

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 of self-defence, and the implements of war were so light and so cheap, that scarcely any would sail without them.

But the Chief Justice was not content to lay down principles. He stated and answered the arguments which had been addressed to the court in the trial of the case. Thus:

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.

It will be observed that in this passage the Chief Justice, speaking under a sense of judicial responsibility and passing adversely upon a contention advanced by his own government in the war of 1812 with Great Britain, states it to be "both the right and the duty of the carrier to avoid capture and to prevent a search," whether the vessel be armed or unarmed. Having stated that it is the duty of the carrier to avoid capture, the conclusion necessarily follows, which the Chief Justice himself draws in the succeeding paragraph, that