion in receding from its acknowledged rights. Thus, in the case of property seized at the breaking out of a war, the government would have an unquestioned right to condemn or to release it. It was not the right to condemn, which depended upon the rule of reciprocity, but the inexpediency. It was not a question of law, but of policy.

As to the armament, and the resistance. It is difficult to say, in what fact the opposite party consider the criminality to exist. Is it that Pinto took unarmed passengers on board? This was lawful. Was it the taking on board enemy goods? This was innocent. Was it in chartering an armed vessel? There is no rule of the law of nations against it. Was it in arming the vessel? The fact is not proved. Was it in joining in the combat? It is fully proved, that he took no part in the contest.

But it is said, that chartering the vessel makes him owner for the voyage. This is not the rule, in a court of admiralty. Even if an enemy charter a neutral vessel, he is not owner for the voyage: the vessel is always restored. Bynkershoek says, it is not unlawful for a neutral to hire a vessel from the enemy, for commercial purposes. But it is said, that he means an unarmed vessel: there is nothing to support that idea; the natural presumption is, that an enemy's ship would be armed.

It is said also, that a neutral may deposit his goods in an armed belligerent vessel, under a bill of lading, but not under a charter-party. That is, that several neutral merchants may severally occupy the whole ship, but that one cannot. A distinction founded upon no difference of principle, cannot alter the case. How does he call the belligerent faculties of the ship into action, more in one case than in the other? Does the neutral add to her belligerent faculty, by lading her deeply and giving her a destination from which she dare not depart in quest of her enemy?

This is not a commissioned vessel: that case might be different. The Epervier was a commissioned vessel, and it is said, was coming from Bermuda, with bullion for the British troops in Canada; otherwise, probably, a claim for the bullion would have been interposed. In the case of the British packets, captured during the present war, was the property of the neutral passengers confiscated? These vessels were armed and commissioned. But there is no distinction taken in the books between commisioned and uncommissioned vessels, except that the latter cannot make captures, under the penalty of being treated as pirates. 2 Azuni 233. [*411

If the doctrine be true, in regard to an armed vessel, it must be equally true, with regard to convoy; yet they do not pretend, that this vessel is liable to condemnation, because she sailed with convoy. The law of England

is, now, that no vessel shall sail without convoy. Such a doctrine would go to prevent neutral property from being laden on board an English merchantman. Did England suppose, when she was passing the law requiring all vessels to sail with convoy, that she was cutting herself off from all neutral freight?

When writers on the law of nations speak of a belligerent vessel, what do they mean? They speak of it as of a wolf, which you can only hold by the ears—*lupum auribus tenere.* They mean a vessel carrying on war. But can a vessel carry on war, without arms? What degree of armament is sufficient to make it unlawful for a neutral to employ her? One musket, or two, or twenty?

The *Consolato del Mare* was written long before the knowledge of firearms, and does not speak of the distinction between armed and unarmed. In all the battles in which England has been engaged, and in all her commercial transactions, has such a case never occurred before? If it has, why are the books silent upon the subject? Why has not a single writer in the world mentioned the difference between neutral goods, found in an armed, and in an unarmed, vessel of the enemy? See 2 Azuni 194, 195, 196, 197, and the authorities there cited.

The owner of the ship was an enemy: he had a perfect right to arm and defend his ship: the master, for *this purpose, was his exclusive agent. His act in defending the ship cannot be attributed to the innocent owner of the cargo, who also had a perfect right to put his goods on board such a ship; and who did not interfere in the combat. But it is said, that a neutral has only a right to carry on his accustomed trade, in his accustomed manner. Where is it said, that it must be carried on in his accustomed manner? There is no authority for such a restriction, nor any principle to justify it. But this trade from London to Buenos Ayres was always carried on in British ships, and often, if not generally, armed. This was a voyage carried on in the accustomed way.

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It is said also, that by putting these neutral goods on board an armed vessel, our right of search, as belligerent nation, was impaired. But how is the right of search applicable to this case? This is a secondary right, auxiliary to the belligerent right of capturing the enemy's goods on board a neutral vessel. It is applicable only to a vessel bearing a neutral flag. The belligerent has a right to know whether the cargo be really neutral, and for that purpose must examine it at sea. But if the vessel bears the flag of an enemy, there is no necessity to search the nature of the cargo at sea. You have the right to capture at once, and bring her in, when the cargo may be examined; the neutral must make out his claim, and is never entitled to damages for the delay or the detention.

Why does neutral resistance of search forfeit the cargo as well as the vessel, although the owner of the cargo had no concern in the vessel nor in the resistance? It is, because the act of resistance was wholly unlawful; and the owner of the cargo can recover damages from the owner of the vessel or the master. But here, the resistance was lawful; Pinto could never recover damages against the master for defending his ship.

March 11th, 1815. (Absent, Todd, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows:—

*In support of the sentence of condemnation in this case, the captors contend, 1. That the claimant, Manuel Pinto, has neither made sufficient proof of his neutral character, nor of his property in the goods he claims. 2. That by the treaty between Spain and the United States, the property of a Spanish subject, in an enemy's vessel, is prize of war. 3. That on the principles of reciprocity, this property should be condemned. 4. That the conduct of Manuel Pinto and of the vessel has impressed a hostile character on his property, and on that of other Spaniards laden on board of the Nereide.

I. Manuel Pinto is admitted to be a native of Buenos Ayres, and to carry on trade at that place, in connection with his father and sister, who are his partners, and who also reside at Buenos Ayres ; but it is contended, that he has acquired a domicil in England, and with that domicil, the English commercial character. Is the evidence in any degree doubtful on this point ? Baltaza Ximenes, Antonio Lynch and Felix Lynch, three Spaniards, returning with Pinto, in the Nereide, all depose, that Buenos Ayres is the place of his nativity and of his permanent residence, and that he carries on trade at that place. In his test-affidavit, Manuel Pinto swears, in the most explicit terms, to the fact that Buenos Ayres is, and always has been, the place of his permanent residence ; that he carries on business there, on account of himself, his father and sister, and that he has been absent for temporary purposes only. His voyage to London, where he arrived in June 1813, was for the purpose of purchasing a cargo for his trade at Buenos Ayres, and of establishing connections in London for the purposes of his future trade at Buenos Ayres.

This plain and direct testimony is opposed, *1. By his examination *in præparatorio*. In his answer to the first interrogatory, he says, [*414 that he was born at Buenos Ayres, that for seven years last past, he has lived and resided in England and Buenos Ayres, that he now lives at Buenos Ayres, that he has generally lived there for thirty-five years last past, and has been admitted a freeman of the new government. Whatever facility may be given to the acquisition of a commercial domicil, it has never heretofore been contended, that a merchant, having a fixed residence, and carrying on business, at the place of his birth, acquires a foreign commercial character, by occasional visits to a foreign country. Had the introduction of the words "seven years last past," even not been fully accounted for by reference to the interrogatory, those words could not have implied such a residence as would give a domicil. But they are fully accounted for. In his answer to the 12th interrogatory, he repeats, that he is a Spanish American ; now lives and carries on trade at Buenos Ayres, and has generally resided there.

2. The second piece of testimony relied on by the counsel for the captors is the charter-party. That instrument states Manuel Pinto to be of Buenos Ayres, now residing in London. The charter-party does not state him to have been formerly of Buenos Ayres, but to be, at its date, of Buenos Ayres. Nothing can be more obvious, than that the expression, now residing in London, could be intended to convey no other idea than that he was then personally in London. As little importance is attached to the covenant to receive the return-cargo, at the wharf in London. The performance of this duty by the consignee of the cargo, as the agent of Pinto, would be a complete execution of it. Had the English character been friendly, and

the Spanish hostile, it would have been a hardy attempt, indeed, in *Mr. Pinto, to found, on these circumstances, a claim to a domicil in England.

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The question respecting ownership of the goods is not so perfectly clear. The evidence of actual ownership, so far as the claim asserts property existing, at the time, in himself and partners, is involved in no uncertainty. The test-affidavit annexed to the claim, is full, explicit and direct. It goes as far as a test-affidavit can go, in establishing the right which the claim asserts. All the documentary evidence, relating to this subject, corroborates this affidavit. The charter-party shows an expectation that, of a freight of 700*l.*, the goods of Mr. Pinto would pay 400*l.* The very circumstance that he chartered the whole vessel furnishes strong inducements to the opinion, that a great part of her cargo would be his own.

The witnesses examined *in præparatorio*, so far as they know anything on the subject, all depose to his interest. William Puzey was clerk to Pinto, and he deposes to the interest of his employer, on the knowledge acquired in making out invoices and other papers belonging to the cargo. His belief too, is, in some degree, founded on the character of Pinto, in London, where he was spoken of as a man of great respectability and property; and from the anxiety he discovered for the safety of the property, after the Nereide was separated from her convoy. The bills of lading for that part of the cargo which is claimed by Pinto, are filled up, many of them, with his name, some to order, and the marginal letters in the manifest would also denote the property to be his. Where he claims a part of a parcel of goods, the invoice is sometimes to order, and the marginal letters would indicate the goods to be the property of Pinto and some other person.

This testimony proves, very satisfactorily, the interest of Pinto's house in the property he claims. There is no counter-testimony in the cause, except the belief expressed by Mr. Puzey, that for a part of the goods, Pinto was agent for the government of Buenos Ayres. This *belief of Mr. Puzey is supposed to derive much weight from his character as the clerk of Mr. Pinto. The importance of that circumstance, however, is much diminished, by the fact, that he had seen Pinto only a week before the sailing of the Nereide, and that he does not declare his belief to be founded on any papers he had copied or seen; or on any communication made to him by his employer. There are other and obvious grounds for his suspicion. A part of the cargo consisted of arms and military accoutrements; and it was not very surprising, that Puzey should conjecture that they were purchased for a government about to sustain itself by the sword. But this suspicion is opposed by considerations of decisive influence, which have been stated at the bar. The demand for these articles in Buenos Ayres, by the government, would furnish sufficient motives to a merchant for making them a part of his cargo. In a considerable part of this warlike apparatus, British subjects were jointly concerned. It is extremely improbable, that, if acting for his government, he would have associated its interests with those of British merchants. Nor can a motive be assigned for claiming those goods for himself, instead of claiming them for his government. They would not, by such claim, become his, if restored; he would still remain accountable to his government, and the truth would have protected the property as effectually as a falsehood, should it remain undetected. By claiming these goods

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for himself, instead of his government, he would commit a perjury from which he could derive no possible advantage, and which would expose to imminent hazard, not only those goods, but his whole interest in the cargo. The court, therefore, must consider this belief of Mr. Puzey, as a suspicion, which a full knowledge of the facts ought entirely to dissipate.

If there was nothing in the cause but this suspicion, or this belief of Mr. Puzey, the court would not attach any importance to it. But Mr. Pinto himself has, in his examination *in præparatorio*, been, at least, indiscreet, in asserting claims not to be sustained; and in terms which do not exhibit the real fact in its true shape. In his answer to the 12th interrogatory, he says, "And this deponent also has one-fourth interest, as owner of the following goods, &c., viz., 15 bales of merchandise," &c. In his claim, he thus states the transaction under which his title to the one-fourth of these goods accrued. *He had agreed with certain persons in England to select for them a parcel of goods for the market of Buenos Ayres, of which he was to [*417 be the consignee, and which he would sell on a commission of ten per cent. on the amount of sales at Buenos Ayres.. These goods were selected, purchased and consigned to Manuel Pinto. The bills of lading were in his possession, and he considered his interest under this contract as equal to one-fourth of the value of the goods, "wherefore," he says, "he did suppose that he was interested in the said goods and merchandise for himself, his father and sister, and well entitled, as the owner thereof, or otherwise, to an equal fourth part of the said goods, inasmuch as his commissions as aforesaid, would have been equal to such fourth."

It is impossible to justify this representation of the fact. The reasoning might convince the witness, but the language he used was undoubtedly calculated to mislead the court, and to extricate property to which the captors were clearly entitled, although the witness might think otherwise. Such misrepresentations must be frowned on in a prize court, and must involve a claim, otherwise unexceptionable, in doubt and danger. A witness ought never to swear to inferences, without stating the train of reasoning by which his mind has been conducted to them. Prize courts are necessarily watchful over subjects of this kind, and demand the utmost fairness in the conduct of claimants. Yet, prize courts must distinguish between misrepresentations which may be ascribed to error of judgment, and which are, as soon as possible, corrected by the party who has made them, and wilful falsehoods which are detected by the testimony of others, or confessed by the party, when detection becomes inevitable. In the first case, there may be cause for a critical, and perhaps, suspicious examination of the claim, and of the testimony by which it is supported; but it would be harsh indeed, to condemn neutral property, in a case in which it was clearly proved to be neutral, for one false step, in some degree equivocal in its character, which was so soon corrected by the party making it.

The case of Mr. Paul's printing-press is still less dubious in its appearance. It would require a very critical *investigation of the evidence, [*418 to decide whether this press is stated, in his answer to the 12th interrogatory, to be his property or not. Four presses are said in that answer to belong to him; but he also says, in his answer to another interrogatory, perhaps the 26th, that Mr. Paul had one printing-press on board. Whether there were five presses in the cargo, or only four, has not been

decided, because the declaration made in his examination *in præparatorio*, that one of the presses belonged to Mr. Paul, proves unequivocally that the mistake, if he made one, was not fraudulent.

That he should state as his, the property which belonged to a house in Buenos Ayres, whose members all resided at the same place, and of which he was the acting and managing partner, was a circumstance which could not appear important to himself, and which was of no importance in the cause. These trivial and accidental inaccuracies are corrected in his claim, and in his test-affidavit. The court does not think them of sufficient importance, to work a confiscation of goods, of the real neutrality of which no serious doubt is entertained.

II. Does the treaty between Spain and the United States subject the goods of either party, being neutral, to condemnation as enemy property, if found by the other, in the vessel of an enemy? That treaty stipulates that neutral bottoms shall make neutral goods, but contains no stipulation that enemy bottoms shall communicate the hostile character to the cargo. It is contended by the captors, that the two principles are so completely identified, that the stipulation of the one necessarily includes the other. Let this proposition be examined.

The rule that the goods of an enemy, found in the vessel of a friend, are prize of war, and that the goods of a friend, found in the vessel of an enemy, are to be restored, is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly, it has been fully and unequivocally recognised by the United States. This rule is founded on the simple and intelligible principle, that war gives a full right to capture the goods of an enemy, but gives no right to *capture the goods of a friend. In the practical application of this principle, so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property, and that the belligerent flag communicates no hostile character to neutral property, are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

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Many nations have believed it to be their interest to vary this simple and natural principle of public law. They have changed it, by convention between themselves, as far as they have believed it to be for their advantage to change it. But unless there be something in the nature of the rule, which renders its parts unsusceptible of division, nations must be capable of dividing it, by express compact, and if they stipulate either that the neutral flag shall cover enemy goods, or that the enemy flag shall infect friendly goods, there would, in reason, seem to be no necessity for implying a distinct stipulation not expressed by the parties. Treaties are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations, and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be ascribed to inattention. And if an omitted article be not necessarily implied in one which is inserted, the subject to which that article would apply, remains under the ancient rule. That the stipulation of immunity to enemy goods, in the bottoms of one of the parties, being neutral, does not imply a surrender of the goods of that party, being neutral, if found in the vessel of an enemy, is the proposition of the

counsel for the claimant, and he powerfully sustains that proposition, by arguments arising from the nature of the two stipulations. The agreement that neutral bottoms shall make neutral goods is, he very justly remarks, a concession made by the belligerent to the neutral. It enlarges the sphere of neutral commerce, and gives to the neutral flag a capacity not given to it by the law of nations.

The stipulation which subjects neutral property, found in the bottom of an enemy, to condemnation as prize of *war, is a concession made by the neutral to the belligerent. It narrows the sphere of neutral commerce, and takes from the neutral a privilege he possessed under the law of nations. The one may be, and often is, exchanged for the other. But it may be the interest and the will of both parties, to stipulate the one, without the other; and if it be their interest, or their will, what shall prevent its accomplishment? A neutral may give some other compensation for the privilege of transporting enemy goods in safety, or both parties may find an interest in stipulating for this privilege, and neither may be disposed to make to, or require from, the other, the surrender of any right, as its consideration. What shall restrain independent nations from making such a compact? And how is their intention to be communicated to each other, or to the world, so properly, as by the compact itself? [*420

If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress, from the first attempts at their introduction to the present moment. For a considerable length of time, they were the companions of each other—not as one maxim, consisting of a single indivisible principle, but as two stipulations, the one, in the view of the parties, forming a natural and obvious consideration for the other. The celebrated compact, termed the armed neutrality, attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the claimants. Its object was, to enlarge, and not in anything to diminish, the rights of neutrals. The great powers, parties to this agreement, contended for the principle, that free ships should make free goods; but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The king of Prussia declared his expectation, that in future, neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe, that this opinion *was not common to those powers who acceded to the principles of the armed neutrality. [*421

From that epoch to the present, in the various treaties which have been formed, some contain no article on the subject, and consequently, leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral, in the vessel of a friend, shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe. This review, which was taken with minute accuracy at the bar, certainly demonstrates that, in public opinion, no two principles are

more distinct and independent of each other, than the two which have been contended to be inseparable.

Do the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States have, in some treaties, stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods, and that friendly goods shall be safe in the bottom of an enemy. It is, therefore, clearly understood in the United States, so far as an opinion can be formed on their treaties, that the one principle is totally independent of the other. They have stipulated expressly for their separation, and they have sometimes stipulated for the one without the other.

But in a correspondence between the secretary of state of the United States and the minister of the French republic, in 1793, Prussia is enumerated among those nations with whom the United States had made a treaty adopting the entire principle that the character of the cargo should be determined by the character of the flag. Not being in possession of this correspondence, the court is unable to examine the construction it has received. It has not deferred this opinion on that account, because the point in controversy, at that time, was the obligation imposed on the United States to
*422] protect belligerent *property in their vessels, not the liability of their property to capture, if found in the vessel of a belligerent. To this point, the whole attention of the writer was directed, and it is not wonderful, that in mentioning, incidentally, the treaty with Prussia which contains the principle that free bottoms make free goods, it should have escaped his recollection, that it did not contain the converse of the maxim. On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar, in which the best judgment of this court does not concur. But this respectful difference may well comport with the opinion, that an argument incidentally brought forward, by way of illustration, is not such full authority as a decision directly on the point might have been.

III. The third point made by the captors is, that whatever construction might be put on our treaty with Spain, considered as an independent measure, the ordinances of that government would subject American property, under similar circumstances, to confiscation, and therefore, the property, claimed by Spanish subjects in this case, ought to be condemned as prize of war.

The ordinances themselves have not been produced, nor has the court received such information respecting them, as would enable it to decide certainly, either on their permanent existence, or on their application to the United States. But be this as it may, the court is decidedly of opinion, that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political, not a legal measure. It is for the consideration of the government, not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation to avenge its wrongs, in a manner having no affinity to the injury sustained, or it may be its policy to recede from its

full rights, and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation, and to thwart its views. It is not for us to depart from the beaten track *prescribed for us, and to tread the devious and intricate path of politics. Even in the case of [*423 salvage, a case peculiarly within the discretion of courts, because no fixed rule is prescribed by the law of nations, congress has not left it to this department, to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government, to apply to Spain any rule respecting captures, which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Until such an act be passed, the court is bound by the law of nations, which is a part of the law of the land.

Thus far the opinion of the court has been formed, without much difficulty. Although the principles, asserted by the counsel, have been sustained on both sides, with great strength of argument, they have been found, on examination, to be simple and clear in themselves. Stripped of the imposing garb in which they have been presented to the court, they have no intrinsic intricacy which should perplex the understanding.

The remaining point is of a different character. Belligerent rights and neutral privileges are set in array against each other. Their respective pretensions, if not actually intermixed, come into close contact, and the line of partition is not so distinctly marked as to be clearly discernible. It is impossible to declare in favor of either, without hearing, from the other, objections which it is difficult to answer, and arguments which it is not easy to refute. The court has given to this subject a patient investigation, and has endeavored to avail itself of all the aid which has been furnished by the bar. The result, if not completely satisfactory even to ourselves, is one from which it is believed we should not depart, were further time allowed for deliberation.

IV. Has the conduct of Manuel Pinto and of the Nereide been such, as to impress the hostile character on that part of the cargo which was in fact neutral? In considering this question, the court has examined separately the parts which compose it. The vessel was armed; was the property of an enemy; *and made resistance. How do these facts [*424 affect the claim?

Had the vessel been armed by Pinto, that fact would certainly have canstituted an important feature in the case. But the court can perceive no reason for believing she was armed by him. He chartered, it is true, the whole vessel, and that he might as rightfully do, as contract for her partially; but there is no reason to believe, that he was instrumental in arming her. The owner stipulates that the Nereide, "well-manned, victualled, equipped, provided and furnished with all things needful for such a vessel," shall be ready to take on board a cargo to be provided for her. The Nereide, then, was to be put, by the owner, in the condition in which she was to sail. In equipping her, whether with or without arms, Mr. Pinto was not concerned. It appears to have been entirely and exclusively the act of the belligerent owner.

Whether the resistance, which was actually made, is in any degree imputable to Mr. Pinto, is a question of still more importance. It has been argued, that he had the whole ship, and that, therefore, the resistance was

his resistance. The whole evidence upon this point is to be found in the charter-party, in a letter of instructions to the master, and in the answer of Pinto to one of the interrogatories *in præparatorio*. The charter-party evinces throughout, that the ship remained under the entire direction of the owner, and that Pinto in no degree participated in the command of her. The owner appoints the master, and stipulates for every act to be performed by the ship, from the date of the charter-party to the termination of the voyage. In no one respect, except in lading the vessel, was Pinto to have any direction of her. The letter of instructions to the master contains full directions for the regulation of his conduct, without any other reference to Mr. Pinto than has been already stated. That reference shows a positive limitation *of his power, by the terms of the charter-party. Consequently, he had no share in the government of the ship.

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But Pinto says, in his answer to the 6th interrogatory, that "he had control of the said ship and cargo." Nothing can be more obvious, than that Pinto could understand himself as saying no more than that he had the control of the ship and cargo, so far as respected her lading. A part of the cargo did not belong to him, and was not consigned to him. His control over the ship began and ended, with putting the cargo on board. He does not appear ever to have exercised any authority in the management of the ship. So far from exercising any, during the battle, he went into the cabin, where he remained until the conflict was over. It is, then, most apparent, that when Pinto said, he had the control of the ship and cargo, he used those terms in a limited sense. He used them in reference to the power of lading her, given him by the charter-party. If, in this, the court be correct, this cause is to be governed by the principles which would apply to it had the Nereide been a general ship.

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman. That a neutral may lawfully put his goods on board a belligerent ship, for conveyance on the ocean, is universally recognised as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle, that the property of a friend remains his property, wherever it may be found. "Since it is not," says Vattel, "the place where a thing is, which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons, which happen to be in an enemy's country, or on board an enemy's ships, are to be distinguished from those which belong to the enemy." Bynkershoek lays down the same principles, in terms equally explicit ; and in terms entitled to the more consideration, because he enters into the inquiry whether a *knowledge of the hostile character of the vessel, can affect the owner of the goods. The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true, there were some old ordinances of France, declaring that a hostile vessel or cargo should expose both to condemnation ; but these ordinances have never constituted a rule of public law.

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It is deemed of much importance, that the rule is universally laid down in terms which compehend an armed as well as an unarmed vessel ; and that armed vessels have never been excepted from it. Bynkershoek, in discussing a question, suggesting an exception, with his mind directed to hostilities,

does not hint that this privilege is confined to unarmed merchantmen. In point of fact, it is believed, that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed, and who sail under convoy, is too great, not to have attracted the attention of writers on public law; and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange, if a rule laid down, with a view to war, in such broad terms as to have universal application, should be so construed, as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books, pointing to such construction. The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition for self-defence, and the implements of war were so light and so cheap, that scarcely any would sail without them.

A belligerent has a perfect right to arm in his own defence; and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm—ought he to be accountable for the exercise of it? *By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. [*427 Why should it be changed, by the exercise of a belligerent right, universally acknowledged, and in common use when the rule was laid down, and over which the neutral had no control?

The belligerent answers, that by arming, his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy, and assumed the hostile character. Previous to that examination which the court has been able to make of the reasoning by which this proposition is sustained, one remark will be made, which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy, generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

It is said, that by depositing goods on board an armed belligerent, the right of search may be impaired; perhaps, defeated. What is this right of search? Is it a substantive and independent right, wantonly, and in the pride of power, to vex and harass neutral commerce, because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port, before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character. Belligerents have a full and perfect right to capture enemy goods, and articles going to their enemy which are contraband of war. To the exercise of that right, the right of search is essential. It is a mean justified by the end. It has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised, *without search, the right of search can never arise or come into [*428 question.

But it is said, that the exercise of this right may be prevented by the

inability of the party claiming it, to capture the belligerent carrier of neutral property. And what injury results from this circumstance? If the property be neutral, what mischief is done, by its escaping a search? In so doing, there is no sin, even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if, by means, lawful in themselves, he can escape this vexatious procedure, he may certainly employ them.

To the argument, that by placing his goods in the vessel of an armed enemy, he connects himself with that enemy, and assumes the hostile character; it is answered, that no such connection exists. The object of the neutral is the transportation of his goods. His connection with the vessel which transports them is the same, whether that vessel be armed or unarmed. The act of arming is not his—it is the act of a party who has a right so to do. He meddles not with the armament, nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament, further than the freight he pays, and freight he would pay, were the vessel unarmed. It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances, it is the right and the duty of the carrier to avoid capture, and to prevent a search. There is no difference, except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel, without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to
*429] the goods *or their owner, where he has taken no part in it. They are incidents to the character of the vessel; and may always occur where the carrier is belligerent.

It is remarkable, that no express authority on either side of this question, can be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either. The celebrated case of the *Swedish convoy* has been pressed into the service. But that case decided no more than this, that a neutral may arm, but cannot, by force, resist a search. The reasoning of the judge, on that occasion, would seem to indicate, that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side, that the goods would be infected by the resistance of the ship, and on the other, that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of *The Catharine Elizabeth* approaches more nearly to that of the Nereide, because, in that case, as in this, they were neutral goods and a belligerent vessel. It was certainly a case, not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt, and an attempt to take the same vessel, previous to capture, there does not seem to be a total dissimilitude. But it is the reasoning of the judge, and not his decision, of which the claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner, or by a neutral owner, would have on neutral goods.

The first is lawful, the last unlawful. The belligerent owner violates no duty; he is held by force, and may escape, if he can. From the marginal note, it appears, that the reporter understood this case to decide, in principle, that resistance by a belligerent vessel, would not confiscate the cargo. It is only in a case without express authority, that such materials can be relied on.

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same *cause? The master and crew are prisoners of war, why are not those passengers who did not engage in the conflict, also prisoners? That they are not, would seem to the court to afford a strong argument in favor of the goods. The law would operate in the same manner on both. [*430

It cannot escape observation, that in argument, the neutral freighter has been continually represented as arming the Nereide, and impelling her to hostility; he is represented as drawing forth and guiding her warlike energies. The court does not so understand the case. The Nereide was armed, governed and conducted by belligerents; with her force, or her conduct, the neutral shippers had no concern. They deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true, that on her passage, she had a right to defend herself, did defend herself, and might have captured an assailing vessel; but to search for the enemy, would have been a violation of the charter-party and of her duty.

With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench, to discover its only imperfection; its want of resemblance. The Nereide has not that centaur-like appearance which has been ascribed to her; she does not rove over the ocean, hurling the thunders of war, while sheltered by the olive branch of peace; she is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile character of her owner. She is an open and declared belligerent; claiming all the rights, and subject to all the dangers, of the belligerent character. She conveys neutral property, which does not engage in her warlike equipments, nor in any employment she may make of them; which is put on board solely for the purpose of transportation, and which encounters the hazard incident *to its situation; the hazard of being taken into port, and obliged to seek another conveyance, should its carrier be captured. [*431

In this, it is the opinion of the majority of the court, there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the circuit court must be reversed, and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel, as to that property, be dismissed.

Johnson, J.—Circumstances, known to this court, have imposed upon me, in a great measure, the responsibility of this decision. I approach the

case with all the hesitation which respect for the opinion of others, and a conviction of the novelty and importance of some of the questions are calculated to inspire. The same respect imposes upon me an obligation briefly to state the course of reasoning by which I am led to my conclusion.

On the minor points, I feel no difficulty. There is nothing to support the charge of English domiciliation ; the charges of prevarication are satisfactorily explained ; and on the question of national character, we must yet awhile reluctantly yield to the acknowledgment that Buenos Ayres is not free.

On the construction of the Spanish treaty, I feel as little hesitation. That a stipulation calculated solely to produce an extension of neutral rights, should involve in itself a restriction of neutral rights ; that a mutual and gratuitous concession of a belligerent right, should draw after it a necessary relinquishment of a neutral right, which has never yielded but to express and (generally) extorted stipulation ; are conclusions wholly irreconcilable to any principle of logical deduction.

Nor does the argument founded on reciprocity stand on any better ground. There is a principle of reciprocity known to courts administering international law ; but I trust it is a reciprocity of benevolence, and that the angry passions which produce revenge and retaliation will never exert
*432] their influence on the administration of *justice. Dismal would be the state of the world, and melancholy the office of a judge, if all the evils which the perfidy and injustice of power inflict on individual man, were to be reflected from the tribunals which profess peace and good-will to all mankind. Nor is it easy to see how this principle of reciprocity, on the broad scale by which it has been protracted in this case, can be reconciled to the distribution of power made in our constitution among the three great departments of government. To the legislative power alone it must belong to determine, when the violence of other nations is to be met by violence. To the judiciary, to administer law and justice as it is, not as it is made to be by the folly or caprice of other nations.

The last question in the case is the only one on which I feel the slightest difficulty. The general rule, the incontestible principle is, that a neutral has a right to employ a belligerent carrier. He exposes himself thereby to capture and detention, but not to condemnation. To support the condemnation in this case, it is necessary to establish an exception to this rule ; and it is important to lay down the exceptions contended for, with truth and precision.

In the first place, it is contended, that a neutral has not a right to transport his goods on board of an armed belligerent. Secondly, that if this right be conceded, Pinto, in this case, has carried the exercise of it beyond the duties of fair neutrality : 1. By laying the vessel under the obligation of a contract to sail with convoy : 2. By chartering an entire armed vessel of the enemy, and thus expediting an armed hostile force : 3. By taking in enemy goods on freight, and thereby laying himself under an implied con-
*433] tract that the armament of the vessel should be used in its defence : *4. It was also contended, that he had, in fact, armed the vessel after chartering her, and increased her force by admitting passengers : 5. That the correspondence, found on board, shows that the armament was immediately directed against capture by Americans.

On the first and principal ground, much may be said, but nothing added, to the ingenious discussion which it has received from counsel. The question is, why may not a neutral transport his goods on board an armed belligerent? No writer on the law of nations has suggested this restriction on his rights; and it can only be sustained, on the ground of its obstructing the exercise of some belligerent right. What belligerent right does it interfere with? Not the right of search, for that has relation to the converse case; it is a right resulting from the right of capturing enemy's goods in a neutral bottom. It must be, then, the right, which every nation asserts, of being the sole arbiter of his own conduct towards other nations, and deciding for itself, whether property, claimed as neutral, be owned as claimed. The question is thus fairly stated between the neutral and belligerent. On the one hand, the neutral claims the right of transporting his goods in the hostile bottom: on the other, the belligerent objects to his doing it, under such circumstances as to impair his right of judging, between himself and the neutral, on the neutrality of his property and conduct. The evidence of authority, the practice of the world, and the reason and nature of things, must decide between them. All these are, in my opinion, in favor of the neutral claim.

Every writer on international law acknowledges the right of the neutral, to transport his goods in a hostile bottom. No writer has restricted the exercise of that right to unarmed ships. Every civilized nation (with the exception of Spain) has unequivocally acknowledged the existence of this right, unless it be relinquished by express stipulation; *and, even with regard to Spain, the evidence is wholly unsatisfactory, to [*434 prove that she maintains a different doctrine. My present belief is, that she does not; but, admit that does; and surely the practice of one nation, and that one, not the most enlightened or commercial, ought not to be permitted to control the law of the world.

And what is the decision of reason on the merits of these conflicting pretensions? Her first and favorite answer would be, that were the scales equally suspended between the parties, the decision ought to be given in favor of humanity. Already is the aspect of the world sufficiently darkened by the horrors of war. It is time to listen to the desponding claims of man, engaged in the peaceful pursuits of life. But these are considerations in favor of the neutral, to which the heart need not assent; they are addressed to the judgment alone. Admit the claim of the belligerent, and you fritter away the right of the neutral, until it is attenuated to a vision. Admit the claim of the neutral, and it is attended with a very immaterial change in the rights and interests of the belligerent.

Where are we to draw the line? If a vessel is not to be armed, what is to amount to an exceptionable armament? It extends to an absolute and total privation of the right of arming a hostile ship. Resistance, and even capture, is lawful to any belligerent that is attacked. On the other hand, what injury is done to the belligerent, by recognising the right of the neutral? The cargo of a belligerent neither adds to nor diminishes his right to resist. If empty, he must be subdued, before he can be possessed; and if laden, the right or faculty of resistance is in no wise increased. It is inherent in her national character, and can be exercised by strict right, [*435 without any reference to the cargo that she contains. *Suppose,

the case of a vessel and cargo, wholly neutral; even she possesses a natural right to resist seizure; but her resistance must be effectual, or international law pronounces her forfeited. What injury results to the belligerent cruizer? If the cargo be really neutral, the exercise of his right of judging becomes immaterial; and if it be contraband, or otherwise subject to condemnation, what reason in nature can be assigned, why the neutral owner should not throw himself upon the fortune of war, and rely upon the protection of your enemy? You treat him as an enemy, if captured, and why should not he regard you as an enemy, and provide for his defence against you? I can very well conceive, that a case may occur, in which it may become the policy of this country to throw down the gauntlet to the world, and assert a different principle. But the policy of these states is submitted to the wisdom of the legislature, and I shall feel myself bound by other reasons, until the constitutional power shall decide what modifications it will prescribe to the exercise of any acknowledged neutral right.

The second ground of exception resolves itself into several points, and presents to my mind the greatest difficulties in the case. 1. There is a stipulation contained in the charter-party, that the vessel shall sail with convoy. 2. Pinto chartered the whole vessel. 3. He took in sub-affreightment of hostile goods. 4. It is contended, he had contributed to the arming and manning of the vessel, after chartering her. 5. And that her equipment was pointedly against American capture.

With regard to the latter two points, I am of opinion, that the evidence does not prove that Pinto contributed to the armament of the vessel; and if she was armed by the owners, that it was against American capture, is immaterial. As to the passengers, Pinto had no control over the reception of them into the vessel. He had *taken the hold and two berths in the cabin; as to the residue, it remained subject to the disposal of the master or owner. With regard to the three other points, after the best consideration that I have been able to give the subject, I satisfy my mind by two considerations.

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1. I will not now give an opinion upon the abstract case of an individual neutral to all the world. It is known, that Pinto was liable to capture both by the French and Carthagenians. This justified him in placing himself under British protection; and if, in the exercise of this unquestionable right, he has incidentally impaired the exercise of our right of seizure for adjudication, we have nothing to complain of. The case occurs daily; and nothing but candor and fairness can be exacted of a neutral, under such circumstances.

2. There appears to prevail much misconception with regard to the control acquired by Pinto, in this vessel, under the charter-party. His contract gave him the occupation of the hold of the vessel and two berths in the cabin; but went no further. Over the conduct of the master and crew, in navigating or defending the vessel, it communicated to him no power. It is true, that by the conduct of the master and the fate of the vessel, he might be incidentally affected as a sub-freighter, and so far he had an interest in her defence; still, however, it is reducible to the general interest which he had in the performance of the voyage, and it does not appear, that he ever acted under an idea of being authorized to control the conduct of the master, or took any part in the conflict which preceded the capture.

I am of opinion, that the judgment should be reversed, and the property restored.

STORY, J. (*dissenting.*)—My opinion will be confined to the point last argued, because it definitely disposes of the cause, against the claim of Mr. Pinto. The facts material to this point are, that Mr. Pinto chartered the Nereide, an uncommissioned armed ship, belonging to British subjects, for a voyage from London *to Buenos Ayres, and back to London, at a stipulated freight. The ship was to be navigated, during the voyage, [*437 at the expense of the general owner, who expressly covenanted, in the charter-party with Mr. Pinto, that she should sail on the voyage, under British convoy. Mr. Pinto, having thus hired the whole ship, took on board sundry shipments, partly on his own or Spanish account, and partly on account of British merchants, from whom he was to receive, in lieu of freight, a portion of the profits and commissions. The Nereide sailed, with her cargo, under British convoy, and with instructions from the owner to the master, to govern himself, in relation to the objects of the charter-party, according to the direction of Mr. Pinto, who accompanied the ship in the voyage. During the passage to Buenos Ayres, the Nereide was accidentally separated from the convoy, and while endeavoring to regain it, was, after a vigorous but unsuccessful resistance, captured by the privateer Governor Tompkins, and brought into New York for adjudication. It is explicitly asserted, in the testimony, that Mr. Pinto took no part in the resistance, at the time of the capture.

The question is, whether, upon these facts, Mr. Pinto, assuming him to be a neutral, has so incorporated himself with the enemy interests, as to forfeit that protection which the neutral character would otherwise afford him? The general doctrine, though formerly subject to many learned doubts, is now incontrovertibly established, that neutral goods may be lawfully put on board of an enemy ship, without being prize of war. As this doctrine is asserted in the most broad and unqualified manner in publicists, it is thence attempted to be inferred, by the counsel for the claimant, that no distinction can exist, whether the ship be armed or unarmed, or be captured with or without resistance: arguments of this sort are liable to many objections, and are, in general, wholly unsatisfactory. Elementary writers rarely explain the principles of public law, with the minute distinctions which legal precision requires. Many of the most important doctrines of the prize courts will not be found to be treated of, or even glanced at, in the elaborate treatises of Grotius, or Puffendorf or Vattel. A striking illustration is their total silence as to the illegality and penal *consequences of a [*438 trade with the public enemy. Even Bynkershoek, who writes professedly on prize law, is deficient in many important doctrines which every day regulate the decrees of prize tribunals. And the complexity of modern commerce has added incalculably to the number as well as the intricacy of questions of national law. In what publicists are to be found the doctrines as to the illegality of carrying enemy dispatches, and of engaging in the coasting, fishing or other privileged trade of the enemy? Where are transfers *in transitu* pronounced to be illegal? Where are accurately and systematically stated all the circumstances which impress upon the neutral, a general, or a limited, hostile character, either by reason of his domicil, his

territorial possessions, or his connection in a house of trade, in the enemy country? The search would be nearly in vain, in the celebrated jurists whose authority has been quoted to silence the present inquiry. Yet the argument would be no less forcible, that these doctrines have not a legal existence, because not found in systematic treatises on the law of nations, than that which has been so earnestly pressed upon us by the counsel for the claimants. The assumed inference is then utterly inadmissible. The question before the court must be settled upon other grounds; upon a just application of the principles which regulate neutral, as well as belligerent, rights and duties. Let us then proceed to consider them.

It is a clear maxim of national law, that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character; nor is this all. In relation to his commerce, he is bound to submit to the belligerent right of search, and he cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search, without the application on the part of the belligerent of superior force. If he resist this exercise of lawful right, or if, with a view to resist it, he take the protection of an armed neutral convoy, he is treated as an enemy, and his property is confiscated. Nor is it at all material, whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the common protection, without any *distinction whether the convoy belong to the same or to a foreign, neutral sovereign; for upon the principles of natural justice, a neutral is justly chargable with the acts of the party, which he voluntarily adopts, or of which he seeks the shelter and protection. *Qui sentit commodum, sentire debet et onus.* These principles are recognised in the memorable cases of *The Maria*, 1 Rob. 340, and *The Elsebe*, 5 Ibid. 173; and can never be shaken, without delivering over to endless controversy and conflict the maritime rights of the world.

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It has, however, been supposed, by the counsel of the claimants, that a distinction exists between taking the protection of a neutral, and of a belligerent, convoy. That in the former case, all armament for resistance is unlawful; but in the latter case, it is not only lawful, but in the highest degree commendable. That although an unlawful act, as resistance by a neutral convoy, may justly affect the whole associated ships; yet it is otherwise of a lawful act, as resistance of a belligerent ship, for no forfeiture can reasonably grow out of such an act, which is strictly justifiable.

The fallacy of the argument consists in assuming the very ground in controversy; and in confounding things, in their own nature entirely distinct. An act perfectly lawful in a belligerent, may be flagrantly wrongful in a neutral; a belligerent may lawfully resist search, a neutral is bound to submit to it; a belligerent may carry on his commerce by force, a neutral cannot; a belligerent may capture the property of his enemy on the ocean, a neutral has no authority whatever to make captures. The same act, therefore, that, with reference to the rights and duties of the one, may be tortious, may, with reference to the rights and duties of the other, be perfectly justifiable. The act then, as to its character, is to be judged of, not merely by that of the parties, through whose immediate instrumentality

it is done; but also by the character of those, who, having co-operated in, assented to, or sought protection from it, would yet withdraw themselves from the penalties of the act. It is analogous to the case at common law, where an act, justifiable in one party, does not, from that fact alone, shelter his coadjutor. They must stand or fall upon *their own merits. It would be strange, indeed, if, because a belligerent may kill his enemy, [*440 a neutral may aid in the act; or because a belligerent may resist search, a neutral may co-operate to make it effectual. It is, therefore, an assumption utterly inadmissible, that a neutral can avail himself of the lawful act of an enemy, to protect himself in an evasion of a clear belligerent right.

And what reason can there be for the distinction contended for? Why is the resistance of the convoy deemed the resistance of the whole neutral associated ships, let them belong to whom they may? It is not, that there is a direct and immediate co-operation in the resistance, because the case supposes the contrary. It is not, that the resistance of the convoy of the sovereign is deemed an act to which all his own subjects consent, because the ships of foreign subjects would then be exempted. It is, because there is a constructive resistance resulting, in law, from the common association and voluntary protection against search, under a full knowledge of the intentions of the convoy. Then, the principle applies as well to a belligerent as to a neutral convoy; for it is manifest, that the belligerent will, at all events, resist search; and it is quite as manifest, that the neutral seeks belligerent protection, with an intent to evade it. Is it, that an evasion of search, by the employment, protection or terror of force, is inconsistent with neutral duties? Then, *à fortiori*, the principle applies to a case of belligerent convoy, for the resistance must be presumed to be more obstinate, and the search more perilous.

There can be but little doubt, that it is upon the latter principle, that the penalty of confiscation is applied to neutrals. The law proceeds yet further, and deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and therefore, attributes to such preliminary act, the full effect of actual resistance. In this respect, it applies a rule analogous to that in cases of blockade, where the act of sailing with an intent to break a blockade, is deemed a sufficient breach, to authorize confiscation. And Sir W. Scott manifestly recognises the correctness of this doctrine in *The Maria*, *although the circumstances of that case did not require its rigorous application. [*441

Indeed, in relation to a neutral convoy, the evidence of an intent to resist, as well as of constructive resistance, is far more equivocal, than in case of a belligerent convoy. In the latter case, it is necessarily known to the convoyed ships, that the belligerent is bound to resist, and will resist, until overcome by superior force. It is impossible, therefore, to join such convoy, without an intention to receive the protection of belligerent force, in such manner, and under such circumstances, as the belligerent may choose to apply it. It is an adoption of his acts, and an assistance of his interests, during the assumed voyage. To render the convoy an effectual protection, it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of every enemy. The neutral solicitously aids and co-operates in all these important transactions, and thus far

manifestly sides with the belligerent, and performs, as to him, a meritorious service—a service as little reconcilable with neutral duties, as the agency of a spy, or the fraud of a bearer of hostile dispatches. In respect to a neutral convoy, the inference of constructive co-operation and hostility is far less certain and direct. To condemn, in such case, is pushing the doctrine to a great extent, since it is acting upon the presumption, which is not permitted to be contradicted, that all the convoyed ships distinctly understood and adopted the objects of the convoy, and intimately blended their own interests with hostile resistance.

There is not, then, the slightest reason for the favorable distinction, as to the belligerent convoy, assumed by counsel. On the contrary, every presumption of hostility is, in such case, more violent, and every suspicion of unneutral conduct more inflamed. And so, in the argument of *The Maria*, 1 Rob. 346, it was conceded by the counsel for the claimants, and recognised by the court. It was there said by counsel, that it seemed admitted by the court, on a former day, that there was a just distinction to be made between the two cases of convoy, viz., between the convoy of an enemy's force, and a neutral convoy; that the former (*i. e.*, enemy convoy) would stamp a
*442] primary character of hostility on all ships *sailing under its protection, and it would rest on the parties to take themselves out of the presumption raised against them; but that, even in that case, it would be nothing more than a presumption, which had been determined by a late case before the Lords, *The Sampson*, an asserted American ship, sailing with French cruizers, at the time they engaged some English ships, and communicating with the French ships, by signal for battle. That, in that case, although there had been a condemnation in the court below, the Lords sent it to further proof, to ascertain whether there had been an actual resistance. Sir William Scott emphatically observed, "I do not admit the authority of that case, to the extent to which you push it. That question is still reserved, although the Lords might wish to know as much of the facts as possible." It is clear, from this language, that the learned judge did not admit that the party could be legally permitted to contradict the presumption of hostility attached to the sailing under an enemy convoy. On the contrary, he seemed to consider that the primary character of hostility, which, it was conceded on all sides, was stamped upon such conduct, could not be permitted to be rebutted, but was conclusive upon the party. The case of *The Sampson* was originally heard before the court of vice-admiralty, and the decree of condemnation was never disapproved of, if not ultimately affirmed, by the Lords of Appeal. I have been assured by very respectable authority, that no proof of actual resistance ever was, or could have been, made on the final hearing. The case, therefore, affords a strong inference of the law as understood and administered in the prize courts of Great Britain.

And may it be added, in corroboration, that in *Smart* v. *Wolff*, 3 T. R. 323, 332, Sir W. Scott (then advocate-general) asserted, without hesitation, that if the neutral refused search, or sailed under convoy of the enemy's ships of war, or conveyed intelligence to the enemy, they are waivers of the rights of neutrality. The very circumstance of his putting these three cases in connection, to illustrate his general argument, affords the most cogent

proof that he considered himself as stating a doctrine equally clear and well established as to all of them.(*a*)

*And this doctrine seems conformable to the sense of other European sovereigns. In the recent cases of the American ships, captured, [*443 while under British convoy, by the Danes, the right of condemnation was not only asserted and enforced by the highest tribunal of prize, but expressly affirmed by the Danish sovereign, after an earnest appeal made by the government of the United States. On that occasion, the Danish minister pressed the argument "that he who causes himself to be protected by that act (*i. e.*, enemy convoy), ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantages attached to the character of a friend to him against whom he seeks the protection. If Denmark should abandon this principle, the navigators of all nations would find their account in carrying on the commerce of Great Britain, under the protection of English ships of war, without any risk;" and he further declared, "that none of the powers in Europe have called in question the justice of this principle." State Papers, 1811, p. 527.

It cannot be denied, that our own government have acquiesced in the truth and correctness of this statement. And if, to the general silence of the other European sovereigns, we add the positive examples of Great Britain and Denmark (the latter of whom has not of late years been deficient in zeal for neutral rights), it seems difficult to avoid the conclusion, that the doctrine is as well founded in national law, as it seems to me, to be in justice and sound policy.

Another argument which has been urged in favor of the assumed distinction ought not, however, to be omitted. It is, that a party, neutral to one power, may be *an enemy as to another power, and he may lawfully [*444 place himself under belligerent convoy, to escape from his own enemy. In such a predicament, it is, therefore, always open to the neutral to explain his conduct in taking convoy, and to show, by proofs, his innocent intentions as to all friendly belligerents. In my judgment, this supposed state of things would not remove a single difficulty. It is not in relation to enemies, that the question as to taking convoy can ever arise. It has reference only to the rights of friendly belligerents; and these rights remain precisely the same, whatever may be the peculiar situation of the neutral as to third parties. Was it ever heard of, that a neutral might lawfully resist the right

(*a*) Since this opinion was delivered, I find, by an account of all the appeals and final decisions thereon before the Lords of Appeal, published by order of the house of commons, in 1801, that the judgment of condemnation in *The Sampson* was affirmed by the Lords of Appeal. The following is a transcript of the printed account: "Sampson, Joshua Barney, master; cargo, sugar, coffee, cotton, indigo and dry goods, and specie, taken by his majesty's ship of war, Penelope, Bartholomew Samuel Rowley, Esq., commander, claimed for American subjects for ship, cargo and specie; sentence appealed from, pronounced at Jamaica, 22d April 1794—ship, cargo and specie condemned. Sentence in the court of appeals, viz., 31st May 1798, sentence affirmed, as to the specie claimed on behalf of Wacksmuth & Dutilh; and 21st of June, further proof directed to be made of the property of the ship, cargo and rest of the specie. 29th June 1799, ship, cargo and specie condemned."[1]

[1] See The Franklyn, 2 Acton 106; The Fanny, 1 Dods. 448.

of search of one power, because he was at war with another? And is not the evasion of this right just as injurious, whether the neutral be at peace with all the world, or with a part only?

There would be extreme difficulty in establishing, by any disinterested testimony, the fact of any such special intentions as the argument supposes. Independent of this difficulty, it would, in effect, be an attempt to repel, by positive testimony, a conclusive inference of law, flowing from the very act of taking convoy. The belligerent convoy is bound to resist all visitations by enemy ships, whether neutral to the convoyed ships, or not. This obligation is distinctly known to the party taking its protection. If, therefore, he choose to continue under the convoy, he shows an intention to avail himself of its protection, under all the chances and hazards of war. The abandonment of such intention cannot be otherwise evidenced, than by the *overt* act of quitting convoy. And it is impossible to conceive, that the mere secret wishes or private declarations of a party could prevail over his own deliberate act of continuing under convoy, unless courts of prize would surrender themselves to the most stale excuses and imbecile artifices. It would be in vain to administer justice in such courts, if mere statements of intention would outweigh the legal effects of the acts of the parties. Besides, the injury to the friendly belligerent is equally great, whatever might be the special objects of the neutral. The right of search is effectually prevented, by the
*445] presence of superior *force, or exercised only after the perils and injuries of victorious warfare. And it is this very evasion of the right of search, that constitutes the ground of condemnation in ordinary cases. The neutral, in effect, declares that he will not submit to search, until the enemy convoy is conquered, and then only because he cannot avoid it. The special intention of the neutral, then, could not, if proved, upon principle prevail, and it has not a shadow of authority to sustain it. The argument upon this point was urged in *The Maria* and *The Elsebe*, and was instantly repelled by the court.

On the whole, on this point, my judgment is, that the act of sailing under belligerent or neutral convoy is, of itself, a violation of neutrality, and the ship and cargo, if caught *in delicto*, are justly confiscable; and further, that if resistance be necessary, as in my opinion it is not, to perfect the offence, still, that the resistance of the convoy is, to all purposes, the resistance of the associated fleet. It might, with as much propriety, be maintained, that neutral goods, guarded by a hostile army, in their passage through a country, or voluntarily lodged in a hostile fortress, for the avowed purpose of evading the municipal rights and regulations of that country, should not, in case of capture, be lawful plunder (a pretension never yet asserted), as that neutral property on the ocean should enjoy the double protection of war and peace.

If these principles be correct, it remains to be considered, how far the conduct of Mr. Pinto brings him within the range of their influence. It is clear, that in the original concoction of the voyage, it was his intention to avail himself of British convoy. The covenant in the charter-party demonstrates this intention; a covenant that, from its terms, being made by the ship-owner, must have been inserted for the benefit and at the instance of the charterer. Under the faith of this stipulation, Mr. Pinto put his own property on board, and received shipments from persons of an acknowledged hostile character. The ship sailed on the voyage, under British convoy, with

Mr. Pinto on board, and though captured, after a separation from the convoy, she was in the very attempt to rejoin it. There is no pretence, therefore, of an abandonment of the convoy, and the **corpus delicti*, the character of hostility, impressed by the sailing under convoy, if any [*446 attached, remained, notwithstanding the separation. It is like the sailing for a blockaded port, where the offence continues, although, at the moment of capture, the ship be, by stress of weather, driven in a direction from the port of destination ; for the hostile intention still remains unchanged.

And here, to avoid the effect of the general doctrine, we are met with another distinction, founded upon the supposed difference between a belligerent and a neutral merchant ship, as to the taking of convoy. It is argued, that the belligerent ship has an undoubted right to take the protection of the convoy of the nation to which she belongs ; and that this extends a perfect and lawful immunity to the neutral cargo on board.

It is certainly incumbent on the counsel for the claimant, to support this exception to the general rule, by precedent or analogy. Nothing has been offered which, in my judgment, affords it the slightest support. It is not true, that a neutral can shelter his property from confiscation, behind an act lawful in a belligerent. The law imputes to the neutral the consequences of the act, if he might have foreseen and guarded against it, or if he voluntarily adopts it. Was it ever supposed, that a neutral cargo was protected from seizure, by going in a belligerent ship to a blockaded port? or that contraband goods, belonging to a neutral, were exempted from confiscation, because of such a ship, bound on a voyage lawful to the belligerent, but not to the neutral? yet the pretensions in these cases seem scarcely more extravagant than that now urged. Why should a neutral be permitted to do that, indirectly, which he is prohibited from doing directly? Why should he aid the enemy, by giving extraordinary freight for belligerent ships, sailing under belligerent convoy, with the avowed purpose of escaping from search, and often, with the concealed intention of aiding belligerent commerce, and yet claim the benefits of the most impartial conduct? Until some more solid ground can be laid for the distinction, than the ingenuity of counsel has yet suggested, it would seem fit to declare, *ita lex non scripta est.*

But even if the distinction existed, it could not apply *to the case [*447 at bar. This is a case where the claimant becomes the charterer of the whole vessel, for the voyage, and stipulates for the express benefit of the convoy. The ship, though navigated by a belligerent master and crew, was necessarily under the control and management of the charterer. He was the real effective *dux negotii.* Whatever may be the technical doctrine of the common or prize law, as to the general property in the ship, the charterer was, to all purposes important in this inquiry, the owner for the voyage, and the master his agent. Can there be a doubt, that, as to the shipments of the enemy freighters, Mr. Pinto was responsible for the acts of the master? Was he not materially interested in the safety and protection of these shipments, in respect to freight, commissions and profits? If they had been lost by capture, from the negligence of Mr. Pinto, or of the master, when by ordinary diligence and resistance the loss might have been avoided, would not Mr. Pinto have been responsible? How then it can be consistently held, that the ship was not essentially governed and managed by Mr. Pinto, and all her conduct incorporated with his interests, I profess

to be unable to comprehend. For what purpose should he insist on a covenant for convoy, if he never meant to derive aid and protection from it, to the whole cargo on board, and to range himself and his interests on the side of resistance? His private conduct, at the time of the capture, when resistance was almost hopeless, affords no evidence to repel the irresistible presumptions from his deliberate acts.

And here again, it has been argued, that Mr. Pinto had no hostile intentions against the United States; but that the taking of convoy was simply to resist the French and Carthagenians, who are the enemies of his own country. If such special intention could, in point of law, uphold his claim, which, for the reasons already stated, I am entirely satisfied, it could not, yet there is not, in the present case, within my recollection, any proof of such special intention. It rests upon the mere suggestions of counsel. How, indeed, could Mr. Pinto show, that he meant to yield his property to the search of the cruizers of the United States, when the deliberate act of assuming British convoy precluded the possibility of its exercise, unless acquired by victory, after resistance?

*448] *If this view of the case be correct, it must be pronounced, that Mr. Pinto, by voluntarily sailing under convoy, forfeited his neutrality, and bound his property to an indissolubly hostile character.

This, however, is not the only ground upon which the claim of Mr. Pinto ought to be repudiated. There was not merely the illegality of sailing under enemy convoy, up to the very eve of capture, but the fact of actual resistance of the chartered ship, and submission to search only in consequence of superior force. An attempt, however, is made to extract the case at bar, from the penalty of confiscation attached to resistance of search, upon the ground, that Mr. Pinto took no part in this resistance. It is asserted, that a shipper in a general ship is not affected by the act of the enemy master; that the charterer of the whole ship is entitled to as favorable a consideration; and that there is no difference, in point of law, whether the ship have, or have not, a commission, or be, or be not armed. It will be necessary to give to these positions a full examination.

In the first place, it is to be considered, whether a neutral shipper has a right to put his property on board of an armed belligerent ship, without violating his neutral duties? If the doctrine already advanced on the subject of convoy be correct, it is incontestible, that he has no such right. If he cannot take belligerent convoy, *à fortiori*, he cannot put his property on board of such convoy; or, what is equivalent, on board of an armed and commissioned ship of the belligerent. What would be the consequences, if neutrals might lawfully carry on all their commerce in the frigates and ships of war of another belligerent sovereign? That there would be a perfect identity of interests and of objects, of assistance and of immunity, between the parties. The most gross frauds and hostile enterprises would be carried on under neutral disguises, and the right of search would become as utterly insignificant in practice, as if it were extinguished by the common consent of nations. The extravagant premiums and freights which neutrals could well afford to pay for this extraordinary protection, would enable the bel-

*449] ligerent to keep up armaments of incalculable *size, to the dismay and ruin of inferior maritime powers. Such false and hollow neutrality would be infinitely more injurious than the most active warfare. It would

strip from the conqueror all the fruits of victory, and lay them at the feet of those whose singular merit would consist in evading his rights, if not, in collusively aiding his enemy. It is not, therefore, to be admitted, that a neutral may lawfully place his goods under armed protection, on board of an enemy ship. Nor can it be at all material, whether such armed ship be commissioned or not: that is an affair exclusively between a sovereign and his own subjects, but is utterly unimportant to the neutral. For whether the armament be employed for offence, or for defence, in respect to third parties, the peril and the obstruction to the right of search are equally complete. Nor is it true, as has been asserted in argument, that a non-commissioned armed ship has no right to capture an enemy ship, except in her own defence. The act of capture, without such pretext, so far from being piracy, would be strictly justifiable, upon the law of nations, however it might stand upon the municipal law of the country of the capturing ship. Vattel has been quoted to the contrary; but on a careful examination, it will be found that his text does not warrant the doctrine.

I have had occasion to consider this point, in another cause, in this court, and to the opinion then delivered, I refer, for a more full discussion of it. If the subject capture, without a commission, he can acquire no property to himself in the prize; and if the act be contrary to the regulations of his own sovereign, he may be liable to municipal penalties for his conduct. But as to the enemy, he violates no rights by the capture. Such, on an accurate consideration, will be found to be the doctrine of Puffendorf, and Grotius and Bynkershoek, and they stand confirmed by a memorable decision of the Lords of Appeal, in 1759. 2 Browne's Civil and Adm. app'x, 524; Grotius, lib. 3, ch. 6, § 8, 9, 10, and Barbeyrac's note, on § 8; Puffendorf, lib. 8, ch. 6, § 21, &c.; Bynk. Q. P. J. ch. 3, 4, 16, 17; 2 Wooddes. Lect. 432; Consol. del Mare, ch. 287, 288; 4 Inst. 152, 154; Zouch Adm. 101; Casaregis, Disc. 24, n. 24; Com. Dig. Admiralty, E. 3; Bulst. c. 27.

Admitting, however (what to me seems utterly inadmissible), *that a neutral may lawfully ship his goods on board the armed ship of an [*450 enemy, it will be of little avail, unless he is exempted from the consequences of all the acts of such enemy. If the shipment be innocent, it will be of little avail, in this case, if the resistance of the enemy master will compromit the neutral character of the cargo. To the establishment, therefore, of such an exemption, the exertions of counsel have been strenuously directed. It has been inferred from the silence of elementary writers, from the authority of analogous cases, and from the positive declarations of the court, in *The Catharina Elizabeth*, 5 Rob. 206.

The argument drawn from the silence of jurists has been already sufficiently answered. It remains to consider, that which is urged upon the footing of authority. The reasoning from supposed analogous cases is quite as unsatisfactory. It is not true, as to neutrals, that the act of the master never binds the owner of the cargo, unless the master is proved to be the actual agent of the owner. The act of the master may be, and very often is, conclusive upon the cargo, although no general agency is established. Suppose, he violate a blockade, suppress and fraudulently destroy the ship's papers, or mix up, under the same cover, enemy interests, will not the cargo share the fate of the ship? The cases cited are mere exceptions to the general rule. They, in general, turn upon a settled distinction, that the act

of the master shall not bind the cargo, where the act, under the circumstances, could not have been within the scope or contemplation of the shipper, at the time of shipment; or where his ignorance of the voyage, and of the intended acts of the master, is placed beyond the possibility of doubt. See *The Adonis*, 5 Rob. 256. The very case of resistance is a strong illustration of the principle. The resistance of the neutral master, has been deliberately held to be conclusive on the neutral cargo. *The Elsebe*, 5 Rob. 173; *The Catharina Elizabeth*, Ibid. 206. What reason can there be for a different rule in respect to a belligerent master?

It must be admitted, that the language of the court in the case of *The Catharina Elizabeth*, would, at first view, seem to support the position of the claimants' counsel. On a close examination, however, it will not be found *451] to *assert so broad a doctrine. The case was of a rescue, attempted by an enemy master, having on board a neutral cargo; and this rescue attempted, not of the captured, but of the capturing, ship. It is argued, that this resistance of the master exposed the whole cargo, intrusted to his management, to confiscation. The court held, that no such penalty was incurred. That the resistance could only be the hostile act, of a hostile person, who was a prisoner of war, and who, unless under parole, had a perfect right to emancipate himself, by seizing his own vessel. That the case of a neutral master differed from that of any enemy master. No duty was violated by such an act on the part of the latter; *lupum auribus teneo*, and if he could withdraw himself, he had a right so to do. And that a material fact in the case was, that the master did not attempt to withdraw his property, but to rescue the ship of the captor, and not his own vessel. Such was the decision of the court, upon which several observations arise. In the first place, the resistance was not made, previous to the capture; and therefore, whatever may be the extent of the language, it must be restrained to the circumstances of the case in judgment, otherwise, it would be extra-judicial. In the next place, it would be impossible to conceive how the fact, as to what vessel was seized, could be material, if the argument of the present claimant be correct, for in all events, the resistance, as to the cargo, would be without any legal effect. In the last place, it is clear, that the case is put by the court upon the ground, that the master, at the time of the act, had been dispossessed of his vessel by capture, and was a prisoner of war. He was, therefore, no longer acting as master of the ship, and had no further management of her. His rights and duties, as master, had entirely ceased by the capture, and there could be no pretence to affect the ship or cargo with his subsequent acts, any more than with the acts of any other stranger. The case would have been entirely different with a neutral master, whose relation to his ship continues, notwithstanding a capture and carrying in for adjudication. The case, therefore, admits of sound distinctions from that at bar, and cannot be admitted to govern it.

There is another text, not cited in the argument, which may be thought to favor the doctrine of the claimant's counsel. It is the only passage bear- *452] ing on the subject in *controversy which has fallen under my notice in any elementary work. Casaregis, in his Commercial Discourses (Disc. 24, n. 22), has the following remarks:—"*Verum tamen notandum est, quod si navis inimica onerata mercibus mercatorum amicorum aggressa fuerit, alteram inimicam et mercatores aut* domini mercium *operam ac indus-*

triam dedissent pro ea aggredienda tunc merces dominorum cadunt etiam sub præda, si navis predicta onerata mercibus fuerit deprædata, &c., et regulariter bona eorum qui auxilium inimices nostris præstant vel confederati cum iis sunt, prædari possunt." It is obvious, that Casaregis is here considering the case of an attack of an enemy merchant ship, laden with a neutral cargo, upon the ship of its enemy, in which the former is unsuccessful and is captured. Under such circumstances, he holds, that if the neutral shippers, or the persons having the management of the cargo (*domini mercium*) have aided in the attack, the cargo is forfeited, upon the ground, that all who assist or confederate with an enemy, are liable to be plundered, by the law of war. He does not touch the case, where an enemy merchant ship simply makes resistance, in her own defence, or resists the right of search; nor how far the master of such ship is the *dominus mercium*, or can by his own acts bind the cargo. Much less has he discussed the question, as to what acts amount to an incorporation into the objects and interests of the enemy, so as to affix a hostile character. It does not seem to me, that his text can be an authority, beyond the terms in which it is expressed. It pronounces affirmatively, that a co-operation in an attack will induce confiscation of the cargo (which cannot be doubted), but it does not pronounce negatively, that the resistance of an enemy master will not draw after it the same penalty. And if it were otherwise, it would deserve consideration, whether the opinion of a mere elementary writer, respectable as he may be, delivered at a time when the prize law was not as well settled as it has been in the present age, should be permitted to regulate the maritime rights of belligerent nations.

The argument, then, on the footing of authority, fails, for none is produced which directly points at circumstances like those in the case at bar. And upon principle, it seems quite as difficult to support it. I am unable *to perceive any solid foundation on which to rest a distinction between the resistance of a neutral and of an enemy master. The [*453 injury to the belligerent is, in both cases, equally great, for it equally withdraws the neutral property from the right of search, unless acquired by superior force. And until it is established, that an enemy protection legally suspends the right of search, it cannot be, that resistance to such right should not be equally penal in each party. I have, therefore, no difficulty in holding, that the resistance of the ship is, in all cases, the resistance of the cargo, and that it makes no difference, whether she be armed or unarmed, commissioned or uncommissioned. He who puts his property on the issue of battle, must stand or fall by the event of the contest. The law of neutrality is silent, when arms are appealed to, in order to decide rights; and the captor is entitled to the whole prize, won by his gallantry and valor. This opinion is not the mere inference, strong as it seems to me to be, of general reasoning. It is fortified by the consideration, that in the earliest rudiments of prize law, in the great maritime countries of Great Britain and France, confiscation is applied by way of penalty for resistance of search, to all vessels, without any discrimination of the national character of the vessels or cargoes. The Black Book of the Admiralty expressly articulates that any vessel making resistance may be attacked and seized as enemies; and this rule is enforced in the memorable prize instructions of Henry VIII. Clerke's Praxis 164; Rob. Collect. Marit. p. 10, and note, and p. 118. The ordi-

nance of France of 1584, is equally broad ; and declares all such vessels good prize ; and this has ever since remained a settled rule in the prize code of that nation.

Valin informs us, that it is also the rule in Spain ; and that in France, it is applied as well to French vessels and cargoes, as to those of neutrals, and allies. Coll. Marit. 118 ; Valin, *Traits des Prizes*, ch. 5, § 8, p. 80. There is not to be found in the maritime code of any nation, or in any commentary thereon, the least glimmering of authority, that distinguishes, in cases of resistance, the fate of the cargo, from that of the ship. If such a distinction could have been sustained, it is almost incredible, that a single ray of light should not have beamed upon it, during the long lapse of ages, in which maritime warfare *has engaged the world. And if any argument is to be drawn from the silence of authority, I know not under what circumstances it can be more forcibly applied, than against the exception now contended for.

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But even if it were conceded, that a neutral shipper, in a general ship, might be protected, the concession would not assist the present claimant. His interests were so completely mixed up and combined with the interests of the enemy ; the master was so entirely his agent under the charter-party, that it is impracticable to extract the case from the rule that stamps Mr. Pinto with a hostile character. The whole commercial enterprise was radically tainted with a hostile leaven. In its very essence, it was a fraud upon belligerent rights. If, for a moment, it could be admitted, that a neutral might lawfully ship goods in an armed ship of an enemy, or might charter such a ship, and navigate her with a neutral crew, these admissions would fall far short of succoring the claimant. He must successfully contend for broader doctrines, for doctrines which, in my humble judgment, are of infinitely more dangerous tendency than any which Schlegel and Hubner, the champions of neutrality, have yet advanced into the field of maritime controversy. I cannot bring my mind to believe, that a neutral can charter an armed enemy ship, and victual and man her with an enemy crew (for though furnished directly by the owner they are in effect paid and supported by the charterer), with the avowed knowledge and necessary intent that she should resist every enemy ; that he can take on board hostile shipments, on freight, commissions and profits ; that he can stipulate expressly for the benefit and use of enemy convoy, and navigate during the voyage under its guns and protection ; that he can be the entire projector and conductor of the voyage, and co-operate in all the plans of the owner, to render resistance to search secure and effectual ; and that yet, notwithstanding all this conduct, by the law of all nations, he may shelter his property from confiscation, and claim the privileges of an inoffensive neutral. On the contrary, it seems to me, that such conduct is utterly irreconcilable with the good faith of a friend, and unites all the qualities of the most odious hostility. It wears the habiliments of neutrality, only when the sword and the armor of an enemy become *useless for defence. If it be, as it undoubtedly is, a violation of neutrality, to engage in the transport service of the enemy, or to carry his dispatches, even on a neutral voyage, how much more so must it be, to enlist all our own interests in his service, and hire his arms and his crew, in order to prevent the exercise of those rights which, as neutrals, we are bound to submit to? The doctrine is founded in most perfect

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justice, that those who adhere to an enemy connection, shall share the fate of the enemy.

On the whole, in every view which I have been able to take of this subject, I am satisfied, that the claim of Mr. Pinto must be rejected, and that his property is good prize to the captors. And in this opinion, I am authorized to state, that I have the concurrence of one of my brethren. It is matter of regret, that in this conclusion, I have the misfortune to differ from a majority of the court, for whose superior learning and ability I entertain the most entire respect. But I hold it an indispensable duty, not to surrender my own judgment, because a great weight of opinion is against me, a weight which no one can feel more sensibly than myself. Had this been an ordinary case, I should have contented myself with silence; but believing that no more important or interesting question ever came before a prize tribunal, and that the national rights, suspended on it, are of infinite moment to the maritime world, I have thought it not unfit to pronounce my own opinion, diffident, indeed, of its fullness and accuracy of illustration, but entirely satisfied of the rectitude of its principles.

Sentence reversed.

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