

THE CUBA, PRIVATEER HORNET.

The Case Closed—Decision of the United States Commissioner.

The following is the decision in full of Commissioner Rutherford in the case of the Cuban privateer *Hornet* or *Cuba*, recently tried at Wilmington, N. C.:

DECISION.

The United States vs. The Officers of the Steamship Cuba.—In this case the defendants, twenty-four in number, are charged with a violation of the third section of the act of Congress of April 20, 1818, known as the Neutrality law, the charge being: "that they did fit out and arm, and did procure to be fitted out and armed within the limits of the United States, a certain ship or vessel, called the *Cuba*, with intent that the said vessel shall be employed in the service of the people of Cuba to cruise and commit hostilities against the people of Spain, a country with which the United States is at peace."

I have carefully reviewed the testimony given on the examination and considered the arguments of counsel, as well as the cases cited in support of their positions, and am of the opinion that but two acts are shown to have been committed within the limits of the United States from which an intent to violate the neutrality laws can be inferred. These were—First, the enlistment of the witness James Gordon, Jr., by D. D. Munro, one of the defendants; and with this act no one but the defendant Munro is shown to have been connected. Second, the act of taking on board a cargo of coal from the schooner *James Fredmore*. The testimony of all the witnesses unite in showing that this coal was taken on board the *Cuba* while she was lying in Long Island Sound, inside Montauk Point, and therefore clearly within the limits of the United States, even though she was more than three miles from the shore.

From all the evidence as to the position of the *Cuba* at the time she received the arms, stores and men from the *Petrel*, the *Coarter Oak*, the *Only Son*, the *Martha Washington* and the *Virginia Seymour*, I believe that she was more than a marine league from land, and without the jurisdiction of the United States.

The evidence, as well of the prosecution as of the defence, shows that some of the defendants were merely passengers on the vessel, who had taken passage at a foreign port, and that others had joined her on the high seas; that these persons had exercised no command and had no control over the vessel or its crew until after the arms had been put on board and the coal shipped, and not until the *Cuba* was on the high seas and beyond the limits and jurisdiction of the United States.

It is claimed by the defence that as no proof has been offered by the prosecution that the United States is at peace with Spain, this being, as they claim, a material point of the charge made against them, that the Commissioner cannot take judicial notice of the fact, and that the prosecution having failed to prove it as a fact, the whole charge falls to the ground. With this view of the case I cannot agree; the public acts, treaties, &c., made by the United States with foreign countries are judicially noticed by the courts of the United States, and the fact that peace exists between the United States and Spain is a public matter affecting the whole people and need not be proved.

Much has been said by both the prosecution and the defence upon the duties of a Commissioner as a committing magistrate, the prosecution taking the ground that it was the province of the Commissioner merely to inquire into the matter and ascertain if the offence charged had been committed, and if this fact appeared, it was then his duty to hold for trial any person or persons whom there was "probable cause" to believe had committed the offence. What may be "probable cause" must of course rest entirely in the discretion of the Commissioner under the different circumstances in each case; but in my opinion he would not be justified in committing a citizen for trial and subjecting him to the great annoyance and expense attending such proceedings, on a light evidence which created only suspicion against the accused, and where it is evident that a jury would not convict.

The defendants, Edward Higgins, Thomas L. Dornin, G. W. Reed, F. J. McNulty, E. Valiente, P. Ingram, G. W. DuBois, R. Somers, H. M. Cooke, A. M. Mason, Antonio Munoz, Wm. H. Robinson, Stephen Kearney, Joaquin Aguilar, Edward Toulas, John Mullay, W. J. Flaherty, are discharged. The defendants, David A. Telfair, D. D. Munro, Nicholas Esting, R. H. Gibson, W. D. Phillips, Louis French and John Lynch, will be required to give good and sufficient bail in the sum of \$500 each for their appearance at the next term of the District Court of the United States for the Cape Fear district of North Carolina, to be held in the United States Court room, in the city of Wilmington, on Monday, the 1st day of November, 1862, to answer any indictment that may be found against them, and in default of finding bail as aforesaid that the said David A. Telfair, D. D. Munro, Nicholas Esting, R. H. Gibson, W. D. Phillips, Louis French and John Lynch stand committed for trial.

ALLAN RUTHERFORD,

United States Commissioner for the Cape Fear district of North Carolina.

The Commissioner stated orally after reading the above decision that it had also come to his knowledge that the offence had been committed in the Eastern district of New York.