So far the rule seems perfectly equitable; but to press it further, and charge them with the freight of goods which they have never received, or with the burden of a charter-party into which they have never entered, would be unreasonable in itself, and inconsistent with the admitted principles of prize law. It might, in a case of justifiable capture, by the condemnation of a single bale of goods, *lead the captors to their ruin, by loading them with the stipulated freight of a whole cargo. [*170

On the whole, we are all of opinion, that the decree of the circuit court ought to be affirmed, except so far as it charges the freight upon the property condemned, and the moiety claimed by Messrs. Ivens & Burnett; and as to this, it ought to be reversed, and that the freight should be decreed to be a charge upon the whole cargo, to be paid by each parcel thereof, in proportion to its value.

Decree affirmed, except as to the freight.(*a*)

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*The Nereide: Pinto, Claimant. [*171

Duties on prize goods.

Under the prize act of June 26th, 1812, and the act of the 2d of August 1813, allowing a deduction of thirty-three and one-third *per centum* on "all goods captured from the enemy, and made good and lawful prize of war, &c., and brought into the United States," are not included goods captured and brought in for adjudication, sold by order of court, and ultimately restored to a neutral claimant as his property; but such goods are chargeable with the same rate of duties as goods imported in foreign bottoms.
The Concord, 9 Cr. 387, re-affirmed.

This cause was originally brought into the Circuit Court, by appeal from the district court for the southern district of New York, in which the property, claimed by Mr. Pinto had been condemned as prize of war. The decree of the district court was affirmed in the circuit court, September term 1814, *pro formâ*, for the purpose of taking the cause, by appeal, before the supreme court, for its final determination; which was accordingly done, and the decree of the circuit court reversed, February term 1815, except as to the undivided fourth part which Mr. Pinto claimed of certain goods, part of the cargo, his claim to which was relinquished by his counsel, on the argument of the cause before the supreme court. All the other property claimed by Mr. Pinto, for himself and others, was ordered to be restored to him. (9 Cranch 388.) The cause was then remanded to the circuit court, with directions to carry the decree *of the supreme court into effect; [*172

(*a*) It has been held, that the charter-party is not the measure by which the captor is, in all cases, bound, even where no fraud is imputed to the contract itself. When, by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not, necessarily, bound to that inflamed rate of freight. When no such circumstances exist, when a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied, when the trade is subjected to very extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the belligerent cruisers. *The Twilling Riget*, 5 Rob. 82.

and the mandate for that purpose was filed in the circuit court, April term 1815, and an order made in pursuance of the mandate.

It was then stated, and made to appear to the satisfaction of the circuit court, that after the Nereide and her cargo had been libelled by the captors, as prize of war, in the district court, and after the condemnation thereof, except the parts of the cargo which were claimed by Mr. Pinto, and during the pendency of such claim, Peter H. Schenck, the prize-agent of the Governor Tompkins, entered the whole of the cargo of the Nereide at the custom-house of the city of New York, and secured the duties thereon; Mr. Pinto having consented that the goods which he claimed should be entered with the others, and be subject to the payment of such duties as they were by law liable to, without prejudice to his rights under his claim; that the prize-agent did enter the goods, so condemned (as also the said goods of which Mr. Pinto claimed the one-fourth), as prize goods, and bonded therefor for prize duties; but was required by the collector of the customs, and did enter all the residue of the goods, claimed by Mr. Pinto, as neutral property, subject to the full duties payable on goods regularly imported in foreign bottoms, and bonded for the same accordingly. The goods claimed by Mr. Pinto were, afterwards, and before condemnation, sold by the marshal of the district, together with the goods condemned, in pursuance of an order of the district court, to which Mr. Pinto also consented, subject to the
*173] same reservation of his rights; and the proceeds of the sales of the goods claimed by Mr. Pinto, after deducting the duties, were paid into court; the amount of the said duties having been paid by the marshal to the prize-agent, with the consent of Mr. Pinto, for the prize-agent's indemnity.

The difference between the duties thus secured to be paid by the prize-agent on the goods finally restored to Mr. Pinto, according to the decision of the supreme court, and those which would have been payable on them, as prize goods, under the act of the 2d of August 1813, entitled, "an act for reducing the duties payable on prize goods captured by the private armed vessels of the United States," amounted to $11,079.59. After the mandate and decree of the supreme court, respecting the restitution of the goods claimed by Mr. Pinto, was carried into effect by the circuit court, there remained in the district court the sum of $18,771.63, being the amount of the net proceeds of the fourth part of the goods, Mr. Pinto's claim to which had been relinquished.

A motion was made in the circuit ceurt, on behalf of Mr. Pinto, that the prize-agent should be ordered to pay to him, out of any of the proceeds of the sales of the condemned part of the Nereide and cargo, and which were in, or might come to, his hands, the said sum of $11,079.59, the difference between the two rates of duties on the goods finally restored to Mr. Pinto, as before mentioned.

It then appeared to this court, that three bonds had been given by the prize-agent, for the duties on those goods, which were thus ordered to be
*174] restored *to Mr. Pinto; that the two of those bonds which first became due, had been paid by the prize-agent; but that the last, which became payable on the 9th of February 1815, and which was for the sum of $8782.97, the collector had suffered, as he said, to remain unpaid, until it should be ascertained whether the property, on which said duties

were thus secured, was condemned to the captors, or restored to the claimant. That after the mandate of the supreme court was returned to the circuit court, the collector required the prize-agent to pay this bond, and he paid the same accordingly, on the 7th of April 1815.

The court were divided in opinion on the point respecting the rates of duties chargeable on the goods so restored to Mr. Pinto; whereupon, it was ordered, that the said sum of $11,079.59 should remain subject to the opinion of the supreme court, and that the residue of the $18,771.65 be paid to Mr. Schenck, as the prize-agent. And that the point on which the disagreement of the judges of the circuit court took place should be certified to the supreme court for their final decision thereon.

Hoffman, for the appellant and claimant.—The statutes on this subject are, 1st. The prize act of the 26th of June 1812, § 14, which repeals the non-importation act, so far as respects goods "captured from the enemy, and made good and lawful prize of war;" and declares, that such goods, "when imported and brought into the United States, shall pay the same duties as goods imported *in American vessels, in the ordinary course of trade," [*175
&c. 2d. The act of the 2d of August 1813, which provides "that all goods captured from the enemy, and made good and lawful prize of war, &c., and brought into the United States, shall be allowed a deduction of thirty-three and one-third *per centum*." 3d. The acts of non-importation, prohibiting the importation of British goods.

1. The goods in question, being of British manufacture, could only be imported under the prize act, and the act of the 2d of August 1813. They were captured from the enemy, for they were on board an enemy's vessel; they were taken as enemy's property; they were captured and brought in, as good and lawful prize of war.

2. The character of the goods is determined at the time they were brought in; it is not to be determined by subsequent events: duties are payable on goods, on their being first imported or brought in; and the prize act puts these goods on the same footing with other importations, and of course, makes the duties on them payable at the same time.

3. The words "good and lawful prize of war," refer to the time of capture, and not of condemnation. By the very act of capture, the goods became prize; and being captured by a lawfully-commissioned vessel, were good and lawful prize. The expression "such goods," refers to goods so captured. They are to pay, when brought in, and not subsequently, upon condemnation.

4. The condemnation does not make the goods prize of war; it merely puts an end to the *jus recuperandi* of the former owner, and gives a new title to the purchaser. The character of prize is, *then, either con- [*176
firmed by condemnation, or lost by restitution. If the property is restored, it is released from the character it had before borne, from the time of capture, and ceases to be prize of war, but being captured and brought in as such, is to pay the prize duties.

Pinkney, for the respondents and captors.—The question now raised seemed to be settled by the decision in the case of *The Concord*, at the last term. (9 Cranch 387.) But, independently of authority, the question is manifestly against the claimant.

1. The goods were not entered under the prize act, and the act of the 2d of August 1813 ; but, as neutral property imported in a foreign bottom, and having been sold, are evidently liable to the full duties on such goods, unless these acts authorize a diminution of them.

2. These acts do not authorize such diminution ; the goods were not captured from the enemy, and have never been made good and lawful prize. They were taken from Mr. Pinto, who was no enemy, either in fact or constructively, according to the judgment of the court. If anything, then, has made them lawful prize, how has it happened that they have been restored? The claimant's counsel, to avoid the appearance of too bold a paradox, mitigates his conclusion on this head, in such a way as proves nothing for the purpose of his argument. He ends with saying, that these goods were captured and brought into the United States, as good and lawful prize. He can scarcely, however, have intended to stop here ; for if his conclusion goes no further, it surrenders the *whole argument, unless it can be *177] shown, that to seize and bring in as prize, that which is not good and lawful prize, and never can become so, makes good and lawful prize of the thing so seized and brought in ; or, in other words, that a seizure and bringing in, *as* prize, of neutral property, makes it, *ipso jure*, good prize, although the owner is, nevertheless, entitled to have it again, as not being good prize, and has, in fact, got it again, accordingly.

3. The character of these goods, with reference to their liability to duty, was not determined at the time they were brought in. If they had been specifically restored, and withdrawn from the United States by the claimant, they would have been liable to no duty.

4. The words "made good and lawful prize," do not refer to the capture merely : the act speaks of the capture first, and then adds, "and made good and lawful prize." The capture, too, must be of enemy's goods, either in fact, or in contemplation of law. To say, that the goods are, by the act of capture, made good and lawful prize, because the capture is made by a lawfully-commissioned cruiser, is to drop more than a moiety of the definition of good and lawful prize, or, rather, to insist on that which is not an essential part of its definition. Prize may be made (as a *droit*) by a non-commissioned captor ; but good and lawful prize cannot be made by any captor, unless the goods be liable to condemnation. It is the *formula* of a sentence of condemnation, to condemn the thing taken as "good and lawful prize," to the captors ; and this, not because it was taken by a lawfully-commissioned cruiser, but because, being so taken, it *was, under all the cir- *178] cumstances, subject to confiscation.

5. Capture gives possession ; but it is the condemnation which ascertains that the things taken are good prize of war : until condemnation, it cannot be known, whether they are good prize or not. But, certainly, it is self-evident, that after restitution, it must be held, that they were not good prize. The condemnation does more than destroy the *jus recuperandi ;* it establishes, what nothing else can establish, that the goods were lawful prize. Restitution, on the other hand, establishes, conclusively, that they never were lawful prize, although they might be justifiably seized, upon probable cause, as such.

March 6th, 1816. MARSHALL, Ch. J., delivered the opinion of the court,

that the goods were chargeable with the same rate of duties as goods imported in foreign bottoms, according to the decision in the case of *The Concord*, at the last term. (9 Cr. 387.)

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*Hepburn & Dundas's Heirs and Executors *v.* Dunlop & Company. [*179

Dunlop & Company *v.* Hepburn & Dundas's Heirs and Executors.

Specific performance.—Rescission.—Interest.

A court of equity will decree a specific performance of a contract for the sale of land, if the vendor is able to make a good title, at any time before the decree is pronounced;[1] but the dismissal of a bill to enforce a specific performance, in such a case, is a bar to a new bill for the same object.

The inability of the vendor to make a good title, at the time the decree is pronounced, though it forms a sufficient ground for refusing a specific performance, will not authorize a court of equity to rescind the agreement, in a case where the parties have an adequate remedy at law for its breach.

The alienage of the vendee is an insufficient ground to entitle the vendor to a decree for rescinding a contract for the sale of lands, though it may afford a reason for refusing a specific performance, as against the vendee.

But if the parties have not an adequate remedy at law, the vendor may be considered as a trustee for whoever may become purchasers, under a sale by order of the court, for the benefit of the vendee.

Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the vendor must pay interest from the time the debt is liquidated, until he makes a good title, and the vendee is accountable for the rents and profits, from the time the title is perfected, until the contract is specifically performed.[2]

Hepburn *v.* Dundas, 2 Cr. C. C. 86, reversed.

These causes were appeals from the chancery side of the Circuit Court of the district of Columbia, for the county of Alexandria. The facts are stated in the opinion of the court, and the controversy is the *same as in the suits between the same parties reported in 1 Cranch 321, [*180 and 5 Ibid. 262.

The causes were argued by *Taylor* and *Swann*, for Hepburn & Dundas, and by *Jones* and *Lee*, for Dunlop & Company.

March 9th, 1816. Washington, J., delivered the opinion of the court.—These causes come before the court uppon appeals from the circuit court of the district of Columbia, for the county of Alexandria. The material facts upon which the questions now to be decided arise, are as follows:

Hepburn & Dundas, being indebted to John Dunlop & Co., of Great Britain, on account of certain mercantile dealings which had taken place between those parties, the precise amount whereof was disputed, an agreement in writing was entered into, on the 27th of September 1799, between the said Hepburn & Dundas, and Colin Auld, the attorney in fact of John Dunlop & Co.; whereby it was stipulated, that the parties mutually agreed to submit all matters in dispute respecting the demand of Dunlop & Co., to certain arbitrators named in the agreement, whose award should be made on or before the 1st day of January following. That Auld, as the agent of

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[1] Seymour *v.* Delancy, 3 Cow. 445; Browne *v.* Haff, 5 Paige 235; Tompkins *v.* Hyatt, 28 N. Y. 347.

[2] See s. c. 3 Wheat. 231.