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The Commercen

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The Commercen

14 U.S. (1 Wheat.) 382

APPEAL FROM THE CIRCUIT COURT FOR

THE DISTRICT OF MASSACHUSETTS

SYLLABUS

Quaere whether the British rule of the war of 1756 be founded on correct principles.

The Rule of 1756 stands upon two grounds: 1st, that a trade, such as the coasting or colonial trade, which, by the permanent policy of a nation, is reserved for its

own vessels, if opened to neutrals during war, must be opened under the pressure of the enemy's arms, and in order to obtain relief from that pressure, which relief a neutral has no right to afford; 2d, if the trade be not opened by law, that a neutral employed in a trade thus reserved by the enemy to his own vessels identifies himself with that enemy and assumes a hostile character.

A neutral ship, laden with a cargo of provisions, the property of the enemy specially permitted to be exported for the supply of his forces, is not entitled to freight.

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

This was the case of a Swedish

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vessel captured on 16 April, 1814, by the private armed schooner *Lawrence* on a voyage from Limerick, in Ireland, to Bilboa, in Spain. The cargo consisted of barley and oats, the property of British subjects, the exportation of which is generally prohibited by the British government, and as well by the official papers of the custom house as by the private letters of the shippers, it appears to have been shipped under the special permission of the government for the sole use of his Britannic Majesty's forces then in Spain. Bonds were accordingly given for the fulfillment of this object. At the hearing in the district Court of Maine, the cargo was condemned as enemy's property, and the vessel restored, with an allowance, among other things, of the freight for the voyage, according to the stipulation of the charter party. The captors appealed from so much of the sentence as decreed freight to the neutral ship, and upon the appeal to the Circuit Court of Massachusetts, the decree as to freight was reversed, and from this last sentence an appeal was prosecuted to this Court.

STORY, J., delivered the opinion of the Court.

The single point now in controversy in this cause is whether the ship is entitled to the freight for the voyage. The general rule that the neutral carrier of enemy's property is entitled to his freight is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence the carrying of contraband goods to the enemy, the engaging in the coasting or colonial trade of the enemy, the spoliation of papers, and the fraudulent suppression of enemy interests have been held to affect the neutral with the forfeiture of freight, and in cases of a more flagrant character, such as carrying dispatches or hostile military passengers, an engagement in the transport service of the enemy, and a breach of blockade, the penalty of confiscation of the vessel has also been inflicted. By the modern law of nations, provisions

are not in general deemed contraband, but they may become so, although the property of a neutral, on account of the particular situation of the war or on account of their destination. If destined for the ordinary use of life in the enemy's country, they are not in general contraband, but it is otherwise if destined for military use. Hence if destined for the army or navy of the enemy or for his ports of naval or military equipment, they are deemed contraband. Another exception from being treated as contraband is where the provisions are the growth of the neutral exporting country. But if they be the growth of the enemy's country, and more especially if the property of his subjects and destined for enemy's use, there does not seem any good reason for the exemption, for, as Sir William Scott has observed, in such case the party has not only gone out of his way for the supply of the enemy, but he has assisted him by taking off his surplus commodities. But it is argued that the doctrine of contraband cannot apply to the present case, because

the destination was to a neutral country, and it is certainly true that goods destined for the use of a neutral country can never be deemed contraband, whatever may be their character or however well adapted to warlike purposes. But if such goods are destined for the direct

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and avowed use of the enemy's army or navy, we should be glad to see an authority which countenances this exemption from forfeiture, even though the property of a neutral. Suppose, in time of war, a British fleet were lying in a neutral port -- would it be lawful for a neutral to carry provisions or munitions of war thither avowedly for the exclusive supply of such fleet? Would it not be a direct interposition in the war and an essential aid to the enemy in his hostile preparations? In such a case the goods, even if belonging to a neutral, would have had the taint of contraband in its most offensive character, on account of their destination, and the mere interposition of a neutral port would not protect them from forfeiture.

Strictly speaking, however,

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this is not a question of contraband, for that can arise only when the property belongs to a neutral,

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and here the property belonged to an enemy, and therefore was liable at all events to condemnation. But was the voyage lawful, and such as a neutral could with good faith and without a forfeiture engage in? It has been solemnly adjudged that being engaged in the transport service or in the conveyance of military persons in his employ are acts of hostility which subject the property to confiscation. And the carrying of dispatches from the colony to the mother country of the enemy has subjected the party to the like penalty. And in these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction.

The principle of these determinations was asserted to be that the party must be deemed to place himself in the service of the hostile state, and

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assist in warding off the pressure of the war or in favoring its offensive projects.

Now we cannot distinguish these cases in principle from that before the Court. Here is a cargo of provisions exported from the enemy's country with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to be exported at all. Can a more important or essential service be performed in favor of the enemy? In what does it differ from the case of a transport in his service? The property nominally belongs to individuals, and is freighted, apparently, on private account, but in reality for public use and under a public contract implied from the very permission of exportation. It is vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy indirectly to operate with more vigor and promptitude against us and increase his disposable force. But it is not the effect of the particular transaction that the law regards, it is the general tendency of such transactions to assist the military operations of the enemy and the temptations which it presents to deviate from a strict neutrality.

Nor do we perceive how the destination, to a neutral port, can vary the application of this rule; it is only doing that indirectly which is prohibited in direct courses. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might lawfully supply a British

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fleet stationed on our coast? We presume that two opinions could not be entertained on such questions, and yet, though the cases put are strong, we do not know that the assistance is more material than might be supplied under cover of a neutral destination like the present.

An attempt has been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy upon the ground that the war of Great Britain against France was a war distinct from that against the United States, and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. Whatever might be the right of the Swedish sovereign acting under his own authority, we are of opinion that if a Swedish vessel be engaged in the actual service of Great Britain or in carrying stores for the exclusive use of the British armies, she must to all intents and purposes be deemed a British transport. It is perfectly immaterial in what particular enterprise those armies might at the time be engaged, for the same important benefits are conferred upon an enemy, who thereby acquires a greater disposable force to bring into action against us. In the *Friendship,* 6 Rob. 420. 426, Sir W. Scott, speaking on this subject, declares,

"It signifies nothing whether the men so conveyed are to be put into action on an immediate expedition, or not. The mere shifting of drafts in detachments and the conveyance of stores from one place to another is an ordinary employment of a transport vessel, and it is a distinction totally unimportant

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whether this or that case may be connected with the immediate active service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action, but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels."

It is obvious that the learned judge did not deem it material to what places the stores might be destined, and it must be equally immaterial what is the immediate occupation of the enemy's military force. That force is always hostile to us, be it where it may be. Today it may act against France, tomorrow, against us, and the better its commissary department is supplied, the more life and activity is communicated to all its motions. It is not, therefore, in our view, material whether there be another distinct war in which our enemy is engaged or not; it is sufficient

that his armies are everywhere our enemies, and every assistance offered to them must, directly or indirectly, operate to our injury.

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

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MR. CHIEF JUSTICE MARSHALL.

As a principle, which I think new and which may certainly in future, be very interesting to the United States, has been decided in this case, I trust I may be excused for stating the reasons which have prevented my concurring in the opinion that has been delivered.

In argument, this sentence of the circuit court has been sustained on two grounds -- 1st, that the exportation

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of grain from Ireland is generally prohibited, and therefore that a neutral cannot lawfully engage in it during war; 2d, that the carriage of supplies to the army of the enemy is to take part with him in the war, and consequently to become the enemy of the United States so far as to forfeit the right to freight.

The first point has been maintained on its supposed analogies to certain principles which have been at different times avowed by the great maritime and belligerent powers of Europe respecting the colonial and coasting trade, and which are generally known in England and in this country by the appellation of the Rule of 1756. Without professing to give any opinion on the correctness of those principles, it is sufficient to observe that they do not appear to me to apply to this case. The Rule of 1756 prohibits a neutral from engaging in time of war in a trade in which he was prevented from participating in time of peace, because that trade

was, by law, exclusively reserved for the vessels of the hostile state. This prohibition stands upon two grounds:

1st. That a trade, such as the coasting or colonial trade, which, by the permanent policy of a nation, is reserved for its own vessels, if opened to neutrals during war, must be opened under the pressure of the arms of the enemy, and in order to obtain relief from that pressure. The neutral who interposes to relieve the belligerent under such circumstances rescues him from the condition to which the arms of his enemy has reduced him, restores to him those resources which have been wrested from him by the

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arms of his adversary, and deprives that adversary of the advantages which successful war has given him. This the opposing belligerent pronounces a departure from neutrality, and an interference in the war to his prejudice, which he will not tolerate.

2d. If the trade be not opened by law, that a neutral employed in a trade thus reserved by the enemy to his own vessels identifies himself with that enemy, and by performing functions exclusively appertaining to the enemy character, assumes that character.

Neither the one nor the other of these reasons applies to the case under consideration. The trade was not a trade confined to British vessels during peace and opened to neutrals during war under the pressure created by the arms of the enemy. It was prohibited for political reasons entirely unconnected with the interests of navigation, and thrown open from motives equally unconnected with maritime strength. Neither did the neutral employed in it engage in a trade then or at any time reserved for British vessels, and therefore did not identify himself with them. He was not performing functions exclusively appertaining to the enemy, and consequently, in performing them did not assume that character.

The second point presents a question of much more difficulty. That a neutral carrying supplies to the army of the enemy does, under the mildest interpretation

of international law, expose himself to the loss of freight is a proposition too well settled to be controverted. That it is a general rule, admitting of few if any exceptions is not denied by the counsel

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for the appellants. But they contend that this case is withdrawn from that rule by its peculiar circumstances. The late war between the United States and Great Britain was declared at a time when all Europe, including our enemy, was engaged in a war with which ours had no connection and in which we professed to take no interest. The allies of our enemy, engaged with him in a common war, the most tremendous and the most vitally interesting to the parties that has ever desolated the earth, were our friends. We kept up with them the mutual interchange of good offices and declared our determination to stand aloof from that cause which was common to them and Great Britain. They too considered this war as entirely distinct from that in which they were engaged. Although at a most critical period we had attacked their ally, they did not view it as an act of hostility to them. They did not ascribe it to a wish to affect in any manner the war in Europe, but solely to the desire of asserting our violated rights. They seemed almost to consider the Britain who was our enemy as a different nation from that Britain who was their ally.

How long this extraordinary state of things might have continued it is impossible to say, but it certainly existed when the *Commercen* was captured. What its effect on that capture ought to be must depend more on principle than on precedent. It has been said, and truly said, by the counsel for the captors that we were at war with Great Britain in every part of the world. We were enemies everywhere. Her troops in Spain or elsewhere as

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well as her troops in America were our enemies. It was a conflict of nation against nation. This is conceded, and therefore the cargo of the *Commercen,* being British property, was condemned as prize of war. But although this must be

conceded, the corollary which is drawn from it -- that those who furnish their armies in Spain with provisions aid them to our prejudice, and therefore take part in the war and are guilty of unneutral conduct -- must be examined before it can be admitted.

It is not true that every species of aid given to an enemy is an act of hostility which will justify our treating him who gives it or his vessels as hostile to us. The history of all Europe, and especially of Switzerland, furnishes many examples of the truth of this proposition. Those examples need not be quoted particularly, because they stand on principles not entirely applicable to this case. It is the peculiarity of this war which requires the adoption of rules peculiar to a new state of things, in adopting which we must examine the principle on which a nation is justified in treating a neutral as an enemy. That a neutral is friendly to our enemy and continues to interchange good offices with him can furnish no subject of complaint, for then all commerce with one belligerent would be deemed hostile by the other. The effect of commerce is to augment his resources and enable him the longer to prosecute the war; but this augmentation is produced by an act entirely innocent on the part of the neutral and manifesting no hostility to the opposing belligerent. It cannot therefore be molested by him while the same good offices

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are allowed to him, although he may not be enabled to avail himself of them to an equal degree. It would seem, then, that a remote and consequential effect of an act is not sufficient to give it a hostile character; its tendency to aid the enemy in the war must be direct and immediate. It is also necessary that it should be injurious to us, for a mere benefit to another which is not injurious to us cannot convert a friend into an enemy.

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

affect the operations of their common war in Europe. The armies of Portugal and Spain were united to those of Britain, and unquestionably aided and assisted our enemy, but they did not aid and assist him against us, and therefore did not become our enemies. Had any other of the combined powers equipped a military expedition for the purpose of reinforcing the armies of Britain in any part of Europe, or had a new ally engaged in the war, that would have been no act of hostility against the United States, although it would have aided our enemy. But if a military expedition to the United States had been undertaken, the case would have assumed a different aspect. Such expedition would be hostile to this country, and the power undertaking it would

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become our enemy. It would have been an interference operating directly to our prejudice. The declaration of war against Great Britain had, without doubt, a remote and consequential effect on the war in Europe. The force employed against the United States must be subducted from that employed in support of the common cause in Europe, or greater exertions must be made which might sooner exhaust those resources which enabled her to continue her gigantic efforts in their common war. Consequently the declaration of war by the United States remotely affected the war in Europe, to the advantage of one party and the injury of the other. Yet no one of the allies considered this declaration as taking part in that war and placing America in the condition of an enemy. But had the United States employed its force on the peninsula against the British troops, or had they interfered in the operations of the common war, it may well be doubted whether it might not have been rightfully considered as taking part against the allies and arranging itself on the side of the common enemy.

In answer to arguments of this tendency made at the bar it was said that nations are governed by political considerations, and may choose rather to overlook conduct at which they might justly take offense than unnecessarily to increase the number of their enemies or provoke increased hostility, but that courts of justice are bound by the law and must inflexibly adhere to its mandate. While this is conceded, it is deemed equally true that those acts which will justify the

condemnation of a

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neutral as an enemy would also justify the treating his nation as an enemy if they were performed or defended by the nation. There is a tacit compact that the hostile act of the individual shall not be ascribed to his government, and that, in turn, the government will not protect the individual from being treated as an enemy. But if the government adopts the act of the individual, and supports it by force, the government itself may be rightfully treated as hostile. Thus, contraband of war, though belonging to a neutral, is condemned as the property of an enemy, and his government takes no offense at it; but should his government adopt the act and insist upon the right to carry articles deemed contraband, and support that right, it would furnish just ground of war. The belligerent might choose to overlook this hostile act, but the act would be in its nature hostile.

The inquiry, then, whether the act in which this individual Swede was employed, would, if performed by his government, have been considered an act of hostility to the United States, and might rightfully be so considered, is material to the decision of the question whether the act of the individual is to be treated as hostile. Great Britain and Sweden were allies in the war against France. Consequently the King of Sweden might have ordered his troops to cooperate with those of Britain in any place against the common enemy. He might have ordered a reinforcement to the British army on the peninsula, and this reinforcement might have been transported by sea. An attempt on the part of the United States to intercept it because it was

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aiding their enemy would certainly have been an interference in the war in Europe which would have provoked and would have justified the resentment of all the allied powers. It would have been an interference not to be justified by our war with Britain, because those troops were not to be employed against us. If, instead of a reinforcement of men, a supply of provisions were to be furnished in that part of the allied army which was British, would that alter the case? Could an American

squadron intercept a convoy of provisions or of military stores of any description going to an army engaged in a war common to Great Britain and Sweden, and not against the United States? Could this be done without interfering in that war and taking part in it against all the allies. If it could not, then any supplies furnished by the government of Sweden, promoting the operations of their common war, whether intended for the British or any other division of the allied armies, had a right to pass unmolested by American cruisers.

It is not believed that any act which, if performed by the government, would not be deemed an act of hostility, is to be so deemed if performed by an individual. Had the provisions then on board the *Commercen* been Swedish property, the result of this reasoning is that it would not have been confiscated as prize of war. Being British property, it is confiscable, but the Swede is guilty of no other offense than carrying enemy's property -- an offense not enhanced in this particular case by the character of that property. He is therefore as much entitled to freight as if his cargo had been

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of a different description. His trade was not more illicit than the carriage of enemy's goods for common use would have been.

If the cases in which neutrals have been condemned for having on board articles the transportation of which clothe them with the enemy character be attentively considered, it is believed that they will not be found to contravene the reasoning which has been urged. To carry dispatches to the government has been considered as an act of such complete hostility as to communicate the hostile character to the vessel carrying them. But this decision was made in a case where the dispatches could only relate to the war between the government of the captors and that to which the dispatches were addressed. They were communications between a colonial government in danger of being attacked and the mother country. In a subsequent case, it was determined that a neutral vessel might bear dispatches to a hostile government without assuming the belligerent character if they were from an ambassador residing in the neutral state. Yet such dispatches

might contain intelligence material to the war. But this is a case in which the belligerent right to intercept all communications addressed to the enemy by the officers of that enemy is modified and restrained by the neutral right to protect the diplomatic communications which are necessary to the political intercourse between belligerents and neutrals. It is a case in which the right of the belligerent is narrowed and controlled by the positive rights of a neutral; still more reasonably may they

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

It may be said that this reasoning would go to the protection of British troops passing to the peninsula and of British supplies transported in British vessels for their use; that it therefore proves too much, and must consequently unsound.

It is admitted that, pressed to its extreme point, the argument would go this extent, an extent which cannot be maintained; but it does not follow that it is unsound in every stage of its progress. In every case of conflicting rights, each must yield something to the other. The pretensions of neither party can be carried to the extreme. They meet -- they check -- they limit each other. The precise line which neither can pass but to which each may advance is not easily to be found and marked; yet such a line must exist, whatever may be the difficulty of discerning it. To attack an enemy or to take his property, if either can be done without violating the sovereignty

of a friend, is of the very essence of war. None can be offended at the exercise of this right who may not be offended at the declaration of war itself. The injury which the allies of our enemy, in a war common to them (but in which we are not engaged), sustain by this occasional interruption is incidental, while on our part it is the exercise of a direct and essential right. But when we attack a friend who is carrying on military operations conjointly with our enemy but not against us, we are not making direct war, but are using those incidental rights which war gives us against those direct rights which are exercised by a belligerent not our enemy, and which constitute war itself. In either case it would seem to me that the incidental must yield to the direct and essential right.

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

LIVINGSTON, J.

I concur in the opinion of THE CHIEF JUSTICE. Considering Sweden an ally of Great Britain in the war which the latter was carrying on

in the peninsula, either the King of Sweden himself might send transports with provisions for the use of the British army while engaged in any common enterprise or his subjects might lawfully aid in such transportation without a violation of their neutral character as it regarded the United States. If the American government had asserted the right of capturing and condemning Swedish vessels or depriving

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

JOHNSON, J.

I also concur in the opinion of THE CHIEF JUSTICE, and I do it without the least doubt or hesitation. Sweden was an ally in the war going on in the peninsula, and her subjects had an indubitable right to transport provisions in aid of their nation or its allies. The owner therefore had a right to his freight, for he did no act inconsistent with our belligerent rights while in the direct and ordinary exercise of those rights which a state of war conferred on himself.

Sentence of the circuit court affirmed.

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