

of discontinuance in order to protect themselves from the penalties of attempted violation."

To subject the Newfoundland to confiscation for passing near and by the ports of Sagua and Caibairien, after he had received notice from the boarding officer of the Badger that these ports were in fact blockaded, the government should show that the blockade as established by the naval officers on that station at Sagua and Caibairien was still in existence, and some act on the part of the Newfoundland indicating an intention to enter those ports, or one of them. The record contains no testimony on either point, and the contention of the government that she should be condemned on this ground, being supported by neither proof, reason, nor authority, must fail. Passing by Sagua and Caibairien, ports which appear on the maps as lying to the westward of the middle of the island, the Newfoundland was next boarded by the United States coast guard ship Hudson, about 11:30 a. m. on Tuesday, July 19th, off Cardenas. Her papers were examined, and she was allowed to proceed. At 6:20 p. m. of same day she was boarded by an officer of the United States steamship Tecumseh, was warned not to approach any nearer the island of Cuba, or to attempt to enter any port. This warning was entered upon the log, and she was allowed to proceed, passing on in a westward course. The log contains this entry, "8:30 p. m., Havana light bearing south 10 miles," and the master's testimony is that at 10:05 p. m. a gun was fired from the Mayflower, and his ship was seized, at a point 21 miles N. N. W.  $\frac{1}{2}$  W. from Havana light. In answer to the interrogatory, "For what reason, or on what pretense was the seizure made?" the master says:

"Captain Mackenzie [who commanded the Mayflower] said the ship was out of her course for either Vera Cruz or Kingston. I protested against the seizure, saying, so far as I know, I had not violated the blockade law. He then asked some one on board—I don't know who he was—what they had on board the Mayflower about the Newfoundland. A letter was brought to him, and, after he read, he told me he had information by or through the United States consul at Halifax to the effect that the Newfoundland had left Halifax with the intention of running the blockade to Cuba or Havana,—I don't know for certain which,—and for that reason he would have to send me in."

The testimony of the chief mate as to the time, place, and circumstances of the seizure accords with that of the master. He gives the bearing of Havana light as S. E. by S.  $\frac{1}{2}$  S., 21 miles, and says they were about 13 or 14 miles off shore. A typewritten sheet of paper, containing the following statement by Commander Mackenzie, is pasted in the log book:

"U. S. S. Mayflower.

"Off Havana, Cuba, July 19, 1898.

"July 19, about 8:30 p. m., the Mayflower, then being about eight miles north of Morro light, Havana, started in chase of a faint light to the northward, which was only occasionally visible. The chase occasionally changed course two or three times, and was finally brought to about 10:30 p. m., about 17 miles north-northwest of the Morro. She had been warned by the Tecumseh about 6 p. m. (four hours and a half before we brought her to), and previously by the Badger. She was out of her shortest course either for Jamaica or Vera Cruz, for both of which places she had clearance. The

conduct of the vessel was so suspicious that I feel obliged to send her to the nearest healthy port.

M. R. S. Mackenzie,

“Commander U. S. Navy, Commanding U. S. S. *Mayflower*.”

The proctor for claimant urges that this statement cannot be considered upon this hearing, which is confined to testimony of persons aboard and to the ship's papers, and the point seems to be well taken. An entry in the log of a captured ship, stating the fact that the ship was boarded, or warned, or captured at a time stated, imports verity, and may be considered as so far a part of the ship's papers as to be properly cognizable upon the preliminary hearing; but, inasmuch as an officer of the capturing ship could not, upon such hearing, be heard to testify concerning the circumstances of such capture, and the reasons therefor, it does not seem to the court that a written statement of such character, not under oath, and attached to the ship's papers, is a part thereof, which, under the practice, is to be considered. Taking the testimony which alone is now before the court, there is nothing in it which shows or tends to show that the *Newfoundland*, at the time of capture, or at any other time, was heading for the port of Havana, or any other port.

The cases cited by the district attorney in support of a sentence of condemnation will now be examined. In *The Circassian*, 2 Wall. 151, the court says: “At the time of the capture, ship and cargo were on their way to New Orleans [the blockaded port] under contract that the cargo should be discharged there, and not elsewhere, and that the blockade should be forced in order to the fulfillment of that contract.” The charter party contained an express stipulation that she was to “run the blockade if so ordered by the freighters.” With this charter party was a memorandum of affreightment, by which Soubry, the agent, engages “that the merchandise shall not be disembarked except at New Orleans, and to this effect he engages to force the blockade.” Numerous letters were found aboard, written to correspondents in New Orleans, in which the steamer is spoken of as “loaded entirely with our products for New Orleans,” as being a fast sailer, and being intended “to convey to your place, New Orleans, by forcing the blockade, a very fine cargo,” etc. And it was also proved that at the moment of capture the captain ordered the destruction of a package of letters, which the court says would be a strong circumstance, and, taken in connection with others, “it irresistibly compels belief of guilty intent at the time of sailing and time of capture.” In *The Cornelius*, 3 Wall. 225, the court says that the master “made every effort to escape by crowding sail and running in towards the blockaded port.” The steward testified “that the master told him that he had intended to run the blockade from the first,” and there were other circumstances of suspicion in the character and conduct of the charterer and supercargo, etc. In *The Admiral*, 3 Wall. 616, the facts have already been referred to. She was heading for the land, and in the act of entering the blockaded port for which she had sailed after notice of the blockade. In *The Cheshire*, 3 Wall. 234, one of the owners and a claimant was a partner of an enemy, who resided in Savannah, and the cargo was condemned as enemy's property. The ship had run the blockade on her outward voyage. She knew of the

blockade before she sailed. She was captured off Savannah, and claimed that she had called there merely for the purpose of inquiry; and the court held that the circumstances had "the appearance of a device to cover up a settled purpose to elude the blockade." The *Herald*, 3 Wall. 768, was a case where the vessel was captured in attempting to escape from a blockaded port, and the court, after reviewing the facts, says: "It would be difficult to make more conclusive proof of the existence of the blockade, or of notice of the fact to the master of the captured vessel." The *Rising Sun*, 2 C. Rob. Adm. 104, was an American vessel sailing from a French port, ostensibly to Altona, but in reality bound to Guernsey. Sir William Scott says: "It is well known that, although it is the ordinary form of clearing out of a belligerent country to bear an ostensible destination to a neutral port, yet no one imputes that as a fraud, nor is it considered such an act as would justly subject neutral property on board neutral ships to be molested on that account." The real question in that case was as to the effect of the spoliation of papers. The *Hurtige Hane*, 2 C. Rob. Adm. 124, was the case of a ship actually entering a blockaded port, and the defense set up was that she went in from distress and want of water. The only question considered was as to how far such pretenses could avail. The *Calypso*, 2 C. Rob. Adm. 154, was the case of an attempt of a neutral to cover enemy's property, a case which Sir William Scott declared to be "poisoned with fraud in every vein." No question arose therein pertinent to the case now under consideration.

These are all of the cases cited by the counsel for the government, and the pressure upon the court has been so great that it has had but little time for independent investigation. So far as its examination has extended, no case has been found where a sentence of condemnation was passed upon such a state of facts as is presented in this record. How far short the cases cited fall in showing cause for condemnation the circumstances hereinabove recited demonstrate. These circumstances do no more than create a suspicion that there was an intention to enter a Cuban port in violation of the blockade; but suspicion, however well founded, is not proof, and cannot be accepted in any court in place of evidence. There must be some overt act denoting an attempt to do the thing forbidden, some fact in addition to the proved intention to commit the infraction, which shows that the unlawful intent is persisted in, and is being carried into execution. As this court has in a recent case had occasion to remark, the testimony in preparatorio rarely affords opportunity for such proof. From the master's testimony it appears that Commander Mackenzie informed him that he had information through a letter from the American consul at Halifax that the Newfoundland sailed with intention to run the blockade. The court can form no opinion as to the probable weight of such testimony. It also appears that Commander Mackenzie thought the movements and conduct of the Newfoundland on the night of the capture suspicious. The court has personal acquaintance with Commander Mackenzie, and knows that in character, intelligence, and attainments he is the peer of any officer of the navy; but, highly as it values his opinion, it cannot accept it in lieu of proof. It

furnishes ground for ordering further evidence. In *The Sir William Peel*, 5 Wall. 534, the chief justice, after stating the rule that upon the first hearing no evidence is admissible except that which comes from the ship, either in the papers or the testimony of persons found on board, says: "If upon this evidence the case is not sufficiently clear to warrant condemnation or restitution, opportunity is given by the court, either of its own accord or upon motion and proper grounds shown, to introduce additional evidence under an order for further proof."

An order has accordingly been entered allowing further proof, and, as that will probably involve delay, an order will be entered, if moved, for the discharge of the ship and cargo upon stipulation for their value.

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### THE OLINDE-RODRIGUES.

(District Court, D. South Carolina. August 13, 1868.)

#### 1. PRIZE—PROCEDURE—EVIDENCE IN PREPARATORIO.

On the first hearing in prize proceedings only the evidence in preparatio is admissible, which evidence is confined to the depositions of officers, crew, and passengers of the captive ship, and the papers and documents found aboard.

#### 2. SAME—VIOLATION OF BLOCKADE.

Sailing for a blockaded port with knowledge of the blockade is a breach thereof, and subjects the ship to condemnation.

#### 3. SAME—KNOWLEDGE OF BLOCKADE—PRESUMPTION.

It being lawful for neutrals to trade with the enemy, and a blockade not being a necessary consequence of a state of war, it is not to be assumed that a neutral possesses any knowledge of its existence until the fact of its establishment is in some way brought home to him.

#### 4. SAME—NOTICE OF BLOCKADE.

While the French and other continental jurists hold that there must be notice from the government instituting the blockade, and also notice from a vessel at or near the blockaded port, that the blockade has in fact been established, the rule accepted in England and the United States is that notification at the port of blockade should only be required when there has not been sufficient time for neutral ships at sea or in distant ports to become aware of its existence.

#### 5. SAME—VESSEL AT SEA.

A vessel at sea when a proclamation of blockade of one of her ports of destination is issued has the right to proceed upon her voyage until arrival at the blockaded port, unless notice of the blockade was actually received by her master, or unless facts were disclosed from which actual knowledge must be inferred.

#### 6. SAME—PRESUMPTIONS.

The mere fact that a vessel in her regular route touches at a port where notice of the blockade might have been received by cable is not sufficient to raise a presumption of actual knowledge by her master, when there is no proof and no good reason to suppose that news of the blockade had in fact been cabled to such port.

#### 7. SAME—ADEQUACY OF BLOCKADE.

A vessel which enters a port after a blockade has been proclaimed is not to be condemned, when there is no evidence of the presence of any adequate force to maintain the blockade until some time after her departure.