

## Syllabus.

ter of agent, and acted within the principle laid down in the circular, it was protected. But, as we have already shown, the defendant changed that relation by using the money as its own, and became the debtor of the plaintiff for the sum collected.

The counsel for plaintiff in error raises the point, that the action was trespass on the case for wrongfully receiving the depreciated paper, and that the circular is a sufficient defence to such a count. This is undoubtedly true, both as to the nature of the action and as to the effect of the notice, and if it had been in any manner made a point in the court below, we do not see how we could avoid reversing the judgment. But nothing of the kind was done. All the testimony was received without objection. No instruction was asked of the court by either party as to the effect of the testimony in sustaining plaintiff's case, or as to the effect of the notice in making good defendant's receipt of depreciated paper. On the contrary, the only instruction prayed by defendant's counsel recognizes the right to recover something with interest, and only raises the question of the measure of damages.\* On that subject we think the instruction asked was erroneous, and properly refused. It is too late now to object for the first time to the particular form of the action.

JUDGMENT AFFIRMED WITH COSTS.

## THE VENICE.

1. The military occupation of the city of New Orleans by the forces of the United States, after the dispossession of the rebels from that immediate region in May, 1862, may be considered as having been substantially complete from the publication of General Butler's proclamation of the 6th (dated on the 1st) of that month; and all the rights and obligations resulting from such occupation, or from the terms of the proclamation, existed from the date of that publication.
2. This proclamation, in announcing, as it did, that "all rights of property" would be held "inviolate, subject only to the laws of the United

\* See *supra*, p. 253.

## Statement of the case.

States;" and that "all foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States," would be "protected in their persons and property as heretofore under the laws of the United States," did but reiterate the rules established by the legislative and executive action of the national Government, and which may also be inferred from the policy of the war, in respect to the portions of the States in insurrection occupied and controlled by the troops of the Union. It was the manifestation of a general purpose, which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any view of subjugation by conquest.

3. Substantial, complete, and permanent military occupation and control, as distinguished from one that is illusory, imperfect, and transitory, works the exception made in the act of July 13th, 1861 (§ 5), which excepts from the rebellious condition those parts of rebellious States "from time to time occupied and controlled by forces of the United States engaged in the dispersion of the insurgents;" and such military occupation draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government.
4. The President's proclamation of 31st of March, 1863, affected in no respect the general principles of protection to rights and property under temporary government, established after the restoration of national authority.
5. Vessels and their cargoes belonging to citizens of New Orleans, or neutrals residing there and not affected by any attempts to run the blockade, or by any act of hostility against the United States, were protected after the publication of General Butler's proclamation, dated May 1st, 1862, and published on the 6th; though such persons, by being identified by long voluntary residence and by relations of active business with the enemy, may have themselves been "enemies" within the meaning of the expression as used in public law.

THE schooner *Venice*, with a cargo of cotton, was captured in Lake Pontchartrain, Louisiana, by the United States ship-of-war *Calhoun*, on the 15th of May, 1862; was taken to Key West, libelled as a prize of war in the District Court, but was restored, with her cargo, to the claimant, *Cooke*, by its decree. The United States appealed.

The case, as appearing from the proofs,\* and from the public history of the country, was in substance thus:

\* These consisted of the papers found on board at the time of capture, the depositions of the master and of the claimant, taken on the standing interrogatories, and a special affidavit.

## Statement of the case.

The claimant, Cooke, was a native British subject, and had resided, and been engaged in business, in New Orleans, without being naturalized as a citizen of the United States, for nearly ten years previously to the capture. About the 1st of April, 1862, he purchased, in the interior of the State of Mississippi, two hundred and five bales of cotton. This cotton, as he alleged, was bought as an investment for "Confederate notes," which he had become possessed of in previous employments in New Orleans; his intention being to let the cotton remain in the interior, away from the seaboard, until the rebellion should be over, and the cotton could be shipped and sold for gold or its equivalent. To prevent the threatened destruction of it under rebel order in Mississippi, he shipped it to New Orleans, where it arrived about the 7th of April. The same danger awaited it there. General Lovell, the rebel commanding general, gave him notice that his cotton must be immediately removed, or prepared for complete destruction in the event of the capture of the city. The schooner Venice was then lying near New Orleans, in the basin of the Pontchartrain Canal. This vessel the claimant purchased from her New Orleans owner, and about the 12th of April stowed the cotton, purchased as above stated, on board of her, together with twenty other bales of the same article, which were purchased in New Orleans, and put on board to complete the lading of the vessel, in order that it might be out of danger of burning in case of the capture of New Orleans by the United States forces. After being thus loaded, the Venice, on the 17th April, was towed out into Lake Pontchartrain.

During all this time, New Orleans and the surrounding region was in open rebellion and war against the United States, and the port of New Orleans and Lake Pontchartrain under blockade.

The Venice remained at anchor in the lake from the time she was taken there, April 17th, 1862, till her capture, on May 15th, 1862, being unfit for service; and though undergoing repairs, having had no intention of breaking the blockade.

## Statement of the case.

Between these two dates, however, important naval and military events took place at New Orleans. The Government fleet, under Flag-officer Farragut, reached New Orleans on the 25th April; and on the 26th, the flag-officer sent one of his commanders to demand of the mayor the surrender of the city. The reply of the mayor was "that the city was under martial law, and that he would consult General Lovell." General Lovell declared in turn that "he would surrender nothing," but at the same time that he would retire and leave the mayor unembarrassed. On the 26th, the flag-officer sent a letter, No. 2, to the mayor, in which he says:

"I came here to reduce New Orleans to obedience to the laws, and to vindicate the offended majesty of the Government. The rights of persons and property shall be secured. I therefore demand the unqualified surrender of the city, and that the emblem of sovereignty of the United States be hoisted upon the City Hall, Mint, and Custom House, by meridian of this day. And all emblems of sovereignty other than those of the United States must be removed from all public buildings from that hour."

To this the mayor transmitted, on the same day, an answer, which he says "is the *universal sense of my constituents*, no less than the prompting of my own heart." After announcing that "out of regard for the lives of the women and children who crowd this metropolis," General Lovell had evacuated it with his troops, and "restored to me the custody of its power," he continues:

"The city is without the means of defence. To surrender such a place were an idle and an unmeaning ceremony. The place is yours by the power of brutal force, not by any choice or consent of its inhabitants. *As to hoisting any flag other than the flag of our own adoption and allegiance, let me say to you that the man lives not in our midst whose hand and heart would not be paralyzed at the mere thought of such an act; nor can I find in my entire constituency so wretched and desperate a renegade as would dare to profane with his hand the sacred emblem of our aspirations. . . . Your occupying the city does not transfer allegiance from the govern-*

## Statement of the case.

*ment of their choice to one which they have deliberately repudiated, and they yield the obedience which the conqueror is entitled to extort from the conquered."*

At 6 A.M. of the 27th, the National flag was hoisted, under directions of Flag-officer Farragut, on the Mint, which building lay under the guns of the Government fleet; but at 10 A.M. of the same day an attempt to hoist it on the Custom House was abandoned; "the excitement of the crowd was so great that the mayor and councilmen thought that it would produce a conflict and cause great loss of life."

On the 29th, General Butler reports that he finds the city under the dominion of the mob. "They have insulted," he says, "our flag; torn it down with indignity. . . . I send a marked copy of a New Orleans paper containing an *applauding* account of the outrage."

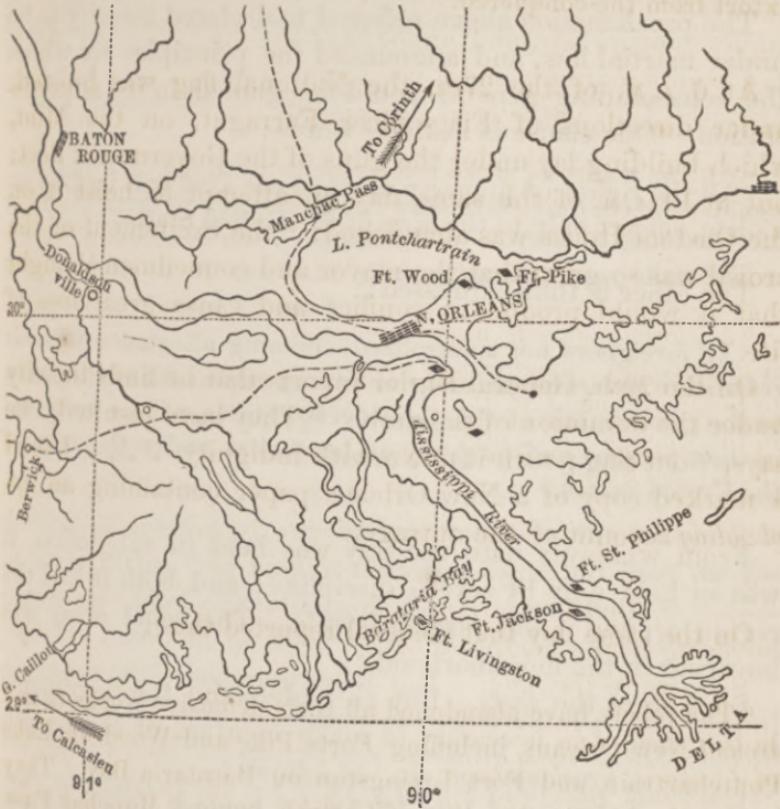
On the same day that General reported thus:

"The rebels have abandoned all their defensive works *in and around* New Orleans, including Forts Pike and Wood on Lake Pontchartrain, and Fort Livingston on Barataria Bay. They have retired in the direction of Corinth, beyond Manchac Pass, and abandoned everything in the river as far as Donaldsonville, some seventy miles beyond New Orleans."

Transports conveying troops under General Butler reached New Orleans on the 1st of May, and the actual occupation of the city was begun. There was no armed resistance, but there were constant exhibitions of a malignant spirit and temper both by the people and the authorities. On the 2d of May, the landing of troops was completed, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, and printed on the 2d by some soldiers, in an office seized for the purpose, was published in the newspapers of the city. Some copies of the proclamation

## Statement of the case.

had been previously distributed to individuals, but it was not made known generally until thus published.\*



On this same 6th of May, Flag-officer Farragut made a report to the Government confirming a previous account of his, and stating the arrival of General Butler, on the 29th of April, at New Orleans; the recital of events terminating with the hauling down of the Louisiana State flag from the City Hall, and the hoisting of the American flag on the Custom House on that day, the report closing with this statement:

"Thus, sir, I have endeavored to give you an account of my attack upon New Orleans from our first movement to the sur-

\* See the work entitled "General Butler in New Orleans," by Parton: New York, 1864; pp. 182-3.

## Statement of the case.

render of the city to General Butler, whose troops are now in full occupation."

The proclamation above referred to declared the city to be under martial law, and announced the principles by which the commanding general would be guided in its administration. One clause is in these words:

"All the rights of property of whatever kind will be held inviolate, subject only to the laws of the United States."

The other is thus expressed:

"All foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States."

From whatever date the city was held in subjection, it was so held only by severe discipline; and both it and the region around it was largely hostile. The rebel army was hovering in the neighborhood.

Such were the facts. But to understand the arguments in the case, it is necessary to make mention of certain *acts of Congress, proclamations, &c.*, as follows:

Congress, by act of July 13, 1861,\* made it lawful for the President, by proclamation, to declare the inhabitants of any State, or section of it, where insurrection existed, in a state of insurrection against the United States: and "thereupon," the statute proceeds:

"All commercial intercourse by and between the same and the citizens thereof and the citizens of the rest of the United States shall cease, and be unlawful so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section by land or water, shall, together with the vessel or

\* § 5; 12 Stat. at Large, 257.

## Statement of the case.

vehicle conveying the same, be forfeited to the United States. *Provided*, that the President may in his discretion license and permit commercial intercourse, &c., as he in his discretion may think most conducive to the public welfare," &c.

The statute enacts also:\*

"That . . . any ship or vessel belonging in whole or in part to any citizen or inhabitant of said State, or part of a State, whose inhabitants are so declared in a state of insurrection, found at sea or in any part of the United States, shall be forfeited to the United States."

In pursuance of the authority given by this act, the President, by proclamation of 16th August, 1862,† did declare "Louisiana"—along with several other Southern States—in a state of insurrection against the United States, with interdiction of commerce; excepting, however, the inhabitants of such States "as may maintain a legal adhesion to the Union and the Constitution, or may be from time to time occupied and controlled by forces of the United States engaged in the dispersion of the said insurgents."

By a subsequent proclamation,‡ reciting that experience had shown that the exceptions made as above, embarrassed the execution of the act of July 13, 1861 (already mentioned), they were revoked, and the inhabitants of several States, including "Louisiana," "except the ports of New Orleans, &c.," were declared "in a state of insurrection," &c., and all commercial intercourse not licensed, &c., declared unlawful, "until such insurrection shall cease or be suppressed, and notice thereof has been duly given by proclamation."

On the 12th May, 1862,—that is to say two days before the capture,—the President issued his proclamation, reciting that "as the blockade of the same ports may now safely be relaxed with advantage to the interests of commerce," therefore he declared that the blockade of the port of New

\* § 6; 12 Stat. at Large, 257.

† Id. 1262.

‡ 31 March, 1863; 13 Stat. at Large.

## Argument for the Government.

Orleans, shall so far cease and determine *from and after the 1st day of June, 1862*, that commercial intercourse with it might be carried on except as to persons, things, and information contraband of war.

The question now before this court, on the appeal, was, whether upon the state of facts above presented, the cotton had been properly restored.

*Mr. Assistant Attorney-General Ashton, and Mr. Eames, for the appellant:*

I. Cooke having been permanently established in New Orleans, and having had uninterrupted commercial and personal domicile there, for ten years previous to the capture, without having either property or residence, actual or constructive, anywhere else, or even any purpose of abandoning his domicile or business at that city, was an enemy, and his property was liable to confiscation if *New Orleans*, when the capture of the property was effected, was enemy territory.\*

II. Was New Orleans then enemies' territory? Were her people enemies of the United States? That is the question now for this court.

1. In adjudicating the public status, at any particular point of time, of territory within a State once involved in the general hostile relation, the court will follow the acts and declarations, touching and respecting such territory, of the political department of the Government. It *can* do nothing else. The Government is waging war against organized hostile bodies of men, who assert that they act under the authority of the government of "sovereign States," and who are contending for an alleged right of exclusive jurisdiction and control over the whole extent of territory embraced by such States. The duty of the political power is to pursue the struggle until the rebel organization is destroyed, and the supremacy of the Government is everywhere re-established. But who is to judge where and when the power of

\* The Indian Chief, 3 Robinson, 18; The Gerasimo, 11 Moore's P. C. 96; The Venus, 8 Cranch, 280.

## Argument for the Government.

the enemy has been so broken as that, with safety to the whole cause, the people and property once subject to hostile control may be released from the law of war, and restored to their rights under the Government? The “*line of insurgent bayonets*,” as Grier, J., denominates it,\* forced back to-day, may advance to-morrow. Who but the President, whose duty it is to plant the standard of the nation on this hostile soil, can know what measures of war may serve to keep that standard fixed where it may once be planted?

Now, on the 14th of May, the date of this capture, New Orleans was, indeed, in the possession of the United States, but the claim of the *de facto* power, which had been dispossessed, was still actively asserted. Every part of the case,—the language of the chief municipal officer of New Orleans, who declared that he would surrender nothing; that the people would not transfer their allegiance “from the government of their choice to one which they have deliberately repudiated;” the “applauded” insult to the flag of the Union; in short, the whole history,—shows defiance and malignity. There is nothing like it in the history of any conquered city whatever. Among our own cities, most, like Savannah, have submitted with grace. In the city was the whole of the late city corporation, hundreds of so-called “citizens,”—foreign adventurers, many of them, who had risked all that they had or hoped for in the success of their own rebellion,—all ready to consign the city to the traitor Lovell and his army. That army, on the day of this capture, was still in array at the gates of the city, and was there asserting its right to exclude the United States from that soil. Indeed, the enemy’s army has never, to this day, been driven from Louisiana. There was no certainty that General Butler could hold possession even if he had it firmly; which, on the day of this capture, he had not. General Banks, in the same State, at a later day, after having been fully in possession on the Red River, was compelled to retire, and the district went right back to the enemy’s control. This is matter of history; a history

\* 2 Black, 647.

## Argument for the Government.

which will make the basis of a decision at this term in this court.\*

The right of maritime capture was exercisable by the United States after the occupation of the city, not only to promote the complete establishment of its power there, but also with reference to the contingency of its forces being driven from their position, and the city again being subjected to the enemy's power. The duty of the President, in view of this possible event, was to destroy the trade, and diminish the wealth of the place in every way sanctioned by the law of nations.

2. This view of the relations of the executive department to the judicial, or of the judicial to it, in these hostilities, would be well founded and conclusive, even if the President stood upon his ordinary constitutional power. But during this rebellion he wields as well the power conferred by a great national ordinance. The statute of July 13, 1861, authorizes him to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States; to subject vessels and cargo to capture and condemnation; and to direct the capture of any vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are in insurrection.

Under this statute, also, the Executive alone has power to determine whether the condition of hostility, which Congress has imposed upon certain States, has or has not in any place ceased to exist; and that determination of the Executive, it must, in every case, be the constitutional duty of the judiciary to carry by its judgments into legal effect.

3. Now, the President's proclamation of the 12th of May, 1862, declares that the *blockade* of New Orleans should thereafter continue to be maintained in full force until the first of the ensuing *June*. This was but two days before the capture of the Venice. The President's proclamation of a blockade, said Grier, J., speaking in the Prize Cases for this court, is "*official and conclusive* evidence to the court that a *state of war*

\* See *infra*, Mrs. Alexander's cotton, p.

## Argument for the Government.

existed at its date, which demanded and authorized a recourse to such a measure, under the circumstances, peculiar to the case."\* His Honor was speaking, it is true, of the proclamation of a general blockade made by the President at the outbreak of the war; but both the terms and spirit of his observation apply to the blockade specially at New Orleans. This proclamation, then, on the 12th of May, 1862, declares to all the world that the President, while fulfilling his duties as Commander-in-chief in suppressing rebellion in New Orleans, *after military occupation of the city was achieved*, had continued to meet with such measure of hostile resistance, that until the 1st of June he should continue to need a blockade to aid him in the work wherewith he was intrusted by the Constitution; that the crisis demanded, till *that* date, such force as the *law of war* justifies and sanctions only when employed against enemies and the territory of enemies.

4. But independently of arguments peculiar to the present rebellion, what is the effect, by PUBLIC LAW, of the reduction and occupation during war of a portion of the enemy's territory, under circumstances similar to those that attended the reduction and occupation of New Orleans?

*Elphinstone v. Bedreechund*, in the British Privy Council,† is in point. In that case, a British Provisional Government in the East had seized, on the 17th of July, 1818, at Poonah, then recently captured from the natives by the British, a large amount of treasure of an Eastern prince. *At the time of the seizure, the city had been eight months in the undisturbed possession of the municipal government*; and even courts of justice, under the authority of that government, were sitting in it for the administration of justice. No disturbance had taken place in Poonah itself after it was captured, nor were any actual hostilities carried on in its immediate neighborhood; the headquarters of the British major-general had been, in fact, forty-two miles away. The whole country, however, was in a disturbed state. Poonah was greatly disaffected. "The enemy were dispersed, but not subdued."

\* 2 Black, 670.

† 1 Knapp, 316.

## Argument for the Government.

Poonah was kept in order only by letting every one see that there was an overwhelming force on account of their being a disaffected population, and the fact of one government having been overturned and another set up, and the character of the people being turbulent. Proclamations, too, had been issued at Poonah as at New Orleans. The case was much like ours. The question in the suit was one of jurisdiction, *i. e.* whether the case belonged to the civil or to the military courts? This depended on the nature of the seizure, whether it was what is technically called a "hostile" seizure, or not. Very able counsel, Sir Thomas Denman and others, contended, as the other side would contend here. Speaking of the nature of the war, and the proclamation which had been made, they say:

"It is a war of conquest and annexation, and its sole and avowed object was to place the principality under the dominion of the East India Company. From the moment the proclamation was issued, every part of the country that was conquered became, at the time of its conquest, part and parcel of its dominion and of the crown. On the 16th of November, 1817, the capital was taken possession of by us, and has ever since remained in our possession. It is said that the country was unsettled, or in a state of passage from one settlement to another. Such a state is unknown to our laws. A country must either be in a state of war or a state of peace; although it is sometimes difficult to define the actual boundaries between them. The distinction between the day and the night is perfectly clear, but who can ascertain the exact point where one ends and the other begins. It cannot be disputed that in point of fact, at least, Poonah was perfectly subdued and tranquil."

But Sir Edward Sugden, then solicitor-general, arguing in support of the seizure, thus gives the answer:

"No country can ever be thoroughly brought under subjection if it is to be held that where there has been a conquest and no capitulation, the mere publication of a proclamation desiring the people to be quiet, and telling them what means would be re-

## Argument for the Government.

sorted to if they did not, so far reduces the country under the civil rule that the *army* loses its control, and the municipal courts acquire altogether jurisdiction."

Of this view was the Privy Council, which, through Lord Tenterden, declared that "the proper character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*," and judgment went accordingly.

The result of the British prize adjudications on this point is, that where the question is as to the national character of a place in an enemy's country, it is not sufficient to show, that possession or occupation of the place was taken, and that, at the time in question, the captor was in control. It must be shown, either that the possession was given in pursuance of a capitulation, the terms of which contemplated a change of national character, or that the possession was subsequently confirmed by a formal cession or by a long lapse of time.\*

III. Is the property, then, relieved from liability to confiscation by General Butler's proclamation?

It will be contended that this proclamation is, in effect, a convention between the Government and the rebels.

1. But General Butler was without authority to make any such convention. "To exempt the property of enemies from the effects of hostilities," says Lord Stowell,† "is a very high act of sovereign authority. If at any time delegated to persons in a subordinate station, it must be exercised either by those who have *special commissions* granted to them for the particular business, or by persons in whom such a power is vested by virtue of any situation to which it may be considered incidental." The office of General Butler, after the

\* The Negotie en Zeevaart, in the House of Lords, July 18, 1782; cited in The Danckebar, C. Robinson, 111; The Boletta, Edwards, 174; The Edel Catharina, 1 Dobson, 56; The Dart and Happy Couple, in the House of Lords, 17 March, 1805; cited in The Manilla, Edwards, 3; The Gerasimo, 11 Moore's Privy Council, 101.

† The Hope, 1 Dodson, 227; see also the Elsebee, 5 Robinson, 173; or 155 American edition of 1807.

## Argument for the Government.

reduction of the city, was to devise and execute measures for the *preservation of the peace* in the city. The power of setting aside the law of war, of defeating the right of capture given by that law, as well as by statute, to the naval vessels of the nation, and of repealing, in effect, all grants of prize interest, were not powers incidental to the situation and office of a commander of land forces in occupation of an enemy's city.

2. Even if General Butler possessed sufficient authority to give the exemption claimed, he did not by the proclamation, rightly interpreted, attempt to exercise it as respected ships and cargo afloat. Ships and cargo afloat do not come under such expressions as he used. This is settled law. The case of the *Ships taken at Genoa* is in point.\* In that case one of the articles gave the inhabitants permission "to withdraw themselves, their money, *merchandise, movables, or effects*, by *sea or land*," and another stipulated for "freedom of trade." On a question of seizure, it was contended that on these articles the intention of the parties was plain to exempt the *shipping* from seizure, and that it would be nugatory to grant "freedom of trade," and at the same time seize the vehicles in which trade was carried on. Sir William Scott, however, says :

"If the court was to abstract itself from the consideration of what has usually been understood and done, the terms—'themselves, their money, movables, and effects'—are perhaps large enough to admit this interpretation; although it is an acknowledged rule, that ships—themselves being property of a peculiar species—do not necessarily pass under such a description. It is impossible not to refer to the practice of commanders of other fortunate expeditions, by whom a broad distinction has usually been taken between property afloat and property on land."

And with respect to the argument made from the expression "freedom of trade," he remarks:

"To this observation I can only say that nugatory as such a clause might be, it is every day's practice to seize all property

\* 4 Robinson, 388.

## Opinion of the court.

afloat, and yet to allow a general 'freedom of trade,' exclusive of such particular seizure."

3. General Butler's proclamation did, in fact, but express an intention to protect the persons named from the *army of the United States*, for which alone he had authority to speak.

4. The idea of protection, considered with reference to a vessel in the situation of the Venice, involves nothing, if not ability to sail on the seas without molestation. But up to the 12th of May, 1862, the blockade of New Orleans was in full force and effectually maintained. It so remained, in fact, till June. General Butler possessed no power to *license* any vessel to violate the blockade; and yet, what avail was a guaranty of *protection* to this vessel and cargo, unless they would have been permitted to sail on any destination out of the port of New Orleans?

The Government, therefore, has not only not ratified or confirmed in any way the supposed action of General Butler, but it has, by the proclamation of May 12, 1862, repudiated whatever act of his is susceptible of the interpretation contended for by the claimant.

IV. Even if the neutral character of the claimant be sustained, the vessel and cargo must be condemned. In a blockaded port, Cooke bought from the enemy an enemy commercial vessel, and then loaded her during the blockade, with property purchased from the enemy, in the enemy country.\*

*Messrs. Reverdy Johnson and Gillet, contra, for the claimant Cooke.*

The CHIEF JUSTICE delivered the opinion of the court.

This cause comes before us upon appeal from a decree of the District Court of the United States for the Southern District of Florida.

The schooner Venice, with a cargo of two hundred and

\* The General Hamilton, 6 Robinson, 61; The Vigilantia, 6 id. 124; The Potsdam, 4 id. 89; The Negotie en Zeevaart, 1 id. 111, *et cas. cit.*

## Opinion of the court.

twenty-five bales of cotton, was captured in Lake Pontchartrain by the United States ship-of-war Calhoun, on the 15th of May, 1862; was taken to Key West; was libelled as prize of war in the District Court; and was restored with her cargo, to the claimant, David G. Cooke, by its decree. The United States appealed. The claimant, Cooke, was a British subject, but had resided in New Orleans nearly all the time for ten years preceding the capture. He was a clerk in a large mercantile establishment until June, 1861, when the firm closed its affairs, and he turned his attention to other business, particularly to the collection of planters' acceptances which he had purchased, and to the investment of their proceeds in cotton. Early in April, 1862, he bought two hundred and five bales in Mississippi; and had them brought to New Orleans, where he purchased the Venice on the 9th of April. Finding that the two hundred and five bales would not fully complete the lading of the schooner, Cooke bought twenty bales more about the 12th of April. The whole was put on board with as little delay as possible, and on the 17th of April, the schooner was towed out into Lake Pontchartrain, and taken to the head of the lake, where she was anchored, and remained, with only such change of position as was necessary to obtain a supply of water, until the capture. In the meantime the vessel was undergoing repairs.

While these transactions were in progress, the war was flagrant. The States of Louisiana and Mississippi were wholly under rebel dominion, and all the people of each State were enemies of the United States. The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the citizens or subjects of the other, applies equally to civil and to international wars.\* Either belligerent may modify or limit its operation as to persons or territory of the other; but in the absence of such modification or restriction judicial tribunals cannot discriminate in its application.

\* Prize Cases, 2 Black, 666; concurred in by dissenting Justices, *Id.* 687-8.

## Opinion of the court.

The vessel and the cotton at the time of purchase belonged to citizens either of Mississippi or Louisiana, and was therefore enemies' property.

Did the transfer to Cooke change the character in this respect of both or either?

Cooke was a British subject, but was identified with the people of Louisiana by long voluntary residence and by the relations of active business.\* Upon the breaking out of the war, he might have left the State and withdrawn his means; but he did not think fit to do so. He remained more than a year, engaged in commercial transactions. Like many others, he seems to have thought that, as a neutral, he could share the business of the enemies of the nation, and enjoy its profits, without incurring the responsibilities of an enemy. He was mistaken. He chose his relations, and must abide their results. The ship and cargo were as liable to seizure as prize in his ownership, as they would be in that of any citizen in Louisiana, residing in New Orleans, and not actually engaged in active hostilities against the Union.

This brings us to the consideration of the events which transpired at New Orleans, and in its vicinity, very soon after the Venice was taken into Lake Pontchartrain.

The fleet of the United States, under command of Flag-officer, now Vice-Admiral, Farragut, reached New Orleans on the 25th of April, and the flag-officer demanded the surrender of the city, and required the authorities to display the flag of the Union from the public buildings. The mayor refused to surrender and refused to raise the National Flag, but declared the city undefended and at the mercy of the victors. The flag-officer then directed the flag to be raised upon the Mint. It was raised accordingly, but was torn down on the same or the next day. The flag of the rebellion still floated over the hall where the city authorities transacted business. On the 29th, the Union flag was raised again, both on the Custom House and Mint, and was not again disturbed. On the 30th, the flag-officer received from the

\* Prize Cases, 2 Black, 674.

## Opinion of the court.

mayor a note so offensive in its character, that all communication was broken off.\* The power of the United States to destroy the city was ample and at hand, but there was no surrender and no actual possession.

The transports conveying the troops under the command of Major-General Butler, commanding the Department of the Gulf, arrived on the 1st of May, and the actual occupation of the city was begun. There was no armed resistance, but abundant manifestations of hostile spirit and temper both by the people and the authorities. The landing of the troops was completed on the 2d of May, and on the 6th a proclamation of General Butler, which had been prepared and dated on the 1st, and the next day printed by some soldiers, in an office seized for the purpose, was published in the newspapers of the city. Some copies of the proclamation had been previously distributed to individuals, but it was not made known to the population generally until thus published. There was no hostile demonstration, and no disturbance afterwards; and we think that the military occupation of the city of New Orleans may be considered as substantially complete from the date of this publication; and that all the rights and obligations resulting from such occupation, or from the terms of the proclamation, may be properly regarded as existing from that time.

This proclamation declared the city to be under martial law, and announced the principles by which the commanding general would be guided in its administration. Two clauses only have any important relation to the case before us. One is in these words: "All the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States." The other is thus expressed: "All foreigners, not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States." These clauses only reite-

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\* Message and Documents, 1862-63, part 3, pp. 282-288.

## Opinion of the court.

rated the rules established by the legislative and executive action of the national Government, in respect to the portions of the States in insurrection, occupied and controlled by the troops of the Union.

The fifth section of the act of July 13th, 1861, providing for the collection of duties and for other purposes, provided that, under certain conditions, the President, by proclamation, might declare the inhabitants of a State, or any section or part thereof, to be in a state of insurrection against the United States. In pursuance of this act, the President, on the 16th of August following, issued a proclamation declaring that the inhabitants of the States of Virginia, North Carolina, Tennessee, Arkansas, and the other States south of these, except the inhabitants of Virginia west of the Alleghanies, and of those parts of States maintaining a loyal adhesion to the Union and the Constitution, "or from time to time occupied and controlled by forces of the United States, engaged in the dispersion of the insurgents," were in a state of insurrection against the United States.

This legislative and executive action related, indeed, mainly to trade and intercourse between the inhabitants of loyal and the inhabitants of insurgent parts of the country; but, by excepting districts occupied and controlled by national troops from the general prohibition of trade, it indicated the policy of the Government not to regard such districts as in actual insurrection, or their inhabitants as subject, in most respects, to treatment as enemies. Military occupation and control, to work this exception, must be actual; that is to say, not illusory, not imperfect, not transient; but substantial, complete, and permanent. Being such, it draws after it the full measure of protection to persons and property consistent with a necessary subjection to military government. It does not, indeed, restore peace, or, in all respects, former relations; but it replaces rebel by national authority, and recognizes, to some extent, the conditions and the responsibilities of national citizenship.

The regulations of trade made under the act of 1861 were framed in accordance with this policy. As far as possible

## Opinion of the court.

the people of such parts of the insurgent States as came under national occupation and control, were treated as if their relations to the national Government had never been interrupted.

It is true that the general exception from the prohibition of commercial intercourse, which has just been mentioned, was cancelled and revoked by the President's proclamation of the 31st of March, 1863, and, instead of it, a particular exception made of West Virginia, and of the ports of New Orleans, Key West, Port Royal, and Beaufort, in North Carolina. But this revocation merely brought all parts of insurgent States under the special licensing power of the President, conferred by the act of July 13, 1861. It affected, in no respect, the general principles of protection to rights and property under temporary government, established after the restoration of the national authority.

The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule, the rights of persons and of property have been, in general, respected and enforced. When Flag-officer Farragut, in his first letter to the rebel mayor of New Orleans, demanded the surrender of the city, and promised security to persons and property, he expressed the general policy of the Government. So, also, when Major-General Butler published his proclamation and repeated the same assurance, and made a distinct pledge to neutrals, he made no declaration which was not fully warranted by that policy. There was no capitulation. Neither the assurance nor the pledge was given as condition of surrender. Both were the manifestation of a general purpose which seeks the re-establishment of the national authority, and the ultimate restoration of States and citizens to their national relations, under better forms and firmer guaranties, without any views of subjugation by conquest. Hence, the proclamation of the commanding general at New Orleans must not be interpreted by such rules as governed the case of the *Ships taken at Genoa*.\* Vessels and their cargoes belonging to citizens

\* 4 Robinson, 387.

## Statement of the case.

of New Orleans, or neutrals residing there, and not affected by any attempts to run the blockade, or by any act of hostility against the United States after the publication of the proclamation, must be regarded as protected by its terms.

It results from this reasoning that the *Venice* and her cargo, though undoubtedly enemies' property at the time she was anchored in Lake Pontchartrain, cannot be regarded as remaining such after the 6th of May; for it is not asserted that any breach of blockade was ever thought of by the claimant, or that he was guilty of any actual hostility against the national Government.

It is hardly necessary to add that nothing, in this opinion, touches the liability of persons for crimes or of property to seizure and condemnation under any act of Congress.

DECREE AFFIRMED.

[See *supra*, p. 135, *The Circassian*; a case, in some senses, supplementary or complementary to the present one.]

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PICO v. UNITED STATES.

When a claim to land in California is asserted as derived through the Mexican Land System, the absence from the archives of the country, of evidence supporting the alleged grant, creates a presumption against the validity of such a grant so strong that it can be overcome, if at all, only by the clearest proof of its genuineness, accompanied by open and continued possession of the premises.

APPEAL by Andres Pico from the decree of the District Court of the United States for the Northern District of California, the case being as follows:

Pico claimed a tract of land in California, to the extent of eleven square leagues, under a grant alleged to have been issued to him on the 6th of June, 1846, by Pio Pico, then Mexican Governor of the department. In 1852 he presented a petition, for the confirmation of his claim, to the Board of Commissioners to ascertain and settle land titles in Califor-