ing humility upon the state tribunals. God forbid! that the judicial power in these states should ever, for a moment, even in its humblest departments, feel a doubt of its own independence. Whilst adjudicating on a subject which the laws of the country assign finally to the revising power of another tribunal, it can feel no such doubt. An anxiety to do justice is ever relieved, by the knowledge that what we do is not final between the parties. And no sense of dependence can be felt, from the knowlege that the parties, not the court, may be summoned before another tribunal. With this view, by means of laws, avoiding judgments obtained in the state courts in cases over which congress has constitutionally assumed jurisdiction, and inflicting penalties on parties who shall contumaciously persist in infringing the constitutional rights of others—under a liberal extension of the writ of injunction and the *habeas corpus ad subjiciendum*, I flatter myself, that the full extent of the constitutional revising power may be secured to the United States, and the
*382] *benefits of it to the individual, without ever resorting to compulsory or restrictive process upon the state tribunals; a right which, I repeat again, congress has not asserted, nor has this court asserted, nor does there appear any necessity for asserting.

The remaining points in the case being mere questions of practice, I shall make no remarks upon them.

Judgment affirmed.

The Commercen: Lindgren, Claimant.

Contraband of war.—Freight.

Provisions, neutral property, but the growth of the enemy's country, and destined for the supply of the enemy's military or naval forces, are contraband.[1]

Provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life in the enemy's country, are not contraband.[2]

Freight is never due to the neutral carrier of contraband.

Quære? In what cases, the vehicle of contraband is confiscable?

A neutral ship, laden with provisions, enemy's property, and the growth of the enemy's country, specially permitted to be exported for the supply of his forces, is not entitled to freight.

It makes no difference, in such a case, that the enemy is carrying on a distinct war, in conjunction with his allies, who are friends of the captor's country, and that the provisions are intended for the supply of his troops engaged in that war, and that the ship in which they are transported belongs to subjects of one of those allies.

The Commercen, 2 Gallis. 261, affirmed.

*383] Appeal from the Circuit Court for the district of Massachusetts. This was the case of a Swedish *vessel captured on the 16th of April 1814, by the private armed schooner Lawrence, on a voyage from Limerick, in Ireland, to Bilboa, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government; and as well by the official papers of the custom-house, as by the private letters of the shippers, it appeared to have been shipped under the special permission of the government, for the sole use of his Britannic Majesty's forces then in Spain. Bonds were accordingly given for the fulfilment of this object.

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[1] Maisonnaire *v.* Keating, 2 Gallis. 325.

[2] The Henry C. Homeyer, 2 Bond 217. See The Peterhoff, 5 Wall. 28.

The Commercen.

At the hearing in the district court of Maine, the cargo was condemned as enemy's property, and the vessel restored, with an allowance, among other things, of the freight for the voyage, according to the stipulation of the charter-party. The captors appealed from so much of the sentence as decreed freight to the neutral ship; and upon the appeal to the circuit court of Massachusetts, the decree, as to freight, was reversed; and from this last sentence, an appeal was prosecuted to this court.

Key, for the appellants and claimants.—1. The general principle of law allows freight to the neutral carrier of enemy's property. It is incumbent upon the captors, to show, that this case forms an exception to the rule, which they can only do, by alleging this to be an unlawful interposition in the war between the United States and Great Britain; but an interposition in the Peninsular war, was not necessarily an interposition in the American war. Were it *so, it would follow, that the Spaniards and Swedes might not trade with the United States, they being the allies of Great [*384
Britain; as the prize courts of England decide, that the subjects of an ally cannot lawfully trade with the common enemy. Bynkershoek puts the case of two powers allied, during a truce, but before enemies (Q. J. Pub. lib. 16, p. 125, Du Ponceau's Translation). What would be the situation of neutrals? If they came to the assistance of either, they might be liable to be treated as enemies by the other. In the present instance, if the British forces had been so situated, as that they might operate against the United States as well as France, it would alter the case. But remote and uncertain consequences cannot be held to affect the conduct of neutrals with illegality.

2. There is no proof or presumption, that the master knew the special destination of the cargo. His act cannot be unlawful, unless done knowingly and wilfully, as in the case of carrying enemy's dispatches, where Sir William Scott, at first, went entirely on the ground of the master's privity; afterwards, he adopted a rule more strict and severe; but still knowledge was held to be necessary, and presumed, wherever there was a want of extraordinary diligence on the part of the master. It is conceded, that the *onus* is on the claimant, to show his ignorance of the contents of the papers concerning the cargo, which, if the present testimony is not sufficient, may be done upon further proof.

*Story, J.—Ignorance of the master was not pretended, in the court below. [*385

Dexter, for the respondents and captors.—The rule that the neutral carrier of enemy's property is entitled to freight, is a mitigated rule, and Bynkershoek argues with much force against its reasonableness. (Q. J. Pub. ch. 14, p. 111, Du Ponceau's Translation.) But the master, in the present case, is not entitled to the benefit of it, having, by his conduct, made himself an enemy, *pro hâc vice*. The principle, as to the nature of the Spanish war, was settled, when the court determined, that to carry goods to Lisbon, under a British license, was cause of confiscation. Can a party in a similar predicament be entitled to freight? Can a neutral stand on any better ground than a citizen? Either the British troops in the Peninsula were enemies or friends. If enemies, this is an interposition which cannot be permitted to neutrals. Being at war, the British fleets and armies were

hostile, in every quarter of the globe. Where shall the line be drawn, to mark when they became our enemies? At what period, from the time of their landing in Portugal, until their crossing the Pyrennees, and embarking at Bordeaux for the United States? It is impossible to aid the operations of our enemy, in any part of the world, without strengthening his means of annoying us. The very men fed by this trade came here to fight us on our own soil, and to destroy our capital. It is said, that this involves the con-
*386] sequence, that we were at war *with Spain and Portugal; but it depends upon the councils of every country, to judge what acts of hostility shall render it expedient to make war; it depended on us, to be at war with the allies of our declared enemy. It is a general rule, that it is not unlawful to carry provisions to a neutral country; but if the enemy be there, and the articles are destined for his use, it is unlawful. The whole evidence shows, that the master knew he was carrying provisions for the supply of the British forces, and his ignorance of the law, is immaterial. But even if it were material, the inflamed rate of freight shows that he was conscious of the risk he ran.

Harper, in reply.—The principle contended for by the captors is *stricti juris*, and extreme in its application to this particular case, where there is nothing like moral guilt in the conduct of the master, who did not intend to interfere in our distinct war. There is no adjudged case that comes up to this; and freight is refused, from analogy to the general principle established by the British prize courts, as to neutral interposition in the war. But an interference in the coasting and colonial, or other privileged trade of the enemy, and relief to him, is a direct assistance, and the rule cannot justly be extended to a remote and consequential aid, not contemplated by the party. The license cases, determined by this court, went on the ground of an adoption of the enemy character, and an incorporation with enemy interests; the case of *The Liverpool Packet* (1 Gallis. 513), determined by
*387] the same learned judge who tried this cause, shows the distinction *between this and the license cases. The rule of the war of 1756, even supposing it to be well established, does not apply to the relative situation of Great Britain and the United States. The former had hung out no signals of depression and defeat in the Peninsular war, and required no neutral aid, as a relief from the pressure of her enemies.(*a*)

March 21st, 1816. Story, J., delivered the opinion of the court.—The single point now in controversy in this cause is, whether the ship is entitled to the freight for the voyage? The general rule, that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy; the engaging in the coasting or colonial trade of the enemy; the spoliation of papers, and the fraudulent suppression of enemy interests, have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying dispatches or hostile

(*a*) *Vide* Appendix, note III.

military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted.(*a*) By the modern law of nations, provisions *are [*388 not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war, or on account of their destination. *The Jonge Margaretha*, 1 Rob. 189. If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise, if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband. (Ibid.) Another exception from being treated as contraband is, where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and, more especially, if the property of his subjects, and destined for enemy's use, there does not seem any good reason for the exemption; for, as Sir WILLIAM SCOTT has observed, in such case, the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities. (Ibid.) But it is argued, that the doctrine of contraband cannot apply to the present case, because the destination was to a neutral country; and it is certainly true, that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character, or however well adapted to warlike purposes. But if such goods are destined for the direct *and [*389 avowed use of the enemy's army or navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port, would it be lawful for a neutral to carry provisions or munitions of war thither, avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war, and an essential aid to the enemy in his hostile preparations? In such a case, the goods, even if belonging to a neutral, would have had the taint of contraband, in its most offensive character, on account of their destination; and the mere interposition of a neutral port would not protect them from forfeiture.(*b*) Strictly speaking,

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(*a*) Bynk. Quæst. J. Pub. c. 14; The Sarah Christina, 1 Rob. 237; The Haase, Id. 288; The Emanuel, Id. 296; The Immanuel, 2 Id. 101; The Atlas, Id. 299; The Rising Sun, Id. 104; The Madonna delle Gracie, 4 Id. 161; The Neutralitat, 3 Id. 295; The Welvaart, 2 Id. 128; The Friendship, 6 Id. 420.

(*b*) Articles which are exclusively useful for warlike purposes, are always contraband, when destined for the enemy; those of promiscuous use, in war and in peace, only become so, under particular circumstances. Grotius, *De jure belli ac pacis*, lib. 3, c. 1, § 5; Vattel, lib. 3, c. 7, § 112. Among the latter class, are included naval stores and provisions; though Vattel considers naval stores as always contraband, whilst he holds that provisions only become so, under peculiar circumstances. "*Les choses qui sont d'un usage particulier pour la guerre, et dont on empêche le transport chez l'ennemi s'appellent marchandises de contrabande. Telles sont les armes, les munitions de guerre, les bois, et tout ce qui sert à la construction, et à l'armément des vaisseaux de guerre, les chevaux, et les vivres mêmes en certaines occasions, ou l'on espere de réduire l'ennemi par la faim.*" But Bynkershoek reasons against admitting into the list of contraband, articles of promiscuous use, and the materials out of which warlike articles are formed. Q. Jur. Pub. lib. 1, c. 10. He, however, states that materials for building ships may be prohibited under certain circumstances. "*Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis ea quam maxime indigeat, et absque ea com-*

however, *this is not a question of contraband; for that can arise only when
*391] the property belongs to a neutral, *and here the property belonged to an enemy, and therefore, was liable, at all events, to condemnation.

But was the voyage lawful, and such as a neutral could, with good faith, and without a forfeiture, engage in? It has been solemnly adjudged, that being engaged in the transport service, or in the conveyance of military persons in his employ, are acts of hostility which subject the property to confiscation. *The Carolina*, 4 Rob. 256; *The Friendship*, 6 Ibid. 420; *The Orozenbo*, Ibid. 430. And the carrying of dispatches from the colony to the mother country of the enemy has subjected the party to the like penalty. *The Atalanta*, 6 Rob. 440; *The Constantia*, Ibid. 461, note. And in these cases, the fact that the voyage was to a neutral port, was not thought to

mode bellum gerere haud possit. Quum ordines generales in § 2, *edicti contra Lysitanos, Dec.* 31, 1657, *iis, quæ communi populorum usu contrabande censentur, Lysitanos juvari vetuissent, specialiter addunt in* § 3, *ejusdem edicti, quia nihil nisi mari a Lysitanos metuebant, ne quis etiam navium materiam iis advehere vellet, palam sic navium a contrabandis distincta, sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum instrumentis belli in* § 2, *d. Edicti contrà Anglos, Dec.* 5, 1652, *et in Edicto ordinum generalium contrà Francos*, 9 *Mart.* 1689. *Sed sunt hæc exceptiones quæ regulam confirmant.*" So also, of provisions, they are not, in general, contraband; but if the produce of an enemy's country, and not destined for the ordinary sustenance of human life, but for military or naval use, they become contraband, according to the law of England. And articles, the growth of the neutral exporting country, are not contraband, though carried in the vessels of another country. The Apollo, 4 Rob. 161. And the benefit of the principle is extended to maritime countries, exporting the produce of neighboring interior districts, whose produce those countries are usually employed in exporting, in the ordinary course of their trade. The Evert, Id. 354. But the law of France and Spain does not consider provisions as contraband. Ordonnance de la Marine, lib. 3, tit. 9, *des Prises*, art. 11; D'Habreu, *sobre las Presas*, part 1, c. 10, p. 136. And Valin states, that, both by the law of France and the common law of nations, provisions are contraband only where destined to besieged or blockaded places. But he asserts, that naval stores were contraband, at the time he wrote (1758), and had been so since the beginning of that century, which they were not formerly. Sur l'Ord, Ibid. Pothier, commenting on the same article of the ordinance, observes, "*A l'égard des munitions de bouche que des sujets des puissances neutres envoient à nos ennemies, elles ne sont point censées de contrabande, ni par conséquent sujettes confiscation; sauf dans un seul cas, qui est lorsqu'elles sont envoyées à une place assiégée ou bloquée.*" De Propriété, No. 104. By the Swedish Ordinance of 1715, contraband articles are declared to be those "*qui peuvent être employées pour la guerre.*" The Danish Ordinance of 1659 (provided for the subsisting war with Sweden) contains a long list of contraband articles, among which are included naval stores and provisions. The modern conventional law of nations has generally excluded provisions and naval stores from the list of contraband, and in all the treaties made by the United States, since they were an independent power, except in the treaties with Great Britain, they are excluded; but the only treaty now subsisting which contains a definition of contraband, is that of 1795, with Spain, which embraces the munitions of war only. The treaty of 1794 with great Britain, declares naval stores, with the exception of unwrought iron and fir planks, to be contraband, and liable to confiscation, and declares, that when provisions and other articles, not generally contraband, shall become such, according to the existing law of nations, they shall be entitled to pre-emption, with freight to the carrier. By the treaty negotiated in 1807, but not ratified, provisions were omitted in the list of contraband, and tar and pitch (unless destined to a port of naval equipment) were added to the naval stores excepted in the treaty of 1794.

change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the hostile state, and *assist in warding off the pressure of the war, or in favoring its offensive projects. Now, we cannot [*392 distinguish these cases, in principle, from that before the court. Here is a cargo of provisions, exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to be exported at all. Can a more important or essential service be performed in favor of the enemy? In what does it differ from the case of a transport in his service? The property, nominally, belongs to individuals, and is freighted, apparently, on private account, but, in reality, for public use, and under a public contract, implied from the very permission of exportation. It is vain to contend, that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy, indirectly, to operate with more vigor and promptitude against us, aud increase his disposable force. But it is not the effect of the particular transaction that the law regards, it is the general tendency of such transactions to assist the military operations of the enemy, and the temptations which it presents to deviate from a strict neutrality. Nor do we perceive how the destination to a neutral port, can vary the application of this rule; it is only doing that, indirectly, which is prohibited in direct courses. Would it be contended, that a neutral might lawfully transport provisions for the British fleet and army, while it lay at Bordeaux, preparing for an expedition to the United States? Would it be contended, that he might lawfully supply a British *fleet [*393 stationed on our coast? We presume, that two opinions could not be entertained on such questions; and yet, though the cases put are strong, we do not know that the assistance is more material then might be supplied under cover of a neutral destination like the present.

An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground, that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms, in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign, acting under his own authority, we are of opinion, that if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It is perfectly immaterial, in what particular enterprise those armies might, at the time, be engaged; for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us. In *The Friendship*, 6 Rob. 420, 426, Sir W. Scott, speaking on this subject, declares, "It signifies nothing, whether the men, so conveyed, are to be put into action, on an immediate expedition, or not. The mere shifting of drafts in detachments, and the conveyance of stores from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant, [*394 *whether this or that case may be connected with the immedate active service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action, but still, the general impor-

tance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It is obvious, that the learned judge did not deem it material to what places the stores might be destined ; and it must be equally immaterial, what is the immediate occupation of the enemy's military force. That force is always hostile to us, be it where it may be. To-day it may act against France, to-morrow, against us ; and the better its commissary department is supplied, the more life and activity is communicated to all its motions. It is not, therefore, in our view, material, whether there be another distinct war in which our enemy is engaged, or not ; it is sufficient, that his armies are everywhere our enemies, and every assistance offered to them must, directly or indirectly, operate to our injury.

On the whole, the court are of opinion, that the voyage, in which this vessel was engaged, was illicit, and inconsistent with the duties of neutrality, and that it is a very lenient administration of justice, to confine the penalty to a mere denial of freight.(*a*)

*395] *Marshall, Ch. J. (*dissenting.*)—As a principle, which I think new, and which may certainly, in future, be very interesting to the United States, has been decided in this case, I trust, I may be excused for stating the reasons which have prevented my concurring in the opinion that has been delivered.

In argument, this sentence of the circuit court has been sustained on two
*396] grounds : 1st. That the exportation *of grain from Ireland is generally prohibited, and therefore, that a neutral cannot lawfully engage

(*a*) As to the penalty for the carrying of contraband, see 3 Rob. 182, note *a*. Freight and expenses are almost always refused by the British prize courts to a carrier of contraband. There is but one case in the books, of an exception to this rule, which was of sail-cloth carried to Amsterdam, the contraband being in a small quantity, amongst a variety of other articles. The Neptunus, 3 Rob. 91. The penalty is carried beyond the refusal of freight and expenses, and is extended to the confiscation of the ship, and innocent parts of the same cargo, 1st. Where the ship and the contraband articles belong to the same person. The Staadt Emden, 1 Rob. 31; The Young Tobias, Id. 330. 2d. Where the cargo is carried with a false destination, false papers, or other circumstances of fraud. The Franklin, 3 Rob. 217; The Edward, 4 Id. 69; The Richmond, 5 Id. 290; The Ranger, 6 Id. 125. 3d. Where the owner of the ship is bound, by the obligation of treaties between his own country and the capturing power, to refrain from carrying contraband to the enemy. The Neutralitet, 3 Rob. 295. By the ancient prize law of France, contraband goods were subject to pre-emption only. Ordonnance de 1584, art. 69. The ordinance of 1681 subjected the contraband articles only to confiscation; but by the regulation of 1778, the same penalty was extended to the ship, in case three-fourths of the cargo consisted of contraband articles. The law of Holland confiscates the contraband articles only, but refuses freight; the principle of of which is vindicated by Bynkershoek. "*Idque longe verissimum est, nam mercedes non debentur, nisi itinere perfecto, et, ne perficeretur, hostis jure prohibuit. Deinde publicantur contrabanda velex delicto, et ita nihil commiserunt navarchi, quam ipsi mercium vetitarum domini, vel, quod magis est, ex re, ex ipsa nimirum transvectione : quamois enim amico nostro non possimus commercio interdicere cum hoste nostro, possumus tamen prohibere, ne in bello illi prosit in necem nostram. Atque ita, quod publicatur, publicabitur citra ullum ullius hominis respectum, et habebitur, ac si divina periisset, extincto sic jure pignoris.*"

in it during war. 2d. That the carriage of supplies to the army of the enemy is to take part with him in the war, and consequently, to become the enemy of the United States so far as to forfeit the right to freight.

The first point has been maintained, on its supposed analogies to certain principles which have been, at different times, avowed by the great maritime and belligerent powers of Europe respecting the colonial and coasting trade, and which are generally known in England, and in this country, by the appellation of the rule of 1756. Without professing to give any opinion on the correctness of those principles, it is sufficient to observe, that they do not appear to me to apply to this case. The rule of 1756 prohibits a neutral from engaging, in time of war, in a trade in which he was prevented from participating in time of peace, because that trade was, by law, exclusively reserved for the vessels of the hostile state. This prohibition stands upon two grounds. 1st. That a trade, such as the coasting or colonial trade, which, by the permanent policy of a nation, is reserved for its own vessels, if opened to neutrals during war, must be opened under the pressure of the arms of the enemy, and in order to obtain relief from that pressure. The neutral who interposes to relieve the belligerent, under such circumstances, rescues him from the condition to which the arms of his enemy has reduced him, restores to him those resources which have been wrested from him by the *arms of his adversary, and deprives that adversary of the advantages which successful war has given him. This, the opposing belligerent pronounces a departure from neutrality, and an interference in the war, to his prejudice, which he will not tolerate. 2d. If the trade be not opened by law, that a neutral employed in a trade thus reserved by the enemy to his own vessels, identifies himself with that enemy, and by performing functions exclusively appertaining to the enemy character, assumes that character. Neither the one nor the other of these reasons applies to the case under consideration. The trade was not a trade confined to British vessels, during peace, and opened to neutrals, during war, under the pressure created by the arms of the enemy. It was prohibited, for political reasons, entirely unconnected with the interests of navigation, and thrown open from motives equally unconnected with maritime strength. Neither did the neutral employed in it engage in a trade, then, or at any time, reserved for British vessels, and therefore, did not identify himself with them. He was not performing functions exclusively appertaining to the enemy, and consequently, in performing them, did not assume that character. [*397

The second point presents a question of much more difficulty. That a neutral carrying supplies to the army of the enemy does, under the mildest interpretation of international law, expose himself to the loss of freight, is a proposition too well settled to be controverted. That it is a general rule, admitting of few, if any, exceptions, is not denied by the counsel *for the appellants. But they contend, that this case is withdrawn from that rule, by its peculiar circumstances. The late war between the United States and Great Britain was declared, at a time when all Europe, including our enemy, was engaged in a war with which ours had no connection, and in which we professed to take no interest. The allies of our enemy, engaged with him in a common war, the most tremendous and the most vitally interesting to the parties that has ever desolated the earth, were our friends. We kept up with them the mutual interchange of good offices, [*398

and declared our determination to stand aloof from that cause which was common to them and Great Britain. They, too, considered this war as entirely distinct from that in which they were engaged. Although, at a most critical period, we had attacked their ally, they did not view it as an act of hostility to them. They did not ascribe it to a wish to affect, in any manner, the war in Europe, but solely to the desire of asserting our violated rights. They seemed almost to consider the Britain who was our enemy, as a different nation from that Britain who was their ally.

How long this extraordinary state of things might have continued, it is impossible to say; but it certainly existed, when the Commercen was captured. What its effect on that capture ought to be, must depend more on principle than on precedent. It has been said, and truly said, by the counsel for the captors, that we were at war with Great Britain, in every part of the world. We were enemies everywhere. Her troops in Spain, or else-
*399] where, as *well as her troops in America, were our enemies. It was a conflict of nation against nation. This is conceded; and therefore, the cargo of the Commercen, being British property, was condemned as prize of war. But, although this must be conceded, the corollary which is drawn from it, that, those who furnish their armies in Spain with provisions, aid them to our prejudice, and therefore, take part in the war, and are guilty of unneutral conduct, must be examined, before it can be admitted. It is not true, that every species of aid given to an enemy, is an act of hostility which will justify our treating him who gives it, or his vessels, as hostile to us. The history of all Europe, and especially of Switzerland, furnishes many examples of the truth of this proposition. Those examples need not be quoted particularly, because they stand on principles not entirely applicable to this case. It is the peculiarity of this war, which requires the adoption of rules peculiar to a new state of things, in adopting which, we must examine the principle on which a nation is justified in treating a neutral as an enemy. That a neutral is friendly to our enemy, and continues to interchange good offices with him, can furnish no subject of complaint; for then, all commerce with one belligerent would be deemed hostile by the other. The effect of commerce is to augment his resources, and enable him the longer to prosecute the war; but this augmentation is produced by an act entirely innocent on the part of the neutral, and manifesting no hostility to the opposing belligerent. It cannot, therefore, be
*400] molested by him, while the same good offices *are allowed to him, although he may not be enabled to avail himself of them to an equal degree. It would seem, then, that a remote and consequential effect of an act, is not suffiicient to give it a hostile character; its tendency to aid the enemy in the war, must be direct and immediate. It is also necessary, that it should be injurious to us; for a mere benefit to another, which is not injurious to us, cannot convert a friend into an enemy.

If these principles be correct, and they are believed to be so, let us apply them to the present case. When hostilities commenced between the United States and Great Britain, that country was carrying on a war with France, in which the great powers of Europe were combined. We did not expect, and certainly had no right to expect, that our declaration of war against one of the allies, would, in any manner, affect the operations of their common war in Europe. The armies of Portugal and Spain were united to

those of Britain, and, unquestionably, aided and assisted our enemy, but they did not aid and assist him against us, and therefore, did not become our enemies. Had any other of the combined powers equipped a military expedition, for the purpose of reinforcing the armies of Britain in any part of Europe, or had a new ally engaged in the war, that would have been no act of hostility against the United States, although it would have aided our enemy. But if a military expedition to the United States had been undertaken, the case would have assumed a different aspect. Such expedition would be hostile to this country, and the power undertaking it would *become our enemy. It would have been an interference operating directly to our prejudice. The declaration of war against Great [*401 Britain had, without doubt, a remote and consequential effect on the war in Europe. The force employed against the United States must be subducted from that employed in support of the common cause in Europe, or greater exertions must be made, which might sooner exhaust those resources which enabled her to continue her gigantic efforts in their common war. Consequently, the declaration of war by the United States remotely affected the war in Europe, to the advantage of one party and the injury of the other. Yet no one of the allies considered this declaration as taking part in that war, and placing America in the condition of an enemy. But, had the United States employed their force on the Peninsula against the British troops, or had they interfered in the operations of the common war, it may well be doubted, whether they might not have been rightfully considered as taking part against the allies, and arranging themselves on the side of the common enemy.

In answer to arguments of this tendency, made at the bar, it was said, that nations are governed by political considerations, and may choose rather to overlook conduct at which they might justly take offence, than unnecessarily to increase the number of their enemies, or provoke increased hostility; but that courts of justice are bound by the law, and must inflexibly adhere to its mandate. While this is conceded, it is deemed equally true, that those acts which will justify the condemnation of a *neutral, as an enemy, would also justify the treating his nation as an enemy, if they [*402 were performed or defended by the nation. There is a tacit compact, that the hostile act of the individual shall not be ascribed to his government; and that, in turn, the government will not protect the individual from being treated as an enemy. But if the government adopts the act of the individual, and supports it by force, the government itself may be rightfully treated as hostile. Thus, contraband of war, though belonging to a neutral, is condemned as the property of an enemy, and his government takes no offence at it; but should his government adopt the act, and insist upon the right to carry articles deemed contraband, and support that right, it would furnish just ground of war. The belligerent might choose to overlook this hostile act, but the act would be, in its nature, hostile.

The inquiry, then, whether the act in which this individual Swede was employed, would, if performed by his government, have been considered an act of hostility to the United States, and might rightfully be so considered, is material to the decision of the question, whether the act of the individual is to be treated as hostile. Great Britain and Sweden were allies in the war against France. Consequently, the King of Sweden might have ordered

his troops to co-operate with those of Britain, in any place, against the common enemy. He might have ordered a reinforcement to the British army on the Peninsula, and this reinforcement might have been transported by sea. An attempt on the part of the United States to intercept it, because it
*403] was *aiding their enemy, would certainly have been an interference in the war of Europe, which would have provoked, and would have justified, the resentment of all the allied powers. It would have been an interference, not to be justified by our war with Britain, because those troops were not to be employed against us. If, instead of a reinforcement of men, a supply of provisions were to be furnished to that part of the allied army which was British, would that alter the case? Could an American squadron intercept a convoy of provisions, or of military stores, of any description, going to an army engaged in a war common to Great Britain and Sweden, and not against the United States? Could this be done, without interfering in that war, and taking part in it against all the allies? If it could not, then any supplies furnished by the government of Sweden, promoting the operations of their common war, whether intended for the British or any other division of the allied armies, had a right to pass unmolested by American cruisers. It is not believed, that any act which, if performed by the government, would not be deemed an act of hostility, is to be so deemed, if performed by an individual. Had the provisions then on board the Commercen been Swedish property, the result of this reasoning is, that it would not have been confiscated as prize of war. Being British property, it is confiscable; but the Swede is guilty of no other offence than carrying enemy's property, an offence not enhanced in this particular case by the character of that property, He is, therefore, as much entitled to freight,
*404] as if his cargo had been *of a different description. His trade was not more illicit, than the carriage of enemy's goods for common use, would have been.

If the cases in which neutrals have been condemned for having on board articles, the transportation of which clothe them with the enemy character, be attentively considered, it is believed, that they will not be found to contravene the reasoning which has been urged. To carry dispatches to the government, has been considered as an act of such complete hostility, as to communicate the hostile character of the vessel carrying them, But this decision was made in a case where the dispatches could only relate to the war between the government of the captors, and that to which the dispatches were addressed. They were communications between a colonial government, in danger of being attacked, and the mother country. In a subsequent case, it was determined, that a neutral vessel might bear dispatches to a hostile government, without assuming the belligerent character, if they were from an ambassador residing in the neutral state. Yet such dispatches might contain intelligence material to the war. But this is a case in which the belligerent right to intercept all communications addressed to the enemy, by the officers of that enemy, is modified and restrained by the neutral right to protect the diplomatic communications which are necessary to the political intercourse between belligerents and neutrals. It is a case, in which the right of the belligerent is narrowed and controlled by the
*405] positive rights of a neutral; still more reasonably may they *be narrowed and controlled by the positive rights of a belligerent engaged

in a war in which we have no concern, and in which we ought not to interfere. To transport troops, or military persons, belonging to the enemy, from one place to another, has also been determined to subject the vessel to condemnation ; but in those cases, the service in which it was supposed the persons, so conveyed, were to be employed, was against the government of the captors. The transportation of these persons was to aid the views of one belligerent against the other, and was therefore, to take part in the war against that other. It is an act, the operation of which is direct and immediate.

It may be said, that this reasoning would go to the protection of British troops passing to the Peninsula, and of British supplies transported in British vessels for their use ; that it, therefore, proves too much, and must, consequently, be unsound. It is admitted, that, pressed to its extreme point, the argument would go this extent, an extent which cannot be maintained ; but it does not follow, that it is unsound in every stage of its progress. In every case of conflicting rights, each must yield something to the other. The pretensions of neither party can be carried to the extreme. They meet—they check—they limit each other. The precise line which neither can pass, but to which each may advance, is not easily to be found and marked ; yet such a line must exist, whatever may be the difficulty of discerning it. To attack an enemy, or to take his property, if either can be done, without violating the sovereignty *of a friend, is of the very essence of [*406
war. None can be offended at the exercise of this right, who may not be offended at the declaration of war itself. The injury which the allies of our enemy, in a war common to them (but in which we are not engaged), sustain, by this occasional interruption, is incidental, while, on our part, it is the exercise of a direct and essential right. But when we attack a friend, who is carrying on military operations conjointly with our enemy, but not against us, we are not making direct war, but are using those incidental rights which war gives us, against those direct rights which are exercised by a belligerent, not our enemy, and which constitute war itself. In either case, it would seem to me, that the incidental must yield to the direct and essential right.

Upon this view of the subject, I have at length, not, it is confessed, without difficulty, come to the conclusion, that the Commercen, being a Swedish vessel, whose nation was engaged in a war, common to Great Britain and Sweden, against France, and to which the United States were not a party, might convey military stores for the use of the British armies engaged in that war, as innocently as she could carry British property of any other description, and is, therefore, as much entitled to freight as she would be, had the property belonged to the enemy, but been destined for ordinary use.

Livingston, J.—I concur in the opinion of the chief justice. Considering Sweden an ally of Great Britain, in the war which the latter was [*407
carrying on *in the Peninsula, either the king of Sweden himself might send transports with provisions for the use of the British army, while engaged in any common enterprise, or his subjects might lawfully aid in such transportation, without a violation of their neutral character, as it regarded the United States. If the American government had asserted the

right of capturing and condemning Swedish vessels, or depriving them of their freight, on the ground on which it has been denied to the Commercen, I am not certain, that Sweden would not have thought it a very serious aggression, and would not have had a right to consider it, if persisted in, as an act of hostility.

JOHNSON, J.—I also concur in the opinion of the chief justice; and I do it, without the least doubt or hesitation. Sweden was an ally in the war going on in the Peninsula, and her subjects had an indubitable right to transport provisions in aid of their nation, or its allies. The owner, therefore, had a right to his freight; for he did not act inconsistent with our belligerent rights, while in the direct and ordinary exercise of those rights which a state of war conferred on himself.

Sentence of the circuit court affirmed.

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*408] *The GEORGE, The BOTHNEA, and The JANSTAFF.

Evidence in prize causes.

In cases of joint or collusive capture, the usual simplicity of the prize proceedings is necessarily departed from; and where, in these cases, there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to.

APPEAL from the Circuit Court for the district of Massachusetts. These were British vessels captured and brought in by the private armed vessels, the Fly and the Washington, and libelled as prize of war. In each of them, the United States interposed a claim, charging that the capture was collusive and that the whole property ought, on that account, to be forfeited to the Uniied States. In each case, the captors applied for permission to make further proof. In that of the George, it was allowed in the district court, and partially received; but the application to make still further proof, and to introduce into the record testimony already taken, was rejected in the circuit court, and was again offered in this court. In the last two cases, further proof was refused, both in the district and circuit courts. In all the cases, the vessels and cargoes were condemned to the United States, and from each of these sentences of condemnation, the captors appealed to this court.

*409] *The first case was argued by *Dexter* and *G. Sullivan*, for the appellants and captors, and by the *Attorney-General*, for the United States. The last two by *Winder* and *Harper*, for the appellants and captors, and by *Dexter* and *Pinkney*, for the United States.

MARSHALL, Ch. J., delivered the opinion of the court as follows:—The first question to be discussed is, the propriety of allowing further proof. It is certainly a general rule in prize causes, that the decision should be prompt; and should be made, unless some some good reason for departing from it exist, on the papers and testimony afforded by the captured vessel, or which can be invoked from the papers of other vessels in possession of the court. This rule ought to be held sacred, in that whole description of causes to which the reasons on which it is founded are applicable. The usual controversy in prize causes is between the captors and captured. If the cap-