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Into the Wind: Rhett Butler and the Law of War at Sea

JOHN PAUL JONES*

I INTRODUCTION

When Margaret Mitchell wrote *Gone With the Wind*, her epic novel of the American Civil War, she introduced to fiction the unforgettable character Rhett Butler. What makes Butler unforgettable for readers is his unsettling moral ambiguity, which Clark Gable brilliantly communicated from the screen in the movie version of Mitchell's work. Her clever choice of Butler's wartime calling aggravates the unease with which readers contemplate Butler, for the author made him a blockade runner.

As hard as Butler is to figure out—a true scoundrel or simply a great pretender?—so is it hard to morally or historically pigeonhole the blockade running captains of the Confederacy. They certainly dared a great deal in attempting to break in or out of the cordons patrolled by the U.S. Navy.¹ While force of arms apparently took few lives, they could draw hostile fire or face armed boarders with hostile intent. They ventured out in weather and darkness that kept ordinary mariners otherwise snugly ashore. They regularly risked impoverishment, imprisonment, or both. They operated a makeshift and desperate pipeline between the Confederacy and her trading partners, through which King Cotton flowed out and the tools for making war flowed in. In this endeavor, they were absolutely vital to the rebellion, as its leaders appreciated and made clear. On the other hand, they made for themselves an enormously profitable market from the war and its deprivations, catering to human weakness at the expense of the cause they

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¹See generally F. Bradlee, *Blockade Running During the Civil War* (1974); D. Homer, *The Blockade Runners: True Tales of Running the Yankee Blockade of the Confederate Coast* (1968); H. Cochran, *Blockade Runners of the Confederacy* (1958).

ostensibly aided. Indeed, Butler and the special merchant class he exemplifies both epitomize and indict the ideology we have come to embrace as capitalism. Mitchell's theme in *Gone With the Wind*—of war between old and new virtues—is personified in Rhett Butler, her blockade runner.

The sine qua non of a blockade runner is a blockade, and a blockade arises out of international law. The term describes certain of the generally accepted conditions under which neutral nations and their merchants may continue trading with one or more nations at war.² In the American Civil War, the two sides chose to conform generally to the law of war, thereafter mimicking the behavior of warring sovereigns.³ In this, that part of the rest of the world which was paying attention more or less acquiesced, adopting a stance of neutrality. In this, the two American sides more or less acquiesced in turn. From the assumption of these postures, there followed mutual attention to the laws of capture and neutrality, on land and at sea, and from that could flow a blockade of Charleston, South Carolina, out of which Rhett Butler would carve his reputation and make his fortune.

In what follows, I propose to review what Scarlett O'Hara reported in *Gone with the Wind* about Rhett Butler's career as a blockade runner, and then to make some guesses about what the law of war at sea might have meant for Captain Butler's commercial operations. As a way of organizing my thoughts about the interplay of three aspects of the law of war at sea—capture or prize, blockade, and neutrality—I have chosen to speculate about whether Butler would have sailed under a flag of convenience, i.e., the Union Jack.

²See generally J. Verzijl et al., *International Law in Historical Perspective*, at pt. IX-C ("The Law of Maritime Prize") (1992); C. Colombos, *A Treatise on the Law of Prize* (1926); T. Holland, *A Manual of Naval Prize Law* (1888); F. Upton, *The Law of Nations Affecting Commerce During War: With a Review of the Jurisdiction, Practice and Proceedings of Prize Courts* (1861).

In June 1861, Judge Betts of the U.S. District Court in New York, together with the two Prize Commissioners of his court, Henry H. Elliott and E.H. Owen, anticipated a dramatic resurgence in prize litigation as a result of the rebellion. The three wrote to Francis Upton requesting a summary of American prize practice and proceedings. A member of the New York bar well known for his interest in prize law, Upton supplied his treatise the following month, on his own initiative including a summary of the relevant international law. Over half of the cases resulting from Union captures were subsequently brought in Judge Betts' court, where Upton frequently appeared as counsel. See M. Robinton, *An Introduction to the Papers of the New York Prize Court 1861-1865*, 30 and passim (1945). Robinton attributes to Justice Joseph Story the note, "On the Practice in Prize Causes," which appears at 14 U.S. (1 Wheat.) 494 (1816).

³For the story of the diplomatic exchanges arising from implementation of the blockade and the aggressive, if often unsuccessful, efforts towards its enforcement by the U.S. Navy's two blockading squadrons, see generally S. Bernath, *Squall Across the Atlantic: American Civil War Prize Cases and Diplomacy* (1970), and I C. Savage, *Policy of the United States Toward Maritime Commerce in War: 1776-1914*, at ch. XI (1934).

II WHAT IS KNOWN OF RHETT BUTLER

Rhett Butler was born to a prominent low country family and was raised in Charleston.⁴ He grew up on the water, early becoming expert in navigating the inshore waters of both Carolinas. After Charleston was blockaded in 1861, he acted as a pilot for blockade runners.

The Union Navy's practice was to treat blockade-running pilots with due regard for the learned nature of their calling and the importance of their services to the enemy.⁵ Others in the crew of a captured blockade runner were apparently held no longer than was necessary for the prize court to collect their statements for use in the condemnation of their vessel. Charleston and Wilmington pilots whom the Union Navy caught red-handed were retained in custody, however, more or less as prisoners of war. Consequently, piloting blockade runners was regarded as risky business and commensurately compensated.

Market conditions allowed a skilled and plucky pilot like Butler to quickly amass capital sufficient for acquisition of his own vessel. Eventually, he owned four blockade runners, operating out of both Charleston and Wilmington, the only two Atlantic coast ports of the Confederacy at which blockade running was feasible for most of the war. He is said to have employed other pilots, no doubt so that his other vessels could be as productive as the one he commanded, and that they might be steered by those as expert in navigating the approaches to Wilmington as he was in navigating the approaches to Charleston.

III CAPTAIN BUTLER'S FLOTILLA

The four vessels in Rhett Butler's little fleet are never named or described in any detail. His extraordinary success in avoiding the blockading force at both ports persuades that his vessels were steam driven, able to outrun or evade Union Navy pursuers driven by the wind. His success also suggests that his vessels were nimble and of relatively shallow draft, enabling them also to escape capture even by Union Navy steamers, for which general

⁴Facts about the fictional blockade runner Rhett Butler come from M. Mitchell, *Gone With the Wind* (1936).

⁵Bradlee, *supra* note 1, at 79; Cochran, *supra* note 1, at 37. According to Cochran, Admiral Dupont recommended to Secretary Welles the imprisonment of the captain and supercargo of a blockade runner, because the Navy "cannot exercise too much vigilance in preventing the return of these men, who from their local knowledge of this part of the coast are the most efficient instruments of the rebels in violating the blockade." *Id.*

requirements of greater range and better seakeeping commonly dictated larger hulls, broader beams, and deeper drafts.

Rather than offloading his outbound cargos of cotton at the nearest safe port for transfer to neutral bottoms, Captain Butler preferred to carry them all the way to England, in pursuit of the highest price. For this reason, I suppose that at least the vessel he personally commanded was possessed of sufficient range and seaworthiness for an Atlantic crossing. The vessel he ran across the Atlantic might have been equipped as well with sails. Bunkers for the amount of coal required to voyage so far under steam alone would otherwise have dictated either a large and comparatively ungainly hull, or else smaller and comparatively fewer spaces for cargo.

According to Scarlett O'Hara, Rhett Butler carried cotton to Nassau in the Bahamas, to unnamed ports in Canada, and to ports in England, including Liverpool. Out of Wilmington, his vessels certainly would have frequented Bermuda. Outbound, Butler's vessels carried cotton on consignment for the Confederacy. Returning, they transported medicines, arms, and other military stores purchased for the government, as well as luxury items, including women's wear, intimate and otherwise, purchased on Butler's own account. He claimed to have sailed to New York at least once during the war, whence, perhaps, he exported the hoop skirts and muskets he claimed, in a different conversation, to have bought from a Union supplier. Some northern merchants certainly traded knowingly with the enemy, and others certainly traded with neutral partners, more or less aware that their goods were destined after transshipment for import through the blockade.

Captain Butler bragged of realizing as much as 200% in profit on his cargoes. At least sometimes, he took his own imports inland as far as Atlanta for sale, rather than auctioning them on the pier, as was the general custom of other blockade runners. He was never captured, and sold his vessels prior to early 1864, when he turned his energies to food speculation. At the end of the war, he quietly converted to his own use funds of the Confederate government held offshore over which he had exercised control as an agent. Together with the profits of his wartime enterprises, these left Rhett Butler with a personal fortune amounting at one time to half a million dollars.

IV

A CONVENIENT FLAG FOR CAPTAIN BUTLER

There is nothing in the meager record from which to ascertain under what flag Butler's vessels sailed during the conflict. A considerable amount of re-flagging occurred early in the war, when U.S. shipowners based in the South and sympathetic to secession transferred their vessels to owners in

England or her Atlantic possessions.⁶ Because Captain Butler preferred to carry cotton not just to the nearest neutral port, but to distant (but more profitable) markets in Canada and England, I think it likely that Butler operated under a British flag at least the vessel of which he himself was the master, and perhaps his entire flotilla.

From Scarlett O'Hara's report, Captain Butler lacked enthusiasm for secession and the Confederate cause throughout the war. Nevertheless, he was a citizen of South Carolina who regularly voiced his sympathy for the rebels, admitted to acting as the Confederacy's contracting agent and armorer, and operated his businesses under its protection. At least in the legal sense, therefore, Rhett Butler's allegiance went to the secessionist government.⁷ He was accordingly an enemy of the Union and its Navy. Under the law of war at sea, his vessels and their cargoes were forfeit upon capture by the U.S. Navy and condemnation in a federal prize court. On the other hand, neutral merchants and their vessels were entitled, despite a state of war, to trade with both sides in conflict, so the ships of those with allegiance to foreign sovereigns were not lawful objects of capture in our civil war, unless they acted in some way contrary to the rules pertaining to neutrality (e.g., by carrying contraband or defying a blockade).⁸

Operating his vessels under a neutral flag offered Rhett Butler-the-shipowner substantial advantages, especially if the flag belonged to a neutral nation with clout, like England. A Union warship was obliged by the realities of the international situation to tread more lightly in the presence of the Union Jack than in the presence of the Palmetto flag of South Carolina. The law is not always an ass, however, and the law was sufficiently sophisticated as to draw a line dividing genuine sales from sham transactions intended to circumvent the law of capture. A state of war entitled armed ships of the belligerent powers to halt any merchant vessel for so long as necessary to confirm the identity suggested by her flag and to ascertain both the nature of her cargo and the status of any passengers. Herein, it is said, is the traditional origin of "probable cause" modernly applied as a Constitutional prerequisite to the analogous stopping of persons ashore by ordinary police.⁹

Among the factors recognized as tending to call into doubt the transfer of a ship's ownership are its timing with respect to the initiation of hostilities,

⁶Bernath, *supra* note 3, at 7.

⁷Colombos, *supra* note 2, at §§ 54-56; Holland, *supra* note 2, at §§ 19-31; Upton, *supra* note 2, at 260-62.

⁸Colombos, *supra* note 2, at §§ 199-202; Holland, *supra* note 2, at § 50; Upton, *supra* note 2, at 262-64.

⁹Bederman, *The Feigned Demise of Prize*, 9 *Emory Int'l L. Rev.* 31, 44 (1995). See Colombos, *supra* note 2, at § 243.

the adequacy of the exchanged consideration, and the degree to which the allegedly former owner remains in control of her voyages and operations.¹⁰ Evidence relevant to the question of ownership, as well as to other issues on which forfeiture of the ship and its cargo could turn, was to be found in the ship's papers and in the statements of her crew and passengers upon their interrogation.¹¹

During the American Civil War, the flagrancy with which many English shipping interests sided with the secessionists and flouted the laws of neutrality itself became a factor for federal courts sitting to hear cases of prize. Had any of Captain Butler's vessels been stopped, even when in ballast, it is unlikely that any foreign flag or registration would have sufficiently masked them when visited by a Union officer with a personal financial interest in penetrating such disguise.¹²

From Captain Butler's extraordinary financial success it might reasonably be inferred that his ships were rarely idle, and rarely sailed in ballast. What transient advantage might accrue to his vessels from their re-flagging would not survive their being caught with a cargo of contraband. A neutral vessel was subject to capture and forfeiture for transporting contraband. Passengers could be contraband if they were members of the military force or government of the enemy, except those on diplomatic missions to neutral states. Goods could be contraband according to their nature or when they were to be delivered to the enemy government. Naturally, contraband goods traditionally included military supplies and naval stores intended for the enemy, as well as its despatches.

Others told Scarlett O'Hara that Captain Butler imported war materials. On one occasion, he himself bragged to her of purchasing muskets. On another, he told her he had been authorized to purchase guns in England with funds of the secessionist government, and to bring them back to the Confederacy. Had any of his vessels been found carrying munitions to the Confederacy, the vessel would have been forfeit, regardless of its flag and registry.

Captain Butler also imported hoop skirts, hoops, chantilly lace, silk, tea, and sugar. Although very profitable, these were hardly contraband, so that their presence aboard a neutral vessel did not itself justify capture and forfeiture. A Confederate regulation, however, obliged shipowners to

¹⁰Colombos, *supra* note 2, at § 51; Holland, *supra* note 2, at § 5; Upton, *supra* note 2, at 77-78.

¹¹Robinton, *supra* note 2, at 47, 56-59; On the Practice in Prize Causes, *supra* note 2, at 495-99.

¹²When a vessel was condemned as prize, she was forfeit to the sovereign of her captors. As was the custom in other sea powers, the officers and men of a U.S. warship were allowed by Act of Congress a moiety of the net proceeds from the sale of their prize by the marshal. Act of July 17, 1862, 12 Stat. 606. See Robinton, *supra* note 2, at 89-90. See also Holland, *supra* note 2, at 142-50.

reserve half the cargo space of inbound vessels for government cargoes.¹³ Regardless of their nature, goods consigned to the enemy government were contraband, so, to the extent that Captain Butler complied with this law, his vessels inbound were subject to forfeiture for carrying contraband, and their flag or home port would have offered no defense.

Outbound, Captain Butler appears to have carried exclusively cotton. For the Confederacy, cotton was more than a commodity. When inflation quickly robbed government notes of their value, cotton became a medium of exchange in the Confederacy, taken as revenue by the secessionist government and distributed in payment of its public debts.¹⁴ When the Union declared cotton contraband, the neutral powers by and large acquiesced. Thus, the cargoes carried by Captain Butler's flotilla would have condemned them to capture and forfeiture, despite their re-flagging, at least so long as those cargoes were en route from, or to, a port of the Confederacy.

Regardless of her cargo or flag, any vessel attempting to run a blockade was subject to capture and forfeiture as prize.¹⁵ While international law permitted neutrals during time of war to trade with the enemy goods that were not contraband, it obliged neutrals to honor a blockade. Traditionally, belligerent naval powers imposed blockades on particular ports of their enemies. During the Civil War, the Union imposed a blockade on the entire coastline of the Confederacy, from Hampton Roads in Virginia to the mouth of the Rio Grande River in Texas. To this enlargement of the blockade principle, the neutral powers also by and large acquiesced. In the Atlantic theater of operations, the blockade quickly and effectively sealed the ports of Virginia and Savannah, but it long remained permeable to the specialized traffic of blockade runners in and out of both Wilmington and Charleston. Once the blockade was established, however, re-flagging no longer offered any advantage for those vessels venturing in or out of Wilmington or Charleston. All vessels caught running the blockade were subject to capture and forfeiture, neutral vessels included.

Bermuda is only 690 miles from Wilmington; Nassau is only 560 miles from Charleston. The proximity of these neutral ports was a considerable advantage for the secessionists, their trading partners, and the blockade runners serving both. Because Captain Butler preferred to carry contraband to its final destination, re-flagging might have offered a somewhat greater attraction to him than to other blockade runners content to make only the short voyages between Wilmington or Charleston and the nearest British island possession. In theory, cargo could only be contraband when carried to

¹³Cochran, *supra* note 1, at 50.

¹⁴Bernath, *supra* note 3, at 2-3; Bradlee, *supra* note 1, at 7-8; Cochran, *supra* note 1, at 49.

¹⁵Colombos, *supra* note 2, at § 203; Holland, *supra* note 2, at § 138; Upton, *supra* note 2, at 189-202.

or from the port of an enemy.¹⁶ Cotton shipped from Wilmington to Bermuda, or from Charleston to Nassau, was therefore contraband, but cotton shipped from Bermuda or Nassau to other neutral ports was not.

In an attempt to break out of a blockade, a British flag would have offered no protection from capture, and once free of the blockade, transiting from an enemy port to a neutral one, a British flag would have offered no greater safeguard for a vessel carrying contraband. For the next leg, the longer haul to Canada or England, however, a British flag might have gained the vessel and her cargo at least an initial presumption of immunity from capture. That flag might have the same effect for the long first leg of a return voyage, but inbound cargo of the forbidden sort would become contraband once it left Bermuda or Nassau for a Confederate port, and the vessel transporting it would be subject to capture until she arrived safely under Confederate guns. A British flag would be no more effective when it came time to break into the blockaded port.

Even on the high seas between neutral ports, a British flag might not have reduced very much the risk of capture. The Union's blockading squadrons went about their work aggressively, with a deaf ear turned to the complaints of neutral powers, especially England. Patently sympathetic to the secessionists and their movement for independence, England was viewed by Union naval leaders and others in the Federal government as abusing its neutral status for the benefit of their enemies. Had one of Captain Butler's vessels been re-flagged and then captured on a voyage between Nassau and Liverpool, he might well have seen her condemned by a Union prize court applying the "continuous voyage doctrine."¹⁷

V CONCLUSION

In the long run, then, a Union Jack would not have saved any of Captain Butler's vessels from forfeiture. They really still belonged to the enemy, they carried contraband, and they ran the blockade. But first, the U.S. Navy

¹⁶Colombos, *supra* note 2, at §§ 162-71; Holland, *supra* note 2, at §§ 57-73; Upton, *supra* note 2, at 213-20.

¹⁷Colombos, *supra* note 2, at §§ 164-66; Holland, *supra* note 2, at §§ 71; Bernath, *supra* note 3, at 63-98.

Under the continuous voyage doctrine, the contraband nature of goods is not altered by their transshipment through a neutral port along the way. This doctrine, of distinct advantage to the greater sea power as between belligerents, emerged from the English prize court during the Napoleonic wars. Union prize courts would have applied it to captures from the Nassau trade with relish at the prospect of the British lion being hoisted by her own petard. Indeed, to the frustration of English commerce, her majesty's government declined to object in such cases, preferring the advantage the doctrine promised the Royal Navy in future wars at sea.

had to capture one, and Butler was surely enough of an opportunist to see that, away from the coastal blockade, an English flag would complicate the game for his hunters, at least marginally. Someday, a moment's hesitation in changing course or calling for more steam on the part of a pursuer could have put his quarry out of range when she entered neutral waters, or when darkness otherwise put an end to the chase. That would likely have been enough of an edge to persuade Rhett Butler to change his stripes.

