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The Nereide

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The Nereide

13 U.S. (9 Cranch) 388

APPEAL FROM THE CIRCUIT COURT

OF THE DISTRICT OF NEW YORK

SYLLABUS

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

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

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

A merchant having a fixed residence and carrying on business at the place of his birth does not acquire a foreign commercial character by occasional visit to a foreign country.

The right of search grows out of and is auxiliary to the greater right of capture.

The rule that the goods of an enemy found in the vessel of a friend are prize of war and those of a friend found in the vessel of an enemy are to be restored is a part of the law of nations, and has been fully and unequivocally recognized by the United States.

The principle of retaliation upon the subjects of a foreign state for its unjust proceedings towards our citizens is a political, not a judicial, measure. It is for the consideration of the government, but it is not a rule of decision in courts of justice.

This was an appeal by Manuel Pinto from the sentence of the Circuit Court for the District of New York affirming *pro forma* the sentence of the district court which condemned that part of the cargo which was claimed by him.

The facts of the case are thus stated by THE CHIEF JUSTICE in delivering the opinion of the court

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Manuel Pinto, a native of Buenos Ayres, being in London, on 26 August, 1813, entered into a contract with John Drinkald, owner of the ship *Nereide,* whereof William Bennet was master, whereby the said Drinkald let to the said Pinto the said vessel to freight for a voyage to Buenos Ayres and back again to London on the conditions mentioned in the charter party. The owner covenanted that the said

vessel, being in all respects seaworthy, well manned, victualed, equipped, provided, and furnished with all things needful for such a vessel, should take on board a cargo to be provided for her, that the master should sign the customary bills of lading, and that the said ship being laden and dispatched, should join and sail with the first convoy that should depart from Great Britain for Buenos Ayres, that on his arrival, the master should give notice thereof to the agents or assigns of the said freighter and make delivery of the cargo according to bills of lading; and that the said ship, being in all respects seaworthy, manned, &c.;, as before mentioned, should take and receive on board at Buenos Ayres all such lawful cargo as they should tender for that purpose, for which the master should sign the customary bills of lading, and the ship, being laden and dispatched, should sail and make the best of her way back to London, and on her arrival deliver her cargo according to the bills of lading. For unloading the outward and taking in the homeward cargo the owner agreed to allow 90 running days, and for unloading the return cargo 15 running days. The owner also agreed that the freighter and one other person whom he might appoint should have their passage without being chargeable therefor. In consideration of the premises, the freighter agreed to send or cause to be sent alongside of the ship such lawful goods as he might have to ship or could procure from others and dispatch her therewith in time to join and sail with the first convoy, and on her arrival at Buenos Ayres to receive the cargo according to bills of lading, and afterwards to send along side of the ship a return cargo and dispatch her to London, and on her arrival receive the cargo according to bills of lading, and to pay freight as follows, *viz.,* for the outward cargo 700, together with five percent primage, to be paid on signing the bills of lading, and for the homeward or return cargo at the rate mentioned in the charter party. He was also to advance the master at

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Buenos Ayres such money as might be necessary for disbursements on the ship. It was provided that all the freight of the outward cargo, except on the goods belonging to the freighter, which should not exceed 400 should be received by the owner on the bills of lading being signed, and in case of the loss of the ship, such

freight should be his property; but if she arrived safe back with a full cargo, then the freighter should be credited for the excess of the said freight over and above the sum of 700. A delay of 10 running days over and above the time stipulated is allowed the freighter, he paying for such demurrage at the rate of 10, 10s per day.

Under this contract a cargo, belonging in part to the freighter, in part to other inhabitants of Buenos Ayres and in part of British subjects, was taken on board the *Nereide,* and she sailed under convoy sometime in November, 1813.

Her license or passport, dated 16 November, states her to mount 10 guns and to be manned by 16 men.

The letter of instructions from the owner to the master is dated on 24 November, and contains this passage:

"Mr. Pinto is to advance you what money you require for ship's use at River Plate, and you will consider yourself as under his directions so far as the charter party requires."

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

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of the district court was affirmed *pro forma,* and from that sentence an appeal has been prayed to this Court.

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MR. CHIEF JUSTICE MARSHALL, after stating the facts of the case, delivered the opinion of the Court as follows:

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In support of the sentence of condemnation in this case, the captors contend

1. That the claimant, Manuel Pinto, has neither made sufficient proof of his neutral character nor of his property in the goods he claims.

2. That by the treaty between Spain and the United States, the property of a Spanish subject in an enemy's vessel is prize of war.

3. That on the principles of reciprocity this property should be condemned.

4. That the conduct of Manuel Pinto and of the vessel has impressed a hostile character on his property and on that of other Spaniards laden on board of the *Nereide.*

1. Manuel Pinto is admitted to be a native of Buenos Ayres and to carry on trade at that place in connection with his father and sister, who are his partners and who also reside at Buenos Ayres, but it is contended that he has acquired a domicile in England, and with that domicile the English commercial character.

Is the evidence in any degree doubtful on this point? Baltaza Ximenes, Antonio Lynch, and Felix Lynch, three Spaniards returning with Pinto in the *Nereide,* all depose that Buenos Ayres is the place of his nativity and of his permanent residence and that he carries on trade at that place.

In his test affidavit, Manuel Pinto swears in the most explicit terms to the fact that Buenos Ayres is and always has been the place of his permanent residence, that he carries on business there on account of himself, his father, and sister, and that he has been absent for temporary purposes only. His voyage to London, where he arrived in June, 1813, was for the purpose of purchasing a cargo for his trade at Buenos Ayres and of establishing connections in London for the purposes of his

future trade at Buenos Ayres.

This plain and direct testimony is opposed:

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1. By his examination *in preparatorio.*

In his answer to the first interrogatory, he says that he was born at Buenos Ayres, that for seven years last past, he has lived and resided in England and Buenos Ayres, that he now lives at Buenos Ayres, that he has generally lived there for thirty-five years last past, and has been admitted a freeman of the new government.

Whatever facility may be given to the acquisition of a commercial domicile, it has never heretofore been contended that a merchant having a fixed residence and carrying on business at the place of his birth acquires a foreign commercial character by occasional visits to a foreign country. Had the introduction of the words "seven years last past" even not been fully accounted for by reference to the interrogatory, those words could not have implied such a residence as would give a domicile. But they are fully accounted for.

In his answer to the 12th interrogatory, he repeats that he is a Spanish American, now lives and carries on trade at Buenos Ayres, and has generally resided there.

2. The second piece of testimony relied on by the counsel for the captors is the charter party. That instrument states Manuel Pinto to be of Buenos Ayres, now residing in London.

The charter party does not state him to have been formerly of Buenos Ayres, but to be at its date of Buenos Ayres. Nothing can be more obvious than that the expression, now residing in London, could be intended to convey no other idea than that he was then personally in London.

As little importance is attached to the covenant to receive the return cargo at the wharf in London. The performance of this duty by the consignee of the cargo as the agent of Pinto, would be a complete execution of it.

Had the English character been friendly and the Spanish hostile, it would have been a hardy attempt indeed in

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Mr. Pinto to found on these circumstances a claim to a domicile in England.

The question respecting ownership of the goods is not so perfectly clear.

The evidence of actual ownership, so far as the claim asserts property existing at the time in himself and partners, is involved in no uncertainty. The test affidavit annexed to the claim is full, explicit, and direct. It goes as far as a test affidavit can go in establishing the right which the claim asserts. All the documentary evidence relating to this subject corroborates this affidavit. The charter party shows an expectation that, of a freight of 700, the goods of Mr. Pinto would pay 400. The very circumstance that he chartered the whole vessel furnishes strong inducement to the opinion that a great part of her cargo would be his own.

The witnesses examined *in preparatorio,* so far as they know anything on the subject, all depose to his interest. William Puzey was clerk to Pinto, and he deposes to the interest of his employer on the knowledge acquired in making out invoices and other papers belonging to the cargo. His belief, too, is in some degree founded on the character of Pinto in London, where he was spoken of as a man of great respectability and property, and from the anxiety he discovered for the safety of the property after the *Nereide* was separated from her convoy.

The bills of lading for that part of the cargo which is claimed by Pinto are filled up many of them with his name, some to order, and the marginal letters in the manifest would also denote the property to be his. Where he claims a part of a parcel of goods, the invoice is sometimes to order, and the marginal letters would indicate the goods to be the property of Pinto and some other person.

This testimony proves very satisfactorily the interest of Pinto's house in the property he claims. There is no countertestimony in the cause except the belief expressed by Mr. Puzey that for a part of the goods, Pinto was agent for the government of Buenos Ayres. This

belief of Mr. Puzey is supposed to derive much weight from his character as the clerk of Mr. Pinto. The importance of that circumstance, however, is much diminished by the fact that he had seen Pinto only a week before the sailing of the *Nereide,* and that he does not declare his belief to be founded on any papers he had copied or seen, or on any communication made to him by his employer. There are other and obvious grounds for his suspicion. A part of the cargo consisted of arms and military accoutrements, and it was not very surprising that Puzey should conjecture that they were purchased for a government about to sustain itself by the sword. But this suspicion is opposed by considerations of decisive influence which have been stated at the bar. The demand for these articles in Buenos Ayres by the government would furnish sufficient motives to a merchant for making them a part of his cargo. In a considerable part of this warlike apparatus British subjects were jointly concerned. It is extremely improbable that, if acting for his government, he would have associated its interests with those of British merchants. Nor can a motive be assigned for claiming those goods for himself instead of claiming them for his government. They would not by such claim become his if restored. He would still remain accountable to his government, and the truth would have protected the property as effectually as a falsehood should it remain undetected. By claiming these goods for himself instead of his government, he would commit a perjury from which he could derive no possible advantage and which would expose to imminent hazard not only those goods but his whole interest in the cargo. The Court therefore must consider this belief of Mr. Puzey as a suspicion which a full knowledge of the facts ought entirely to dissipate. If there was nothing in the cause but this suspicion or this belief of Mr. Puzey, the Court would not attach any importance to it. But Mr. Pinto himself has, in his examination *in preparatorio,* been at least indiscreet in asserting claims not to be sustained

and in terms which do not exhibit the real fact in its true shape. In his answer to the 12th interrogatory, he says "And this deponent also has one-fourth interest as owner of the following goods, &c.;, *viz.,* 15 bales of merchandise," &c.; In his claim he thus states the transaction under which his title to the one-fourth of these goods accrued.

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He had agreed with certain persons in England to select for them a parcel of goods for the market of Buenos Ayres of which he was to be the consignee and which he would sell on a commission of 10 percent on the amount of sales at Buenos Ayres. These goods were selected, purchased, and consigned to Manuel Pinto. The bills of lading were in his possession, and he considered his interest under this contract as equal to one-fourth of the value of the goods, "wherefore," he says,

"he did suppose that he was interested in the said goods and merchandise for himself, his father, and sister, and well entitled, as the owner thereof, or otherwise, to an equal fourth part of the said goods, inasmuch as his commissions as aforesaid would have been equal to such fourth."

It is impossible to justify this representation of the fact. The reasoning might convince the witness, but the language he used was undoubtedly calculated to mislead the court and to extricate property to which the captors were clearly entitled, although the witness might think otherwise. Such misrepresentations must be frowned on in a prize court, and must involve a claim, otherwise unexceptionable, in doubt and danger. A witness ought never to swear to inferences without stating the train of reasoning by which his mind has been conducted to them. Prize courts are necessarily watchful over subjects of this kind, and demand the utmost fairness in the conduct of claimants. Yet prize courts must distinguish between misrepresentations which may be ascribed to error of judgment and which are, as soon as possible, corrected by the party who has made them and willful falsehoods which are detected by the testimony of others or confessed by the party when detection becomes inevitable. In the first case, there

may be cause for a critical and perhaps suspicious examination of the claim and of the testimony by which it is supported; but it would be harsh indeed to condemn neutral property, in a case in which it was clearly proved to be neutral, for one false step, in some degree equivocal in its character, which was so soon corrected by the party making it.

The case of Mr. Paul's printing press is still less dubious in its appearance. It would require a very critical

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investigation of the evidence to decide whether this press is stated in his answer to the 12th interrogatory to be his property or not. Four presses are said in that answer to belong to him, but he also says in his answer to another interrogatory, perhaps the 26th, that Mr. Paul had one printing press on board. Whether there were five presses in the cargo or only four has not been decided, because the declaration made in his examination *in preparatorio* that one of the presses belonged to Mr. Paul proves unequivocally that the mistake, if he made one, was not fraudulent.

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

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

necessarily includes the other.

Let this proposition be examined.

The rule that the goods of an enemy found in the vessel of a friend are prize of war and that the goods of a friend found in the vessel of an enemy are to be restored is believed to be a part of the original law of nations, as generally, perhaps universally, acknowledged. Certainly it has been fully and unequivocally recognized by the United States. This rule is founded on the simple and intelligible principle that war gives a full right to capture the goods of an enemy, but gives no right to

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capture the goods of a friend. In the practical application of this principle so as to form the rule, the propositions that the neutral flag constitutes no protection to enemy property and that the belligerent flag communicates no hostile character to neutral property are necessarily admitted. The character of the property, taken distinctly and separately from all other considerations, depends in no degree upon the character of the vehicle in which it is found.

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

article would apply remains under the ancient rule. That the stipulation of immunity to enemy goods in the bottoms of one of the parties being neutral does not imply a surrender of the goods of that party being neutral if found in the vessel of an enemy is the proposition of the counsel for the claimant, and he powerfully sustains that proposition by arguments arising from the nature of the two stipulations. The agreement that neutral bottoms shall make neutral goods is, he very justly remarks, a concession made by the belligerent to the neutral. It enlarges the sphere of neutral commerce and gives to the neutral flag a capacity not given to it by the law of nations.

The stipulation which subjects neutral property found in the bottom of an enemy to condemnation as prize of

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

If reason can furnish no evidence of the indissolubility of the two maxims, the supporters of that proposition will certainly derive no aid from the history of their progress from the first attempts at their introduction to the present moment.

For a considerable length of time they were the companions of each other -- not as one maxim consisting of a single indivisible principle, but as two stipulations, the one in the view of the parties forming a natural and obvious consideration for the

other. The celebrated compact termed the "armed neutrality" attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the claimants. Its object was to enlarge, and not in anything to diminish, the rights of neutrals. The great powers, parties to this agreement, contended for the principle that free ships should make free goods, but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other that the contrary opinion was openly and distinctly avowed. The King of Prussia declared his expectation that in future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe that this opinion

was not common to those powers who acceded to the principles of the armed neutrality.

From that epoch to the present, in the various treaties which have been formed, some contain no article on the subject, and consequently leave the ancient rule in full force. Some stipulate that the character of the cargo shall depend upon the flag, some that the neutral flag shall protect the goods of an enemy, some that the goods of a neutral in the vessel of a friend shall be prize of war, and some that the goods of an enemy in a neutral bottom shall be safe, and that friendly goods in the bottom of an enemy shall also be safe.

This review, which was taken with minute accuracy at the bar, certainly demonstrates that in public opinion, no two principles are more distinct and independent of each other than the two which have been contended to be inseparable.

Does the United States understand this subject differently from other nations? It is certainly not from our treaties that this opinion can be sustained. The United States has in some treaties stipulated for both principles, in some for one of them only, in some that neutral bottoms shall make neutral goods and that friendly

goods shall be safe in the bottom of an enemy. It is therefore clearly understood in the United States, so far as an opinion can be formed on its treaties, that the one principle is totally independent of the other. It has stipulated expressly for their separation, and it has sometimes stipulated for the one without the other.

But in a correspondence between the Secretary of State of the United States and the minister of the French Republic in 1793, Prussia is enumerated among those nations with which the United States had made a treaty adopting the entire principle that the character of the cargo should be determined by the character of the flag.

Not being in possession of this correspondence, the Court is unable to examine the construction it has received. It has not deferred this opinion on that account, because the point in controversy at that time was the obligation imposed on the United States to protect belligerent

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property in its vessels, not the liability of their property to capture if found in the vessel of a belligerent. To this point the whole attention of the writer was directed, and it is not wonderful that in mentioning incidentally the treaty with Prussia which contains the principle that free bottoms make free goods, it should have escaped his recollection that it did not contain the converse of the maxim. On the talents and virtues which adorned the cabinet of that day, on the patient fortitude with which it resisted the intemperate violence with which it was assailed, on the firmness with which it maintained those principles which its sense of duty prescribed, on the wisdom of the rules it adopted, no panegyric has been pronounced at the bar in which the best judgment of this Court does not concur. But this respectful deference may well comport with the opinion that an argument incidentally brought forward by way of illustration is not such full authority as a decision directly on the point might have been.

3. The third point made by the captors is that whatever construction might be put on our treaty with Spain, considered as an independent measure, the ordinances

of that government would subject American property under similar circumstances to confiscation, and therefore the property claimed by Spanish subjects in this case ought to be condemned as prize of war.

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

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prescribed for us, and to tread the devious and intricate path of politics. Even in the case of salvage, a case peculiarly within the discretion of courts because no fixed rule is prescribed by the law of nations, Congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.

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

the understanding.

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

4. Has the conduct of Manuel Pinto and of the *Nereide* been such as to impress the hostile character on that part of the cargo which was in fact neutral?

In considering this question, the Court has examined separately the parts which compose it.

The vessel was armed, was the property of an enemy,

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and made resistance. How do these facts affect the claim?

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

belligerent owner.

Whether the resistance which was actually made is in any degree imputable to Mr. Pinto is a question of still more importance.

It has been argued that he had the whole ship, and that therefore the resistance was his resistance.

The whole evidence upon this point is to be found in the charter party, in the letter of instructions to the master, and in the answer of Pinto to one of the interrogatories *in preparatorio.*

The charter party evinces throughout that the ship remained under the entire direction of the owner, and that Pinto in no degree participated in the command of her. The owner appoints the master and stipulates for every act to be performed by the ship from the date of the charter party to the termination of the voyage. In no one respect except in lading the vessel was Pinto to have any direction of her.

The letter of instructions to the master contains full directions for the regulation of his conduct, without any other reference to Mr. Pinto than has been already stated. That reference shows a positive limitation of

his power by the terms of the charter party. Consequently he had no share in the government of the ship.

But Pinto says in his answer to the 6th interrogatory that "he had control of the said ship and cargo."

Nothing can be more obvious than that Pinto could understand himself as saying no more than that he had the control of the ship and cargo so far as respected her lading. A part of the cargo did not belong to him and was not consigned to him. His control over the ship began and ended with putting the cargo on board. He does not appear ever to have exercised any authority in the management of the ship. So far from exercising any during the battle, he went into the cabin, where he

remained till the conflict was over. It is, then, most apparent that when Pinto said he had the control of the ship and cargo, he used those terms in a limited sense. He used them in reference to the power of lading her given him by the charter party.

If in this the Court be correct, this cause is to be governed by the principles which would apply to it had the *Nereide* been a general ship.

The next point to be considered is the right of a neutral to place his goods on board an armed belligerent merchantman.

That a neutral may lawfully put his goods on board a belligerent ship for conveyance on the ocean is universally recognized as the original rule of the law of nations. It is, as has already been stated, founded on the plain and simple principle that the property of a friend remains his property wherever it may be found. "Since it is not," says Vattel,

"the place where a thing is which determines the nature of that thing, but the character of the person to whom it belongs, things belonging to neutral persons which happen to be in an enemy's country, or on board an enemy's ships, are to be distinguished from those which belong to the enemy."

Bynkershoek lays down the same principles in terms equally explicit, and in terms entitled to the more consideration because he enters into the inquiry whether a

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knowledge of the hostile character of the vessel can effect the owner of the goods.

The same principle is laid down by other writers on the same subject, and is believed to be contradicted by none. It is true there were some old ordinances of France declaring that a hostile vessel or cargo should expose both to condemnation. But these ordinances have never constituted a rule of public law.

It is deemed of much importance that the rule is universally laid down in terms which comprehend an armed as well as an unarmed vessel, and that armed

vessels have never been excepted from it. Bynkershoek, in discussing a question suggesting an exception with his mind directed to hostilities, does not hint that this privilege is confined to unarmed merchantmen.

In point of fact it is believed that a belligerent merchant vessel rarely sails unarmed, so that this exception from the rule would be greater than the rule itself. At all events, the number of those who are armed and who sail under convoy is too great not to have attracted the attention of writers on public law, and this exception to their broad general rule, if it existed, would certainly be found in some of their works. It would be strange if a rule laid down with a view to war in such broad terms as to have universal application should be so construed as to exclude from its operation almost every case for which it purports to provide, and yet that not a *dictum* should be found in the books pointing to such construction.

The antiquity of the rule is certainly not unworthy of consideration. It is to be traced back to the time when almost every merchantman was in a condition for self-defense, and the implements of war were so light and so cheap that scarcely any would sail without them.

A belligerent has a perfect right to arm in his own defense, and a neutral has a perfect right to transport his goods in a belligerent vessel. These rights do not interfere with each other. The neutral has no control over the belligerent right to arm -- ought he to be accountable for the exercise of it?

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By placing neutral property in a belligerent ship, that property, according to the positive rules of law, does not cease to be neutral. Why should it be changed by the exercise of a belligerent right, universally acknowledged and in common use when the rule was laid down, and over which the neutral had no control?

The belligerent answers that by arming, his rights are impaired. By placing his goods under the guns of an enemy, the neutral has taken part with the enemy and assumed the hostile character.

Previous to that examination which the Court has been able to make of the reasoning by which this proposition is sustained, one remark will be made which applies to a great part of it. The argument which, taken in its fair sense, would prove that it is unlawful to deposit goods for transportation in the vessel of an enemy generally, however imposing its form, must be unsound, because it is in contradiction to acknowledged law.

It is said that by depositing goods on board an armed belligerent, the right of search may be impaired, perhaps defeated.

What is this right of search? Is it a substantive and independent right wantonly, and in the pride of power, to vex and harass neutral commerce because there is a capacity to do so? or to indulge the idle and mischievous curiosity of looking into neutral trade? or the assumption of a right to control it? If it be such a substantive and independent right, it would be better that cargoes should be inspected in port before the sailing of the vessel, or that belligerent licenses should be procured. But this is not its character.

Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a means justified by the end. It has been truly denominated a right growing out of and ancillary to the greater right of capture. Where this greater right may be legally exercised

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without search, the right of search can never arise or come into question.

But it is said that the exercise of this right may be prevented by the inability of the party claiming it to capture the belligerent carrier of neutral property.

And what injury results from this circumstance? If the property be neutral, what mischief is done by its escaping a search? In so doing there is no sin, even as against the belligerent, if it can be effected by lawful means. The neutral cannot justify the use of force or fraud, but if by means lawful in themselves he can

escape this vexatious procedure, he may certainly employ them.

To the argument that by placing his goods in the vessel of an armed enemy he connects himself with that enemy and assumes the hostile character it is answered that no such connection exists.

The object of the neutral is the transportation of his goods. His connection with the vessel which transports them is the same whether that vessel be armed or unarmed. The act of arming is not his -- it is the act of a party who has a right so to do. He meddles not with the armament nor with the war. Whether his goods were on board or not, the vessel would be armed and would sail. His goods do not contribute to the armament further than the freight he pays and freight he would pay were the vessel unarmed.

It is difficult to perceive in this argument anything which does not also apply to an unarmed vessel. In both instances it is the right and the duty of the carrier to avoid capture and to prevent a search. There is no difference except in the degree of capacity to carry this duty into effect. The argument would operate against the rule which permits the neutral merchant to employ a belligerent vessel without imparting to his goods the belligerent character.

The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods

or their owner, where he has taken no part in it. They are incidents to the character of the vessel, and may always occur where the carrier is belligerent.

It is remarkable that no express authority on either side of this question car be found in the books. A few scanty materials, made up of inferences from cases depending on other principles, have been gleaned from the books and employed by both parties. They are certainly not decisive for or against either.

The celebrated case of the Swedish convoy has been pressed into the service. But that case decided no more than this -- that a neutral may arm, but cannot by

force resist a search. The reasoning of the judge on that occasion would seem to indicate that the resistance condemned the cargo, because it was unlawful. It has been inferred on the one side that the goods would be infected by the resistance of the ship, and on the other that a resistance which is lawful, and is not produced by the goods, will not change their character.

The case of the *Catharine Elizabeth* approaches more nearly to that of the *Nereide,* because in that case as in this there were neutral goods and a belligerent vessel. It was certainly a case not of resistance, but of an attempt by a part of the crew to seize the capturing vessel. Between such an attempt and an attempt to take the same vessel previous to capture there does not seem to be a total dissimilitude. But it is the reasoning of the judge, and not his decision, of which the claimants would avail themselves. He distinguishes between the effect which the employment of force by a belligerent owner or by a neutral owner would have on neutral goods. The first is lawful, the last unlawful. The belligerent owner violates no duty. He is held by force, and may escape if he can. From the marginal note, it appears that the reporter understood this case to decide in principle that resistance by a belligerent vessel would not confiscate the cargo. It is only in a case without express authority that such materials can be relied on.

If the neutral character of the goods is forfeited by the resistance of the belligerent vessel, why is not the neutral character of the passengers forfeited by the same

cause? The master and crew are prisoners of war; why are not those passengers who did not engage in the conflict also prisoners? That they are not would seem to the Court to afford a strong argument in favor of the goods. The law would operate in the same manner on both.

It cannot escape observation that in argument the neutral freighter has been continually represented as arming the *Nereide* and impelling her to hostility. He is represented as drawing forth and guiding her warlike energies. The Court does not so understand the case. The *Nereide* was armed, governed, and conducted by

belligerents. With her force or her conduct the neutral shippers had no concern. They deposited their goods on board the vessel and stipulated for their direct transportation to Buenos Ayres. It is true that on her passage she had a right to defend herself, did defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty.

With a pencil dipped in the most vivid colors and guided by the hand of a master, a splendid portrait has been drawn exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of peace and war. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold investigating faculty which ought always to belong to those who sit on this bench to discover its only imperfection: its want of resemblance.

The *Nereide* has not that centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive branch of peace. She is not composed in part of the neutral character of Mr. Pinto and in part of the hostile character of her owner. She is an open and declared belligerent, claiming all the rights, and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her warlike equipments or in any employment she may make of them, which is put on board solely for the purpose of transportation and which encounters the hazard incident

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to its situation -- the hazard of being taken into port and obliged to seek another conveyance should its carrier be captured.

In this it is the opinion of the majority of the Court there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case. The sentence, therefore, of the circuit court must be

Reversed and the property claimed by Manuel Pinto for himself and his partners, and for those other Spaniards for whom he has claimed, be restored, and the libel as to that property be dismissed.

JOHNSON, J.

Circumstances known to this Court have imposed upon me in a great measure the responsibility of this decision. I approach the case with all the hesitation which respect for the opinion of others and a conviction of the novelty and importance of some of the questions are calculated to inspire. The same respect imposes upon me an obligation briefly to state the course of reasoning by which I am led to my conclusion.

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

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

Nor does the argument rounded on reciprocity stand on any better ground. There is a principle of reciprocity known to courts administering international law, but I trust it is a reciprocity of benevolence, and that the angry passions which produce revenge and retaliation will never exert their influence on the administration of

justice. Dismal would be the state of the world and melancholy the office of a judge if all the evils which the perfidy and injustice of power inflict on individual man were

to be reflected from the tribunals which profess peace and goodwill to all mankind. Nor is it easy to see how this principle of reciprocity, on the broad scale by which it has been protracted in this case, can be reconciled to the distribution of power made in our Constitution among the three great departments of government. To the legislative power alone it must belong to determine when the violence of other nations is to be met by violence. To the judiciary, to administer law and justice as it is, not as it is made to be by the folly or caprice of other nations.

The last question in the case is the only one on which I feel the slightest difficulty.

The general rule, the incontestable principle is that a neutral has a right to employ a belligerent carrier. He exposes himself thereby to capture and detention, but not to condemnation.

To support the condemnation in this case, it is necessary to establish an exception to this rule, and it is important to lay down the exceptions contended for with truth and precision.

In the first place, it is contended that a neutral has not a right to transport his goods on board of an armed belligerent.

Secondly, that if this right be conceded, Pinto in this case has carried the exercise of it beyond the duties of fair neutrality

1. By laying the vessel under the obligation of a contract to sail with convoy;

2. By chartering an entire armed vessel of the enemy, and thus expediting an armed hostile force;

3. By taking in enemy goods on freight, and thereby laying himself under an implied contract that the armament of the vessel should be used in its defense;

4. It was also contended that he had in fact armed the vessel after chartering her and increased her force by admitting passengers;

5. That the correspondence found on board shows that the armament was immediately directed against capture by Americans.

On the first and principal ground much may be said, but nothing added to the ingenious discussion which it has received from counsel.

The question is why may not a neutral transport his goods on board an armed belligerent? No writer on the law of nations has suggested this restriction on his rights, and it can only be sustained on the ground of its obstructing the exercise of some belligerent right. What belligerent right does it interfere with? Not the right of search, for that has relation to the converse case; it is a right resulting from the right of capturing enemy's goods in a neutral bottom. It must be then the right which every nation asserts of being the sole arbiter of its own conduct towards other nations and deciding for itself whether property claimed as neutral be owned as claimed. The question is thus fairly stated between the neutral and belligerent. On the one hand, the neutral claims the right of transporting his goods in the hostile bottom. On the other, the belligerent objects to his doing it under such circumstances as to impair his right of judging, between himself and the neutral, on the neutrality of his property and conduct. The evidence of authority, the practice of the world, and the reason and nature of things must decide between them.

All these are, in my opinion, in favor of the neutral claim.

Every writer on international law acknowledges the right of the neutral to transport his goods in a hostile bottom. No writer has restricted the exercise of that right to unarmed ships.

Every civilized nation (with the exception of Spain) has unequivocally acknowledged the existence of this right unless it be relinquished by express stipulation,

and even with regard to Spain the evidence is wholly unsatisfactory to prove that she maintains a different doctrine. My present belief is that she does not, but, admit that she does and surely the practice of one nation, and that one not the most enlightened or commercial, ought not to be permitted to control the law of the world.

And what is the decision of reason on the merits of these conflicting pretensions?

Her first and favorite answer would be that were the scales equally suspended between the parties, the decision ought to be given in favor of humanity.

Already is the aspect of the world sufficiently darkened by the horrors of war. It is time to listen to the desponding claims of man engaged in the peaceful pursuits of life.

But there are considerations in favor of the neutral to which the heart need not assent -- they are addressed to the judgment alone.

Admit the claim of the belligerent and you fritter away the right of the neutral until it is attenuated to a vision.

Admit the claim of the neutral and it is attended with a very immaterial change in the rights and interests of the belligerent.

Where are we to draw the line? If a vessel is not to be armed, what is to amount to an exceptionable armament? It extends to an absolute and total privation of the right of arming a hostile ship. Resistance and even capture is lawful to any belligerent that is attacked.

On the other hand, what injury is done to the belligerent by recognizing the right of the neutral? The cargo of a belligerent neither adds to nor diminishes his right to resist. If empty, he must be subdued before he can be possessed, and if laden, the right or faculty of resistance is in no wise increased. It is inherent in her national character, and can be exercised by strict right without any reference to the cargo that she contains.

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

The second ground of exception resolves itself into several points, and presents to my mind the greatest difficulties in the case.

1. There is a stipulation contained in the charter party that the vessel shall sail with convoy.

2. Pinto chartered the whole vessel.

3. He took in sub-affreightment of hostile goods.

4. It is contended he had contributed to the arming and manning of the vessel after chartering her.

5. And that her equipment was pointedly against American capture.

With regard to the two latter points, I am of opinion that the evidence does not prove that Pinto contributed to the armament of the vessel, and if she was armed by the owners, that it was against American capture is immaterial. As to the passengers, Pinto had no control over the reception of them into the vessel. He

had

taken the hold and two births in the cabin; as to the residue, it remained subject to the disposal of the captain or owner.

With regard to the three other points, after the best consideration that I have been able to give the subject, I satisfy my mind by two considerations.

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

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

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

STORY, J.

My opinion will be confined to the point first argued, because it definitively disposes of the cause against the claim of Mr. Pinto.

The facts material to this point are that Mr. Pinto chartered the *Nereide,* an uncommissioned armed ship belonging to British subjects, for a voyage from London

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to Buenos Ayres and back to London at a stipulated freight. The ship was to be navigated during the voyage at the expense of the general owner, who expressly covenanted in the charter party with Mr. Pinto that she should sail on the voyage under British convoy. Mr. Pinto, having thus hired the whole ship, took on board sundry shipments, partly on his own or Spanish account and partly on account of British merchants from whom he was to receive, in lieu of freight, a portion of the profits and commissions. The *Nereide* sailed with her cargo under British convoy and with instructions from the owner to the master to govern himself in relation to the objects of the charter party according to the direction of Mr. Pinto, who accompanied the ship in the voyage. During the passage to Buenos Ayres, the *Nereide* was accidentally separated from the convoy, and, while endeavoring to regain it, was, after a vigorous but unsuccessful resistance, captured by the privateer *Governor Tompkins* and brought into New York for adjudication.

It is explicitly asserted in the testimony that Mr. Pinto took no part in the resistance at the time of the capture.

The question is whether, upon these facts, Mr. Pinto, assuming him to be a neutral, has so incorporated himself with the enemy interests as to forfeit that protection which the neutral character would otherwise afford him.

The general doctrine, though formerly subject to many learned doubts, is now incontrovertibly established that neutral goods may be lawfully put on board of an enemy ship without being prize of war. As this doctrine is asserted in the most broad and unqualified manner in publicists, it is thence attempted to be inferred by the counsel for the claimant that no distinction can exist whether the ship be armed or unarmed or be captured with or without resistance; arguments of this sort are liable to many objections and are in general wholly unsatisfactory.

Elementary writers rarely explain the principles of public law with the minute distinctions which legal precision requires. Many of the most important doctrines of the prize courts will not be found to be treated of or even glanced at in the elaborate treatises of Grotius or Puffendorf or Vattel. A striking illustration is their total silence as to the illegality and penal

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consequences of a trade with the public enemy. Even Bynkershoek, who writes professedly on prize law, is deficient in many important doctrines which every day regulate the decrees of prize tribunals. And the complexity of modern commerce has added incalculably to the number as well as the intricacy of questions of national law. In what publicist are to be found the doctrines as to the illegality of carrying enemy dispatches and of engaging in the coasting, fishing, or other privileged trade of the enemy? Where are transfers *in transitu* pronounced to be illegal? Where are accurately and systematically stated all the circumstances which impress upon the neutral a general, or a limited, hostile character, either by reason of his domicile, his territorial possessions, or his connection in a house of trade in the enemy country? The search would be nearly in vain in the celebrated jurists whose authority has been quoted to silence the present inquiry. Yet the argument would be no less forcible that these doctrines have not a legal existence because not found in systematic treatises on the law of nations, than that which has been so earnestly pressed upon us by the counsel for the claimants. The assumed inference is then utterly inadmissible. The question before the Court must be settled upon other grounds -- upon a just application of the principles which regulate neutral, as well as belligerent, rights and duties. Let us then proceed to consider them.

It is a clear maxim of national law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either, if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character -- nor is this all. In relation to his commerce, he is bound to submit to the belligerent right of search, and he cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal

and accurate search without the application on the part of the belligerent of superior force. If he resist this exercise of lawful right, or if, with a view to resist it, he take the protection of an armed neutral convoy, he is treated as an enemy and his property is confiscated. Nor is it at all material whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the common protection, without any

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distinction whether the convoy belong to the same or to a foreign neutral sovereign -- for upon the principles of natural justice, a neutral is justly chargeable with the acts of the party which he voluntarily adopts or of which he seeks the shelter and protection. *Quam sentit commodum sentire debet et onus* -- these principles are recognized in the memorable cases of the *Maria,* 1, Rob. 340, and the *Elsebe,* 5, Rob. 173, and can never be shaken without delivering over to endless controversy and conflict the maritime rights of the world.

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

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

perfectly justifiable. The act, then, as to its character is to be judged of not merely by that of the parties through whose immediate instrumentality it is done, but also by the character of those who, having cooperated in, assented to, or sought protection from it, would yet withdraw themselves from the penalties of the act. It is analogous to the case at common law where an act justifiable in one party does not, from that fact alone, shelter his coadjutor. They must stand or fall upon

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their own merits. It would be strange indeed if, because a belligerent may kill his enemy, a neutral may aid in the act, or because a belligerent may resist search, a neutral may cooperate to make it effectual. It is therefore an assumption utterly inadmissible that a neutral can avail himself of the lawful act of an enemy to protect himself in an evasion of a clear belligerent right.

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

There can be but little doubt that it is upon the latter principles that the penalty of confiscation is applied to neutrals. The law proceeds yet further and deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a

premeditated attempt to oppose, if practicable, the right of search, and therefore attributes to such preliminary act the full effect of actual resistance. In this respect it applies a rule analogous to that in cases of blockade, where the act of sailing with an intent to break a blockade is deemed a sufficient breach to authorize confiscation. And Sir W. Scott manifestly recognizes the correctness of this doctrine in the *Maria,*

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although the circumstances of that case did not require its rigorous application.

Indeed, in relation to a neutral convoy, the evidence of an intent to resist, as well as of constructive resistance, is far more equivocal than in case of a belligerent convoy. In the latter case it is necessarily known to the convoyed ships that the belligerent is bound to resist and will resist until overcome by superior force. It is impossible, therefore, to join such convoy without an intention to receive the protection of belligerent force in such manner and under such circumstances as the belligerent may choose to apply it. It is an adoption of his acts and an assistance of his interests during the assumed voyage. To render the convoy an effectual protection, it is necessary to interchange signals and instructions, to communicate information, and to watch the approach of every enemy. The neutral solicitously aids and cooperates in all these important transactions, and thus far manifestly sides with the belligerent and performs, as to him, a meritorious service -- a service as little reconcilable with neutral duties as the agency of a spy or the fraud of a bearer of hostile dispatches. In respect to a neutral convoy, the inference of constructive cooperation and hostility is far less certain and direct. To condemn in such case is pushing the doctrine to a great extent, since it is acting upon the presumption, which is not permitted to be contradicted, that all the convoyed ships distinctly understood and adopted the objects of the convoy and intimately blended their own interests with hostile resistance.

There is not, then, the slightest reason for the favorable distinction as to the belligerent convoy assumed by counsel. On the contrary, every presumption of hostility is in such case more violent, and every suspicion of unneutral conduct

more inflamed. And so in the argument of the *Maria,* 1 Rob. 346, it was conceded by the counsel for the claimants and recognized by the court. It was there said by counsel that it seemed admitted by the court on a former day that there was a just distinction to be made between the two cases of convoy, *viz.,* between the convoy of an enemy's force and a neutral convoy; that the former (*i.e.* enemy convoy) would stamp a primary character of hostility on all ships

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sailing under its protection, and it would rest on the parties to take themselves out of the presumption raised against them, but that even in that case it would be nothing more than a presumption, which had been determined by a late case before the Lords, the *Sampson,* an asserted American ship sailing with French cruisers at the time they engaged some English ships, and communicating with the French ships by signal for battle. That in that case, although there had been a condemnation in the court below, the Lords sent it to further proof to ascertain whether there had been an actual resistance. Sir Wm. Scott emphatically observed

"I do not admit the authority of that case to the extent to which you push it. That question is still reserved, although the Lords might wish to know as much of the facts as possible."

It is clear from this language that the learned judge did not admit that the party could be legally permitted to contradict the presumption of hostility attached to the sailing under an enemy convoy. On the contrary, he seemed to consider that the primary character of hostility, which, it was conceded on all sides, was stamped upon such conduct, could not be permitted to be rebutted, but was conclusive upon the party. The case of the *Sampson* was originally heard before the court of vice admiralty, and the decree of condemnation was never disapproved of, if not ultimately affirmed, by the Lords of Appeal. I have been assured by very respectable authority that no proof of actual resistance ever was or could have been made on the final hearing. The case therefore affords a strong inference of the law as understood and administered in the prize courts of Great Britain.

And it may be added in corroboration that in *Smart v. Wolff,* 3 T.R. 323, 332, Sir W. Scott (then Advocate General) asserted, without hesitation, that if the neutral refused search or sailed under convoy of the enemy's ships of war or conveyed intelligence to the enemy, they are waivers of the rights of neutrality. The very circumstance of his putting these three cases in connection to illustrate his general argument affords the most cogent proof that he considered himself as stating a doctrine equally clear and well established as to all of them.

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And this doctrine seems conformable to the sense of other European sovereigns. In the recent cases of the American ships captured while under British convoy by the Danes, the right of condemnation was not only asserted and enforced by the highest tribunal of prize, but expressly affirmed by the Danish sovereign after an earnest appeal made by the government of the United States. On that occasion the Danish minister pressed the argument

"that he who causes himself to be protected by that act (*i.e.* enemy convoy) ranges himself on the side of the protector, and thus puts himself in opposition to the enemy of the protector, and evidently renounces the advantages attached to the character of a friend to him against whom he seeks the protection. If Denmark should abandon this principle, the navigators of all nations would find their account in carrying on the commerce of Great Britain, under the protection of English ships of war without any risk,"

and he further declared "that none of the powers in Europe has called in question the justice of this principle." State Papers 1811, p. 527.

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

Another argument which has been urged in favor of the assumed distinction ought not, however, to be omitted. It is that a party, neutral as to one power, may be

an enemy as to another power, and he may lawfully place himself under belligerent convoy to escape from his own enemy. In such a predicament, it is therefore always open to the neutral to explain his conduct in taking convoy, and to show by proofs his innocent intentions as to all friendly belligerents. In my judgment, this supposed state of things would not remove a single difficulty.

It is not in relation to enemies that the question as to taking convoy can ever arise. It has reference only to the rights of friendly belligerents, and these rights remain precisely the same whatever may be the peculiar situation of the neutral as to third parties. Was it ever heard of that a neutral might lawfully resist the right of search of one power because he was at war with another? And is not the evasion of this right just as injurious whether the neutral be at peace with all the world or with a part only?

There would be extreme difficulty in establishing by any disinterested testimony the fact of any such special intentions as the argument supposes. Independent of this difficulty, it would in effect be an attempt to repel by positive testimony a conclusive inference of law flowing from the very act of taking convoy. The belligerent convoy is bound to resist all visitations by enemy ships, whether neutral to the convoyed ships or not. This obligation is distinctly known to the party taking its protection. If, therefore, he choose to continue under the convoy, he shows an intention to avail himself of its protection under all the chances and hazards of war. The abandonment of such intention cannot be otherwise evidenced than by the overt act of quitting convoy. And it is impossible to conceive that the mere secret wishes or private declarations of a party could prevail over his own deliberate act of continuing under convoy unless courts of prize would surrender themselves to the most stale excuses and imbecile artifices. It would be in vain to administer justice in such courts if mere statements of intention would outweigh the legal effects of the acts of the parties. Besides, the injury to the friendly belligerent is

equally great whatever might be the special objects of the neutral. The right of search is effectually prevented by the presence of superior

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force, or exercised only after the perils and injuries of victorious warfare. And it is this very evasion of the right of search that constitutes the ground of condemnation in ordinary cases. The neutral in effect declares that he will not submit to search until the enemy convoy is conquered, and then only because he cannot avoid it. The special intention of the neutral then could not, if proved, upon principle prevail, and it has not a shadow of authority to sustain it. The argument upon this point was urged in the *Maria and Elsebe,* and was instantly repelled by the court.

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

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

in the very attempt to rejoin it. There is no pretense, therefore, of an abandonment of the convoy, and the

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corpus delicti, the character of hostility, impressed by the sailing under convoy, if any attached, remained notwithstanding the separation. It is like the sailing for a blockaded port, where the offense continues, although at the moment of capture the ship be, by stress of weather, driven in a direction from the port of destination, for the hostile intention still remains unchanged.

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

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

the ingenuity of counsel has yet suggested, it would seem fit to declare *ita lex non scripta est.*

But even if the distinction existed, it could not apply

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to the case at bar. This is a case where the claimant becomes the charterer of the whole vessel for the voyage and stipulates for the express benefit of convoy. The ship, though navigated by a belligerent master and crew, was necessarily under the control and management of the charterer. He was the real effective *dux negotii.* Whatever may be the technical doctrine of the common or prize law as to the general property in the ship, the charterer was, to all purposes important in this inquiry, the owner for the voyage, and the master his agent. Can there be a doubt that, as to the shipments of the enemy freighters, Mr. Pinto was responsible for the acts of the master? Was he not materially interested in the safety and protection of these shipments in respect to freight, commissions, and profits? If they had been lost by capture, from the negligence of Mr. Pinto or of the master when by ordinary diligence and resistance the loss might have been avoided, would not Mr. Pinto have been responsible? How then it can be consistently held that the ship was not essentially governed and managed by Mr. Pinto, and all her conduct incorporated with his interests, I profess to be unable to comprehend. For what purpose should be insist on a covenant for convoy if he never meant to derive aid and protection from it to the whole cargo on board and to range himself and his interests on the side of resistance? His private conduct at the time of the capture, when resistance was almost hopeless, affords no evidence to repel the irresistible presumptions from his deliberate acts.

And here again it has been argued that Mr. Pinto had no hostile intentions against the United States, but that the taking of convoy was simply to resist the French and Carthagenians, who are the enemies of his own country. If such special intention could in point of law uphold his claim which, for the reasons already stated, I am entirely satisfied it could not, yet there is not, in the present case, within my recollection, any proof of such special intention. It rests upon the mere

suggestions of counsel. How, indeed, could Mr. Pinto show that he meant to yield his property to the search of the cruisers of the United States when the deliberate act of assuming British convoy precluded the possibility of its exercise unless acquired by victory after resistance?

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

This, however, is not the only ground upon which the claim of Mr. Pinto ought to be repudiated. There was not merely the illegality of sailing under enemy convoy up to the very eve of capture, but the fact of actual resistance of the chartered ship and submission to search only in consequence of superior force.

An attempt, however, is made to extract the case at bar from the penalty of confiscation attached to resistance of search upon the ground that Mr. Pinto took no part in this resistance. It is asserted that a shipper in a general ship is not affected by the act of the enemy master; that the charterer of the whole ship is entitled to as favorable a consideration; and that there is no difference in point of law whether the ship have or have not a commission or be, or be not armed. It will be necessary to give to these positions a full examination.

In the first place, it is to be considered whether a neutral shipper has a right to put his property on board of an armed belligerent ship without violating his neutral duties. If the doctrine already advanced on the subject of convoy be correct, it is incontestable that he has no such right. If he cannot take belligerent convoy, *a fortiori* he cannot put his property on board of such convoy, or, what is equivalent, on board of an armed and commissioned ship of the belligerent. What would be the consequences if neutrals might lawfully carry on all their commerce in the frigates and ships of war of another belligerent sovereign? That there would be a perfect identity of interests and of objects, of assistance and of immunity, between the parties. The most gross frauds and hostile enterprises would be carried on

under neutral disguises, and the right of search would become as utterly insignificant in practice as if it were extinguished by the common consent of nations. The extravagant premiums and freights which neutrals could well afford to pay for this extraordinary protection would enable the belligerent to keep up armaments of incalculable

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

I have had occasion to consider this point in another cause in this Court, and to the opinion then delivered I refer for a more full discussion of it. If the subject capture without a commission, he can acquire no property to himself in the prize, and if the act be contrary to the regulations of his own sovereign, he may be liable to municipal penalties for his conduct. But as to the enemy, he violates no rights by the capture. Such, on an accurate consideration, will be found to be the doctrine of Puffendorf and Grotius and Bynkershoek, and they stand confirmed by a memorable decision of the Lords of Appeal in 1759. 2 Brown's Civil & Adm.App.

524; Grotius, lib. 3, ch. 6, s. 8, 9, 10, and Barbeyrac's note on s. 8; Puffendorf, lib. 8, ch. 6, s. 21, &c.; Bynk. 2, P.J. ch. 3, 4, 16, 17; 2 Woodes.Lect. 432; Consol.del.Mare ch. 287-288; 4 Inst. 152, 154; Zouch Adm. 101; Casaregis Disc. 24 n. 24; Com.Dig. Admiralty E.; Buls. c. 27.

Admitting, however (what to me seems utterly inadmissible),

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

The argument drawn from the silence of jurists has been already sufficiently answered. It remains to consider that which is urged upon the footing of authority. The reasoning from supposed analogous cases is quite as unsatisfactory. It is not true as to neutrals that the act of the master never binds the owner of the cargo unless the master is proved to be the actual agent of the owner. The act of the master may be and very often is conclusive upon the cargo, although no general agency is established. Suppose he violate a blockade, suppress and fraudulently destroy the ship's papers, or mix up under the same cover enemy interests, will not the cargo share the fate of the ship? The cases cited are mere exceptions to the general rule. They in general turn upon a settled distinction that the act of the master shall not bind the cargo where the act under the circumstances could not have been within the scope or contemplation of the shipper at the time of shipment, or where his ignorance of the voyage and of the intended acts of the master is placed beyond the possibility of doubt. *See The Adams,* 5 Rob. 256. The very case of resistance is a strong illustration of the principle. The resistance of the neutral master has been deliberately held to be conclusive on the neutral

cargo. *The Elzebe,* 5 Rob. 173; *The Catherina Elizabeth,* 5 Rob. 206. What reason can there be for a different rule in respect to a belligerent master?

It must be admitted that the language of the court in the case of the *Catherina Elizabeth* would at first view seem to support the position of the claimant's counsel. On a close examination, however, it will not be found to

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assert so broad a doctrine. The case was of a rescue attempted by an enemy master having on board a neutral cargo, and this rescue attempted not of the captured, but of the capturing, ship. It was argued that this resistance of the master exposed the whole cargo entrusted to his management to confiscation. The court held that no such penalty was incurred. That the resistance could only be the hostile act of a hostile person who was a prisoner of war and who, unless under parole, had a perfect right to emancipate himself by seizing his own vessel. That the case of a neutral master differed from that of an enemy master. No duty was violated by such an act on the part of the latter; *lupum auribus teneo,* and if he could withdraw himself he had a right so to do. And that a material fact in the case was that the master did not attempt to withdraw his property, but to rescue the ship of the captor and not his own vessel. Such was the decision of the court, upon which several observations arise. In the first place, the resistance was not made previous to the capture, and therefore whatever may be the extent of the language, it must be restrained to the circumstances of the case in judgment; otherwise it would be extrajudicial. In the next place, it would be impossible to conceive how the fact as to what vessel was seized could be material if the argument of the present claimant be correct, for in all events the resistance as to the cargo would be without any legal effects. In the last place, it is clear that the case is put by the court upon the ground that the master at the time of the act had been dispossessed of his vessel by capture, and was a prisoner of war. He was therefore no longer acting as master of the ship and had no further management of her. His rights and duties as master had entirely ceased by the capture, and there could be no pretense to affect the ship or cargo with his subsequent acts any more than with the acts of any other stranger. The case would have been entirely

different with a neutral master, whose relation to his ship continues notwithstanding a capture and carrying in for adjudication. The case therefore admits of sound distinctions from that at bar, and cannot be admitted to govern it.

There is another text, not cited in the argument, which may be thought to favor the doctrine of the claimant's counsel. It is the only passage bearing on the subject in

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controversy which has fallen under my notice in any elementary work. Casaregis, in his commercial discourses, Disc. 24, n. 22, has the following remarks:

" *Verum tamen notandum est quod si navis inimica onerata mercibus mercatorum amicorum aggressa fuerit alteram inimicam et mercatores aut domini mercium operam ac industriam dedissent pro ea aggredienda tunc merces dominorum cadunt etiam sub proeda, si navis predicta onerata mercibus fuerit depraedata, &c.;, et regulariter bona eorum qui auxilium inimices nostris praestant vel confederati cum iis sunt, praedari possunt.* "

It is obvious that Casaregis is here considering the case of an attack of an enemy merchant ship, laden with a neutral cargo, upon the ship of its enemy in which the former is unsuccessful and is captured. Under such circumstances he holds that if the neutral shippers, or the persons having the management of the cargo *(domini mercium)* have aided in the attack, the cargo is forfeited upon the ground that all who assist or confederate with an enemy are liable to be plundered by the law of war. He does not touch the case where an enemy merchant ship simply makes resistance in her own defense, or resists the right of search, nor how far the master of such ship is the *dominus mercium,* or can by his own acts bind the cargo. Much less has he discussed the question as to what acts amount to an incorporation into the objects and interests of the enemy, so as to affix a hostile character. It does not seem to me that his text can be an authority beyond the terms in which it is expressed. It pronounces affirmatively that a cooperation in an attack will induce confiscation of the cargo (which cannot be doubted), but it does not pronounce negatively that the resistance of an enemy master will not draw

after it the same penalty. And if it were otherwise, it would deserve consideration whether the opinion of a mere elementary writer, respectable as he may be, delivered at a time when the prize law was not as well settled as it has been in the present age, should be permitted to regulate the maritime rights of belligerent nations.

The argument, then, on the footing of authority, fails, for none is produced which directly points at circumstances like those in the case at bar. And upon principle it seems quite as difficult to support it. I am unable

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to perceive any solid foundation on which to rest a distinction between the resistance of a neutral and of an enemy master. The injury to the belligerent is in both cases equally great, for it equally withdraws the neutral property from the right of search unless acquired by superior force. And until it is established that an enemy protection legally suspends the right of search, it cannot be that resistance to such right should not be equally penal in each party. I have therefore no difficulty in holding that the resistance of the ship is in all cases the resistance of the cargo, and that it makes no difference whether she be armed or unarmed, commissioned or uncommissioned. He who puts his property on the issue of battle must stand or fall by the event of the contest. The law of neutrality is silent when arms are appealed to in order to decide rights, and the captor is entitled to the whole prize won by his gallantry and valor. This opinion is not the mere inference, strong as it seems to me to be, of general reasoning. It is fortified by the consideration that in the earliest rudiments of prize law, in the great maritime countries of Great Britain and France, confiscation is applied by way of penalty for resistance of search to all vessels, without any discrimination of the national character of the vessels or cargoes. The black book of the admiralty expressly articulates that any vessel making resistance may be attacked and seized as enemies, and this rule is enforced in the memorable prize instructions of Henry VIII, Clerk's Praxis 164, Rob. Collect.Marit. 10 and note, and p. 118. The ordinance of France of 1584 is equally broad, and declares all such vessels good prize, and this has ever since remained a settled rule in the prize code of that

nation.

Valin informs us that it is also the rule of Spain, and that in France it is applied as well to French vessels and cargoes as to those of neutrals and allies, Coll.Marit 118; Valin, Traits des Prizes, ch. 5, § 8, p. 80. There is not to be found in the maritime code of any nation or in any commentary thereon the least glimmering of authority that distinguishes, in cases of resistance, the fate of the cargo from that of the ship. If such a distinction could have been sustained, it is almost incredible that not a single ray of light should have beamed upon it during the long lapse of ages in which maritime warfare

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has engaged the world. And if any argument is to be drawn from the silence of authority, I know not under what circumstances it can be more forcibly applied than against the exception now contended for.

But even if it were conceded that a neutral shipper in a general ship might be protected, the concession would not assist the present claimant. His interests were so completely mixed up and combined with the interests of the enemy, the master was so entirely his agent under the charter party, that it is impracticable to extract the case from the rule that stamps Mr. Pinto with a hostile character. The whole commercial enterprise was radically tainted with a hostile leaven. In its very essence it was a fraud upon belligerent rights. If for a moment it could be admitted that a neutral might lawfully ship goods in an armed ship of an enemy, or might charter such a ship and navigate her with a neutral crew, these admissions would fall far short of succoring the claimant. He must successfully contend for broader doctrines -- for doctrines which, in my humble judgment, are of infinitely more dangerous tendency than any which Schlegel and Hubner, the champions of neutrality, have yet advanced into the field of maritime controversy. I cannot bring my mind to believe that a neutral can charter an armed enemy ship, and victual and man her with an enemy crew (for though furnished directly by the owner, they are in effect paid and supported by the charterer), with the avowed knowledge and necessary intent that she should resist every enemy; that he can take on board

hostile shipments on freight, commissions and profits; that he can stipulate expressly for the benefit and use of enemy convoy and navigate during the voyage under its guns and protection; that he can be the entire projector and conductor of the voyage, and cooperate in all the plans of the owner to render resistance to search secure and effectual, and that yet, notwithstanding all this conduct, by the law of nations he may shelter his property from confiscation and claim the privileges of an inoffensive neutral. On the contrary it seems to me that such conduct is utterly irreconcilable with the good faith of a friend and unites all the qualities of the most odious hostility. It wears the habiliments of neutrality only when the sword and the armor of an enemy become

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useless for defense. If it be, as it undoubtedly is, a violation of neutrality to engage in the transport service of the enemy or to carry his dispatches even on a neutral voyage, how much more so must it be to enlist all our own interests in his service and hire his arms and his crew in order to prevent the exercise of those rights which, as neutrals, we are bound to submit to? The doctrine is founded in most perfect justice, that those who adhere to an enemy connection shall share the fate of the enemy.

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

rectitude of its principles.

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