Statement of the case.

THE CIRCASSIAN.

1. A blockade may be made effectual by batteries on shore as well as by ships afloat; and, in case of an inland port, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter.
2. The occupation of a city by a blockading belligerent does not terminate a public blockade of it previously existing; the city itself being hostile, the opposing enemy in the neighborhood, and the occupation limited, recent, and subject to the vicissitudes of war. Still less does it terminate a blockade proclaimed and maintained not only against that city, but against the port and district commercially dependent upon it and blockaded by its blockade.
3. A public blockade, that is to say, a blockade regularly notified to neutral governments, and as such distinguished from a simple blockade or such as may be established by a naval officer acting on his own discretion, or under direction of his superiors, must, in the absence of clear proof of a discontinuance of it, be presumed to continue until notification is given by the blockading government of such discontinuance.
4. A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as prize from the time of sailing; and the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port, not reached at time of capture, with ulterior destination to the blockaded port.
5. Evidence of intent to violate blockade may be collected from bills of lading of cargo, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shippers of the cargo and their agents, and from the spoliation of papers in apprehension of capture.

THE steamship Circassian, a merchant steamer under British colors, was captured with a valuable cargo by the United States steamer Somerset, for an attempted violation of the blockade established in pursuance of the proclamation of the President, dated 19th of April, 1861. Both vessel and cargo were condemned as lawful prize by the District Court for the Southern District of Florida; and the master, as representative of both, now brought the decree under the review of this court by appeal.

The capture was made on *the 4th of May*, 1862,—the date is important,—seven or eight miles off the northerly coast of Cuba, about half way between Matanzas and Havana, and

about thirty miles from Havana; the ship at the time ostensibly proceeding to Havana, then distant but two or three hours' sail. The main voyage was begun at Bordeaux. There she took a cargo,—no part of it contraband,—and was making her way to Havana when captured. Pearson & Co., of Hull, British subjects, were her ostensible owners. The cargo was shipped by various English and French subjects, and consigned to order. The bills of lading spoke of the ship as "loading for the port of Havana *for orders;*" and the promise of the bills was to deliver the packages "to the said port of Havana, *there to receive orders for the final destination of my said steamer*, and to deliver the same to Messrs. Brulatour & Co., or their order, he or they paying me freight in accordance *with the terms of my charter-party, which is to be considered the supreme law as regards the voyage of said steamer, the orders to be received for her and her final destination.*" The master swore positively that he did not know of any destination after Havana; nor did the *depositions* directly show an intention to break the blockade.

The evidence of this intent rested chiefly on papers found on the vessel when captured, and in the inference arising from the spoliation of others. Thus while on her way from Cardiffe to Bordeaux, the ship had been chartered by Pearson & Co. to one J. Soubry, of Paris, agent for merchants loading her; the charter-party containing a stipulation that she should proceed to Havre or Bordeaux as ordered, and then to load from the factories of the said merchants a full cargo, and "therewith proceed to Havana, Nassau, or Bermuda, as ordered on sailing, and thence to proceed to a port of America, and to run the blockade, IF SO ORDERED by the freighters."

With this charter-party was the following:

Memorandum of affreightment.

Taken on freight of Mr. Bouvet, Jr., by order and for account of Mr. J. Soubry, on board of the British steamer Circassian, &c., bound to *Nassau*, *Bermuda*, or *Havana*, the quantity, &c. Mr. J. Soubry engages to execute the charter-

party of affreightment; that is to say, that the merchandise shall not be disembarked but at the port of New Orleans, *and to this effect he engages to force the blockade, for account and with authority of J. Soubry.*

LAIBERT, Neveu.

And on this was indorsed, by one P. Debordes, who was the ship's husband or agent at Bordeaux, these words:

BORDEAUX, 15 February, 1862.

Sent similar memorandum to the parties concerned.

P. DESBORDES.

So, too, Bouvet wrote his correspondents in New Orleans, as follows, the letter being found on the captured vessel:

BORDEAUX, 1st April, 1862.

MESSRS. BRULATOUR & Co., New Orleans:

Confirming my letter of the 29th ult., copy of which is annexed, I inclose herewith bills lading for 659 packages merchandise, and 92 small casks U. P.; *also, copy of charter-party, and private memorandum, per Circassian*, in order that you may have no difficulty in settling the freight by that vessel.

The Circassian has engaged to force the blockade, but should she fail in doing so, you will act in this matter as you may deem best. I intrust this matter entirely to you.

Accept, gentlemen, my affectionate salutations.

E. BOUVET.

In addition to these papers, various private letters, mostly, of course, in French, from persons in Bordeaux to their correspondents at Havana and New Orleans, were found on the vessel. One of these spoke of the steamer as "loading entirely with our products for *New Orleans*, where, it is said, she has engaged to introduce them;" another describes her "as arrived at Bordeaux, a month since, to take on board a fine cargo, with which *to force the blockade;*" a third, as "a very fast sailer, loaded in our port for *New Orleans*, where she will proceed, after having touched at Havana;" a fourth,

as "about to *try to enter your Mississippi*, touching, previously, at Havana." So others, with similar expressions. A British house of Belfast, sending a letter by her to Havana, "takes it *for granted* that she will proceed with her freight to *New Orleans*." A French one of Bordeaux had a different view as to her getting there. This one writes:

"We are going to have a British steamer here of a thousand tons cargo *for your port*. We shall ship nothing by her, because the affair has been badly managed. Instead of keeping it a secret, it has been announced in Paris, London, and Bordeaux. Of course, the American Government is well informed as to all its details; and if the steamer ever enters New Orleans, it will be because the commanding officer of the blockading squadron shuts his eyes. If he does not, she *must* be captured."

In addition to this evidence, it appeared that a package of letters, which were sent on board at Panillac, a small place at the mouth of the Gironde, after the Circassian had cleared from Bordeaux, and was setting off *to sea*, *were burned after the vessel hove to*, and before the officers of the Somerset came on board, at the time of capture.

So far with regard to evidence of intent to break the blockade. This case, however, presented a special feature.

The capture, as already noted, took place on the 4th of May, 1862; at which date the *city* of New Orleans, for whose *port* the libellants alleged that the vessel had been really about to run, was in possession, more or less defined and firm, of the United States. The history was thus:

A fleet of the United States, under Commodore Farragut, having captured Forts Jackson and St. Philip on the 23d of April,* reached New Orleans on the 25th. On the 26th, the commodore demanded 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."

* These forts were situated on opposite banks of the Mississippi River, about one-third of the way up to New Orleans from its mouths, and commanded the river approaches to the city. See chart, *infra*, page 140.

Statement of the case.

The rebel 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 government 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."

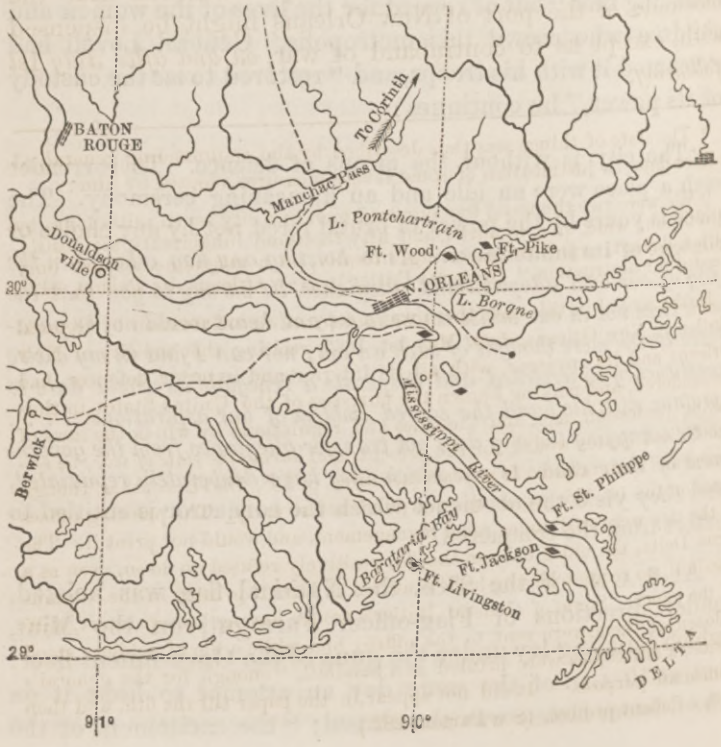
At 6 A.M. of the 27th, the National flag was hoisted, under directions of Flag-officer Farragut, on the Mint, which building lay under the guns of the Government fleet; but at 10 A.M. of the same day an attempt to hoist it on the Custom House was abandoned; "the excitement of the

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."



Statement of the case.

To the reader who does not recall these places in their relations to New Orleans, the diagram on the page preceding will present them.

A small body of Federal troops began to occupy New Orleans on the 1st of May. On the 2d, the landing was completed. The rebel mayor and council were not deposed. There was no armed resistance, but the city was bitterly disaffected, and was kept in order only by severe military discipline, and the rebel army was still organized and in the vicinity.*

The blockade in question, as already mentioned, was declared by proclamation of President Lincoln in April, 1861; and was a blockade of the whole coast of the rebel States. No action to terminate it was taken by the Executive *until the 12th of May*, 1862, when, after the success of Flag-officer Farragut, the President issued a proclamation that the blockade of the port of New Orleans might be dispensed with, except as to contraband of war, *on and after July 1st following.*

* The state of things was thus described by the commanding general, at a later date, in justification of some severe measures adopted by him:

"We were two thousand five hundred men in a city seven miles long, by two to four wide, of a hundred and fifty thousand inhabitants, all hostile, bitter, defiant, explosive; standing, literally, on a magazine, a spark only needed for destruction." (General Butler in New Orleans, by Parton, 342.)

In the record in this case, there was a copy of a proclamation by General Butler at New Orleans, *dated* May 1st, 1862, reciting that the city of New Orleans and its environs, with all its interior and exterior defences, had surrendered, and making known the purposes of the United States in thus taking possession, &c., and the rules and regulations by which the laws of the United States would, for the present, and *during the state of war*, be enforced and maintained. It appears (see *infra*, p. 258, *The Venice*) that, though *dated* on the 1st, this paper was not published so early. The printing offices of the city were still under rebel management, and would not print it. The True Delta, the chief one, on the 2d, positively refused to do so, even as a handbill, no request having been ventured to have it printed in the columns of the paper. Some of General Butler's troops having been printers, half a dozen of them were sent to the office; and while a file of soldiers stood beside, a few copies were printed as a handbill, "enough for the general's immediate purpose." It did not appear in the paper till the 6th, and then with a defiant protest. (See Parton, 282.)

The case thus presented two principal questions:

1. Was the port of New Orleans, on the 4th of May, under blockade?

2. If it was, was the Circassian, with a cargo destined to that place, then sailing with an intent to violate it?

Supposing the cargo generally guilty, a minor question was, as to a particular part of it, asserted to have been shipped by Leech & Co., of Liverpool, British subjects, and of which a certain William Burrows was really, or in appearance, "supercargo."

Burrows himself swore—his own testimony being the only evidence on the subject—that he did not know of any charter-party for the voyage; that *he received the bills of lading* (which, like all the bills, were in French) *from Messrs. Desbordes & Co., the ship's agents at Bordeaux;* that he knew nothing about any papers relating to other portions of the cargo; that he was going *to Havana to sell this merchandise, shipped by Leech, Harrison & Co.*, and was to return to Liverpool, either by the way of St. Thomas or New York; that he knew of no instructions to break the blockade; had heard nothing about the vessel's entering or breaking the blockade of any port, either before sailing or on the voyage, from any person as owner or agent, or connected with the vessel or cargo. No letters or other papers were found compromising this portion of the cargo other than as above stated.

The statutory port of New Orleans, as distinguished from the city of New Orleans itself, it may here be said, includes an extended region along the Mississippi above the city, parts of which were, at this date and afterwards, in complete possession of the rebels.

Messrs. A. F. Smith and Larocque, for the claimants of the ship and cargo:

I. A *blockade* is an interruption, by one belligerent, of communication, by any persons whatever, with a place occupied by another belligerent. No right exists in a belligerent,

as against a neutral, to blockade his own ports. That would be war upon the neutral. Blockade is a right of war *against the enemy*, and affects the neutral only incidentally, and from the necessity of the case. It is a right burdensome to neutrals, and is strict in its character. It is one which is claimed by the belligerent and yielded by the neutral, so long, and only so long, as a blockade is maintained which is in accordance with and recognized by the law of nations. The blockade of his own ports would be an embargo, an act of war against the neutral, thereby made and treated as an enemy. The embargo draws after it belligerent rights, and of a character entirely different from those that belong to a blockade; which are peaceful.

Now, was New Orleans, on the 4th of May, an enemy's port? Plainly not. *The United States* v. *Rice*,* in this court, some years since, is in point. In A.D. 1814, a place called Castine, on the south coast of the State of Maine, was captured by the British, then at war with us; and remained under the control of their military and naval forces until peace, in 1815. They established a custom-house under ordinary British laws. Certain goods were imported into the place during this interval; and, on the repossession of the place by the American Government, the question was, whether the goods were liable to duty under the laws of the United States. This court held that they were not. "By the conquest and military occupation of Castine," say the court, "the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over the place. The sovereignty of the United States was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory on the inhabitants, who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as *it* chose to recognize and impose." Our case is stronger than this. In the case

* 4 Wheaton, 253.

just cited, the port was an American port, which fell under really foreign rule. This rule was an unnatural, exceptional, and temporary one. It was never regarded by any party as otherwise, or other than as an occupation during war, to be relinquished when peace should come. Great Britain, of course, never expected to hold permanently an isolated point in our country. With peace, the port was surrendered to us. Here, however, New Orleans had been seized by an insurrectionary faction only; *certain* Americans in temporary and mad revolt. We never ceased to regard New Orleans as a city of the United States. We never acknowledged her as belonging to any State but a State of this Union; a State then, as now, part of our one common country. In due time, and in a short time, the mob was brought, by the power of the Government, under its actual control, as the Government has always considered it to be under its constitutional right. The people were, at all times, American citizens; and at any moment, had they laid down their arms, these rights would have been conceded to them. With the suppression of the insurgent organization, law and order resumed the throne; the place became, in fact and in form, what it was always in law,—a port of the United States. Everything was remitted to its former condition. The case is one where the fiction of postliminy happens to be a fact; the just and benignant fiction of the Roman law, *quæ fingit eum qui captus est in civitate semper fuisse.*

Very likely the presence of the Federal army was odious enough to both mob and gentry of New Orleans, to men and women alike, "neutrals" and rebels as well. The population may have been all hostile, bitter, defiant, explosive. Still, the Federal army *did* keep its possession there, and with no other opposition than that of offensive words, gestures, and looks. Probably it was never in any danger; for if *it* had been insufficient, the Federal *fleet* lay beside the town, and could have destroyed it in a day. Here is the fact. From the hour that General Butler landed till this day, New Orleans has been under the Government control.

Argument for the claimants.

That the fleet and army were not welcomed by the population with open hearts and arms, has nothing to do with the question.

The Government, then, was re-established, and everything was remitted. If this position be true, the right to capture was gone, no matter how guilty the design of the Circassian. "When the blockade is raised, a veil is thrown over everything that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is, by subsequent events, entirely done away."*

II. *As to intent to run the blockade*, the only evidence tending to show this is derived from the documents found on board; and from these, the following are the most unfavorable inferences for the vessel and cargo which could be drawn:

1st. By the charter-party, the vessel was to proceed "to Havana, Nassau, or Bermuda, as ordered on sailing, and thence to proceed to a port of America, *and to run the blockade*, IF SO ORDERED BY FREIGHTERS."

2d. By a paper found, signed "Laibert, Neveu" (nephew), Laibert engages, on behalf of Soubry, that the merchandise should not be disembarked but at the port of New Orleans, and, to this effect, he engages to force the blockade for account and with authority of Soubry.

3d. The bills of lading contain an engagement by the master to convey the cargo to the port of Havana, there to "receive orders for the final destination of the steamer, and there to deliver the same to ——, they paying freight in accordance with the terms of the charter-party, which was to be considered the supreme law as regarded the voyage, the orders to be received for her, and her final destination."

4th. There are letters from *various shippers* to their correspondents in Havana and New Orleans, showing *their* belief that she was going to New Orleans.

This, we say, is all the evidence. Apart, therefore, from the memorandum signed "Laibert, Neveu," of the genuine-

* The Lissett, 6 Robinson, 387, 395.

ness of which and of whose authority there is no proof, how does the case stand? The Circassian was not, at the time of capture, and never had been, *sailing to New Orleans*, nor indeed to any port contiguous thereto; Havana and New Orleans are distant 650 miles. Then the controlling document is the charter-party; and, according to that, the eventual running of the blockade was dependent upon an option to be exercised by the charterer *on arriving at Havana:* the bills of lading were expressly made subject to the charter-party. Her voyage was, therefore, to Havana *for orders*—by the terms of the charter-party—by her bills of lading—and by the fact. At Havana there was a "*locus penitentiæ.*" The *orders* might never be given. Indeed, it is quite certain they never would have been given under the change of circumstances by the capture of New Orleans.

Authority supports the view that this change of purpose, if effected at Havana, would avoid the capture.

In *The Imina*,* Sir William Scott decided, that where the vessel had originally sailed for Amsterdam, a blockaded port, under circumstances which would have subjected her to condemnation before changing her course; but the master, in consequence of information received at Elsinore, altered her destination, and proceeded towards Embden, she was not taken *in delicto* on a subsequent capture.

What difference exists between a guilty purpose forborne by the master, *without the knowledge of the owners*, and one not yet fully matured, but resting in contingency, merely, at the time of capture?

III. *As respects the portion of the cargo under the care of Burrows.* The evidence of this person, the supercargo, exculpates the owners, and the portion of the cargo owned by them, from all participation in even an intention to violate the blockade. The bills of lading were in French, which it does not appear that he understood. If he did, they, as do those for all the rest of the cargo, contain an express stipulation for the delivery of the goods to order, at Havana, on

* 3 Robinson, 138, Amer. ed.; 167, English ed.

payment of the freight, according to the charter-party; and the reference to the latter instrument would neither authorize the carrying of the goods beyond that port, nor was it of a nature to awaken any uneasiness on the part of a supercargo bound only thither.

Finally. An affirmance of the decree below will give the sanction of this great American court to the extravagant pretensions set up in times past by the British Courts of Admiralty, and will even go beyond them. The inducement to do this is, we admit, great at this moment. We are engaged in putting down a vast, awful, and wicked rebellion. We have had no countenance from the British Government, and have been actively and constantly thwarted by the cupidity and wealth of British subjects. But the rebellion *will* be suppressed, and the United States will resume their natural and former place in the family of nations; the place of a great, upright, and enterprising neutral. "*Ita scriptum est.*" The nations of Europe will assume their places also; two of them the place of "natural enemies" to each other; a third, the mighty empire of the North, taking a rank equal to either, with hostility to both. "Let *us* not, with a short-sighted and foolish impatience, by snatching at a present and temporary advantage, sacrifice the permanent enjoyment of rights which we know not how soon we may require to exercise." Let us adhere, at this trying time, in the judicial department, to the positions which we have so ably maintained in better times past—times soon to return—in the executive; and ratify, by solemn examples, the code which it is our interest, and the true interest of the world, to establish. Let us confirm afresh, and in a manner which none will gainsay, by our patience in war, the principles which we have found so necessary to our interests in peace. Let us earn, as self-controlled belligerents, the right to be great and prosperous neutrals. And then, when the hour of danger has passed,—as surely, if not shortly, it will pass,—we shall find that we have not, in order to suppress the outbreaks of insane revolt, made a sacrifice of the sources of

that wealth which alone can make us either prosperous in peace or powerful in war.

Mr. Eames, contra, for the captors.

The CHIEF JUSTICE delivered the opinion of the court.

The Circassian, a merchant steamer, under British colors, was captured, on the 4th of May, 1862, by the United States war steamer Somerset, for attempted violation of the blockade, established in pursuance of the proclamation of the President, dated 19th of April, 1861.

The vessel and cargo having been condemned as lawful prize by the District Court of the United States for the Southern District of Florida, the master, as representative of both, has brought the decree under the review of this court by appeal.

That the rebellion against the national Government, which, in April, 1861, took the form of assault on Fort Sumter, had, before the end of July, assumed the character and proportions of civil war; and that the blockade, established under the President's proclamation, affected all neutral commerce, from that time, at least, with its obligations and liabilities, are propositions which, in this court, are no longer open to question. They were not more explicitly affirmed by the judges who concurred in the judgment pronounced in the prize cases at the December Term, 1862, than by the judges who dissented from it.

The Government of the United States, involved in civil war, claimed the right to close, against all commerce, its own ports seized by the rebels, as a just and proper exercise of power for the suppression of attempted revolution. It insisted, and yet insists, that no one could justly complain if that power should be decisively and peremptorily exerted. In deference, however, to the views of the principal commercial nations, this right was waived, and a commercial blockade established. It was expected that this blockade, effectively maintained, would be scrupulously respected by nations and individuals who declared themselves neutral.

Opinion of the court.

Of the various propositions asserted and controverted in the discussion of the cause now under consideration, two only need be examined in order to a correct understanding of its merits. It is insisted for the captors,

1. That on the 4th of May, 1862, the port of New Orleans was under blockade;

2. That the Circassian, with a cargo destined for New Orleans, was then sailing with intent to violate that blockade, and therefore liable to capture as naval prize.

Both propositions are denied by the claimants. We shall consider them in their order.

First, then, was the port of New Orleans under blockade at the time of the capture?

The city of New Orleans, and the forts commanding its approaches from the Gulf, were captured during the last days of April, 1862, and military possession of the city was taken on the 1st of May. Did this capture of the forts and military occupation of the city terminate the blockade of the port?

The object of blockade is to destroy the commerce of the enemy, and cripple his resources by arresting the import of supplies and the export of products. It may be made effectual by batteries ashore as well as by ships afloat. In the case of an inland port, the most effective blockade would be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent, and capture offending vessels attempting to enter.

The capture of the forts, then, did not terminate the blockade of New Orleans, but, on the contrary, made it more complete and absolute.

Was it terminated by the military occupation of the city? The blockade of the ports of the insurgent States was declared from the first by the American Government to be a blockade of the whole coast, and so it has been understood by all governments. The blockade of New Orleans was a part of this general blockade. It applied not to the city alone, but controlled the port, which includes the whole

parish of Orleans, and lies on both sides of the Mississippi, and all the ports on that river and on the lakes east of the city.

Now, it may be well enough conceded that a continuous and complete possession of the city and the port, and of the approaches from the Gulf, would make a blockade unnecessary, and would supersede it. But, at the time of the capture of the Circassian, there had been no such possession. Only the city was occupied, not the port, much less the district of country commercially dependent upon it, and blockaded by its blockade. Even the city had been occupied only three days. It was yet hostile; the rebel army was in the neighborhood; the occupation, limited and recent, was subject to all the vicissitudes of war. Such an occupation could not at once, of itself, supersede or suspend the blockade. It might ripen into a possession which would have that effect, and it did; but at the time of the capture it operated only in aid and completion of the naval investment.

There is a distinction between simple and public blockades which supports this conclusion. A simple blockade may be established by a naval officer, acting upon his own discretion or under 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 of discontinuance in order to protect themselves from the penalties of attempted violation. The blockade of the rebel ports was and is of the latter sort. It was legally established and regularly notified by the American Government to the neutral governments. Of such a blockade, it was well observed by Sir William Scott: "It must be conceived to exist till the revocation of it is actually notified." The blockade of the rebel ports, therefore, must be presumed to have continued until notification of discontinuance.*

* The Betsey, Goodhue, Master, 1 Robinson, 282; The Neptune, 1 Id. 144.

Opinion of the court.

It is, indeed, the duty of the belligerent government to give prompt notice; and if it fails to do so, proof of discontinuance may be otherwise made; but, subject to just responsibility to other nations, it must judge for itself when it can dispense with blockade. It must decide when the object of blockade, namely, prevention of commerce with enemies, can be attained by military force, or, when the enemies are rebels, by military force and municipal law, without the aid of a blockading force. The Government of the United States acted on these views. Upon advice of the capture of New Orleans, it decided that the blockade of the port might be safely dispensed with, except as to contraband of war, from and after the 1st of June. The President, therefore, on the 12th of May, issued his proclamation to that effect, and its terms were undoubtedly notified to neutral powers. This action of the Government must, under the circumstances of this case, be held to be conclusive evidence that the blockade of New Orleans was not terminated by military occupation on the 4th of May. New Orleans, therefore, was under blockade when the Circassian was captured.

It remains to be considered whether the ship and cargo were then liable to capture as prize for attempted violation of that blockade.

It is a well-established principle of prize law, as administered by the courts, both of the United States and Great Britain, 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,

* Yeaton *v.* Fry, 5 Cranch, 335; 1 Kent's Commentaries, 150; The Frederick Molke, 1 Robinson, 72; The Columbia, 1 Id. 130; The Neptune, 2 Id. 94.

and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights. It is not likely to be abandoned until the nations, by treaty, shall consent to abolish capture of private property on the seas, and with it the whole law and practice of commercial blockade.

Do the Circassian and her cargo come within this rule?

The Circassian was chartered at Paris on the 11th of February, 1862, by Z. C. Pearson & Co. to J. Soubry, agent, and the charter-party contained a stipulation that she should proceed to Havre or Bordeaux, and, being loaded, proceed thence with her cargo to Havana, Nassau, or Bermuda, and thence to a port in America and "run the blockade, if so ordered by the freighters." With this charter-party was found on the ship, at the time of capture, a memorandum of affreightment given to Bouvet, one of the shippers, and signed "For account and with authority of J. Soubry,—Laibert, Neveu," and containing this engagement: "Mr. J. Soubry engages to execute the charter-party of affreightment; that is to say, that the merchandise shall not be disembarked except at New Orleans, and to this effect he engages to force the blockade." With this paper was the following note, signed "P. Desbordes:" "Sent similar memorandum to the parties concerned." This P. Desbordes was the ship's husband or agent at Bordeaux.

It is urged, on behalf of the claimants, that there is no evidence that Laibert had authority to act for Soubry; but the fact that the paper was found on the ship raises a presumption that he had that authority, and puts the burden of proof to the contrary on the claimants. Besides, it appears, from a letter written by Bouvet, that he forwarded by the ship, inclosed with this letter, the bills of lading of the goods shipped by him, and also "a copy of the charter-party and *private memorandum.*" It can hardly be doubted that the copy of the charter-party in the record is this copy forwarded by Bouvet, or that the memorandum found with it is the *private* memorandum of which he writes. The circumstance that a similar memorandum was sent to the parties con-

cerned raises an almost irresistible presumption that the other freighters shipped their merchandise under the same express stipulation to force the blockade.

It is hardly necessary to go further on the question of intent; but if doubt remained, it would be dispelled by an examination of the other papers and facts in the case. Every bill of lading contained a stipulation for the conveyance of goods described in it to Havana, in order to receive orders as to their ulterior destination, and for their delivery at that destination on payment of freight. Such, we think, is the true import of each bill before us. Almost every letter found on board the ship and contained in the record, affords evidence of intent to force the blockade. These letters were written, at Bordeaux, to correspondents at Havana and New Orleans, and speak of the steamer as "loaded entirely with our products for New Orleans;" as "arrived hither a month since, to convey to your place, New Orleans, by forcing the blockade, a very fine cargo;" as "loaded in our port for New Orleans, whither she will proceed after touching at Havana;" as "being a very fast sailer;" as "going to attempt the entrance of your river, after previously touching at Havana;" as "bound to your port, New Orleans;" as "bound from Bordeaux to New Orleans;" and as "having engaged to force the blockade." Most of these letters were written by shippers, and relate to merchandise described in one or another of the bills of lading. Finally, it is proved that on the eve, and almost at the moment, of capture, the captain ordered the destruction of a package of letters put on board the ship, after she had cleared from Bordeaux, at Panillac, a town on the Gironde, nearer the sea. These letters, doubtless, related to the ship, the cargo, or the voyage, probably to all. Their destruction would be a strong circumstance against the ship and cargo, were the other facts less convincing; taken in connection with them, it irresistibly compels belief of guilty intent at the time of sailing and time of capture.

It was urged in argument that the ship was bound primarily to Havana, and might discharge her cargo there, and

should not be held liable to capture for an intent which would have been abandoned on her arrival at that place.

We agree, that if the ship had been going to Havana with an honest intent to ascertain whether the blockade of New Orleans yet remained in force, and with no design to proceed further if such should prove to be the case, neither ship nor cargo would have been subject to lawful seizure. But it is manifest that such was not the intent. The existence of the blockade was known at the inception of the voyage, and its discontinuance was not expected. The vessel was chartered and her cargo shipped with the purpose of forcing the blockade. The destination to Havana was merely colorable. It proves nothing beyond a mere purpose to touch at that port, perhaps, and, probably, with the expectation of getting information which would facilitate the success of the unlawful undertaking. It is quite possible that Havana, under the circumstances, would have turned out to be, as was insisted in argument, a *locus penitentiæ;* but a place for repentance does not prove repentance before the place is reached. It is quite possible that the news which would have met the vessel at Havana would have induced the master and shippers to abandon their design to force the blockade by ascending the Mississippi; but future possibilities cannot change present conditions. Nor is it at all certain that the purpose to break the blockade would have been abandoned. On the contrary, it is quite possible that the "ulterior destination" mentioned in the bills of lading would have been changed to some other blockaded port. But this is not important. Neither possibilities nor probabilities could change the actual intention one way or another. At the time of capture, ship and cargo were on their way to New Orleans, under contract that the cargo should be discharged there and not elsewhere, and that the blockade should be forced in order to the fulfilment of that contract. This condition made ship and cargo then and there lawful prize.

There was some attempt, in argument, to distinguish that portion of the cargo shipped by William Burrows from the

remainder. We do not think it can be so distinguished. The bill of lading of the goods shipped by him is expressed in the same terms as the bills of goods shipped by others, and Burrows himself states that he received it from P. Desbordes & Co.,—the same Desbordes who sent "to the other parties" memorandums similar to that which was given to Bouvet, and which stipulated for breach of blockade. There is no indication in the bill of lading that any one except Burrows had any interest in these goods, and no testimony except his own to that effect. Against the strong circumstances which tend to prove that they were in equal fault with all the rest, his not very unequivocal statement, that they were destined for sale in Havana, cannot prevail.

The decree of the District Court, condemning the vessel and cargo as lawful prize, must be

AFFIRMED.

Mr. Justice NELSON, dissenting:

I am unable to concur in the judgment of the court in this case; and shall proceed to state briefly the grounds of my dissent, without entering upon the argument or discussion in support of them.

I think the proof sufficient to show, that the purpose of the master was to break the blockade of the port of New Orleans, and that it existed from the inception of the voyage: but, in my judgment, the defect in the case, on the part of the captors, is that no blockade existed at the port of New Orleans at the time the seizure was made. The city was reduced to possession by the naval forces of the United States, on the 25th of April preceding the seizure, and Forts Jackson and St. Philip on the 23d of the same month. They were situated on the opposite banks of the Mississippi River, about one-third of the way up to the city from its mouth. Admiral Farragut announced to the Government the capture and possession of the city on the day it took place, 25th of April, and General Butler, of the capture of the forts on the 29th. The latter announced, that the enemy had abandoned all their defensive works in and around New Orleans, including Forts Pike and Wood, on Lake Pontchartrain,

and Fort Livingston on Barataria Bay; and had abandoned everything up the river as far as Donaldsville, some seventy miles beyond New Orleans. The authority of the Government of the United States had been restored over the city and its inhabitants; and over the Mississippi River, and both of its banks and the inlets to the same, from the ocean or gulf, including, also, the passage for vessels by the way of Lakes Borgne and Pontchartrain, the usual channel for vessels engaged in the coasting trade to and from New Orleans. And on the 1st of May, General Butler announced by proclamation, that the city of New Orleans and its environs, with all its interior and exterior defences, having surrendered to the combined land and naval forces of the United States, and being now in the occupation of these forces, the Major-General commanding hereby proclaims the objects and purposes of the United States in thus taking possession, &c., and the rules and regulations by which the laws of the United States would be, for the present, and during the state of war, enforced and maintained. The seizure of the vessel and cargo was made between Matanzas and Havana, on the 4th of May, several days after the city and port of New Orleans were reduced, and full authority of the United States extended and held over them.

A blockade under the law of nations is a belligerent right, and its establishment an act of war upon the nation whose port is blockaded. One of the most important of the belligerent rights is that of blockading the enemy's ports, not merely to compel the surrender of the place actually attacked or invested, but, as a means, often the most effectual, of compelling the enemy, by the pressure upon his financial and commercial resources, to listen to terms of peace. The object of a blockade, says Chancellor Kent, is not merely to prevent the importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded port.

Now, the capture and possession of the port of the enemy by the blockading force, or by the forces of the belligerent, in the course of the prosecution of the war, puts an end to

the blockade and all the penal consequences growing out of this measure to neutral commerce. The altered condition of things, and state of the war between the two parties in respect to the besieged port or town, makes the continuance of the blockade inconsistent with the code of international law on the subject; as no right exists on the part of the belligerent as against the neutral powers to blockade his own ports. This principle was recognized and applied by Sir W. Scott in the case of *The Trende Soztre*, decided in 1807.* She was a Danish vessel and was on a voyage to the Cape of Good Hope, then the port of an enemy, with contraband articles on board, and was seized as a prize of war; but the vessel had arrived at the Cape after that settlement had surrendered to the British forces. The counsel for the captors insisted, that though the settlement had become British, the penalty would not be defeated, as the intention and the act continued the same; that there was no case in which such a distinction had been allowed on the question of contraband. "The distinction," it was remarked, "which had been admitted in blockade cases, stood altogether on particular grounds, as arising out of a class of cases depending on the blockade of neutral ports, in which the court had expressed a disposition to admit all favorable distinctions." The court, in delivering its opinion, observes: "If the port had continued Dutch, a person could not have been at liberty to carry thither articles of a contraband nature, under an intention of selling other innocent commodities only, and of proceeding with the contraband articles to a port of ulterior destination. But before the ship arrives, a circumstance takes place which completely discharges the whole of the guilt. Because, from the moment when the Cape became a British possession, the goods lost their nature of contraband. They were going into the possession of a British settlement; and the consequence of any pre-emption that could be put upon them, would be British pre-emption." The court also observed: "It has been said, that this is a

* 6 Robinson, 390, n.

principle which the court has not applied to cases of contraband; and that the court, in applying it to cases of blockade, did it only in consideration of the particular hardships consequent on that class of cases. But I am not aware of any material distinction; because the principle on which the court proceeded was, that there must be a *delictum* existing at the moment of the seizure to sustain the penalty." "I am of opinion, therefore," the judge says, in conclusion, "that the same rule does apply to cases of contraband, and upon the same principle on which it has been applied in those of blockade." See also the case of *The Lisette*,* and of *The Abby*,† in which the same principle is declared, and one of them a case of blockade.

The cessation of the blockade necessarily resulted from the capture and possession of the port and town of New Orleans. They no longer belonged to the enemy, nor were under its dominion, but were a port and town of the United States. They had become emphatically so, for the capture was not that of the territory of a foreign nation to which we had obtained only the right and title of a conqueror; but the conquest was over our own territory, and over our own people, who had by illegal combinations, and mere force and violence, subverted the laws and usurped the authority of the General Government. The capture was but the restoration of the ancient possession, authority, and laws of the country, the continuance and permanency of which, so far as the right is involved, depend not on conquest, nor on the success or vicissitudes of armies; but upon the Constitution of the United States, which extends over every portion of the Union, and is the supreme law of the land. The doubt, therefore, that arose in the case of the *Thirty Hogsheads of Sugar* v. *Boile*,‡ and which was solved by Chief Justice Marshall, and related to the case of a foreign conquest, cannot arise in this case. The Chief Justice observed, "Some doubt has been suggested whether Santa Cruz, while in possession of Great Britain, could properly be considered a British

* 6 Robinson, 387. † 5 Id. 251. ‡ 9 Cranch, 191.

island. But for this doubt there can be no foundation. Although acquisitions made during war are not considered permanent until confirmed by treaty; yet, to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them. The Island of Santa Cruz, after the capitulation, remained a British island until it was restored to Denmark." Now, as we have seen, it is not necessary to invoke this doctrine in a case where the capture is of territory previously belonging to the sovereign power acquiring it, and which is retaken and held under the organic law and authority of that power.

I have said, that the cessation of the blockade in question resulted from the capture and repossession of the port and town of New Orleans, and that there was no longer an enemy's port or town to be blockaded. In addition to this, the moment the capture took place, and the authority of the United States was established, the municipal laws of that government took the place of the international law upon which the blockade rested. The reason for its continuance no longer existed: it had accomplished its object as one of the coercive measures against the enemy to compel a surrender. So far as intercourse with the town became material, whether commercial or otherwise, after the capture and possession, it was subject to regulation by the municipal laws, and which is much more efficient and absolute and less expensive than the measure of blockade. It is true, these laws cannot operate extra-territorially; but within the limit of the jurisdiction, and which extends to a marine league from the coast, their control over all intercourse with the port or town is complete. Seizures of neutral vessels and cargo on the high seas are, indeed, not admissible, but blockades are not established for the purpose of these seizures; they are but incidental to the exercise of the belligerent right against the port of the enemy.

The proclamation of the President of the 12th of May, 1862, which announces that the blockade of the port of New Orleans shall cease after the 1st of June following, has been

referred to as evidence of its continuance to that period. But I think it will be difficult to maintain the position upon any principle of international law, that the belligerent may continue a blockading force at the port after it has not only ceased to be an enemy's, but has become a port of its own. It is not necessary that the belligerent should give notice of the capture of the town, in order to put in operation the municipal laws of the place against neutrals. The act is a public event of which foreign nations are bound to take notice, and conform their intercourse to the local laws. The same principle applies to the blockade, and the effect of the capture of the port upon it. The event is public and notorious, and the effect and consequences of the change in the state of war upon the blockading force well understood.

I have felt it a duty to state the grounds of my dissent in this case, not on account of the amount of property involved, though that is considerable, or from any particular interests connected with the case, but from a conviction that there is a tendency, on the part of the belligerent, to press the right of blockade beyond its proper limits, and thereby unwittingly aid in the establishment of rules that are often found inconvenient, and felt as a hardship, when, in the course of events, the belligerent has become a neutral. I think the application of the law of blockade, in the present case, is a step in that direction, and am, therefore, unwilling to give it my concurrence.

[See *infra*, p. 258, *The Venice;* a case, in some senses, suppletory or complemental to the present one.]

FREEBORN v. SMITH.

1. When Congress has passed an act admitting a Territory into the Union as a State, but omitting to provide, by such act, for the disposal of cases pending in this court on appeal or writ of error, it may constitutionally and properly pass a subsequent act making such provision for them.
2. This court will not hear, on writ of error, matters which are properly the subject of applications for new trial.