

THE NEWFOUNDLAND.

(District Court, D. South Carolina. August 17, 1898.)

1. PRIZE—PRACTICE—TESTIMONY IN PREPARATORIO.

On the first hearing in prize proceedings only the testimony taken in preparatorio, including the ship's papers, can be considered; and it is for the court to determine whether, upon such testimony alone, there is sufficient ground for condemnation or discharge.

2. SAME—VIOLATION OF BLOCKADE.

Where there has been no proclamation of a blockade of certain ports, but a vessel, on arriving in the region thereof, has been actually notified that they are blockaded, she is not to be condemned for thereafter passing near and by them, unless the government further shows that the blockade as established by the naval officers was still in existence, and proves some act on the part of the vessel indicating an intention to enter such ports, or one of them.

3. SAME—EVIDENCE IN PREPARATORIO.

At the hearing on the evidence in preparatorio the court cannot consider a paper prepared by the commanding officer of the capturing vessel, which he caused to be inserted in the log of the prize, stating the circumstances under which the capture was made.

4. SAME—EVIDENCE OF INTENT.

A vessel cannot be condemned when the circumstances do no more than create a suspicion of an intention to violate the blockade; for suspicion, however well founded, cannot be accepted in the place of proof. There must be some overt act, denoting an attempt to do the forbidden thing.

5. SAME—ADDITIONAL PROOFS.

The fact that the commander of the capturing vessel states that he had information from the American consul at the port of departure that the vessel intended to run the blockade, and that in his opinion her movements and conduct on the night of the capture were suspicious, *held* sufficient to warrant the court in authorizing the taking of additional evidence, when the evidence in preparatorio was insufficient to warrant condemnation.

This was a prize proceeding, instituted in behalf of the United States against the British steamship Newfoundland for an alleged attempt to violate the blockade.

Theodore G. Barker, for claimant.

Edward W. Hughes, Asst. U. S. Atty.

BRAWLEY, District Judge. The British steamship Newfoundland, Frederick N. Malcolm, master, cleared from Halifax, Nova Scotia, July 8, 1898, for Kingston, Jamaica, and Vera Cruz, Mexico. She carried a cargo of flour, pork, corn, wheat, and canned goods, shipped by David Robertson & Co. Bills of lading were issued to them for 4,386 packages for Kingston, and 3,747 for Vera Cruz. These bills of lading are indorsed by them in blank. The charter party was for a voyage of three months to ports of the United States, West Indies, Central and South America, etc., in the customary printed form, and written therein was, "Including open Cuban ports, no contraband of war to be shipped"; and was to terminate at Halifax. Musgrave & Co. were the charterers. She was captured near Havana by the United States ship of war Mayflower, and sent to the port of Charleston as prize of war, was libeled, and the testimony of the master, mate, and seamen was duly taken in preparatorio by

the prize commissioners, and the cause is now before the court upon that testimony and upon the ship's papers. By the well-settled practice, no other testimony can be considered upon this hearing, and it is for the court to determine whether, upon such testimony alone, there is sufficient ground for condemnation or discharge. Test affidavits and answers have been filed by James A. Farquhar as claimant of the ship, and by David Robertson & Co. as claimants of the cargo.

The libel charges that the vessel was captured as prize of war, "in attempting to violate the blockade at Havana," and it has been argued with much force that, inasmuch as a distinct and specific charge has been articulated in the libel, to which the claimants have answered, no other ground for forfeiture can be considered, upon the familiar principle that in all admiralty proceedings the decree must be *secundum allegata et probata*. As it will hereinafter appear that the decision does not turn upon it, the question will be pretermitted whether the words above quoted may not be rejected as surplusage; but it may be as well to say that the accepted form of libel in prize cases is such as states in general terms that the vessel captured is prize of war. The *Empress*, 8 Fed. Cas. p. 691 (No. 4,476); Ben. Adm. p. 612. It appears from the master's testimony that he was instructed by the charterers to follow the directions of the shippers of the cargo, and he received from Robertson & Co., through the former captain, verbal instructions to clear for Kingston and Vera Cruz, and to proceed with all haste to the north coast of Cuba, and to enter either the port of Sagua la Grande or Caibairien, but on no account to enter any blockaded port; and, if he found the ports of Sagua and Caibairien blockaded, to proceed to Kingston, and wire for instructions. It seems clear from this testimony that it was the intention of the shippers that the cargo was to be landed at Sagua or Caibairien, where the master was instructed that he would be met by pilots; and that Kingston and Vera Cruz were "contingent" or provisional destinations. Neither Sagua nor Caibairien were included among the Cuban ports in either of the president's proclamations notifying a blockade. The Newfoundland sailed from Halifax on July 9th. Her speed is about 8 knots; her registered tonnage 567 tons. She steered for the "Crooked Island Passage" in the Bahamas, passing thence into the "Old Bahama Channel," and, going in the direction of Sagua and Caibairien, she reached a point northwestwardly from Nuevitas, on the north coast of Cuba, where she was stopped by the United States ship of war *Badger* at 12:45 a. m., on Monday, July 18th. Her papers were examined by the boarding officer, who informed the master that the whole island of Cuba was blockaded, and was allowed to proceed upon her course. The island of Jamaica lies almost due south from Nuevitas, which, being about 200 miles from the eastern end of the island of Cuba, it is contended that the Newfoundland should at that point have changed her course, and proceeded eastward around Cape Maysi, and thence to Kingston. This undoubtedly would have been the shortest course, and, if Kingston was the destination, the sailing westward from Nuevitas would have carried the ship many hundreds of miles out of her course. It may be here observed

that on the log book kept by the mate the line at the head of each page up to and including Monday, 18th July, is, "Journal from Halifax, N. S., towards Kingston and Vera Cruz." On Tuesday, 19th July, the head line is, "Journal from Halifax, N. S., towards Vera Cruz and Kingston." If, after reaching Nuevitas, there was an intention to go to Vera Cruz, the westwardly course would be the most direct. It is earnestly contended by the attorney for the government that the sailing in the direction of Sagua and Caibairien, after notice by the officer of the *Badger* that those ports were blockaded, is ground of forfeiture, and in support of such contention he cites *The Vrow Johanna*, 2 C. Rob. Adm. 109, and *The Neptunus*, Id. 110. These cases are sufficient authority to the point that the act of sailing for a blockaded port after receiving notification of the blockade is a breach of the blockade. These were cases of blockade by notification. Sir William Scott, in *The Neptunus*, says:

"In the case of a blockade de facto only, it may be otherwise." In case of a blockade by notification he says: "It is to be presumed that the notification will be formally revoked, and until that is done the port is to be considered as closed up, and from the moment of quitting to sail on such a destination the offense of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing de facto only. There no presumption arises as to continuance, and the ignorance of a party may be admitted as an excuse for sailing on a doubtful and provisional destination."

In *The Circassian*, 2 Wall. 135, Chief Justice Chase says:

"It is a well-established principle of prize law * * * that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel, and in most cases its cargo, to capture and condemnation. We are entirely satisfied with this rule. It was established with some hesitation, when sailing vessels were the only vehicles of ocean commerce; but now, when steam and electricity have made all nations neighbors, and blockade running from neutral ports seems to have been organized as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights."

In the case of *The Admiral*, 3 Wall. 603, the ship sailed for Savannah, after notice of the blockade, and was captured "near the blockaded port, and when heading for the land, and when, in point of fact, she was in the act of entering the port." The facts here clearly distinguish this case from that of *The Admiral*, there being no testimony tending to show any attempt to enter either Sagua or Caibairien. Sailing for a blockaded port and sailing by a blockaded port are very different. No case has been cited to support the view that the sailing in the direction of a port not blockaded by notification, but which is reported to be blockaded de facto, is of itself, without more, a breach of the blockade. Chief Justice Chase, in *The Circassian* (page 150), takes note of the distinction between simple and public blockades:

"A simple blockade may be established by a naval officer acting upon his own discretion, or under the direction of superiors, without governmental notification; while a public blockade is not only established in fact, but is notified by the government directing it to other governments. In the case of a simple blockade the captors are bound to prove its existence at the time of capture, while in the case of a public blockade the claimants are held to proof