

**The Venice**

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**Appeal No. :** 69 U.S. 258

**Appellant :** The Venice

**Judgement :**

The Venice - 69 U.S. 258 (1864)

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**69 U.S. (2 Wall.) 258**

*APPEAL FROM THE DISTRICT COURT OF*

*THE SOUTHERN DISTRICT OF FLORIDA*

## **SYLLABUS**

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 "inviolable, subject only to the laws of the United

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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 reestablishment 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 13, 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 1, 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, libeled 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, [ [Footnote 1](#) ] and from the public history of the country, was in substance thus:

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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 17, 1862, till her capture on May 15, 1862, being unfit for service, and though undergoing repairs, having had no intention of breaking the blockade.

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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 defense. 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 government*

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*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

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had been previously distributed to individuals, but it was not made known generally until thus published. [ [Footnote 2](#) ]

image:a

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 surrender

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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, [ [Footnote 3](#) ] 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

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: [ [Footnote 4](#) ]

"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, [ [Footnote 5](#) ] 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, [ [Footnote 6](#) ] 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

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.

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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

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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 libeled 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 to 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 was 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. [ [Footnote 7](#) ] 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.

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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. [ [Footnote 8](#) ] 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

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mayor a note so offensive in its character that all communication was broken off. [ [Footnote 9](#) ] 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 reiterated

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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 13, 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 Alleghenies, and of those parts of states maintaining a loyal adherence 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 insurrecting 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,

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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 reestablished 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 reestablishment 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*. [ [Footnote 10](#) ] Vessels and their cargoes belonging to citizens

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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. <69 U.S. 135|>135, *The Circassian*, a case in some senses supplementary or complementary to the present one.]

[ [Footnote 1](#) ]

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.

[ [Footnote 2](#) ]

See the work entitled "General Butler in New Orleans," by Parton, New York, 1864, pp. 182-183.

[ [Footnote 3](#) ]

5; 12 Stat. at Large 257.

[ [Footnote 4](#) ]

6; 12 Stat. at Large 257.

[ [Footnote 5](#) ]

*Ibid.*, 1262.

[ [Footnote 6](#) ]

31 March, 1863; 13 Stat. at Large.

[ [Footnote 7](#) ]

[Prize Cases](#), 2 Black 666; concurred in by dissenting Justices, *ibid.*, [67 U. S. 687](#) -688.

[ [Footnote 8](#) ]

*Prize Cases*, 2 Black [67 U. S. 674](#) .

[ [Footnote 9](#) ]

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

[ [Footnote 10](#) ]

4 Robinson 387.

