CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

AUGUST TERM, 1801.

The AMELIA.

SILAS TALBOT *v.* HANS FRED. SEEMAN.

Salvage.—Partial war.—Foreign laws.

Salvage allowed to a United States ship of war, for the recapture of a Hamburg vessel out of the hands of the French (France and Hamburg being neutral to each other), on the ground that she was in danger of condemnation under the French decree of the 18th January 1798.

The United States and France, in the year 1799, were in a state of partial war.[1]

To support a demand for salvage, the recapture must be lawful, and a meritorious service must be rendered.

Probable cause is sufficient to render the recapture lawful.

Where the amount of salvage is not regulated by statute, it must be determined by the principles of general law.[2]

Marine ordinances of foreign countries, promulgated by the executive, by order of the legislature of the United States, may be read in the courts of the United States, without further authentication or proof.

Municipal laws of foreign countries are generally to be proved as facts.

THIS was a writ of error to reverse a decree of the Circuit Court, which reversed the decree of the District Court of New York, so far as it allowed salvage to the recaptors of the ship Amelia and her cargo.

The libel in the district court was filed November 5th, 1799, by Captain Talbot, in behalf of himself and the other officers and crew of the United States ship of war the Constitution, against the ship Amelia, her tackle, furniture and cargo; and set forth—

1. That in pursuance of instructions from the president of the United States he subdued, seized, &c., on the high seas, the said ship Amelia and cargo, &c., and brought her into the port of New York.

2. That at the time of capture, she was armed with eight carriage-guns, and was under the command of citoyen Etienne Prevost, a French officer

[1] Bas *v.* Tingy, 4 Dall. 37.

[2] Post *v.* Jones, 19 How. 150; Tyson *v.* Prior, 1 Gallis. 133; The Emulous, 1 Sumn. 207; The Cora, 2 W. C. C. 80.

of marine, and had on board, besides the commander, eleven French mariners. That the libellant had been informed, that she, being the property of some person to him unknown, sailed from Calcutta, an English port in the East Indies, bound for some port in Europe; that upon her said voyage she was met with and captured by a French national corvette, called La Diligente, commanded by L. J. Dubois, who took out of her the master and crew of the Amelia, with all the papers relating to her and her cargo, and placed the said Etienne Prevost, and the said French mariners, on board of her, and ordered her to St. Domingo for adjudication, as a good and lawful prize; *2] and that she remained in the *full and peaceable possession of the French from the time of her capture, for the space of ten days, whereby, the libellant was advised, that, as well by the law of nations as by the particular laws of France, the said ship became, and was to be considered, as a French ship.

Whereupon, he prayed usual process, &c., and condemnation; or, in case restoration should be decreed, that it might be on payment of such salvage as by law ought to be paid for the same.

The claim and answer of Hans Frederic Seeman, in behalf of Messrs. Chapeau Rouge & Co., of Hamburg, owners of the ship Amelia and her cargo, stated, that the said ship, commanded by Jacob F. Engelbrecht, as master, sailed on the 20th of February 1798, from Hamburg, on a voyage to the East Indies, where she arrived safe; that in April 1799, she left Calcutta, bound to Hamburg; that during her voyage, and at the time of her capture by the French, she and her cargo belonged to Messrs. Chapeau Rouge & Co., citizens of Hamburg, and if restored, she will be wholly their property; that on the 6th of September, on her voyage home, she was captured on the high seas by a French armed vessel, commanded by citizen Dubois, who took out the master and thirteen of her crew, and all her papers, leaving on board the claimant, who was mate of the Amelia, the doctor and five other men. That the French commander put on board twelve hands, and ordered her to St. Domingo, and parted from her on the fifth day after her capture. That on the 15th of September, the Amelia, while in possession of the French, was captured, without any resistance on her part, by the said ship of war the Constitution, and brought into New York. That the Amelia had eight carriage guns, it being usual for all vessels in the trade she was carrying on, to be armed, even in times of general peace. That there being peace between France and Hamburg, at the time of the first capture, and also between the United States and Hamburg, and between the United States and France, the possession of the Amelia by the French, in the manner, and for the time stated in the said libel, could, neither by the law of nations, nor by the laws of France, nor by those of the United States, change the property of the said ship Amelia and her *3] cargo, or make the same liable *to condemnation in a French court of admiralty; that the same could not, therefore, be considered as French property: wherefore, he prayed restoration in like plight as at the time of capture by the ship Constitution, with costs and charges.

On the 16th of December 1799, the district judge, by consent of parties made an interlocutory decree, directing the marshal to sell the ship and cargo, and bring the money into court; and that the clerk should pay half of the amount of sales to the claimant, on his giving security to refund, in case

the court should so decree; and that the clerk should retain the other half in his hands, together with all costs and charges, &c.

Afterwards, on the 25th of February 1800, the judge of the district court (HOBART) made his final decree, directing half of the gross amount of sales of the ship and cargo, without any deduction whatever, to be paid to the libellant for the use of the officers and crew of the ship Constitution, to be distributed according to the act of congress for the government of the navy of the United States. And that out of the other moiety, the clerk should pay the officers of the court, and the proctors for the libellant and claimant, their taxed costs and charges, and that the residue should be paid to the owners of the Amelia, or their agent. From this decree, the claimant appealed to the circuit court.

At the Circuit Court for the district of New York, in April 1800, before Judge WASHINGTON and the district judge, the cause was argued by *B. Livingston* and *Burr* for the appellant, and *Harrison* and *Hamilton*, for the respondent; and on the 9th of April 1800, the circuit court made the following decree, viz.:

"That the decree of the district court, so far forth as it orders a payment, by the clerk, of a moiety of the gross amount of sales, to Silas Talbot, commander, &c., and to the officers and crew of the said ship Constitution, is erroneous, and so far forth, be reversed without costs; that is to say, the court considering the admission on *the part of the respondent, that the papers brought here by Jacob Frederic Englebrecht, master of the [*4 ship Amelia, prove her and her cargo to be Hamburg property, and also considering that as the nation to which the owners of the said ship and cargo belong, is in amity with the French republic, the said ship and cargo could not, consistently with the laws of nations, be condemned by the French as a lawful prize, and that, therefore, no service was rendered by the United States ship of war the Constitution, or by the commander, officers or crew thereof, by the recapture aforesaid.

"Whereupon, it is ordered, adjudged and decreed by the court, and it is hereby ordered, adjudged and decreed by the authority of the same, that the former part of the decree of the district court, by which a moiety of the proceeds is allowed to the commander, officers and crew aforesaid, be and the same is hereby reversed. And the court further considering all the circumstances of the present case, arising from the capture and recapture stated in the libel and claim and answer, and that by the sale of the said ship Amelia and her cargo, made with the express consent of the appellant, the costs and charges in this cause have nearly all accrued, and that, therefore, the expenses should be defrayed out of the proceeds, thereupon, it is hereby further ordered, adjudged and decreed by the court, that so much of the said decree of the said district court as relates to the payment by the clerk, to the several officers of the court, and to the proctors of the libellant and claimant in this cause, of their taxed costs and charges, out of the other moiety of the said proceeds, and also of the residue of the said last-mentioned moiety, after deducting the costs and charges aforesaid, to the owner or owners of the said ship Amelia and her cargo, or to their legal representatives, be and the same is hereby affirmed."

To reverse this decree, the libellant sued out a writ of error to the

supreme court, and by consent of parties, the following statement of facts was annexed to the record which came up.

*5] *"The ship Amelia sailed from Calcutta, in Bengal, in the month of April 1799, loaded with a cargo of the product and manufacture of that country, consisting of cotton, sugars and dry goods in bales, and was bound to Hamburg. On the 6th of September, in the same year, she was captured, while in the pursuit of her said voyage, by the French national corvette La Diligente, L. J. Dubois, commander, who took out her master and part of her crew, together with most of her papers, and placed a prize-master and French sailors on board of her, ordering the prize-master to conduct her to St. Domingo, to be judged according to the laws of war. On the 15th of the same month of September, the United States ship of war the Constitution, commanded by Silas Talbot, Esq., the libellant, fell in with and recaptured the Amelia, she being then in full possession of the French, and pursuing her course for St. Domingo, according to the orders received from the captain of the French corvette.

"At the time of the recapture, the Amelia had eight iron cannon mounted, and eight wooden guns, with which she left Calcutta, as before stated. From such of the ship's papers as were found on board, and the testimony in the cause, the ship Amelia and her cargo appear to have been the property of Chapeau Rouge, a citizen of Hamburg, residing and carrying on commerce in that place. It is conceded, that the republic of France and the city of Hamburg are not in a state of hostility to each other; and that Hamburg is to be considered as neutral between the present belligerent powers.

"The Amelia and her cargo, having been sent by Captain Talbot to New York, were there libelled in the district court, and such proceedings were thereupon had in that court, and the circuit court for that district, as may appear by the writ of error and return."

*6] *The cause now came on to be argued, at August term 1801, by *Bayard* and *Ingersoll*, for the libellant, and *Dallas*, *Mason* and *Levy*, for the claimant.

For the *libellant*, three points were made. 1. That at the time, and under the circumstances, the ship Amelia was liable to capture by the law, and instructions to seize French armed vessels, for the purpose of being brought into port, and submitted to legal adjudication in the courts of the United States. 2. That Captain Talbot, by this capture, saved the ship Amelia from condemnation in a French court of admiralty. 3. That for this service, upon abstract principles of equity and justice, according to the law of nations, and the acts of congress, the recaptors are entitled to a compensation for salvage.

I. Had Captain Talbot a right to seize the Amelia, and bring her into port for adjudication?

The acts of congress on this subject ought all to be considered together and in one view. This is the general rule of construction, where several acts are made *in pari materia*. Plowd. 206; 1 Atk. 457, 458.

The first act authorizing captures of French vessels, is that of 28th May 1798. (1 U. S. Stat. 561.) The preamble recites, that "whereas, armed vessels sailing under authority, or pretence of authority, from the republic of France, have committed depredations on the commerce of the United

States," &c., therefore it is enacted, that the president be authorized to instruct and direct the commanders of the armed vessels of the United States "to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing, depredations on the vessels belonging to citizens thereof; and also to retake any ship or vessel of *any citizen or citizens of the United States, which may have been captured by any such armed vessel." [*7

The Amelia was "an armed vessel, sailing under authority from the republic of France," and if she had committed, or had been found hovering on the coast, for the purpose of committing, depredations on the vessels of the citizens of the United States, she would have been clearly liable to capture under this act of congress. This act is entitled "an act more effectually to protect the commerce and coasts of the United States;" and by it, the objects of capture are limited to "armed vessels, sailing under authority, or pretence of authority, from the republic of France, which shall have committed, or which shall be found hovering on the coasts of the United States, for the purpose of committing, depredations," &c.

It was soon perceived, that a right of capture, so limited, would not afford, what the act contemplated, an effectual protection to the commerce of the United States. Congress therefore, on the 9th July 1798, at the same session, passed the "act further to protect the commerce of the United States" (1 U. S. Stat. 578), and thereby took off the restriction of the former act, which limited captures to vessels having actually committed depredation, or which were hovering on the coast for that purpose. This act authorizes the capture of any "armed French vessel, on the high seas," and if the Amelia was such an armed French vessel as is contemplated by this act, she was liable to capture, and it was the duty of Captain Talbot to take her and bring her into port.

Another act was passed at the same session, on the 25th June 1798 (1 U. S. Stat. 572), entitled "an act to authorize the defence of the merchant vessels of the United States against French depredations," which, as it constitutes a part of that system of defence and opposition which the legislature had in view, ought to be taken into consideration. It enacts, that merchant vessels of citizens of the United States may oppose and defend against any search, restraint or seizure which shall be attempted "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 in case of attack, may repel the same, and subdue and capture the vessel.

The court, *in construing any one of these laws, will not confine themselves to the strict letter of that particular law, but will consider the spirit of the times, and the object and intention of the legislature. It is evident, by the title of the act of the 9th July 1798, and by the general complexion of all the acts of that session upon the subject, that it was not the intention of congress, by the act of July 9th, to restrict the cases of capture contemplated by the act of 28th May, but to enlarge them. The spirit of the people was roused; they demanded a more vigorous and a more effectual opposition to the aggressions of France, and the spirit of congress rose with that of the people. It cannot be supposed, that having, in May, [*8

used the expression, "armed vessels, sailing under authority, or pretence of authority, from the republic of France," and in June the expression, "any armed vessel, sailing under French colors, or acting, or pretending to act, by or under the authority of the French republic," they meant to restrict the cases of capture, in July, when they used the words "any armed French vessel." On the contrary, the confidence in the national opinion was increased, and further measures of defence were adopted, intending not to recede from anything done before, but to amplify the opposition. The act of July was in addition to, not in derogation from, the act of May. Congress evidently meant the same description of vessels, in each of those acts. "Armed vessels, sailing under authority, or pretence of authority, of France," and "armed vessels sailing under French colors, or acting, or pretending to act, under the authority of the French republic," and "armed French vessels," must be understood to be the same.

If there is a difference, no reason can be given for it. A vessel, in the circumstances of the Amelia, was as capable of annoying our commerce, as if she had been owned by Frenchmen. Her force was at the command of France, and there can be no doubt, but she would have captured any unarmed American that might have fallen in her way. She was, therefore, one of the objects of that hostility which congress had authorized. Congress have the power of declaring war: they may declare a general war or a partial war: so, it may be a general maritime war, or a partial maritime war.

*9] *This court, in the case of *Bas* v. *Tingy* (*The Eliza*, 4 Dall. 37), have decided, that the situation of this country with regard to France, was that of a partial and limited war. The substantial question here is, whether the case of the Amelia is a *casus belli?* whether she was an object of that limited war? The kind of war which existed was a war against all French force found upon the ocean, to seize it and bring it in, that it might not injure our commerce. It is precisely as if congress had authorized the capture of all French vessels, excepting those unarmed. If such had been the expressions, there could be no doubt of the right to capture. The object of the war being to destroy French armed force, and not French property, it made no difference in whom the absolute property of the vessel was, if her force was under the command of France. Suppose, the Amelia had captured an American, by what nation would the capture be made? by Hamburg or by France? There can be no doubt, but the injury would be attributed to France. She was under French colors, armed, and to every intent an object of the partial war which existed; and if so, her case is governed by the rights of war, and by the law of nations, as they exist in a state of general war.

Perhaps, it may be said, that this proves too much, and that, if true, the Amelia must be condemned as prize. This would be true, if the rights of a third party did not interfere. Having accomplished the object of the war, as it relates to this case, in wresting from France the armed force, we must now respect the rights of a neutral nation, and restore the property to its lawful owner. But this is a subsequent consideration: it is only necessary now to show that the capture was so far a lawful act, as to be capable of supporting a claim of salvage. At first view, she certainly presented the appearance of such an armed French ship as the libellant was bound in duty to seize and bring in, at least, for further examination. He had probable

cause, at least, which is sufficient to justify the seizure and detention. But if she was liable to be condemned by France, being in the hands and possession of the French, she was within the scope of the war which existed between the United States and France; she was within the meaning of the act of congress.(*a*)

*The act of July gives no new authority to recapture American vessels; it only gives to private armed vessels the same right which the act of May gives to the public armed vessels, to make captures and recaptures. But the act of May only authorizes the recapture of American vessels, "which may have been captured by any such armed vessel," *i. e.*, by armed vessels sailing under authority from the republic of France, and which shall have committed, or be found hovering on the coasts, for the purpose of committing, depredations on our commerce." Yet, the instructions from the president were to recapture all American vessels. These instructions show the opinion of the executive upon the construction of the acts of congress—and for that purpose they were offered to be read. [*10

The counsel for the *claimant* objected to their being read, because they were not in the record. The counsel for the *libellant* contended, they had a right to read them as matter of opinion, but did not offer them as matter of fact.(*b*) The court refused to hear them.

II. The second point is, that a service was rendered to the owners of the Amelia, by the recapture, inasmuch *as she was thereby saved from condemnation in a French court of admiralty. To support this position, the counsel for the *libellant* relied on the general system of violation of neutral rights adopted by France. [*11

In general cases, when belligerents respect the law of nations, no salvage can be claimed for the recapture of a neutral vessel, because no service is rendered; but rather a disservice, because the captured would, in the courts

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(*a*) *Bayard.*—What authority is there for American armed vessels to recapture British vessels taken by the French?

Chase, J.—"Is there any case, where it has been decided in our courts, that such a recapture was lawful? It has been so decided in the English courts."

The counsel on both sides admitted that no such case had occurred in this country.

(*b*) Chase, J.—I am against reading the instructions, because I am against bringing the executive into court on any occasion. It has been decided, as I think, in this court, that instructions should not be read. I think it was in a case of instructions to the collectors. It was opposed by Judge Iredell, and the opposition acquiesced in by the court.

Paterson, J.—The instructions can only be evidence of the opinion of the executive, which is not binding upon us.

Marshall, C. J.—I have no objection to hearing them, but they will have no influence on my opinion.

Moore, J.—Mr. Bayard can state all they contain, and they may be considered as part of his argument.

Bayard.—May I be permitted to read them as a part of my speech?

The Court.—We are willing to hear them as the opinion of Mr. Bayard, but not as the opinion of the executive.

Bayard.—I acquiesce in the opinion of the court. My reasons for wishing to read them were, because the opinion of learned men, and men of science, will always have some weight with other learned men. And the court would consider well the opinien of the executive, before they would decide contrary to it.

of the captors, recover damages and costs for the illegal capture and detention.

The principle upon which the circuit court decided, is not denied; but it is contended, that a service was rendered by the recapture. To show this, the counsel for the libellant offered to read the message from the president to both houses of congress, of 4th May 1798, containing the communications from our envoys extraordinary at Paris, to the department of state, and sundry *arrêts* and decrees of the government of France, in violation of neutral rights, and of the law of nations; and particularly the decree of the council of five hundred of 29th Nivose, an 6 (Jan. 18, 1798), which declares, "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 of her possessions, shall be declared good prize, whoever the owner of these goods or merchandise may be."

The counsel for the *claimant* objected to the reading of those dispatches, because they were matter of fact. No new fact can be shown on the writ of error. Neither the pleadings, nor the statement of facts accompanying the record, give notice of introducing this new matter. By the act of congress (1 U. S. Stat. 83, § 19), *a state of the case must come up with the record; and is conclusive on this court. *Wiscart* v. *D'Auchy*, 3 Dall. 321. On p. 327, ELLSWORTH, Chief Justice, said, a writ of error removes only matter of law. *Arrêts* and decrees of foreign governments are matters of fact, and must be proved as such, and the court cannot notice them unless
*12] shown in the *pleadings, admitted or proved. *Freemoult* v. *Dedire*, 1 P. Wms. 429, 431; *Bernardi* v. *Motteux*, Doug. 557. The same case in the 2d edition, p. 575–79. In that case, the court could not take notice of the *arrêt* of July 1778, as it had not been given in evidence at the trial.

The general conduct of France is a matter of fact, which can only be noticed by the sovereign of the state. Judgment upon a writ of error must be upon the same facts upon which the judgment below was predicated. 3 Bl. Com. 405 (Williams's edit. 407); 8 T. R. 438, 434, 566. If it is matter of law, it is not such law as is binding upon this court, and therefore, they cannot officially take notice of it. Foreign laws must be proved as facts. 3 Woodeson 306; 2 Eq. Cas. Abr. 289, 476; *Way* v. *Yally*, 2 Salk. 651; s. c. 6 Mod. 195; *Mostyn* v. *Fabrigas*, Cowp. 174–5. The law must be given in evidence. 1 Bos. & Pul. 171, 175, 138; 8 T. R. 566. Facts cannot be adduced to contradict the record. 8 T. R. 438. In *The Providentia*, 2 Rob. 126 (Am. edit.), Dr. Scott relied on the king's instructions, but that was because the king has the power of war and peace.

A state of the case is like a special verdict; nothing new can be added to it. In *The Santa Cruz*, 1 Rob. 57, Dr. Scott required the ordinances of Portugal to be proved, and evidence of the decisions of their tribunals upon them.

On the contrary, it was said by the counsel for the *libellant*, that this case differs from evidence offered to a jury. In chancery, if evidence is not legal, the chancellor will hear it, but will give it no weight. The pamphlet containing the despatches is offered to be read, not to show what are the municipal laws of France, but what is the law of nations in France; to

show how it has been modified by that government. We are before this court as a court of admiralty, and not as a court of common law. All the world are parties to a decree of a court of admiralty. *Bernardi* v. *Motteux*, Doug. 560 or 581. This court is now to decide by the law of nations, not by municipal regulations. *All the cases cited against us are cases in common-law courts. But courts of admiralty take notice of foreign ordinances which affect the law of nations, without their being shown in evidence. *The Maria*, 1 Rob. 288 (Eng. ed. 341); and s. c. 1 Rob. 304 (Eng. ed. 363). [*13

The object in reading these dispatches is to show that the law of nations was not respected in France; that the construction of their courts of admiralty was such, that their decisions could not conform to the law of nations; that the law of nations has been so modified in France, that there was no certainty of indemnity for neutrals, and that by the decrees and *arrêts* of that government, the Amelia would have been condemned. They are offered as the official communications of our authorized agents abroad to the executive, and by that department communicated to congress, and published, in conformity to an act of congress (1 U. S. Stat. 612), for the information of the citizens of the United States. This act of congress has made them proper evidence before this court; who are, therefore, bound to notice them. On the subject of admitting foreign ordinances in a court of admiralty, no difficulty ever occurred. The objections are only to private municipal regulations. Such, it is admitted, must be proved as facts, but not when they are offered as explaining the law of nations. In *The Maria*, 1 Rob. 288 (Am. ed.), this very decree is cited; and it is immaterial to us, whether we read it out of the dispatches or out of the book which the opposite counsel have already cited for other purposes. By the same rule that they read pages 57 and 126, we may surely read page 288.

On the part of the *claimant* it was replied: That this decree is not an act of congress, nor the law of nations, but simply a law of France. The record is confined to the facts which originally came up with the writ of error, or such as may afterwards be procured upon a suggestion of diminution. It is admitted, that in equity, on an appeal to the house of lords, nothing new can be received. And nothing ought now to be read which was not before the circuit court, or which that *court was bound to notice. In the cases cited by the opposite counsel, the *arrêts* were read by consent. A common-law court is as much bound as a court of admiralty, to take notice of the law of nations, on a question where that law applies; and the rules by which common-law courts are bound, as to evidence of the law of nations, are equally binding on courts of admiralty. [*14

The Court suffered the dispatches and decrees of France to be read, but reserved the question, whether they ought to be considered in their decision of this cause, until the whole argument of the case should be finished.

The counsel for the *libellant* proceeded in the argument on the second point. The decree of the 18th of January 1798, was not repealed, until the 14th of December 1799, and consequently, was in full force at the time of the capture, on the 6th of September 1799. The facts stated in the appendix

to vol. 2 of Robinson's Reports, show that the French had discarded the law of nations, and that their conduct towards neutrals had been such as to exclude every possibility of escape. So notorious was this conduct, that Sir WILLIAM SCOTT makes it the ground of his decision in various cases.

It is not necessary to show, that the Amelia would certainly have been condemned. To entitle to salvage, it is only necessary to show that she was in a better condition by the recapture. Her cargo was the production of the possessions of England, and therefore, by the decree of the 18th January 1798, was liable to condemnation. The general conduct of France and of the French courts of admiralty towards neutrals has been repeatedly adjudged by Sir WILLIAM SCOTT a good ground for salvage. (*The Two Friends*, 1 Rob. 232 ; *The War Onskan*, 2 Ibid. 246.)

III. But without resorting to the general principle of a service being a ground for salvage, we claim it under the express terms of the act of congress of the 2d of March 1799, entitled "an act for the government of the
*15] navy of the United States," § 7 (1 U. S. Stat. 716), by *which it is enacted, "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, &c., and if after ninety-six hours, one-half ; all of which is to be paid without any deduction whatsoever."

In the case of *Bas* v. *Tingy* (3 Dall. 37), it was decided by this court, that France was to be considered as an enemy. The case of the Amelia comes within the very words of this act of congress. She is a ship belonging to citizens of a nation in amity with the United States, retaken from the enemy, after a possession of ninety-six hours.

By the act of congress of 25th June 1798 (1 U. S. Stat. 572), property of American citizens, recaptured by armed merchant vessels, is to be restored, on the payment of not less than one-eighth, and not more than one-half, for salvage. And by the act of the 3d March 1800, not less than one-sixth is allowed on recapture by a private armed vessel, and one-eighth by a public ship-of-war. If, then, the recapture of this vessel was a lawful act, and if service was rendered thereby to the owners, the recaptors are entitled to salvage, and the rate of that salvage is, by the act of congress, fixed at one-half of the value of the ship and cargo.

On the part of the *claimant*, it was said, that if France and America were at peace, the recapture was not authorized by the law of nations. The claim of salvage must rest on two grounds : 1. A right to interfere. 2. A benefit conferred on the owners.

I. It is admitted, that a belligerent has a right to detain a neutral vessel and carry her into port for the purpose of examination. The possession of a belligerent must, by third parties, be considered as lawful, whatever may
*16] be the motive or intent of such possession. (2 Woodeson 424.) *The belligerent has a lawful right to search merchant vessels, and this right cannot be considered as injurious to the fair neutral trader. Resistance to such search is unlawful, and such resistance, a rescue, or an escape, are sufficient causes to condemn the neutral vessel. (Vattel, lib. 3, c. 7, § 114, p. 507 ; *The Maria*, 1 Rob. 304.)

The act of the recaptors, then, being in aid of the unlawful resistance of the neutral, must in itself be illegal. The courts of the captors only are competent to decide the question of prize or no prize. American citizens have no right to interfere, and wrest the neutral vessel from the possession of the belligerent.

The French have been represented as pirates, *hostes humani generis.* But if France has waged so general a war on neutral property, has not England done the same? We find in their courts, that when a benefit is to accrue to British subjects, by such a decision, they decide that France must be presumed to respect the law of nations and to decree the restitution. *The Betsey*, 1 Rob. 84–5; *Geyer* v. *Aguilar*, 7 T. R. 695; but when salvage is to be given to British recaptors of neutral property, then it appears that France has lost all regard for the law of nations, and there is no chance of escape from her courts of admiralty. *The Two Friends*, 1 Rob. 232; *The War Onskan*, 2 Ibid. 246.

But it is contended, that the courts of France would have decided according to the decree of the 18th January 1798, and not according to the law of nations. This is not to be presumed; but if it was, however tyrannical the conduct of a belligerent may be, no neutral can lawfully interfere, unless she herself is injured, or her property or rights are affected; and even then individuals cannot act. The injury must be redressed by the government, in the way of negotiation or war. What was the conduct of our government in such a case? It first chose to negotiate, and then to prepare for war. At the time the negotiation was begun, all the injurious decrees were in force, full in the view of the legislature, who authorized certain measures of hostility: but no citizen could *go one step beyond what was authorized. The liability of the Amelia to condemnation in a French court of admiralty, created no right in Captain Talbot to capture her, even if that condemnation was certain. [*17

But the facts of this case do not warrant such a conclusion. The fact stated is, that "the ship Amelia sailed from Calcutta, in Bengal, in the month of April 1799, loaded with a cargo of the product and manufacture of that country." What country? Bengal. But Bengal is not stated to be one of the possessions of England. Not long since, the province of Bengal was in possession of sovereign princes; but it does not appear how far they have been subdued by the English. It is true, that the libel speaks of Calcutta as being an English port in the East Indies, but it does not follow, that the whole country of Bengal has been subjected to the British power. Besides, it is not the port from whence the vessel sails which taints the cargo, but its quality, as being the production of an English possession. Hence, it does not appear, that the Amelia was liable to condemnation under the decree of the 18th January 1798, and we cannot presume that she would have been condemned. The French captors did not pretend she was liable under that decree, but sent her in to be judged according to the laws of war; that is, according to the law of nations as applicable to a state of war; and there being no fact stated to the contrary, we are to suppose, that she would have been so judged, and not otherwise. To have interfered on our part to prevent this would have been a just cause of hostilities against us. No citizen ought to be allowed to come into our courts to claim a reward, for an act which hazards the peace of the country.

If benefit be the criterion of salvage, then the greater the service the greater ought to be the salvage. But if the construction given by the opposite counsel to the act of 2d March 1799, be correct, then the same salvage is due for the re-capture of a clear neutral, as of a belligerent. And yet, in common wars, no salvage at all is due for the re-capture of a neutral.

Every neutral nation has a right to choose her own manner of redress. We have no right to interfere, or to decide how far her vessels are liable to condemnation under French decrees. She may be willing to trust to the
*18] *chances of acquittal or indemnification. We have no right to legislate upon the property of a foreign independent nation, and to say, that we will, whether you consent or not, rescue your vessels from the French, and then make you pay us salvage. (Vatt. lib. 2, c. 1, § 7, p. 123.) If an act, intended solely for my benefit, is advantageous to another, I am not entitled to reward. (*The Vryheid*, 2 Rob. 23–4.) In order to ground a claim of salvage, the danger of the property must have been, not hypothetical, but absolute ; not distant and uncertain, but immediate and imminent : the act of saving must have been done with that sole intent, and must have been attended with labor, loss, expense or hazard to the salvor. The Amelia was taken by Captain Talbot, and libelled as a French vessel ; his object was not to save a neutral, but to capture a belligerent. Under such a mistake, he might have a right to examine her further, but the moment she proved to be neutral property, he ought to have released her. His mistake can be no ground for a claim of salvage : it is a mere justification of an act of force, and as such may save him from the payment of damages and costs. In this case, there was no danger to the property, no trouble in saving it, nor any intention to benefit the owners. In Beawes' Lex Mer., vol. 1, p. 158, it is said, that to support a claim of salvage, the vessel must be in evident hazard, and must be saved by means used with that sole view.

The owner was a citizen of an independent nation, and ought to have had his election. Where is the law or the authority that allows salvage to one belligerent taking from another the property of a neutral ? By the state of the case, this vessel was neutral as to all the belligerent powers. If the captor had applied for her, she must have been given up, upon the authority of the case of *Glass* v. *Gibbs*, 3 Dall. 6, without any compensation for recapture. Among the cases cited, the only one against us is *The War Onskan*, 2 Rob. 246. In that case, Sir William Scott says, that "lately" it has been the practice of his court to give salvage on re-capture of neutral property out of the hands of the French ; but that such is not the modern practice of the law of nations ; and upon 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 same enemy would be
*19] *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. But in that very case, however, we see that he might shortly change his course of decisions on that subject, so that, very probably, had that case been decided in the next term, it would have been decided differently. No judge has a right to decide upon the departure of other nations from the law of nations, whatever evidence of such departure he may possess. There will be a variance in the decisions of the

lower courts; it should, therefore, be put upon such a footing, as to make it clear and plain to all the judges of the inferior courts. This decision of Sir WILLIAM SCOTT is a creature of his own, which he himself promises to change, when the situation of affairs will allow.

Sir WILLIAM SCOTT gives salvage expressly on the ground of service rendered, on account of the kind of hostility which France exercised towards neutrals. But in this case, the statement of facts excludes the idea of hostility between France and Hamburg. The law of nations gave no right to re-capture. The authority under the acts of congress must be construed strictly, and confined to their express provisions. Neither the executive, nor individuals, nor the courts, have a right to alter them.

So far as war is not authorized by congress, there is peace. It was not contemplated by any act of congress, that our vessels should capture Hamburg vessels. The mischief to be remedied by the act of May was, that the small armed vessels of France were hovering on our coasts, and taking our vessels almost in our ports. The act of congress has completely met the evil, by authorizing the capture of such French vessels as had taken, or were found hovering, for the purpose of taking our vessels. This act, therefore, does not authorize the capture of a Hamburg vessel. There is no law which authorizes a capture for two purposes, viz., to be condemned as a French vessel, or to be subjected to salvage as a neutral. The Amelia was not navigating under the authority or pretended authority of France: she was engaged in a lawful trade. But if the French took possession of her, under suspicion of unlawful trade, that gave us no *authority to take her from the possession of France, the property, under the law of nations, not being changed. The taking, being unlawful, can support no claim of salvage. [*20

The act of July 1798, authorizes only the capture of armed French vessels, and confines the cases of recapture to the ships or goods of citizens or residents of the United States. The capture can only be justified by the doubtful character of the vessel, and as soon as that was known to be neutral, Captain Talbot ought to have dismissed her; the detention afterwards was unlawful, and will not justify a decree for salvage. This vessel, it is true, might have been used to distress our commerce, and this might possibly be an excuse for detaining her, or even dismantling her, but will not entitle him to salvage.

If this vessel was lawful prize to France, then, France has a claim for indemnity; but as she has made no claim, we must presume, the vessel would have been restored by her to the owners.

The act of congress of March 2d, 1799, upon which the counsel for the libellant rely, does not contemplate a case like the present. That is a permanent law, not made for the present war only, but intended to apply to all future wars. It could not, therefore, intend to give salvage, on the re-capture of a neutral from a belligerent, which is not given by the law of nations, and which, it is allowed on all hands, is given, this war, for the first time, only on account of the conduct of France towards neutrals, and will cease, when that conduct shall be altered. Besides, it would give the same reward for taking the property of a neutral out of the hand of his friend, as out of the hand of his enemy. The word "enemy," in the 7th section of that act, means the enemy of us and our ally, whose vessel is re-captured by our armed vessels, and not our enemy, who is the friend of our ally.

If, then, this is not a statutory case of salvage, we must recur to the question of benefit. In the court below they relied wholly on the act of congress: not a word was said respecting the service rendered. Let us then consider the claim of *quantum meruit*. To support this, there must
*21] be, *1. A lawful consideration; and 2. A contract, express or implied.

To make the consideration lawful, it must be permitted by law; *à fortiori*, it must not be contrary to law. It is not authorized by our law, to take the property of a neutral out of the possession of his friend, and it is in direct opposition to policy, as it tends to commit the peace of the country. It is not alleged, that there was any express contract; and a contract cannot be implied, because the intent with which she was taken, viz., to be condemned as a French armed vessel, excludes the idea. Nor can an implied contract be raised, on the retaining her, because that was a state of duress, which cannot be made the ground of a reward.

But if this case is to be considered upon a *quantum meruit*, then the amount of salvage must depend upon the danger and the exertion. *The San Bernardo*, 1 Rob. 151; and *The Two Friends*, Ibid. 240. It is said, that in cases of unauthorized capture or recapture, the property goes to the crown (*The Princessa*, 2 Rob. 45), and it is sometimes referred to the court to fix the reward of the captors. It follows, then, that the property goes to the government, and they alone can fix the reward; but our code gives no right to salvage in this case, nor does the state of hostilities between the two countries, as disclosed on the record, justify it. But if the decree and the notoriety of the misconduct of France, are to be admitted to prove a benefit conferred, who can say it was worth $94,000, the half of the gross amount of sales of the ship and cargo? Neither the service rendered, the danger to the property, nor the exertion in saving it, can justify so enormous a reward. The decree of France might be only *in terrorem*, and so no danger. If the Amelia was not liable to condemnation in the French courts, then no service was rendered, and consequently, no salvage ought to be allowed.

*22] *But if she was liable to condemnation, then the re-capture is a violation of the rights of France. If France violates the laws of nations, it is no justification of a violation of them on our part. An illegal power to take, given by France to her cruisers, does not authorize us to retake. In the case of *Bas* v. *Tingy* (4 Dall. 37), the reasoning of the court seems to admit that the act of 2d March 1799, will not apply, in the present state of hostilities, to re-captures of the vessels of nations in amity with the United States, unless the owners are residents of the United States; because there could be no lawful re-capture of a neutral from the hand of a belligerent. Judge Moore, in delivering his opinion in that case, says, "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 re-capture of property belonging to a nation in amity with the United States, and such a state of war 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 communi-

cated, 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 13th, 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 [*23 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 re-captured property belonging to a nation in amity with the United States."

And in the same case, Judge WASHINGTON observed, "that 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." And again he says, "It has likewise been said, that the 7th section of the act of March 1799, embraces cases which, according to pre-existing laws, could not then take place, because no authority had been given to re-capture 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 re-capturing 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, 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. *Seeman*, was, that although an American vessel could not justify the taking of a neutral vessel from the French, because neither the sort of war that subsisted, *nor the special [*24 commission under which the American acted, authorized the proceeding; yet that the 7th section of the act of 1799, applied to re-captures 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."(*a*)

Similar sentiments were also expressed by Judge CHASE and Judge PATERSON, in the same case. From these opinions, it seems clearly to

(*a*) This case of Talbot *v.* Seeman was argued once before, in this court, at Philadelphia. See 4 Dall. 34.

result, that the act of March 2d, 1799, cannot be the rule of salvage in this case.

On the part of the *libellant*, it was stated, in reply, as to the admissibility of the dispatches from the American envoys, and the French *arrêt* of 18th January 1798, that courts of admiralty will always take notice of such laws of foreign countries as go to modify or change the law of nations, and are not bound by the same rules of evidence, as courts of common law. 1 Dall. 364; Lofft 631; Doug. 619, 622, 649, 650, 554. The opposite counsel have cited and relied on Robinson's Reports, to show what was the ancient law of France, and surely, we have as good a right to cite the same book, to show what is the present law of France. In *The Maria*, 1 Rob. 288, this *arrêt* of France is cited and argued upon by the judge.

The cases cited by the opposite counsel to show that foreign laws must be proved as facts, are all cases at common law, or relate to the mere municipal laws of a foreign country; and are not such as go to modify or explain the law of nations, as that country has adopted it. The case in P. Williams refers to a municipal law, which had no connection with the law of nations. The same observation applies to the cases from 6 Mod., and 2 Salk. No case can be produced, where a law of a foreign country, authenticated as this is by an act of the legislature of our country, has been refused to be considered by a court.

*25] *As to the objection, that the cargo does not appear to be the production of England, or her possessions, because there is no evidence that the whole of the province of Bengal has been subjected to the dominion of England; it may be sufficient to observe, that the libel and answer admit Calcutta to be an English port, and the case stated says, the vessel sailed from Calcutta, in Bengal, loaded with a cargo of the product and manufacture of that country. It being admitted, that Calcutta is an English port, and that the cargo was the production of that country, it follows, unless the contrary is clearly shown in evidence, that the cargo was the product of an English possession.

It is said, that there is no evidence that France carried her unjust decrees into execution, and that they might only be enacted *in terrorem*. But the fact is notorious to all the world: congress have expressly declared it in the preambles of their acts: the whole system of hostility is founded upon it, and can be justified on no other ground. They have further declared it, by ordering the dispatches to be published and distributed among the citizens of the United States, for their information. It would be strange, if this court, sitting here as a court of the law of nations, to try a cause in which all the world are parties, should be the only persons in the world ignorant of the fact.

The general principle is admitted, that salvage is not due for the recapture of a neutral from a belligerent, and for this reason, that by the law of nations, the neutral would be restored by the captor, with damages and costs. But *cessante ratione, cessat lex*. And it follows, by powerful inference, that if the captor would not have restored the neutral, with damages and costs, salvage ought to be allowed. To bring the Amelia within this inference, it is only necessary to show, that she would not have been restored with damages and costs. If the court should take into consideration

the *arrêt* of the 18th of January 1798, and the fact, that the cargo was the production of an English possession, there is no doubt but, instead of being restored with damages and costs, she would have been condemned and totally lost to her owners. Is no salvage due, for so certain and so signal a benefit?

*It is said, that unless salvage is expressly given by the act of congress, it can only be claimed upon a contract, either express or implied. This is not the case. The claim of salvage upon re-capture never is supposed to arise *ex contractu*. It is given as a reward for the benefit received, and where there is no express statute upon the subject, the amount is to be regulated, not by the labor or hazard of the re-captor, nor by his intention to concur a benefit, but by the supposed amount which the owner would have been willing to give for the rescue of his property. Woodeson, 423. In *The Two Friends*, 1 Rob. 234–5, the rule of salvage on rescue is said to be *quantum meruit*. And in the same case, p. 232, Sir W. Scott says, "it has been slightly questioned in the act of court (which contains the exposition of facts given by both parties), whether there was such a state of hostilities between America and France as to raise a title of salvage for American goods re-taken from the French. But this point has not been pursued in argument; and indeed, I should wonder if it had, after the determinations of this court, which have, in various instances, decreed salvage in similar cases. It is not for me to say, whether America is at war with France, or not; but the conduct of France towards America has been such *de facto*, as to induce American owners to acknowledge the services by which they have recovered their ships and cargoes out of the hands of French cruisers, by force of arms." [*26

In the case of *Bas* v. *Tingy*, the question was not argued, whether salvage could be claimed upon the re-capture of a neutral, on the ground of benefit rendered; and therefore, the opinion of the court in that case does not militate with our claim.

August 11th, 1801. Marshall, C. J., delivered the opinion of the court: This is 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 the payment of one-half for salvage, was reversed, and a decree rendered, directing the restoration of the vessel without salvage.

*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 Hamburg. On the 6th September, she was captured by the French national corvette La Diligente, commanded by L. J. Dubois, who took out the master, 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 the 15th of September, she was re-captured by Captain Talbot, commander of the Constitution, who ordered her into New York for adjudication. At the time of the re-capture, 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, [*27

a citizen and merchant of Hamburg; and it was conceded by the counsel below, that France and Hamburg were not in a state of hostility with each other, and that Hamburg 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 re-captors. The circuit court of New York reversed this decree, from which reversal, the re-captors appealed to this court. The Amelia was libelled 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 Frederic Seeman discloses the neutral character of the vessel, and claims her on behalf of the owners.

The questions growing out of the facts, and to be decided by the court,
*28] 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 re-captured.

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 re-capture, therefore, made by a neutral power, no claim for salvage can arise, because the act of re-taking is a hostile act, not justified by the situation of the nation to which the vessel making the re-capture belongs, in relation to that from the possession of which such re-captured 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 re-captor 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 re-capture. 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
*29] 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 the 28th of 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 pretence 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 re-capture of vessels belonging to the citizens of the United States.

The Amelia.

On the 25th of June 1798, an act was passed "to authorize the defence 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 re-capture of merchant vessels belonging to the citizens of the United States. By the 2d section, such armed vessel is to be brought in and condemned for the use of the owners and captors. By the same section, re-captured 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 the 28th of 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 [*30 section provides that whenever any vessel or goods, the property of any citizen of the United States, or person resident therein, shall be re-captured, the same shall be restored, he paying for salvage one-eighth part of the value, free from all deductions.

On the 9th of 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 6th 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 re-capture, without any deduction.

The 7th section of the act for the government of the navy, passed the 2d of 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 re-taken 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 the 3d of 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 *permanently resident [*31 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 pretence of authority, from any prince, government or state, against which the United States have authorized, or shall authorize, defence 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 re-captures 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 authorizes an 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 the 15th of 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 prob-
*32] able cause to believe the vessel met with at sea, is in the condition of one *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 re-capture, then, was lawful.

But it has been insisted, that this re-capture 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, or 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 practised 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 sup-

pose, 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. [*33

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 re-captures, generally, from the enemy; if one part of the system shall 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 re-capture 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 re-capture 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 the 28th of June 1798, declares, that vessels and goods of this description, when re-captured, shall be restored on paying salvage; thereby plainly indicating, that such re-capture was sufficiently warranted by law, to be the foundation of a claim for salvage. If the re-capture of vessels of one description, not expressly authorized by the very terms of the act of congress, *be yet a rightful act, recognised by congress as the foundation for a claim to salvage, which claim congress proceeds to regulate, then it would seem, that other re-captures 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. [*34

In this situation remained the re-captured vessels of any other power, also at war with France, until the act of the 2d of 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 re-capture such vessels. But their re-capture was an incident which unavoidably grew out of the state of the war. On the capture of a French vessel, having with her as a prize the vessel of such a power, the prize was inevitably re-captured. On the idea, that the re-capture 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 the 2d of March 1799. Thus it continued until the 3d of March 1800, when the legislature regulated the salvage to be paid by neutrals, re-captured from a power against which the United States have authorized defence or reprisals.

This act having passed subsequently to the re-capture 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, until the negotiation then pending should have a pacific termination. Accordingly, there is no expres-
*35] sion in the act extending *the power of re-capture, 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 re-capture, subsequently 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 re-capture 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 re-capture, 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 defence 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 pre-existing 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
*36] used must not only have produced the benefit, but must have *been used with that sole view. For this he cites Beawes' Lex Mer. 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 re-capture, it is as unquestionably incorrect. The re-captor 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 re-capture 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.

2. It becomes then necessary to inquire, whether there has been such a meritorious service rendered to the re-captured, as entitles the re-captor to salvage?

The Amelia.

The Amelia was a neutral ship, captured by a French cruiser, and re-captured 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 unfrequent, to consider and speak of a *regular practice under a rule, as itself forming a rule. [*37
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 re-capture; 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 re-captured 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 re-capture? 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 re-capture 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 the 18th of 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 [*38
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 facts. 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.[1]

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
*39] prize, whoever the owner of these goods or merchandise may be." *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 re-captor 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 the 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 *primâ 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

[1] See Ennis *v.* Smith, 14 How. 427.

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 Hamburg, 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 re-captured vessel [*40 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 Hamburg 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 deem 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 *is France in any manner [*41 to be affected by the decree this court may pronounce. Her interest in the vessel was terminated by the re-capture, 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 re-captor, 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 re-captured, 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. That 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 re-capture.

It has been contended, that an illegal commission to take, given by France, cannot authorize our vessels to re-take; that we have no right by legislation to grant salvage out of the property of a citizen of Hamburg, 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 re-capture made by Captain Talbot; it is the state of hostility between the two nations which is considered as having authorized that act. The re-capture having been made lawfully, then the right to salvage,
*42] on general principles, depends *on the service rendered. We cannot presume this service to have been unacceptable to the Hamburger, because it has bettered his condition; but a re-capture must always be made without consulting the re-captured. The act is one of the incidents of war, and is, in itself, only offensive as against the enemy. The subsequent fate of the re-captured 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 Hamburg been in a state of declared war with, France, the re-captured 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 was 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 gotten 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
*43] 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 re-captor is entitled to salvage.

3. 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 the 2d 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, re-taken 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, re-taken from the enemy. That the description would have been more limited, had the intention of the act been to restrain its application to a re-captured 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 re-captured neutral, and a re-captured 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 [*44
from the laws of France should cease, then, according to the principles laid down in this decree, the liability of re-captured 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 treaty. Yet, if this law applies to the case, salvage from a re-captured 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 re-taken, in order to come within the provisions of the act. The expression used is, the enemy: a vessel re-taken 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 re-captured was saved, and of the risk attending the re-taking 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, *45] 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.[1]

DECEMBER TERM, 1801.

GEORGE WILSON *v.* RICHARD MASON, devisee of GEORGE MASON.

RICHARD MASON, devisee of GEORGE MASON, *v.* GEORGE WILSON.

Writ of error.—Land law of Kentucky.—Effect of notice.

A writ of error upon a *caveat*, lies from the district court of Kentucky district, to the supreme court of the United States.

Waste and unappropriated lands, in Kentucky, in the year 1780, could not be lawfully appropriated by survey alone, without a previous legal entry in the book of entries.

A survey in Kentucky, not founded on an entry, is a void act, and constitutes no title whatever; and land so surveyed remains vacant, and liable to be appropriated by any person holding a land-warrant.

Notice of an illegal act will not make it valid.

THESE were writs of error to the District Court of the United States for the district of Kentucky, upon cross *caveats* for the same tract of land.

The *caveat* of *Wilson* v. *Mason* originated in the supreme court for the district of Kentucky, in 1785, whilst Kentucky was a part of the commonwealth of Virginia, and the record stated, "that heretofore, viz., at a supreme court for the district of Kentucky, held at Danville, in the said district, in the month of March 1785, came George Wilson, and caused a certain *caveat* to be entered against George Mason, which is in the following words, viz.: Let no grant issue to George Mason, of Fairfax county, for 8300 acres of land in Jefferson county, surveyed on the south side of Panther creek, adjoining another survey of the said Mason's, of 8400 acres, on the upper side; because the said George Mason has surveyed the same, contrary to his location, for which cause, and also on account of the vagueness of the entry, George Wilson claims the same, or so much thereof as interferes with his entry made on treasury-warrants for 40,926 acres, specially made on the 9th day of April 1784. Entered, 25th March 1785."

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[1] The general rule, undoubtedly, is, that salvage is not due, on a re-capture of neutral property, from a belligerent. The Carlotta, 5 Rob. 54; The Jonge Lambert, Ibid. n; The Antelope, Bee 233; Peck *v.* Randall's Trustees, 1 Johns. 165. Cases arising under the French arrêt of the 18th January 1798 (such as that of The Amelia), formed exceptions to the general rule, but they did not alter the established doctrine of the courts of admiralty. The Huntress, 6 Rob. 104. For a review of the French proceedings in matters of prize, which occasioned the allowance of military salvage, on re-capture of neutral property from French cruisers, see appendix to 2 Robinson, p. 307 (Am. edit.). And see The Acteon, Edw. 254. In The Charming Betsey, 2 Cr. 121, the court say, that the case of The Amelia was well decided, under the particular circumstances, and is a precedent not to be departed from in like cases.