**Bas Vs. Tingy**

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**Court** : US Supreme Court

**Decided On :** 1800

**Appeal No.** : 4 U.S. 37

**Appellant** : Bas

**Respondent** : Tingy

**Judgement** :

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U.S. Supreme Court Bas v. Tingy, 4 U.S. 4 Dall. 37 37 (1800)

**Bas v. Tingy**

**4 U.S. (4 Dall.) 37**

*ERROR TO THE CIRCUIT COURT*

*FOR THE DISTRICT OF PENNSYLVANIA*

## SYLLABUS

One-half of the whole value of an American vessel and cargo recaptured by a vessel of war of the United States after she had been captured by a French privateer on 31 March, 1799, allowed as salvage.

On the return of the record it appeared by a case stated that the defendant in error had filed a libel in the district court, as commander of the public armed ship the *Ganges,* for himself and others against the ship *Eliza,* John Bas, master, her cargo, &c.;, in which he set forth that the said ship and cargo belonged to citizens of the United States; that they were taken on the high seas by a French privateer on 31 March, 1799, and that they were retaken by the libellant on 21 April following, after having been above ninety-six hours in possession of the captors. The libel prayed for salvage conformably to the acts of Congress, and the facts being admitted by the answer of the respondents, the district court decreed to the libellants one-half of the whole value of ship and cargo. This decree was affirmed in the circuit court without argument and by consent of the parties in order to expedite a final decision on the present writ of error.

The controversy involved a consideration of the following sections in two acts of Congress: by an Act of 28 June, 1798, 4 vol. 154, s. 2, it is declared

"That whenever any vessel the property of or employed by any citizen of the United States or person resident therein or any goods or effects belonging to any such citizen or resident shall be recaptured by any public armed vessel of the United States, the same shall be restored to the former owner or owners upon due proof, he or they paying and allowing, as and for salvage to the recaptors, one-eighth part of the value of such vessel, goods, and effects, free from all deduction and expenses."

By an Act of 2 March, 1799, 4 vol. 472, it is declared

"That for the ships or goods belonging to the citizens of the United States or to the citizens or subjects of any nation in amity with the United States, if retaken from the enemy within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage, . . . and if above ninety-six hours one-half all of which is to be paid without any deduction whatsoever. . . ."

And by the 9th section of the same act it is declared,

"That all the money accruing or which has already accrued from the sale of prizes shall be and remain forever a fund for the payment of the half pay to the officers and seamen who may be entitled to receive the same. "

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The Judges delivered their opinions *seriatim* in the following manner:

MOORE, JUSTICE.

This case depends on the construction of the act for the regulation of the navy. It is objected, indeed, that the act applies only to future wars, but its provisions are obviously applicable to the present situation of things, and there is nothing to prevent an immediate commencement of its operation.

It is, however, more particularly urged that the word "enemy" cannot be applied to the French, because the section in which it is used, is confined to such a state of war, as would authorize a recapture of property belonging to a nation in amity with the United States, and such a state of war, it is said, does not exist between America and France. A number of books have been cited to furnish a glossary on the word enemy; yet our situation is so extraordinary that I doubt whether a parallel case can be traced in the history of nations. But if words are the representatives of ideas, let me ask by what other word the idea of the relative situation of America and France could be communicated, than by that of hostility, or war? And how can the characters of the parties engaged in hostility or war be otherwise described than by the denomination of enemies? It is for the honor and dignity of both nations, therefore, that they should be called enemies, for it is by that description alone that either could justify or excuse the scene of bloodshed, depredation, and confiscation which has unhappily occurred, and surely Congress could only employ the language of the act of June 13, 1798, towards a nation whom she considered as an enemy.

Nor does it follow that the act of March, 1799, is to have no operation, because all the cases in which it might operate are not in existence at the time of passing it. During the present hostilities it affects the case of recaptured property belonging to our own citizens, and in the event of a future war it might also be applied to the case of recaptured property belonging to a nation in amity with the United States. But it is further to be remarked that all the expressions of the act may be satisfied, even at this very time, for by former laws, the recapture of property, belonging to persons resident within the United States is authorized; those residents may be aliens, and if they are subjects of a nation in amity with the United States, they answer completely the description of the law.

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The only remaining objection offered on behalf of the plaintiff in error supposes that because there are no repealing or negative words, the last law must be confined to future cases in order to have a subject for the first law to regulate. But if two laws are inconsistent (as, in my judgment, the laws in question are), the latter is a virtual repeal of the former, without any express declaration on the subject.

On these grounds I am clearly of opinion that the decree of the circuit court ought to be affirmed.

WASHINGTON, JUSTICE.

It is admitted on all hands that the defendant in error is entitled to some compensation, but the plaintiff in error contends that the compensation should be regulated by the Act of 28 June 1798, 4 vol. 154, s. 2, which allows only one-eighth for salvage, while the defendant in error refers his claim to the Act of 2 March ( *ibid.* 456, s. 7), which makes an allowance of one-half, upon a recapture from the enemy, after an adverse possession of ninety-six hours.

If the defendant's claim is well founded, it follows that the latter law must virtually have worked a repeal of the former, but this has been denied for a variety of

reasons:

1st. Because the former law relates to recaptures from the French, and the latter law relates to recaptures from the enemy, and it is said that "the enemy" is not descriptive of France or of her armed vessels according to the correct and technical understanding of the word.

The decision of this question must depend upon another, which is whether, at the time of passing the Act of Congress of 2 March, 1799, there subsisted a state of war between the two nations? It may, I believe, be safely laid down that every contention by force between two nations in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn and is of the perfect kind; because one whole nation is at war with another whole nation, and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent, being limited as to places, persons, and things, and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the



members are not authorized to commit hostilities such as in a solemn war, where the government restrain the general power.

Now if this be the true definition of war, let us see what was the situation of the United States in relation to France. In March, 1799, Congress had raised an army,

stopped all intercourse with France, dissolved our treaty, built and equipped ships of war, and commissioned private armed ships, enjoining the former, and authorizing the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to recapture armed vessels found in their possession. Here, then, let me ask what were the technical characters of an American and French armed vessel combating on the high seas with a view the one to subdue the other and to make prize of his property? They certainly were not friends, because there was a contention by force; nor were they private enemies, because the contention was external, and authorized by the legitimate authority of the two governments. If they were not our enemies, I know not what constitutes an enemy.

2d. But secondly it is said that a war of the imperfect kind is more properly called acts of hostility, or reprisal, and that Congress did not mean to consider the hostility subsisting between France and the United States, as constituting a state of war.

In support of this position it has been observed that in no law prior to March, 1799, is France styled our enemy, nor are we said to be at war. This is true, but neither of these things was necessary to be done, because as to France, she was sufficiently described by the title of the French Republic, and as to America, the degree of hostility meant to be carried on was sufficiently described without declaring war or declaring that we were at war. Such a declaration by Congress might have constituted a perfect state of war, which was not intended by the government.

3d. It has likewise been said that the 7th section of the act of March 1799, embraces cases which, according to preexisting laws, could not then take place, because no authority had been given to recapture friendly vessels from the French, and this argument was strongly and forcibly pressed.

But because every case provided for by this law was not then existing, it does not follow that the law should not operate upon such as did exist and upon the rest whenever they should arise. It is a permanent law, embracing a variety of subjects,

not made in relation to the present war with France only but in relation to any future war with her or with any other nation. It might then very properly allow salvage for recapturing of American vessels from France, which had previously been authorized by law, though it could not immediately apply to the vessels of friends, and whenever such a war should exist between the United States and France, or any other nation, as according to the law of nations

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or special authority would justify the recapture of friendly vessels, it might on that event, with similar propriety, apply to them, which furnishes, I think, the true construction of the act.

The opinion which I delivered at New York in *Talbot v. Seaman* was that although an American vessel could not justify the retaking of a neutral vessel from the French, because neither the sort of war that subsisted, nor the special commission under which the American acted, authorized the proceeding; yet that the 7th sec. of the act of 1799, applied to recaptures from France as an enemy, in all cases authorized by Congress. And on both points my opinion remains unshaken, or rather has been confirmed by the very able discussion which the subject has lately undergone in this Court on the appeal from my decree. Another reason has been assigned by the defendant's counsel why the former law is not to be regarded as repealed by the latter, to-wit: that a subsequent affirmative general law cannot repeal a former affirmative special law, if both may stand together. This ground is not taken, because such an effect involves an indecent censure upon the legislature for passing contradictory laws, since the censure only applies where the contradiction appears in the same law, and it does not follow that a provision which is proper at one time may not be improper at another when circumstances are changed, but the ground of argument is that a change ought not to be presumed. Yet if there is sufficient evidence of such a change in the legislative will, and the two laws are in collision, we are forced to presume it.

What then is the evidence of legislative will? In fact and in law, we are at war: an American vessel fighting with a French vessel, to subdue and make her prize, is

fighting with an enemy accurately and technically speaking, and if this be not sufficient evidence of the legislative mind, it is explained in the same law. The sixth and the ninth sections of the act speak of prizes, which can only be of property taken at sea from an enemy *jure belli,* and the 9th section speaks of prizes as taken from an enemy, in so many words, alluding to prizes which had been previously taken; but no prize could have been then taken except from France; prizes taken from France were therefore taken from the enemy. This, then, is a legislative interpretation of the word "enemy," and if the enemy as to prizes, surely they preserve the same character as to recaptures. Besides, it may be fairly asked, why should the rate of salvage be different in such a war as the present, from the salvage in a war more solemn or general? And it must be recollected that the occasion of making the law of March, 1799, was not only to raise the salvage, but to apportion it to the hazard in which the property retaken was placed, a circumstance for which the former salvage law had not provided.

The two laws, upon the whole, cannot be rendered consistent unless the court could wink so hard as not to see and know that

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in fact, in the view of Congress, and to every intent and purpose, the possession by a French armed vessel of an American vessel was the possession of an enemy, and therefore, in my opinion, the decree of the circuit court ought to be affirmed.

CHASE, JUSTICE.

The judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by the President, and therefore I have not prepared a formal argument on the occasion. I find no difficulty, however, in assigning the general reasons which induce me to concur in affirming the decree of the circuit court.

An American public vessel of war recaptures an American merchant vessel from a French privateer, after 96 hours' possession, and the question is stated what

salvage ought to be allowed? There are two laws on the subject, by the first of which only one-eighth of the value of the recaptured property is allowed, but by the second, the recaptor is entitled to a moiety. The recapture happened after the passing of the latter law, and the whole controversy turns on the single question whether France was at that time an enemy. If France was an enemy, then the law obliges us to decree one-half of the value of ship and cargo for salvage, but if France was not an enemy, then no more than one-eighth can be allowed.

The decree of the circuit court (in which I presided) passed by consent; but although I never gave an opinion, I have never entertained a doubt on the subject. Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli,* forming a part of the law of nations, but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between American and France? In my judgment it is a limited partial war. Congress has not declared war in general terms, but Congress has authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land, to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port, and the authority is not given indiscriminately to every citizen of America against every citizen of France; but only to citizens appointed by commissions or exposed to immediate outrage and violence. So far it is unquestionably a partial war; but nevertheless it is a public war, on account of the public authority from which it emanates.

There are four acts authorized by our government that are demonstrative a of state of war. A belligerent power has a right, by the law of nations, to search a neutral vessel, and, upon

suspicion of a violation of her neutral obligations, to seize and carry her into port for further examination. But by the acts of Congress, an American vessel it authorized: 1st, to resist the search of a French public vessel; 2d, to capture any vessel that should attempt, by force, to compel submission to a search; 3d, to recapture any American vessel seized by a French vessel, and 4th, to capture any French armed vessel wherever found on the high seas. This suspension of the law of nations, this right of capture and recapture, can only be authorized by an act of the government, which is, in itself, an act of hostility. But still it is a restrained or limited hostility, and there are undoubtedly many rights attached to a general war which do not attach to this modification of the powers of defense and aggression.

Hence whether such shall be the denomination of the relative situation of America and France has occasioned great controversy at the bar, and, it appears that Sir William Scott also was embarrassed in describing it when he observed that "in the present state of hostility (if so it may be called) between America and France," it is the practice of the English Court of Admiralty to restore, recaptured American property on payment of a salvage. Rob. 54. *The Santa Cruz.* But for my part I cannot perceive the difficulty of the case. As there may be a public general war, and a public qualified war, so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of "enemy" extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If Congress had chosen to declare a general war, France would have been a general enemy, having chosen to wage a partial war, France was, at the time of the capture, only a partial enemy, but still she was an enemy.

It has been urged, however, that Congress did not intend the provisions of the act of March 1799, for the case of our subsisting qualified hostility with France, but for the case of a future state of general war with any nation. I think, however, that the contrary appears from the terms of the law itself, and from the subsequent repeal. In the 9th section, it is said that all the money accruing, "or which has already accrued from the sale of prizes," shall constitute a fund for the half pay of officers and seamen. Now at the time of making this appropriation, no prizes (which *ex vi*

*termini* implies a capture in a state of war) had been taken from any nation but France, those which had been taken were not taken from France as a friend, they must consequently have been taken from her as an enemy, and the retrospective provision of the law can only operate on such prizes. Besides, when the 13th section regulates "the bounty given by the United States on any national ship of war, taken from the enemy, and brought into port," it is obvious that even if the bounty has no relation to previous captures, it must operate from the moment of passing the

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act, and embraces the case of a national ship of war taken from France as an enemy, according to the existing qualified state of hostilities. But the repealing act, passed on 3 March, 1800 (subsequent to the recapture in the present case) ought to silence all doubt as to the intention of the legislature, for, if the act of Marc 1799, did not apply to the French Republic, as an enemy, there could be no reason for altering or repealing that part of it which regulates the rate of salvage on recaptures.

The acts of Congress have been analyzed to show that a war is not openly denounced against France, and that France is nowhere expressly called the enemy of America, but this only proves the circumspection and prudence of the legislature. Considering our national prepossessions in favor of the French Republic, Congress had an arduous task to perform, even in preparing for necessary defense, and just retaliation. As the temper of the people rose, however, in resentment of accumulated wrongs, the language and the measures of the government became more and more energetic and indignant; though hitherto the popular feeling may not have been ripe for a solemn declaration of war; and an active and powerful opposition in our public councils, has postponed, if not prevented that decisive event, which many thought would have best suited the interest, as well as the honor of the United States. The progress of our contest with France, indeed, resembles much the progress of our revolutionary contest, in which, watching the current of public sentiment, the patriots of that day proceeded, step by step, from the supplicatory language of petitions for a redress of

grievances, to the bold and noble declaration of national independence.

Having, then, no hesitation in pronouncing, that a partial war exists between America and France, and that France was an enemy within the meaning of the act of March 1799, my voice must be given for affirming the decree of the circuit court.

PATERSON, JUSTICE.

As the case appears on the record and has been accurately stated by the counsel and by the judges who have delivered their opinions, it is not necessary to recapitulate the facts. My opinion shall be expressed in a few words. The United States and the French republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations, and this modified warfare is authorized by the constitutional authority of our country. It is a war *quoad hoc.* As far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. It is a maritime war; a war at sea as to certain purposes. The national armed vessels of France attack and capture the national armed vessels of the United States, and the national armed vessels of the United States are expressly authorized and directed to attack, subdue, and take the national armed vessels

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of France, and also to recapture American vessels. It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country. In such a state of things, it is scarcely necessary to add that the term "enemy," applies; it is the appropriate expression, to be limited in its signification, import, and use, by the qualified nature and operation of the war on our part. The word "enemy" proceeds the full length of the war, and no further. Besides, the intention of the legislature as to the meaning of this word "enemy" is clearly deducible from the act for the government of the navy, passed 2 March, 1799. This act embraces the past, present, and future, and contains passages, which point the character of enemy at the French, in the most clear and irresistible manner. I shall select one paragraph -- namely that which

refers to prizes taken by our public vessels anterior to the passing of the latter act. The word "prizes" in this section can apply to the French, and the French only. This is decisive on the subject of legislative intention.

By the Court:

*Let the decree of the circuit court be affirmed.*