The Atalanta: Foussat, Claimant.

Prize.—Neutral cargo.

A neutral cargo, found on board an armed enemy's vessel, is not liable to condemnation as prize of war.

A question of proprietary interest: Further proof ordered.

Appeal from the Circuit Court for the district of Georgia. This ship, being a British armed vessel, was captured, in the year 1814, on a voyage
*410] from Bordeaux *to Pensacola, by the sloop of war Wasp, and sent into Savannah, in Georgia, where she was libelled, and condemned in the district court as prize of war.

The cargo, which was claimed for M. Foussat, a merchant domiciled at Bordeaux, was also condemned. On appeal to the circuit court as to the cargo, further proof was ordered, and restitution decreed to the claimant. The cause was then brought by appeal to this court.

The vessel was owned by Messrs. Barclay, Salkeld and Co., of Liverpool, who were also the owners of large cotton plantations near Pensacola. She sailed from Liverpool, on the 14th of August 1814, for Bordeaux, laden with a cargo, part of which, about equal in value to the cargo subsequently taken in at Bordeaux, belonged to the owners of the ship; and the documentary evidence showed, that her ultimate destination was Pensacola or the Havana. A few days after the arrival of the vessel at Bordeaux, she was chartered by the claimant, who then had a vessel of his own lying unemployed in that port, and the cargo claimed was put on board in September 1814. One Pritchard, who sailed in the vessel, was a British subject, and according to some of the testimony, acted as supercargo. At the time of the capture, the master and Pritchard were taken out of the vessel and carried on board the Wasp, which ship had never since been heard of, and was supposed to have been lost at sea.

The proceedings in the district court were extremely irregular; no examinations of the prisoners on the standing interrogatories having been
*411] taken, and witnesses having been examined, in the first instance, *who neither belonged to the captured nor the capturing vessel. The further proof produced by the claimant in the court below consisted of an affidavit of the claimant, swearing to the property in himself, and a certificate of two royal notaries at Bordeaux, that the copy of a letter from the claimant to Vincent Ramez, the consignee at Pensacola, dated the 28th of August 1814, and stating the object of the adventure, was truly extracted from the claimant's letter-book.

Berrien, for the appellants and captors, argued, that the cargo was liable to condemnation, 1st. As being laden on board an enemy's armed vessel: and 2d, on account of the defects in the proofs of proprietary interest. That, although the doctrine inculcated in the case of *The Nereide*, 9 Cranch 388, tended to show that the circumstance of the cargo being found on board an armed enemy's vessel was not, in itself, a substantive cause of condemnation, the principle had not been decided by a majority of the court; Mr. Justice Johnson's opinion limiting it to the case of a neutral, at peace with all the world. Ibid. 431. This was not the case of Mr. Pinto, but it was the case of M. Foussat. Just before the decision of *The Nereide*, Sir William Scott

had held the contrary doctrine (*The Fanny*, 1 Dods. 443, July 20th, 1814), and decreed salvage for the re-capture of neutral goods previously taken by one of our cruisers, on board an armed British ship, upon the ground, that *the American courts might justly have condemned the property. But [*412 even supposing this circumstance not to be a substantive cause of condemation, it inflames the suspicions of hostile interests, arising from the other circumstances of the case, and does not admit of an explanation consistently with the pretended neutral character set up by the claimant. The inconvenience of exposing himself to these suspicions must have been compensated by the protection afforded by an armed force, or that protection would not have been resorted to. The case is, in that respect, distinguished, to its disadvantage, from that whole class of cases, including *The St. Nicholas*, 1 Wheat. 417, and others, where fraud, and not force, was resorted to, in order to evade, instead of directly resisting, belligerent rights. The principle of reciprocity, as a doctrine of prize law, has been overruled by the court (*The Nereide*, 9 Cranch 422), and therefore, it cannot be contended, that the rule of the French prize code, by which the having an enemy's supercargo on board, is a cause of condemnation, is to be retaliated upon the claimant. But this fact increases the improbability, that a Frenchman, who must have known the law of his own country in this respect, would have exposed his property to the risk of confiscation, in the courts of a country, whose prize law he could not know, because it was still unsettled. All the other circumstances of the case tend to the conclusion, that it was not his property, but that of the British ship-owner.

**Sergeant*, contrà, contended, that the case of *The Fanny*, even if [*413 it were not contradicted by that of *The Nereide*, was not directly in point. Sir W. Scott there goes on the ground of the probability or danger of condemnation in our courts, as affording a reason for giving salvage. Besides, *The Fanny* was a commissioned, as well as armed vessel; which *The Nereide* and *The Atalanta* were not. But it must be confessed, that the decision in *The Fanny* was a very careless, not to say superficial, judgment. The judge agrees, that the Portuguese flag was an inadequate protection, and yet holds the neutral liable to condemnation, for taking shelter under a belligerent force. With all due respect to the great man by whom it was pronounced, it may be said to be tinctured with some of those peculiarities which mark the conduct of the tribunals of a great maritime country, bent on the assertion of its pretensions, by its overwhelming naval power. At all events, it does not form a law for this court, any more than the principle of retaliation which has been already repudiated by the court. The proceedings in the present case have been marked by irregularities subversive of that justice which is due to neutrals, and by a neglect of those forms which are a part of the silent compact by which they agree to submit to the exercise of the harsh and inconvenient prerogative of search. The cause was not heard in the court of first instance, upon the ship's papers and the preparatory depositions, before extraneous testimony was let in, by an order for further proof. The salutary principles of prize practice, which afford a security to *neutrals, in a trial in the courts of the captor, that would [*414 otherwise be grossly oppressive, have been wholly disregarded. It is a rule of justice, in admiralty courts, whether of instance or prize, that where

the original evidence appears to be clear, the court will not indulge in extraneous suspicions. *The Octavia*, 1 Wheat. 23 n. If the employment of an armed enemy's vessel be innocent, no unfavorable inference can legally be drawn from it, any more than from the employment of an unarmed belligerent carrier. Both this circumstance and the employment of an English supercargo (if he was employed) would rather show that no fraud was intended, since the annals of the prize court do not afford a single instance of a fraudulent case, which was not, entirely covered with the neutral garb.

The *Attorney General*, in reply, insisted, that the fact of the cargo being captured on board an armed belligerent ship, raised a strong presumption, throwing the *onus probandi* on the claimant, with more than usual weight. The only evidence to relieve this presumption, was the oath of the claimant himself, unsupported by that of any other witness, or by any documentary evidence; and that too, under an order for further proof; a mere test-affidavit, without which a claimant can in no case receive restitution, but which is no evidence, or next to none, in a case of the least doubt or difficulty.

*415] *MARSHALL, Ch. J., delivered the opinion of the court.—This vessel was captured on a voyage from Bordeaux to Pensacola, by the sloop of war Wasp, and sent into Savannah, in Georgia, where she was libelled and condemned as prize of war. The cargo was claimed for Mons. Foussat, a French merchant, residing at Bordeaux. In the district court, the cargo was condemned as enemy's property, avowedly on the principle that this character was imparted to it by the vessel in which it was found. On an appeal to the circuit court, further proof was directed, and this sentence was reversed, and restitution decreed to the claimant. From this decree, the captors appealed to this court.

It has been contended, that this cargo ought to be condemned as enemy's property, because, 1st. It was found on board an armed belligerent. 2d. It is, in truth, the property of British subjects.

On the first question, the case does not essentially differ from that of *The Nereide*. It is unnecessary to repeat the reasoning on which that case was decided. The opinion then given by three judges is retained by them. The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be, and probably will be, changed, or so impaired as to leave no object to which it is applicable; but so long as the principle shall be acknowledged, this court must reject constructions which render it totally inoperative.

2d. Respecting the proprietary interest, much doubt is entertained. In addition to the extraordinary fact of employing a belligerent carrier, while *416] a neutral *vessel belonging to the alleged owner of the cargo lay in port, there are circumstances in this case, calculated to awaken suspicion, which the claimant ought to clear up, so far as may be in his power.

The return-cargo of the Atalanta was to be in cotton, and Berkely, Salkeld & Co., the owners of the vessel, were also owners of large cotton plantations, the produce of which might readily be shipped from Pensacola. The papers show that the Atalanta sailed from Liverpool, where her owners reside, with a cargo for Bordeaux, a part of which, about equal in value to

the cargo taken in at Bordeaux, belonged to Berkley, Salkeld & Co., and that her ultimate destination, at the time of sailing, was Pensacola, or the Havana. Within a day or two after her arrival at Bordeaux, she was chartered by the claimant, for the voyage on which she was captured, and the cargo he now claims was put on board. A Mr. Pritchard sailed in the vessel, who was a British subject, and who has been represented in some of the testimony as a supercargo.

There are, undoubtedly, circumstances to diminish the suspicion which must be excited by those that have been mentioned. The proceedings have been very irregular; no examinations *in præparatorio* have been taken. The master, and probably the mate, with the alleged supercargo, were carried on board the Wasp, and have perished at sea, and M. Foussat, whose character is unexceptionable, has sworn positively to his interest. Yet, this interest can be, and therefore, ought to be, proved by other testimony, and *it is in the power of M. Foussat to explain circumstances, which, as they now appear, cannot be disregarded. The court, therefore, requires further proof, which M. Foussat is allowed to produce, to the following points: 1st. To his proprietary interest in the cargo; to show how and when it was purchased. 2d. To produce his correspondence with Barclay, Salkeld & Co., if any, respecting this voyage. 3d. To explain the circumstances relative to the original destination to Pensacola, when the Atalanta sailed from Liverpool. 4th. To explain the character of Mr. Pritchard, and his situation on board the Atalanta. 5th. To establish the genuineness of the letter of the 28th of August, and say by what vessel it was sent. 6th. To show to whom that part of the cargo of the Atalanta, on the voyage from Liverpool to Bordeaux, which belonged to Barclay, Salkeld & Co., was consigned, and how it was disposed of. 7th. To produce copies of the letters of Barclay, Salkeld & Co., relative to this transaction, or account for their non-production. [*417

JOHNSON, Justice.—When this cause was considered in the court below, I entertained great doubts on the subject of the proprietary interest. But those doubts have here been satisfactorily cleared up. I am now satisfied, that no inference unfavorable to the claim can fairly be drawn from the circumstance of this *cargo being laden on board an armed belligerent. If it had been intended to throw a veil of neutrality over hostile property, it is more probable, that a neutral carrier would have been used than a belligerent; and as to the dangers supposed to have been unnecessarily incurred, of being captured and turned away from the destined market, it is more than probable, that a chance of being captured and carried into an American port, so far from being prejudicial to the adventure, would have enhanced its profits. The claimant, then, if conscious of his innocence, had no evil to apprehend from capture; on the contrary, as the cargo was calculated for an American market, it might, in case of capture, have reached its destination directly; whereas, if it had arrived at Pensacola, its route would have been more circuitous. With regard to the fact, that the voyage, in its inception, was destined to Pensacola, that I think also satisfactorily explained. It was in strict pursuance of her original destination; on her arrival at Bordeaux, she was put up for Pensacola, and chartered by this claimant for the voyage. The instructions to the master show that it was not fixed, [*418

whether, on her return-voyage, she should be laden on owners' account or not; and it probably depended upon the contingency of her being taken up at Bordeaux for a return freight. As to the facts that Pritchard, the supercargo to Bordeaux, continued in that capacity on the voyage to Pensacola; that Ramez, the consignee, was the agent of the ship-owner; and that the present cargo was purchased with the freight and cargo to Bordeaux, I am
*419] now satisfied, that they are unsupported by the *evidence. That Pritchard should continue to be designated by the appellation of supercargo, among the crew, was to be expected, from his having been known among them, by that epithet, on the voyage to Bordeaux, and that Ramez, who had been recommended to Salkeld, Barclay & Co., for his integrity, by their agent, should be, by them, or by some other, recommended to the patronage of Foussat, was perfectly consistent with ordinary mercantile intercourse; and in the total absence of proof, that the freight, or proceeds of the outward carge of the ship, ever came to the hands of Foussat, there is no sufficient reason for conjecturing that the cargo laden on board for Pensacola was purchased with those funds.

I am, therefore, of opinion, that the proprietary interest is sufficiently established. But as the proprietary interest is altogether immaterial, if lading a neutral cargo on board an armed belligerent is, *per se*, a ground of condemnation, it becomes necessary to consider that question.

It has long been with me a rule of judicial proceeding, never, where I am free to act, to decide more in any case than what the case itself necessarily requires; and so far only, in my view, can a case be considered as authority. Accordingly, when the case of *The Nereide* was before this court, I declined expressing my opinion upon the general question, because the cargo, considered as Spanish property, was exposed to capture by the Carthagenian and other privateers, and, considered as belonging to a revolted colony, was liable to Spanish capture. The neutral shipper, therefore, could not be
*420] charged with *evading our belligerent rights, or putting off his neutral character, when placing himself under the protection of an armed belligerent, when sailing, as that shipper was, between Scylla and Charybdis, he might accept of the aid or protection of one belligerent, without giving just cause of offence to another.

But a case now occurs, of a vessel at peace with all the world; and to give an order for further proof, without admitting the rule, that lading a neutral cargo on board an armed belligerent is not, *per se*, a cause of forfeiture, appears to me nugatory. It is true, this is not a case of a commissioned or cruising vessel, and I have no objection to reserving the question on such a case, until it shall occur, if it can be done consistently with the principles upon which I found my opinion; but in my view, there is no medium, and no necessity for a belligerent to insist on any exception in his favor. On the contrary, I consider all the evils as visionary, that are dwelt upon as the result of thus extending the right in favor of neutrals. No nation can be powerful on the ocean, that does not possess an extensive commerce; and if her armed ships are to be converted into carriers (almost, I would say, an absurd supposition), her own commerce would have the preference; so that the injury could never be of any real extent. But should it be otherwise; what state of things ought one belligerent more devoutly to desire, than that that the whole military marine of her enemy should be so employed,

and bound down to designated voyages, from which they were not at liberty to deviate? It would be curious, to see a government thus involving *itself with merchant shippers, in questions of affreighment, assurance, de- [*421 viation, average and so forth; the possibility may be imagined, but the reality will never exist.

The general rule in this case, it will be observed, is controverted by no one; nor is it denied, that it is incumbent on the captor to maintain the exception contended for. It is for him to prove, that the acknowledged right of the neutral to employ a belligerent carrier, does not include the right of employing an armed belligerent carrier. In order to support this proposition, arguments are usually adduced, from the silence of writers upon the subject; from decisions in analogous cases; and from its general inconsistency with the belligerent right of search or adjudication. If it be asked, why have writers, and particularly the champions of neutral rights, been silent on this subject? I think, the answer obvious. Practically, it is of very little general importance, either to neutrals or belligerents, and those who are more disposed to favor belligerent claims would naturally avoid a doctrine which they could not maintain, whilst all who wrote for the benefit of those who are to read, would avoid swelling their volumes with unnecessary discussions, or raising phantoms for the amusement of laying them. The silence of the world upon the subject is, to my mind, a sufficient evidence that public sentiment is against it. It is impossible, but that in the course of the long and active naval wars of the last two centuries, cases must have occurred in which it became necessary to consider this *question; and [*422 though it had escaped the notice of jurists, it must have been elicited by the avarice of captors, the ingenuity of proctors, or the learned researches of courts of prize. Yet, we find not one case on record, of a condemnation, as prize of war, on the ground of armament, nor a *dictum* in any of the books, that suggests such an exception. But the rule itself is laid down everywhere; and in my view, laying down the rule, without the exception is, in effect, a negative to the exception.

But it is not true, that this subject had altogether escaped the notice of writers on the law of prize. There is on record one opinion on this subject, and that of great antiquity and respectability, and which may have given the tone to public opinion, and thus account for the silence of subsequent writers: I allude to the *dictum* extracted from Casaregis, in which the author asserts "that if a vessel, laden with neutral merchandise, attack another vessel, and be captured, her cargo shall not be made prize, unless the owner of the goods, or his supercargo, engage in the conflict." Now, if an actual attack shall not subject to forfeiture, much less shall arming for defence; and it is fairly inferrible from the passage, that the author had in his view, the case of an armed belligerent carrier, or he would not have represented her as the attacking vessel.

But it is contended, that decisions have taken place, in the courts of other states, in analogous cases, which cannot be reconciled with the principle on which the claimant rests his defence. On this subject, I will make one general remark: I acknowledge *no decision as authority in this court, [*423 but the decisions of the court, so far as necessary to the case decided; and the decisions of the state courts, so far as they go to fix the land-marks

of property; and generally, the *lex loci* of the respective states. All other decisions I will respect for as much as they are worth in principle.

The decisions relied on in this part of the argument are those by which neutral vessels, under neutral convoy, were condemned, for the unneutral act of the convoying vessel; and those in which neutral vessels have been condemned, for placing themselves under protection of a hostile convoy. With regard to the first class of cases, it is very well known, that they originated in the capture of the Swedish convoy, at a time when Great Britain had resolved to throw down the glove to all the world, on the principle of the northern confederacy. It was, therefore, a measure essentially hostile. But independently of this, there are several considerations which present an obvious distinction between both classes of cases and this under consideration. A convoy is an association for a hostile object; in undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to the real, strength of the convoy. If, then, the association be voluntary, the neutral, in suffering the fate of the whole, has only to regret his own folly, in wedding *his fortune to theirs; or, if *424] involved in the aggression or opposition of the convoying vessel, he shares the fate which the leader of his own choice either was, or would have been, made liable to, in case of capture. To elucidate this idea, let us suppose the case of an individual, who voluntarily fills up the ranks of an enemy, or of one who only enters upon the discharge of those duties in war, which would otherwise take men from the ranks; and the reason will be obvious, why he should be treated as a prisoner of war, and involved in the fate of a conquered enemy. But it is not so with the goods which constitute the lading of a ship; those give neither real nor numerical strength to an enemy, but rather embarrass and impede him. And even if it be admitted, that in all cases, a cargo should be tainted with the offence of the carrying vessel, it will be seen, that the reason upon which those cases profess to proceed, is not applicable to the case of neutral goods on board a hostile carrier. Resistance, either real or constructive, by a neutral carrier, is, with a view to the law of nations, unlawful; but not so, with the hostile carrier; she had a right to resist, and in her case, therefore, there is no offence committed, to communicate a taint to her cargo.

But it is contended, that the right to use a hostile armed carrier is inconsistent with the belligerent's right of search, or of capture, or of adjudication; for on this point the argument is not very distinct, though I plainly perceive it must be the right of adjudication, if any, that is impaired. The right of capture applies only to enemy ships or goods; the right of search to *enemy goods, on board a neutral carrier; and therefore, it must *425] be the right of adjudication that is supposed to be impaired, which applies to the case of goods found either on board of a neutral or belligerent, and this mere *scintilla juris* is, at last, the real basis upon which the exception contended for must rest. But in what manner is this right of adjudication impaired? The neutral does not deny the right of the belligerent to decide the question of proprietary interest. If it be really neutral, of what consequence is it to the belligerent, who is the carrier? He has

no right to capture it; and if it be hostile, covered as neutral, the belligerent is only compelled to do that which he must do in all ordinary cases—subdue the ship, before he gets the cargo. It cannot be expected, that the belligerent will rest his complaint upon the humiliating ground of his inability to subdue his enemy; and if he should, the neutral may well reply, it is his affair or his misfortune, but ought not in any of its consequences to affect the rights of the neutral. Nor is it at all certain, that lading on board an enemy carrier is done, at all times, with an intent to avoid capture; it may be to solicit it; as in the case of the late war, when British goods, though neutral owned, could only be brought into our market through the medium of capture. There, instead of capture being a risk of the voyage, it was one of the chances of profit. And the hostile carrier may have been preferred to the neutral, with the express view of increasing the chances of capture.

When we come to analyze and apply the arguments of *the defenders of this exception, I think it will be found, that they expose [*426 themselves to the imputation of unfairness, in professing to sustain an exception, when they mean to aim a blow at the whole neutral right of using a belligerent carrier; or they do not follow up their reasoning in its consequences, so as to be sensible of the result to which it leads. The exception which exhausts the principal rule, must be incorrect, if the rule itself be admitted as a correct one; it is, in fact, an adverse proposition, and it appears to demonstrate that all the arguments urged in favor of the exception now under consideration, if they prove anything, prove too much, and obviously extend to the utter extinction of the rule itself, or the destruction of every beneficial consequence that the neutral can derive from it. Thus, if it be unlawful to employ an armed belligerent carrier, then what proportion of armament or equipment will render it unlawful? Between one gun and one hundred, the difference is only in degree, not in principle; and if it is left to the courts of the belligerent to apply the exception to successive cases as they arise, it evidently becomes a destroying principle, which will soon consume the vitals of the rule. And the neutral will soon consider it as a snare, not a privilege.

Again, the proposition is, that the neutral may employ a hostile carrier; but the indispensable attributes of a state of hostility are the right of armament, of defence, of attack and of capture; if, then, you strip the belligerent of any one or more of these characteristics, the proposition is falsified, for he can no longer *be called a hostile carrier; he assumes an amphibious [*427 anomalous character, for which there is no epithet applicable, unless it be that of semi-hostile. And what becomes of the interest of the neutral? It is mockery, to hold out to him the right of employing a hostile carrier, when you attach to the exercise of that right, consequences, which would make it absurd for a belligerent to enter into a charter-party with him. If resistance, arming, convoying, capturing, be the acknowledged attributes and characteristics of the belligerent, then deprive him of these attributes, and you reduce him to a state of neutrality, nay, worse than a state of neutrality; for he continues liable to all the danger incident to the hostile character, without any of the rights which that character confers upon him. What belligerent could ever be induced to engage in the transportation of neutral goods, if the consequences of such an undertaking be, that he puts

off his own character, and assumes that of the neutral, relinquishes his right of arming or resisting, without acquiring the immunities or protection of the neutral character. It is holding out but a shadow of a benefit to the neutral.

Some confusion is thrown over this subject, by not discriminating carefully between the cases where a neutral shipper, and a hostile carrier, are the parties to the contract, and those in which both shipper and carrier are hostile. In the latter case, the carrier, when armed, may fairly be understood to have undertaken to fight, as well as to carry. But when a neutral is the shipper, the carrier (independently of specific contract), is left to
*428] fight, or not, as he shall deem proper. *Thus, if a neutral shipper charter an unarmed belligerent, he would not be released from his contract, should the belligerent put arms or men into his ship ; otherwise, taking ordinary and prudent precaution for the safety of his vessel, precautions which would, in general, lessen the insurance on the cargo itself, would be a violation of the master's contract. And on the other hand, a belligerent master would be under no obligation to the neutral to fight, if met by an enemy on the ocean, even though particularly required by the neutral shipper. There is, then, nothing in that argument which is founded on the supposition that the neutral is assisting in expediting a naval hostile equipment, when he employs a belligerent carrier; on the contrary, he either embarrasses the belligerent in, or detaches him from, the operations of war.

It makes no difference, in my view, whether the right of using a hostile carrier, be considered as a voluntary concession in behalf of neutrals, or as a conclusion from those principles which form the basis of international law. We find it emanating from the same source as the right of search and adjudication, and it is of equal authority. If, in practice, it should ever be found materially detrimental to acknowledged national rights, it may be disavowed or relinquished ; or should our own legislative power ever think proper to declare against the right, it can impose the law upon its own courts. But until it shall be so relinquished or abrogated, we are bound to apply it, with all the beneficial consequences that it was intended to produce.

*429] I do not, however, consider it as a mere voluntary *concession in favor of neutral commerce. Were it now, for the first time, made a question whether a neutral should be permitted to use a hostile carrier, I should not hesitate to decide, that it would be exceedingly harsh and unreasonable, to deny to the neutral the exercise of such a right. The laws of war and of power, already possess sufficient advantages over the claims of the weak, the wise and pacific. I am, in sentiment, opposed to the extension of belligerent rights. Naval warfare, as sanctioned by the practice of the world, I consider as the disgrace of modern civilization. Why should private plunder degrade the privileges of a naval commission? It is ridiculous, at this day, to dignify the practice with the epithet of reprisal. It it be reprisal, we may claim all the benefit of the example of the savages in our forests, to whom the practice is familiarly known, but we must yield to them in the reasonableness of its application, for they really do apply the thing taken, to indemnify the party injured. The time was, when war, by land and by sea, was carried on upon the same principles. The good sense of mankind has lessened its horrors on land, und it is scarcely possible to find any sufficient reason why an analogous reformation should not take place upon the

ocean. The present time is the most favorable that has ever occurred for effecting this desirable change. There is a power organized upon the continent of Europe that may command the gratitude and veneration of posterity, by determining on this reformation. It must take effect, when they resolve to enforce it.

*We find the law of nations unfortunately embarrassed with the [*430
principle, that it is lawful to impose a direct restraint upon the industry and enterprise of a neutral, in order to produce an incidental embarrassment to an enemy. In its original restricted application, this principle was of undoubted correctness, and did little injury; but in the modern extended use which has been made of it, we see an exemplification of the difficulty of restraining a belligerent in the application of a convenient principle, and an apposite illustration of one of the objections to admitting the exception, unfavorable to the use of an armed hostile carrier. But surely, there must be some limit to the exercise of this right by a belligerent. And it is incumbent upon him to show, that the restraint imposed upon the neutral is indispensable to the exercise of his own acknowledged right, or the punishment inflicted on him, to be justly due to the violation of his neutral obligations. Now, what violation of belligerent right, or neutral obligation, can result from the employment of a hostile carrier? If employed to break a blockade, carry goods that are contraband of war, or engaged in other illicit trade, the goods are liable to condemnation, on principles having no relation to this case. But if employed in lawful commerce, where is the injury done to the belligerent? There is no partiality exhibited on the part of the neutral; for the belligerents are necessarily excluded from each others' ports, and cannot be employed, except each in the commerce of his own country; and so far from violating any belligerent right, the neutral *tempts the ship of the enemy from a place of safety, to [*431
expose her to hostile capture, or detaches her from warlike operations, and engages her in pursuits less detrimental to the interest of her enemy, than cruising or fighting. To the neutral, the right of employing a hostile carrier may be of vital importance. The port of the enemy may be his granary; he may have no ships of his own, no other carrier may be found there; no other permitted to be thus employed, or no other serve him as faithfully, or on as good terms. So also, with regard to the produce of his own industry, his only market may be in the port of one of the belligerents, and his only means of access to it, through the use of the carriers of that port.

A case has been referred to in the argument: the case of *The Fanny*, in Dodson's reports; in which the court of admiralty, in England, granted salvage upon goods shipped on board an armed enemy carrier, captured by an American privateer, and re-captured by the British. The ground on which the court professes to proceed, according to the report, is, that these goods were in danger of being condemned in our courts, on the ground, that the shipper had quitted the protection of his neutrality, and resorted to the protection of arms. Had the question decided in that case been one of forfeiture, and not of salvage, that decision would have been in point. But even then, I should have claimed the privilege exercised by the learned judge who presides in that court with so much usefulness to his country, and honor to himself, of founding my own *opinions upon my own [*432

researches and resources. Should a similar case ever again occur in that court, and the decisions of this court have passed the Atlantic, that learned judge will be called on to acknowledge, that the danger of condemnation was not as great as he had imagined; and that, independent of the question agitated in this case, this court would have had respect to the embarrassing state of warfare in which the people of Buenos Ayres were involved, and adjudged, that the precautions for defence were intended against their enemies rather than their friends. With regard to the award of salvage, it is well known, that the grant of salvage upon the re-caption of a neutral was the favorite offspring of that judge's administration; until then, no contribution had been levied upon neutral commerce, to give activity to hostile enterprise. When a question of salvage on such a re-capture shall occur in this court, those adjudications will come under review; but this case cannot be considered in point, until this court is called on to decide, whether the British example shall prevail, or the obvious dictate of reason, that the neutral should be liberated and permitted to pursue his voyage, or, at least, to decide for himself, in which of the belligerent courts his rights will be most secure.

Upon the whole, I am fully satisfied that the decision in the case of *The Nereide*, was founded in the most correct principles, and recognise the rule, that lading on board an armed belligerent is not, *per se*, a cause of forfeiture; as not only the most correct *on principle, but the most liberal and honorable to the jurisprudence of this country.[1]

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Further proof ordered.(*a*)

Houston *v.* Moore.

Error to state court.—Final judgment.

The court has no jurisdiction, under the 25th section of the judiciary act of 1789, unless the judgment or decree of the state court be a final judgment or decree. A judgment, reversing that of an inferior court, and awarding a *venire facias de novo*, is not a final judgment.[2]

Error to the Supreme Court of the state of Pennsylvania. This was an action of trespass, brought by the plaintiff in error, against the defendant in error, for levying a fine ordered to be collected by the sentence of a court-martial, under an act of the legislature of the state of Pennsylvania, which was alleged to be repugnant to the constitution and laws of the United States.

The suit was commenced in the court of common pleas for the county of Lancaster, in which court a trial was had, and the jury, under the charge of the court, found a verdict for the plaintiff, on which *judgment was rendered. The cause was carried to the supreme court of the state of Pennsylvania, by writ of error, where the judgment of the court of common pleas was reversed, and the cause remanded to that court, with directions to award a *venire facias de novo*. The plaintiff then sued out a writ of error, to bring the cause to this court.

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(*a*) Mr. Justice Todd and Mr. Justice Duvall did not sit in this cause.

[1] The property was finally condemned, the further proof not being deemed satisfactory by the court. See 5 Wheat. 433.

[2] S. P. Reddall *v.* Bryan, 24 How. 420.