
COURT OF ADMIRALTY.

Thursday, May 30th, 1811.

FOX AND OTHERS.

JUDGMENT.

SIR William Scott.—This was the case of an *American* vessel which was taken on the 15th *November* 1810, on a voyage from *Boston* to *Cherbourg*. It is contended, on the part of the Captors, that, under the Order in Council of 26th *April* 1809, this ship and cargo, being destined to a port of *France*, are liable to confiscation. On the part of the Claimants it has been replied, that the ship and cargo are not confiscable under the Orders in Council; first, because these Orders have in fact become extinct, being professedly founded upon measures which the enemy had retracted; and secondly, that if the Orders in Council are to be considered as existing, there are circumstances of equity in the present case, and in the others that follow, which ought to induce the Court to hold them exonerated from the penal effect of these orders.

In the course of the discussion a question has been started, What would be the duty of the Court under Orders in Council that were repugnant to the law of nations? It has been contended on one side, that the Court would at all events be bound to enforce the

Orders in Council: on the other, that the Court would be bound to apply the rule of the Law of Nations applying to the particular case, in disregard of the Orders in Council. I have not observed, however, that these Orders in Council, in their retaliatory character, have been described in the argument as at all repugnant to the Law of Nations, however liable to be so described if merely original and abstract; and therefore it is rather to correct possible misapprehension on the subject than from the sense of any obligation which the present discussion imposes upon me, that I observe that this Court is bound to administer the Law of Nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is Its unwritten law evidenced in the course of Its decisions, and collected from the common usage of civilized states. At the same time it is strictly true, that by the constitution of this country, the King in Council possesses legislative rights over this Court, and has power to issue orders and instructions which It is bound to obey and enforce; and these constitute the written law of this Court. These two propositions, that the Court is bound to administer the Law of Nations, and that It is bound to enforce the King's Orders in Council, are not at all inconsistent with each other; because these Orders and Instructions are presumed to conform themselves, under the given circumstances, to the principles of Its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances

stances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court Itself; or they are positive Regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

The constitution of this Court, relatively to the legislative power of the King in Council, is analogous to that of the Courts of Common Law relatively to that of the Parliament of this kingdom. Those Courts have their unwritten law, the approved principles of natural reason and justice—they have likewise the written or statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the Courts could extract from mere general speculations. What would be the duty of the individuals who preside in those Courts if required to enforce an Act of Parliament which contradicted those principles, is a question which I presume they would not entertain *a priori*, because they will not entertain *a priori* the supposition that any such will arise. In like manner this Court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law.—In the particular case of the orders and instructions which give rise to the present question,

the Court has not heard it at all maintained in argument, that as *retaliatory* orders they are not conformable to such principles—for *retaliatory* orders they *are*.—They are so declared in their own language, and in the uniform language of the Government which has established them. I have no hesitation in saying, that they would cease to be just if they ceased to be retaliatory; and they would cease to be retaliatory, from the moment the enemy retracts in a sincere manner those measures of his which they were intended to retaliate.

The first question is, what is the proper evidence for this Court to receive, under all the circumstances that belong to the case, in proof of the fact that He *has* made a *bona fide* retraction of those measures. Upon that point it appears to me that the proper evidence for the Court to receive, is the declaration of the State Itself, which issued these retaliatory orders, that It revokes them in consequence of such a change having taken place in the conduct of the enemy. When the State, in consequence of gross outrages upon the law of nations committed by Its adversary, was compelled by a necessity which It laments, to resort to measures which It otherwise condemns, It pledged Itself to the revocation of those measures as soon as the necessity ceases.—And till the State revokes them, this Court is bound to presume that the necessity continues to exist; It cannot, without extreme indecency, suppose that they would continue a moment longer than the necessity which produced them, or that the Notification that such measures were revoked, would be less public and formal than their first establishment. Their establishment was doubtless a great and signal departure from
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the ordinary administration of justice in the ordinary state of the exercise of public hostility, but was justified by that extraordinary deviation from the common exercise of hostility in the conduct of the enemy. It would not have been within the competency of the Court Itself to have applied originally such rules, because it was hardly possible for this Court to possess that distinct and certain information of the facts to which alone such extraordinary rules were justly applicable. It waited therefore for the communication of the facts : It waited likewise for the promulgation of the rules that were to be practically applied. For the State might not have thought fit to act up to the extremity of its rights on this extraordinary occasion : It might, from motives of forbearance, or even of policy unmingled with any injustice to other States, have adopted a more indulgent rule than the Law of Nations would authorize, though it is not at liberty ever to apply a harsher rule than that Law warrants. In the case of the *Swedish* convoy, which has been alluded to, no order or instruction whatever was issued, and the Court therefore was left to find its way to that legal conclusion which Its judgment of the principles of the law led it to adopt. But certainly if the State had issued an Order that a rule of less severity should be applied, this Court would not have considered it as any departure from Its duty to act upon the milder rule which the prudence of the State was content to substitute in support of Its own rights. In the present case It waited for the communication of the fact and the promulgation of the rule. It is Its duty in like manner to wait for the notification of the fact that these orders are revoked in consequence of a change in the conduct of the enemy.

The edicts of the enemy themselves, obscure and ambiguous in their usual language, and most notoriously and frequently contradicted by His practice, would hardly afford It a satisfactory evidence of any such change having actually and sincerely taken place. This State has pledged itself to make such a notification when the fact happens : It is pledged so to do by Its public Declarations—by Its acknowledged interpretations of Law of Nations—by every act which can excite an universal expectation and demand, that It shall redeem such a pledge. Is such an expectation peculiar to this Court? most unquestionably not. It is universally felt and universally expressed. What are the expectations signified by the *American* Government in the public correspondence referred to? not that these Orders would become silently extinct under the interpretations of this Court, but that the State would rescind and revoke them. What is the expectation expressed in the numerous private letters exhibited to the Court amongst the papers found on board this class of vessels? not that the *British* Orders had expired of themselves, but that they would be removed and repealed by public authority. If I took upon myself to annihilate them by interpretation, I should act in opposition to the apprehension and judgment of all parties concerned—of the individuals whose property is in question, and of the *American* Government Itself, which is bound to protect them.

Allusion has been made to two or three cases, in which this Court is said to have exercised a power of qualifying and moderating the general terms of an Order in Council, as in the case of the *Lucy, Taylor*, in which the general terms of the order, subjected to confiscation *all* Ships transferred by the enemy

enemy to neutrals during the war, and yet this Court held that these general terms did not extend to *prize ships* so transferred by the enemy. But what was the ground of that interpretation? It was this—The rule itself was adopted from the rule of the enemy, and upon a principle of exact retaliation; for it was declared in the express terms of the preamble of the Order, that it was *just to apply the same rule to the enemy which he was in the habit of applying to this country*. And when the Court found upon satisfactory evidence, that the enemy did not apply any such rule to *prize ships*, but specially exempted them, It would have pronounced, in direct contradiction to the avowed principle of the order itself, if It had not followed the enemy in this acknowledged distinction. It has likewise been urged that cases may be found in which the Court has presumed a revocation, though no such revocation has been promulged. And it is certainly true that where an essential change in the circumstances that occasioned the order has, in effect, extinguished its subject matter, and that change of circumstances has been publicly declared by the State, the Court has not thought it necessary to wait for a formal revocation itself. In the case of the *Baltic* Order, by which, in compliance with the wishes of Its allies in the war, the Government of this country granted an immunity from the molestation of capture in that sea; the Court held that order to be revoked when the state had declared that most of those States to whose applications, as allies, that indulgence had been granted, had changed the character of allies for that of enemies. It was quite unnecessary to wait for such special revocation when by the general declaration of war all hostilities had been authorized against them.

Admitting, however, that there may be cases of presumed revocation, does it follow that this is, with any propriety, to be considered as one of those cases? The novelty of these Orders in Council—the magnitude—the complexity—the extraordinary nature of the facts to which they owe their origin—the attention which they called for and excited both at home and abroad—the pledges given by this State and accepted by other States, all disqualify this Court from taking upon Itself to apply a presumed revocation in any such case.

Supposing, however, that the Court felt itself at liberty to accept as satisfactory other evidence of a sincere retraction of the French Decrees, what is the amount of the evidence offered?—No edict—no public declaration of repeal—no reference to cases in which the courts of that country have acted upon any such revocation. The only case mentioned was that of the *New Orleans Packet*, and it was brought forward in such a way, so void of all authenticity, and of all accurate detail of particulars, as to make it hardly possible for me to allude to it with any propriety, and much less with any legal effect. What the circumstances of that case were, in what form, and under what authority, and on what account released, did not at all appear—Whether at all applicable to the present question, whether a mere irregularity, or what was its real character, the Court could not learn. This however is matter of notoriety, that these Decrees are pronounced fundamental laws of the *French Empire*—that they were declared so in their original formation—and that they have been since so declared repeatedly and recently—long since the date of the present transactions. The declaration of the person styling himself
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Duke de *Cadore* imports no revocation ; for that declaration imports only a conditional retraction, and this upon conditions known to be impossible to be complied with. It has been urged that the *American* Government has considered it otherwise, and has so declared it for the regulation of the conduct of the people of that Country. If such is the fact, it is not for me to lose sight of that respect which is due to the acts of a foreign government so far as to question the propriety of any interpretation which they may have given to such an instrument. But when the effect of such an instrument is pressed upon me for the purpose of calling for my decision, I must be allowed to interpret it for myself, and to act upon that interpretation. And to me it appears, that the declaration, clogged as it is with stipulations known to be beyond the reach of all rational hope of any possible compliance, is in effect a renunciation of any serious purpose of repealing those decrees. I think I might invoke the authority of the government of the *United States* for denying to this *French* declaration the effect of an absolute repeal, when I observe that the period which they have allowed to the *British* Government for revoking our Orders in Council extends to the 2d of *February*—an allowance which could hardly have been made if the revocation on the part of *France* had really taken place at the time to which that declaration purports to refer.

In the absence of any declaration of the *British* Government to such an effect, there is a total failure of all other evidence, (if the Court were at liberty to accept other evidence as satisfactory), that the *French* decrees had been revoked. If I were driven to decide upon that evidence, independent of all evidence

to be regularly furnished by the Government under whose authority I sit, I think I am bound to pronounce that no such revocation has taken place, and therefore that the Orders in Council subsist in perfect justice as well as in complete authority.

It is incumbent upon me, I think, to take notice of an objection of Dr. *Herbert's*, to the *existence* of the Orders in Council—namely, that *British* subjects are, notwithstanding, permitted to trade with *France*, and that a blockade which excludes the subjects of all other countries from trading with ports of the enemy, and at the same time permits any access to those ports to the subjects of the State which imposes it, is irregular, illegal, and null. And I agree to the position, that a blockade, imposed for the purpose of obtaining a commercial monopoly for the private advantage of the State which lays on such blockade, is illegal and void on the very principle upon which it is founded. But, in the first place, (though that is matter of inferior consideration), I am not aware that any such trade between the subjects of this country and *France* is *generally* permitted. Licences have been granted certainly in no inconsiderable numbers; but it never has been argued that particular Licences would vitiate a blockade. If it were material in the present case, it might be observed, that many more of these Licences had been granted to Foreign ships than to *British* ships, to go from this country to *France* and to return here from thence with cargoes. But, secondly, what still more clearly and generally takes this matter out of the reach of the objection, is the particular nature and character of this Blockade of *France*, if it is so to be characterized.

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It is not an original, independent act of Blockade, to be governed by the common rules that belong simply to that operation of war. It is in this instance a counteracting reflex measure, compelled by the act of the enemy, and as such subject to other considerations arising out of its peculiarly distinctive character. *France* declared that the subjects of other States should have no access to *England*; *England*, on that account, declared that the subjects of other states should have no access to *France*. So far this retaliatory Blockade (if Blockade it is to be called) is co-extensive with the principle: Neutrals are prohibited to trade with *France*, because they are prohibited by *France* from trading with *England*. *England* acquires the right, which It would not otherwise possess, to prohibit that intercourse, by virtue of the act of *France*. Having so acquired it, It exercises it to its full extent, with entire competence of legal authority: and having so done, it is not for other Countries to enquire how far this Country may be able to relieve Itself further from the aggressions of that Enemy. The case is settled between them and Itself by the principle on which the intercourse is prohibited. If the convenience of this country before this prohibition required some occasional intercourse with the enemy, no justice that is due to other countries requires that such an intercourse should be suspended on account of any prohibition imposed upon them on a ground so totally unconnected with the ordinary principles of a common measure of blockade, from which it is thus distinguished by its retaliatory character.

The last question is, Are there any circumstances addressed to equitable consideration, that can relieve

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the claimants from the penal effects of these Orders? Certainly, if any could be urged that arose from the conduct of the *British* Government Itself, they might be urged with a powerful and even irresistible effect; but if they found themselves in the fraud of the enemy, or in the misapprehensions of the *American* Government induced by the fraud of the enemy, they found no claim on the *British* Government or on *British* tribunals. In the one case they must resort for redress to a quarter where, I fear, it is not to be found—to the Government of the enemy: in the other, where, I presume, it is to be found—to the Government of their own country.

Upon the declaration of the *American* Government, I have already said as much as consists with the respect which I am bound to pay to the declaration of a foreign Government professedly neutral. The custom-houses of that country, say the claimants, cleared us out for *France* publicly, and without reserve. They did so; but they left the claimants to pursue all requisite measures for their own security, in expectation I presume, that they would inform themselves, by legal inquiry, whether the blockade continued to exist, if its continuance was uncertain. That it was perfectly uncertain in their own apprehensions, is clear from the tenor of these letters of instructions to the different masters of these vessels. In these Letters, which are numerous, all is problematical between hope and fear—a contest between the desire of getting first to a tempting market on the one side and the possible hazard of *British* capture on the other; and it is to be regretted that the eagerness of mercantile speculation has prevailed over the sense of danger. In such a state of mind, acting upon circumstances, the party must understand

derstand that he takes the chance of events—of advantage, if the event which he hopes for has taken place, and of loss if it has not. It is his own adventure, and he must take profit or loss as the event may throw it upon. He cannot take the advantage without the hazard of loss, unless by resorting to *British* ports in the Channel, where certain information may be obtained, on the truth of which all prospects of loss or profit may safely be suspended. On the *British* Government no responsibility can be charged.—They were bound to revoke as soon as they were satisfied of the sincere revocation of the *French* decrees. Such satisfaction they have not signified, and I am bound to presume that no such satisfaction is felt.—With respect to the demand of warning, the orders themselves are full warning. They are the most formal admonitions that could be given—and being given and unrevoked, they require no subsidiary notice.

On the grounds of the present evidence, I therefore see no reason to hold the claimants discharged; but I do not proceed to an ultimate decision upon their interests, till I see the effect of that additional evidence which is promised to be produced upon the fact of the *French* retraction of their Decrees, said to have been very recently received from *Paris* by the *American* Charge D’Affaires in this country. Having no official means of communication with Foreign Ministers, I shall hope to receive the information in a regular manner, through the transmission of the *British* Offices of State.

Final adjudication suspended.