Talbot Vs. Seeman

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Appellant : Talbot

Respondent : Seeman

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Talbot v. Seeman

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ERROR TO THE CIRCUIT COURT

OF THE DISTRICT OF NEW YORK

SYLLABUS

Salvage is a compensation for actual services rendered to the property charged with it, and is demandable of right for vessels saved from the enemy or from pirates.

There must be a meritorious service rendered, and the taking must be lawful.

Congress may authorize general hostilities, and in such case the general laws of war will apply, or partial hostilities, when the laws of war, so far, as they are applicable, will be in force.

A neutral vessel captured by a French vessel of war and armed and manned by the captors was liable to capture by the armed vessels of the United States, under the Act of Congress of 28 May, 1798, but such a vessel, after capture, could not be considered as a French vessel and liable to condemnation.

When there is probable cause to believe a vessel met with at sea is in the condition of one liable to capture, it is lawful to take her for examination and adjudication.

A legislative act founded on a mistaken opinion of what was law does not change the actual state of the law as to preexisting cases.

It is not required, in order to authorize a claim to salvage, that the sole view of the recaptor was the saving of the vessel.

It is an established principle of the law of nations that a neutral merchant vessel which shall be recaptured from a belligerent shall be discharged without salvage, as it is presumed that she would have been discharged by the tribunals of the captors. But if the laws and practices of a particular belligerent subject all neutral vessels captured by her cruisers to condemnation, the general usage and laws of nations do not apply.

The decrees and laws of France subsequent to the revolution were such as rendered the condemnation of a neutral captured by her armed vessels extremely probable, and the recapture of a neutral from the French captors was a meritorious service, and entitled the recaptors to salvage.

The laws of foreign nations are not to be noticed by the courts of other countries unless proved as facts. Those laws, when promulgated by the executive of the government of the United States, may be read as authenticated copies of such

laws.

It is to be presumed that the courts of every country will regard their own laws and that their judicial decisions will conform to them.

A violation of the laws of nations by one country does not justify their violation by another; but if, after remonstrance against injuries committed by one nation to another and redress refused or withheld, hostilities are authorized, this is in conformity with the laws of nations.

The hostilities between the United States and France having authorized the recapture of a neutral vessel, the claim for salvage will depend upon the services rendered to the recaptured vessel.

A mere speculative danger will not be sufficient to authorize a claim to salvage. It is not necessary that the danger be such as that escape from it by any other means was inevitable, but the peril must be imminent.

The laws of the United States ought not to be construed, if it can be avoided, so as to infract the common principles and usages of nations or the general doctrines of national law.

Salvage will be apportioned on a just estimate of the damages from which the vessel was recaptured and of the risk attending the retaking vessel.

This was a libel for salvage filed in the District Court of New York, by Silas Talbot, Esq., for himself and the officers and crew of the *Constitution,* a vessel of the United States, against the ship *Amelia,* the property of merchant citizens of Hamburgh, she having been recaptured on the high seas by the *Constitution* on 15 September, 1799, after her capture on 6 September by a French corvette while on her voyage from Calcutta to Hamburgh. The captors placed a prize master and men on board of the *Amelia* and ordered her to St. Domingo. On her recapture by captain Talbot, she was sent to New York. The district court allowed salvage to the

libellants, and the circuit court reversed the decree. The case came up by writ of error to the circuit court on the part of the libellants.

For the respondents the points made were

1. That captain Talbot had no right to interfere with the *Amelia,* she being a neutral vessel and not liable to condemnation by the laws of nations.

2. That salvage is only due when a benefit has been conferred, and here none was received.

3. That salvage imports a lawful consideration.

4. That to support it, there must be a consideration express or implied.

For the libellants it was claimed

1. That the *Amelia,* under the circumstances in which she was met by the *Constitution,* was liable to recapture.

2. That the libellants saved the property from condemnation in the courts of France.

3. That by the laws of nations and the provisions of the act of Congress, the recaptors were entitled to salvage.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This was a writ of error to a decree of the Circuit Court for the District of New York by which the decree of the district court of that state restoring the ship *Amelia* to her owner on payment of one-half for salvage, was reversed and a decree rendered directing the restoration of the vessel without salvage.

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The facts agreed by the parties and the pleadings in the cause present the following case:

The ship *Amelia* sailed from Calcutta in Bengal in April, 1799, loaded with a cargo of the product and manufacture of that country, and was bound to Hamburgh. On 6 September, she was captured by the French national corvette *La Diligente,* commanded by L. J. Dubois, who took out the captain, part of the crew, and most of the papers of the *Amelia,* and putting a prize master and French sailors on board her, ordered her to St. Domingo to be judged according to the laws of war.

On 15 September she was recaptured by captain Talbot, commander of the *Constitution,* who ordered her into New York for adjudication.

At the time of the recapture, the *Amelia* had eight iron cannon and eight wooden guns, with which she left Calcutta. From the ship's papers and other testimony it appeared that she was the property of Chapeau Rouge, a citizen and merchant of Hamburgh, and it was conceded by the counsel below that France and Hamburgh were not in a state of hostility with each other and that Hamburgh was to be considered as neutral between the present belligerent powers.

The District Court of New York, before whom the cause first came, decreed one-half of the gross amount of the ship and cargo as salvage to the recaptors. The Circuit Court of New York reversed this decree, from which reversal the recaptors appealed to this Court.

The *Amelia* was libeled as a French vessel, and the libellant prays that she may be condemned as prize or, if restored to any person entitled to her, as the former owner, that such restoration should be made on paying salvage. The claim and answer of Hans Frederick Seeman discloses the neutral character of the vessel and claims her on behalf of the owners.

The questions growing out of these facts and to be decided by the Court are:

Is Captain Talbot, the plaintiff in error, entitled to any, and if to any, to what salvage in the case which has been stated?

Salvage is a compensation for actual service rendered to the property charged with it.

It is demandable of right for vessels saved from pirates or from the enemy.

In order, however, to support the demand, two circumstances must concur:

1. The taking must be lawful.

2. There must be a meritorious service rendered to the recaptured.

1. The taking must be lawful -- for no claim can be maintained in a court of justice founded on an act in itself tortious. On a recapture, therefore, made by a neutral power, no claim for salvage can arise, because the act of retaking is a hostile act, not justified by the situation of the nation to which the vessel making the recapture belongs in relation to that from the possession of which such recaptured vessel was taken. The degree of service rendered the rescued vessel is precisely the same as if it had been rendered by a belligerent, yet the rights accruing to the recaptor are not the same, because no right can accrue from an act in itself unlawful.

In order, then, to decide on the right of captain Talbot, it becomes necessary to examine the relative situation of the United States and France at the date of the recapture.

The whole powers of war being by the Constitution of the United States vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that Congress may authorize general hostilities, in which case the general laws of war apply to our situation, or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.

To determine the real situation of America in regard to France, the acts of Congress are to be inspected.

The first act on this subject passed on 28 May, 1798, and is entitled, "an act more effectually to protect the commerce and coasts of the United States."

This act authorizes any armed vessel of the United States to capture any armed vessel sailing under the authority or pretense of authority of the Republic of France which shall have committed depredations on vessels belonging to the citizens of the United States or which shall be found hovering on the coasts for the purpose of committing such depredations. It also authorizes the recapture of vessels belonging to the citizens of the United States.

On 25 June 1798, an act was passed "to authorize the defense of the merchant vessels of the United States against French depredations."

This act empowers merchant vessels owned wholly by citizens of the United States to defend themselves against any attack which may be made on them by the commander or crew of any armed vessel sailing under French colors or acting or pretending to act by or under the authority of the French Republic, and to capture any such vessel. This act also authorizes the recapture of merchant vessels belonging to the citizens of the United States. By the second section, such armed vessel is to be brought in and condemned for the use of the owners and captors.

By the same section, recaptured vessels belonging to the citizens of the United States are to be restored, they paying for salvage not less than one-eighth nor more than one-half of the true value of such vessel and cargo.

On 28 June, an act passed "in addition to the act more effectually to protect the commerce and coasts of the United States."

This authorizes the condemnation of vessels brought in under the first act, with their cargoes, excepting only from such condemnation the goods of any citizen or person resident

within the United States which shall have been before taken by the crew of such captured vessel.

The second section provides that whenever any vessel or goods, the property of any citizen of the United States or person resident therein, shall be recaptured, the same shall be restored, he paying for salvage one-eighth part of the value free from all deductions.

On 9 July, another law was enacted "further to protect the commerce of the United States."

This act authorizes the public armed vessels of the United States to take any armed French vessel found on the high seas. It also directs such armed vessel, with her apparel, guns, &c.;, and the goods and effects found on board, being French property, to be condemned as forfeited.

The same power of capture is extended to private armed vessels.

The sixth section provides that the vessel or goods of any citizen of the United States or person residing therein shall be restored on paying for salvage not less than one-eighth nor more than one-half of the value of such recapture, without any deduction.

The seventh section of the act for the government of the navy, passed 2 March, 1799, enacts

"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 within twenty-four hours, the owners are to allow one-eighth part of the whole value for salvage,"

and if they have remained above ninety-six hours in possession of the enemy, one-half is to be allowed.

On 3 March, 1800, Congress passed "An act providing for salvage in cases of recapture."

This law regulates the salvage to be paid

"when any vessels or goods which shall be taken as prize as aforesaid shall appear to have before belonged to any person or persons

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permanently resident within the territory and under the protection of any foreign prince, government, or state in amity with the United States and to have been taken by an enemy of the United States or by authority or pretense of authority from any prince, government, or state against which the United States have authorized, or shall authorize defense or reprisals."

These are the laws of the United States which define their situation in regard to France and which regulate salvage to accrue on recaptures made in consequence of that situation.

A neutral armed vessel which has been captured and which is commanded and manned by Frenchmen, whether found cruising on the high seas or sailing directly for a French port, does not come within the description of those which the laws authorize as American ship of war to capture unless she be considered *quoad hoc* as a French vessel.

Very little doubt can be entertained but that a vessel thus circumstanced, encountering an American unarmed merchantman or one which should be armed but of inferior force, would as readily capture such merchantman as if she had sailed immediately from the ports of France. One direct and declared object of the war then, which was the protection of the American commerce, would as certainly require the capture of such a vessel as of others more determinately specified, but the rights of a neutral vessel, which the government of the United States cannot be considered as having disregarded, here intervene, and the vessel certainly is not, correctly speaking, a French vessel.

If the *Amelia* was not, on 15 September, 1799, a French vessel within the description of the act of Congress, could her capture be lawful?

It is, I believe, a universal principle, which applies to those engaged in a partial as well as those engaged in a general war that where there is probable cause to believe the vessel met with at sea is in the condition of one

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liable to capture, it is lawful to take her and subject her to the examination and adjudication of the courts.

The *Amelia* was an armed vessel commanded and manned by Frenchmen. It does not appear that there was evidence on board to ascertain her character. It is not then to be questioned but that there was probable cause to bring her in for adjudication.

The recapture then was lawful.

But it has been insisted that this recapture was only lawful in consequence of the doubtful character of the *Amelia,* and that no right of salvage can accrue from an act which was founded in mistake and which is only justified by the difficulty of avoiding error, arising from the doubtful circumstances of the case.

The opinion of the Court is that had the character of the *Amelia* been completely ascertained by captain Talbot, yet as she was an armed vessel under French authority and in a condition to annoy the American commerce, it was his duty to render her incapable of mischief. To have taken out the arms of the crew was as little authorized by the construction of the act of Congress contended for by the claimants as to have taken possession of the vessel herself.

It has, I believe, been practiced in the course of the present war, and if not, is certainly very practicable, to man a prize and cruise with her for a considerable time without sending her in for condemnation. The property of such vessel would not, strictly speaking, be changed so as to become a French vessel, and yet it would probably have been a great departure from the real intent of Congress to

have permitted such vessel to cruise unmolested. An armed ship under these circumstances might have attacked one of the public vessels of the United States. The acts which have been recited expressly authorize the capture of such vessel so commencing hostilities by a private armed ship, but not by one belonging to the public. To suppose that a capture would in one case be lawful and in the other unlawful, or to suppose that even in the limited state of hostilities in which we were placed, two

vessels armed and manned by the enemy and equally cruising on American commerce might the one be lawfully captured while the other, though an actual assailant, could not, or if captured that the act could only be justified from the probable cause of capture furnished by appearances, would be to attribute a capriciousness to our legislation on the subject of war which can only be proper when inevitable.

There must, then, be incidents growing out of those acts of hostility specifically authorized which a fair construction of the acts will authorize likewise.

This was obviously the sense of Congress.

If, by the laws of Congress on this subject, that body shall appear to have legislated upon a perfect conviction that the state of war in which this country was placed was such as to authorize recaptures generally from the enemy, if one part of the system should be manifestly founded on this construction of the other part, it would have considerable weight in rendering certain what might before have been doubtful.

Upon a critical investigation of the acts of Congress, it will appear that the right of recapture is expressly given in no single instance but that of a vessel or goods belonging to a citizen of the United States.

It will also appear that the quantum of salvage is regulated as if the right to it existed previous to the regulation.

Although no right of recapture is given in terms for the vessels and goods belonging to persons residing within the United States not being citizens, yet an act, passed so early as 28 June, 1798, declares that vessels and goods of this description, when recaptured, shall be restored on paying salvage, thereby plainly indicating that such recapture was sufficiently warranted by law to be the foundation of a claim for salvage.

If the recapture of vessels of one description, not expressly authorized by the very terms of the act of Congress,

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be yet a rightful act, recognized by Congress as the foundation for a claim to salvage, which claim Congress proceeds to regulate, then it would seem that other recaptures from the same enemy are equally rightful; and where the claim they afford for salvage has not been regulated by Congress, such claim must be determined by the principles of general law.

In this situation remained the recaptured vessels of any other power also at war with France until the Act of 2 March, 1799, which regulates the salvage demandable from them. Neither by that act nor by any previous act was a power given in terms to recapture such vessels. But their recapture was an incident which unavoidably grew out of the state of war. On the capture of a French vessel, having with her as a prize the vessel of such a power, the prize was inevitably recaptured. On the idea that the recapture was lawful and that it was a foundation on which the right to salvage could stand, the legislature, in March, 1799, declared what the amount of that salvage should be.

The expression of this act is by no means explicit. If it extends to neutrals, then it governs in this case; if otherwise, the law respecting them continued still longer on the same ground with the law respecting a belligerent prior to the passage of the Act of 2 March, 1799. Thus it continued until 3 March, 1800, when the legislature regulated the salvage to be paid by neutrals recaptured from a power against which the United States have authorized defense or reprisals.

This act, having passed subsequent to the recapture of the *Amelia,* can certainly not affect that case as to the quantity of salvage, or give a right to salvage which did not exist before. But it manifests, in like manner with the laws already commented on, the system which Congress considered itself as having established. This act was passed at a time when no additional hostility against France could have been contemplated. It was only designed to keep up the defensive system which had before been formed and which it was deemed necessary to continue till the negotiation then pending should have a pacific termination. Accordingly there is no expression in the act extending

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the power of recapture or giving it in the case of neutrals. This power is supposed to exist as an incident growing out of the state of war and the right to salvage produced by that power is regulated in the act.

In case of a recapture subsequent to the act, no doubt could be entertained but that salvage, according to its terms, would be demandable. Yet there is not a syllable in it which would warrant an idea that the right of recapture was extended by it, or did not exist before.

It must then have existed from the passage of the laws which commenced a general resistance to the aggressions we had so long experienced and submitted to.

It is not unworthy of notice that the first regulation of the right of salvage in the case of a recapture, not expressly enumerated among the specified acts of hostility warranted by the law, is to be found in one of those acts which constitute a part of the very system of defense determined on by Congress, and is the first which subjects to condemnation the prizes made by our public ships of war.

It has not escaped the consideration of the Court that a legislative act founded on a mistaken opinion of what was law does not change the actual state of the law as to preexisting cases.

This principle is not shaken by the opinion now given. The court goes no further than to use the provisions in one of several acts forming a general system as explanatory of other parts of the same system, and this appears to be in obedience to the best established rules of exposition, and to be necessary to a sound construction of the law.

An objection was made to the claim of salvage by one of the counsel for the defendant in error, unconnected with the acts of Congress, and which it is proper here to notice.

He states that to give title to salvage, the means used must not only have produced the benefit, but must have

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been used with that sole view. For this he cites Beawes, Lex Mercatoria 158.

The principle is applied by Beawes to the single case of a vessel saved at sea by throwing overboard a part of her cargo. In that case, the principle is unquestionably correct, and in the case of a recapture it is as unquestionably incorrect. The recaptor is seldom actuated by the sole view of saving the vessel, and in no case of the sort has the inquiry ever been made.

It is then the opinion of the Court, on a consideration of the acts of Congress and of the circumstances of the case, that the recapture of the *Amelia* was lawful and that if the claim to salvage be in other respects well founded, there is nothing to defeat it in the character of the original taking.

It becomes then necessary to inquire:

2. Whether there has been such a meritorious service rendered to the recaptured as entitles the recaptor to salvage.

The *Amelia* was a neutral ship captured by a French cruiser and recaptured while on her way to a French port to be adjudged according to the laws of war.

It is stated to be the settled doctrine of the law of nations that a neutral vessel captured by a belligerent is to be discharged without paying salvage, and for this several authorities have been quoted and many more might certainly be cited. That such has been a general rule is not to be questioned. As little is it to be questioned that this rule is founded exclusively on the supposed safety of the neutral. It is expressly stated in the case of *The War Onskan,* cited from Robinson's Reports to be founded on this plain principle:

"That the liberation of a clear neutral from the hand of the enemy is no essential service rendered to him, inasmuch as that the same enemy would be compelled by the tribunals of his own country, after he had carried the neutral into port, to release him with costs and damages for the injurious seizure and detention."

It is not infrequent to consider and speak of a

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regular practice under a rule as itself forming a rule. A regular course of decisions on the text of the law constitutes a rule of construction by which that text is to be applied to all similar cases, but alter the text and the rule no longer governs. So in the case of salvage. The general principle is that salvage is only payable where a meritorious service has been rendered. In the application of this principle it has been decided that neutrals carried in by a belligerent for examination, being in no danger, receive no benefit from recapture, and ought not therefore to pay salvage.

The principle is that without benefit, salvage is not payable, and it is merely a consequence from this principle which exempts recaptured neutrals from its payment. But let a nation change its laws and its practice on this subject, let its legislation be such as to subject to condemnation all neutrals captured by its cruisers, and who will say that no benefit is conferred by a recapture? In such a course of things, the state of the neutral is completely changed. So far from being safe, he is in as much danger of condemnation as if captured by his own declared enemy. A series of decisions then, and of rules founded on his supposed safety, no longer apply. Only those rules are applicable which regulate a situation of

actual danger. This is not, as it has been termed, a change of principle, but a preservation of principle by a practical application of it according to the original substantial good sense of the rule.

It becomes then necessary to inquire whether the laws of France were such as to have rendered the condemnation of the *Amelia* so extremely probable as to create a case of such real danger that her recapture by captain Talbot must be considered as a meritorious service entitling him to salvage.

To prove this, the counsel for the plaintiff in error has offered several decrees of the French government, and especially one of 18 January, 1798.

Objections have been made to the reading of these decrees as being the laws of a foreign nation, and therefore facts which, like other facts, ought to have been

proved and to have formed a part of the case stated for the consideration of the court.

That the laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries unless proved as facts, and that this Court, with respect to facts, is limited to the statement made in the court below, cannot be questioned. The real and only question is whether the public laws of a foreign nation on a subject of common concern to all nations, promulgated by the governing powers of a country, can be noticed as law by a court of admiralty of that country or must be still further proved as a fact.

The negative of this proposition has not been maintained in any of the authorities which have been adduced. On the contrary, several have been quoted (and such seems to have been the general practice) in which the marine ordinances of a foreign nation are read as law without being proved as fact. It has been said that this is done by consent; that it is a matter of general convenience not to put parties to the trouble and expense of proving permanent and well known laws which it is in their power to prove, and this opinion is countenanced by the case cited from

Douglas. If it be correct, yet this decree having been promulgated in the United States as the law of France by the joint act of that department which is entrusted with foreign intercourse and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts.

It is therefore the opinion of the Court that the decree should be read as an authenticated copy of a public law of France interesting to all nations.

The decree ordains that

"The character of vessels relative to their quality of neuter or enemy shall be determined by their cargo; in consequence, every vessel found at sea loaded in whole or in part with merchandise the production of England or her possessions, shall be declared good prize whoever the owner of these goods or merchandise may be. "

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This decree subjects to condemnation in the courts of France a neutral vessel laden in whole or in part with articles the growth of England or any of its possessions. A neutral thus circumstanced cannot be considered as in a state of safety. His recaptor cannot be said to have rendered him no service. It cannot reasonably be contended that he would have been discharged in the ports of the belligerent with costs and damages.

Let us then inquire whether this was the situation of the *Amelia* . The first fact states her to have sailed from Calcutta in Bengal in April, 1799, laden with a cargo of the product and manufacture of that country. Here it is contended that the whole of Bengal may possibly not be in possession of the English, and therefore it does not appear that the cargo was within the description of the decree. But to this it has been answered that in inquiring whether the *Amelia* was in danger or not, this Court must put itself in the place of a French court of admiralty, and determine as such court would have determined. Doing this, there seems to be no reason to doubt that the cargo, without inquiring into the precise situation of the British power

in every part of Bengal, being *prima facie* of the product and manufacture of a possession of England, would have been so considered unless the contrary could have been plainly shown.

The next fact relied on by the defendant in error is that the *Amelia* was sent to be adjudged according to the laws of war, and from thence it is inferred that she could not have been judged according to the decree of the 18th of January.

It is to be remembered that these are the orders of the captor, and without a question, in the language of a French cruiser, a law of his own country furnishing a rule of conduct in time of war, will be spoken of as one of the laws of war.

But the third and fourth facts in the statement admit the *Amelia* with her cargo to have belonged to a citizen of Hamburgh, which city was not in a state of hostility with the Republic of France, but was to be considered as neutral between the then belligerent powers.

It has been contended that these facts not only do not show the recaptured vessel to have been one on which the decree could operate, but positively show that the decree could not have affected her.

The whole statement taken together amounts to nothing more than that Hamburgh was a neutral city, and it is precisely against neutrals that the decree is in terms directed. To prove, therefore, that the *Amelia* was a neutral vessel, is to prove her within the very words of the decree, and consequently to establish the reality of her danger.

Among the very elaborate arguments which have been used in this case, there are some which the Court deems it proper more particularly to notice.

It has been contended that this decree might have been merely *in terrorem,* that it might never have been executed, and that being in opposition to the law of nations, the Court ought to presume it never would have been executed.

But the Court cannot presume the laws of any country to have been enacted *in terrorem,* nor that they will be disregarded by its judicial authority. Their obligation on their own courts must be considered as complete, and without resorting either to public notoriety, or the declarations of our own laws on the subject, the decisions of the French courts must be admitted to have conformed to the rules prescribed by their government.

It has been contended that France is an independent nation, entitled to the benefits of the law of nations, and further that if she has violated them, we ought not to violate them also, but ought to remonstrate against such misconduct.

These positions have never been controverted, but they lead to a very different result from that which they have been relied on as producing.

The respect due to France is totally unconnected with the danger in which her laws had placed the *Amelia;* nor

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is France in any manner to be affected by the decree this Court may pronounce. Her interest in the vessel was terminated by the recapture, which was authorized by the state of hostility then subsisting between the two nations. From that time it has been a question only between the *Amelia* and the recaptor, with which France has nothing to do.

It is true that a violation of the law of nations by one power does not justify its violation by another, but that remonstrance is the proper course to be pursued, and this is the course which has been pursued. America did remonstrate, most earnestly remonstrate to France against the injuries committed on her; but remonstrance having failed, she appealed to a higher tribunal, and authorized limited hostilities. This was not violating the law of nations, but conforming to it. In the course of these limited hostilities, the *Amelia* has been recaptured, and the inquiry now is not whether the conduct of France would justify a departure from the law of nations, but what is the real law in the case. This depends on the danger from which she has been saved.

Much has been said about the general conduct of France and England on the seas, and it has been urged that the course of the latter has been still more injurious than that of the former. This is a consideration not to be taken up in this cause. Animadversions on either in the present case would be considered as extremely unbecoming the Judges of this Court, who have only to inquire what was the real danger in which the laws of one of the countries placed the *Amelia,* and from which she has been freed by her recapture.

It has been contended that an illegal commission to take, given by France, cannot authorize our vessels to retake; that we have no right by legislation to grant salvage out of the property of a citizen of Hamburgh, who might have objected to the condition of the service.

But it is not the authority given by the French government to capture neutrals which is legalizing the recapture made by captain Talbot; it is the state of hostility between the two nations which is considered as having authorized that act. The recapture having been made lawfully, then the right to salvage, on general principles, depends

on the service rendered. We cannot presume this service to have been unacceptable to the Hamburgher, because it has bettered his condition; but a recapture must always be made without consulting the recaptured. The act is one of the incidents of war, and is in itself only offensive as against the enemy. The subsequent fate of the recaptured depends on the service he has received and on other circumstances.

To give a right to salvage, it is said there must be a contract either express or implied.

Had Hamburgh been in a state of declared war with France, the recaptured vessels of that city would be admitted to be liable to pay salvage. If a contract be necessary, from what circumstances would the law in that state of things imply it? Clearly from the benefit received and the risk incurred. If in the actual state of

things there were also benefit and risk, then the same circumstances concur, and they warrant the same result.

It is also urged that to maintain this right, the danger ought not to be merely speculative, but must be imminent and the loss certain.

That a mere speculative danger will not be sufficient to entitle a person to salvage is unquestionably true. But that the danger must be such that escape from it by other means was inevitable cannot be admitted.

In all the cases stated by the counsel for the defendant in error, safety by other means was possible, though not probable. The flames of a ship on fire might be extinguished by the crew or by a sudden tempest. A ship on the rocks might possibly be got off by the aid of wind and tides without assistance from others. A vessel captured by an enemy might be separated from her captor, and if sailors had been placed on board the prize, a thousand accidents might possibly destroy them, or they might even be blown by a storm into a port of the country to which the prize vessel originally belonged.

It cannot, therefore, be necessary that the loss should be inevitably certain, but it is necessary that the danger should

be real and imminent. It is believed to have been so in this case. The captured vessel was of such description that the law by which she was to be tried, condemned her as good prize to the captor. Her danger then was real and imminent. The service rendered her was an essential service, and the Court is therefore of opinion that the recaptor is entitled to salvage.

The next object of inquiry is what salvage ought to be allowed. The captors claim one-half the gross value of the ship and cargo. To support this claim they rely on the act "for the government of the navy of the United States," passed 2 of March, 1799. This act regulates the salvage payable on the ships and goods belonging to the citizens of the United States, or to the citizens or subjects of any nation in

amity with the United States retaken from the enemy.

It has been contended that the case before the Court is in the very words of the act. That the owner of the *Amelia* is a citizen of a state in amity with the United States, retaken from the enemy. That the description would have been more limited had the intention of the act been to restrain its application to a recaptured vessel belonging to a nation engaged with the United States against the same enemy.

The words of the act would certainly admit of this construction.

Against it, it has been urged, and we think with great force, that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations or the general doctrines of national law. If the construction contended for be given to the act, it subjects to the same rate of salvage a recaptured neutral and a recaptured belligerent vessel. Yet according to the law of nations, a neutral is generally to be restored without salvage.

This argument in the opinion of the Court derives great additional weight from the consideration that the act in question is not temporary, but permanent. It is not merely fitted to the then existing state of things, and

calculated to expire with them, but is a regulation applying to present and future times.

Whenever the danger resulting to captured neutrals from the laws of France should cease, then, according to the principles laid down in this decree, the liability of recaptured neutrals to the payment of salvage would, in conformity with the general law and usage of nations, cease also. This event might have happened, and probably did happen, before hostilities between the United States and France were terminated by a treaty. Yet if this law applies to the case, salvage from a recaptured neutral would still be demandable.

This act, then, if the words admit it, since it provides a permanent rule for the payment of salvage, ought to be construed to apply only to cases in which salvage is permanently payable.

On inspecting the clause in question, the Court is struck with the description of those from whom the vessel is to be retaken in order to come within the provisions of the act. The expression used is "the enemy." A vessel retaken from the enemy. The enemy of whom? The Court thinks it not unreasonable to answer of both parties. By this construction the act of Congress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will always hold sacred.

If this act does not comprehend the case, then the Court is to decide on a just estimate of the danger from which the recaptured was saved, and of the risk attending the retaking of the vessel, what is a reasonable salvage. Considering the circumstances and considering also what rule has been adopted in other courts of admiralty, one-sixth appears to be a reasonable allowance.

It is therefore the opinion of the Court that the decree of the Circuit Court held for the District of New York was correct in reversing the decree of the district court, but not correct in decreeing the restoration of the *Amelia* without paying salvage. This Court therefore is of opinion that the decree, so far as the restoration of the

Amelia without salvage is ordered, ought to be reversed, and that the *Amelia* and her cargo ought to be restored to the claimant, on paying for salvage one sixth part of the net value after deducting therefrom the charges which have been incurred.