

DECEMBER SESSION, 1781.

THE RESOLUTION.

MILLER *v.* The SHIP RESOLUTION, &c.The SAME *v.* The CARGO of the SHIP RESOLUTION, &c.*Rehearing.—Evidence, in case of prize.—Neutrality.*

A rehearing may be granted in a case of prize, where the original decree has not been carried into execution: under what circumstances, it will be granted or refused.

The burden of proving a capture to be lawful prize, lies in the captors; the claimants are not, in the first instance, required to disprove it.

In a prize cause, the ship's papers are *prima facie*, but not conclusive evidence of the national character of the property.

Though Great Britain, after the commencement of hostilities against Holland, declared by proclamation, that Dutch vessels carrying the produce or manufactures of Dominica, should be exempt from capture, for a limited time, this could only operate against British captures; it did not restore the neutrality of Holland, nor take away the rights of war, in favor of other nations, who should retake a Dutch vessel from a British privateer.

ON motion of *Wilson*, for the appellants, a rule had been granted, in September session last, to show cause why there should not be a rehearing in these appeals: 1st, because the decree had erred in fact; and 2d, because there had been a discovery of material testimony since it was pronounced. And it was argued, on the 26th December 1781, by *Morris*, in support of the rule, and by *Serjeant* and *Wilcocks*, in opposition to it.

In support of the rule, it was said, that the rehearing ought to be allowed, on the principle that *humanum est errare*; and by analogy to the practice of the court of chancery, founded on that principle. It is true, that the interest of the community requires, that there should be an end to controversies; but this must be attended to, consistently with doing justice. A rehearing of the chancellor's decree seems, indeed, to be a matter of course, on application, for that purpose, by any two counsel of respectable character. *Bohun's Cur. Can.* 240, 243, 364, 385, 405. The petition for a rehearing was filed, as soon as information of the decree was received: there has, therefore, been no *laches* *in making the application; and even when the
*20] chancellor has made his final decree, the form of petition merely states that he has erred in conscience, as to the facts; and the application is seldom refused. But though the request of counsel should not, of itself, be deemed sufficient, the discovery of new evidence subsequently to the decree, ought to be admitted as a foundation for a rehearing. By this evidence, it will appear, that other vessels, though really British, have been fitted out by the same parties, under the same cover; and, of consequence, the inference will be strong, that the Resolution was also British property.

In opposition to the rule, it was observed, that the most pernicious consequences would ensue, if a new trial should be granted, upon every request, and that the payment of costs will not be a sufficient check; as the advantage of having the property in hand, more than compensates that inconvenience. But in answering the causes assigned for a rehearing, it was contended, that the law of chancery did not apply. In chancery, the suits being

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new, and the parties liable to surprise, rehearings are frequently allowed; but in the House of Lords, a rehearing is never allowed. Nor is it consonant with the practice of this court; though if the court was itself dissatisfied with the principles of the decree, that would, undoubtedly, be a satisfactory reason for the measure. Besides, on a rehearing in chancery, no new evidence can be introduced; and the petition for a rehearing must state the reasons at large. 2 Prec. Ch. 450; *Ibid.* 10. But this application is in the nature of a bill of review, and must, consequently, state new evidence. *Ibid.* 40, 452; 3 Black. Com. 451; 3 Atk. 35; 3 P. Wms. 371, 372. Nor is the new evidence, which is assigned as another cause for a rehearing, admissible: it respects another vessel; and the papers found on board the ship herself must be the ground of acquittal or condemnation.

BY THE COURT.—As the original decree has not been carried into execution, we think it proper, under the peculiar circumstances of the present case, to allow a rehearing. But this is not to be drawn into precedent; nor is any point, previously determined, to be brought again into litigation, unless the state of the facts respecting it, shall be altered by the new evidence.

The causes were, accordingly, argued for several successive days; and on the 24th of January 1782, the following revisionary decree (altering the suspended decree only as to a part of the cargo) was delivered by WILLIAM PACA and CYRUS GRIFFIN, the presiding commissioners.

BY THE COURT.—We have considered the new evidence *which [*21 has been laid before us, and we have also considered the observations and arguments which the counsel upon both sides have made upon it.

On the first argument, we were of opinion, that the ship ought to be considered in the predicament of neutral property, and entitled to all the rights and privileges of neutrality, which the ordinance of congress ascertained and conferred; we took up this idea, from a construction of the articles of capitulation and the British proclamation, which issued immediately on the rupture between Great Britain and the States General, and which protected the ship Resolution, for a limited time, from British capture, on her passage from Dominica to Amsterdam. We conceived, that the neutrality of the States General, with regard to the ship, abstractedly considered, was not broken by the rupture; the proclamation having controlled the extent of the war, by its exemption of the ship from being a subject of hostility and capture.

Such was our opinion, on the first argument: but on consideration of the last argument, we are of a different opinion.

The writers upon the law of nations, speaking of the different kinds of war, distinguish them into perfect and imperfect: A perfect war is that which destroys the national peace and tranquillity, and lays the foundation of every possible act of hostility: The imperfect war is that which does not entirely destroy the public tranquillity, but interrupts it only in some particulars, as in the case of reprisals. Before Great Britain commenced war with the States General, the states were a neutral nation with regard to the war between Great Britain, France, Spain and America: They had taken no part in the war, and were a common friend to all. This is precisely the legal idea of a neutral nation: it implies two nations at war,

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and a third in friendship with both. The war which Great Britain commenced with the States General was a perfect war: it destroyed the national peace of the States General, and with it, the neutrality of the nation. The States became a party in the general war against Britain: they were no longer a common friend to the belligerent powers; and therefore, they ceased to be a neutral nation.

War having thus destroyed the neutrality of the States General, they can never resume the character of a neutral, until they are in circumstances to resume the character of a common friend to Great Britain, France, Spain and America: But this character is not to be acquired, while war subsists between them and Great Britain. Only a peace, therefore, between Britain and the States, can put the States in a capacity to resume their original character of neutrality. But there can be no peace, without the concurrence *22] of both nations: the British could not, therefore, by *the mere authority of their proclamation, restore back to the ship Resolution her original neutrality. The proclamation could only operate as a protection of the ship from British capture. We, therefore, lay out of question the ordinance of congress with regard to the rights of neutrality; this case is not within it.

But the ship Resolution is captured, and both ship and cargo are libelled as prize. A question is made; on whom lies the *onus probandi*? We think, on the captors. There can be no condemnation, without proof that the ship or cargo is prize; and it cannot be expected, that the persons who contest the capture will produce that proof.¹

Every capture is at the peril of the party. A privateer is not authorised to capture every vessel found on the high sea: she is commissioned to capture only such ships as are the property of the enemy. Every ship, indeed, may, in time of war, be brought to and examined; but she is not to be seized and captured, without the captors have just grounds to think she is the property of an enemy, and not the property of subjects of a nation in peace and friendship, or neutrality. If such seizure and capture are made without just grounds, the party injured is entitled to have an action for damages: and it is the policy of all nations at war, to oblige the captains of privateers to give bond and security, to enforce a proper conduct while at sea, and to prevent seizures and captures from being wantonly made.

The sea is open to all nations: no nation has an exclusive property in the sea. Put the case, then, that a privateer meets a ship at sea; is it to be inferred, from the mere circumstance of the ship's being found on the high seas, that she is the property of an enemy? Surely, there is no ground for such an inference: On this ground, a privateer might seize and capture the ships of its own nation. But the privateer attacks, seizes, captures and brings the ship into port: it is plain, here is an act of violence; a seizure and capture. The captain, therefore, must do two things: at all events, he must show just grounds for the violence, or he will be punishable at law, by an action of damages: and in the next place, before he can obtain condemnation, he must prove the ship to be the property of an enemy; for it can never be enough for condemnation, that he found the ship at sea.

¹ But the burden of proving a neutral interest rests on the claimant. *The Amiable Isabella*, 6 Wheat. 1; *The Jenny*, 5 Wall. 183; *The Mersey*, Blatch. Pr. Cas. 187.

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The captors say, "That in the present case they had not only just grounds for seizure; but they have also just grounds for condemnation: for both the ship and cargo were found in the possession of British subjects, and therefore, British property." It must be admitted, that possession is presumptive evidence of property; because possession is a circumstance which generally accompanies property; and therefore, the seizure and capture, in the present case, was a violence, at all events, justified by *the law of nations, and for which no action would lie, even on acquittal of the ship and cargo. But the possession in this case is no ground for condemnation: for what is the nature of presumptive evidence? It only has the force of evidence, whilst it remains uncontested. The possession is clearly accounted for: the ship came into the hands of the enemy by capture; and the prior possession was in the hands of Dutch subjects, and not British subjects. The presumption, therefore, relied on by the captors is defeated, and the argument founded on the possession is in favor of the claimants. [*23

On the question of prize or no prize, what evidence does the law of nations admit for the determination of it? The national interest of every commercial country requires, that some mode or criterion be adopted to ascertain the ship, cargo, destination, property and nation to which such ship belongs; not only as a security for a fair commerce according to law; but as a guard against fraud and imposition in the payment and collection of duties, imposts and commercial revenues. The peace also and tranquillity of nations equally require, that the like criterion should be adopted, to distinguish the ships of different countries found on the high seas in time of war; to prevent an indiscriminate exercise of acts of hostility, which may lay the foundation of general and universal war. Hence it is, that every commercial country has directed, by its laws, that its ships shall be furnished with a set of papers called ship papers: and this criterion the law of nations adopts, in time of war, to distinguish the property of different powers, when found at sea; not indeed as conclusive, but presumptive evidence only. Bills of lading, letters of correspondence, and all other papers on board, which relate to the ship or cargo, are also considered as *prima facie* evidence of the facts they speak; because such papers naturally accompany such a mercantile transaction.

Such then is the evidence which the law of nations admits on a question of prize or no prize; and it is on this evidence, that vessels with their cargoes are generally acquitted or condemned.¹ And therefore, if, in this case, the papers on board affirm the ship and cargo to be such property as is not prize, there must be an acquittal, unless the captors are able, by a contrariety of evidence, to defeat the presumption which arises from the papers, and can show just grounds for condemnation. On the other hand, if the papers affirm the ship and cargo to be the property of an enemy, there must be a condemnation, unless they who contest the capture can produce clear and unquestionable evidence to prove the contrary.

The papers on board, the manifest, clearance, bills of lading, the depositions annexed, the certificates of the chief justice of Dominica, the French

¹ The Lilla, 2 Cliff. 169; s. c. 2 Spra. 177.

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governor's passport, and the letters of correspondence *from the shippers, collectively taken, prove the ship to be the property of Brantlight & Son, subjects of the States General, at the port of Amsterdam, and the cargo to be the property of British capitulants, residing or owning estates in the Island of Dominica, and entitled to the rights of commerce according to the capitulation on the conquest of that island; except with regard to such parts of the cargo as were shipped by Morson & Co., Morson, Vance & Co., and Lovel, Morson & Co.

It lies then on the captors to obviate the force of this evidence: it must be obviated, or an acquittal must be decreed, to the full extent of the evidence.

The papers have been taken up by the counsel for the captors, and separately and distinctly considered, and it is said they do not prove the facts to which they are adduced. It is true, separately considered, they do not; but collectively taken, we think they do, except in the instances we have mentioned.

Many objections have been made to obviate the force of this presumptive evidence: the objections go to the competency of many of the papers, and to the credibility of all. "The certificates of the chief justice, it is said, ought not to be admitted as legal and competent evidence; for the chief justice is a British judge of the Island of Dominica, and an enemy." We do not think the chief justice of that Island, reduced as it is by conquest, can with propriety be called a British judge and an enemy. But whether he derives his commission originally from the crown, and still holds it under the articles of capitulation, and so far is a British judge, or not, he must certainly be subject to removal by the French government; and it highly derogates from the honor and dignity of the French crown, and too deeply affects the zeal and loyalty of Governor Duchilot, to admit the supposition, that a man is suffered to fill so important an office, who publicly prostitutes his official character from a partiality to the British nation. The chief justice gave his certificates officially and under the obligation of an oath: We must want charity indeed, if, under these circumstances, we were to say, that they have not even the force of presumptive evidence.

But the competency of this evidence, so far as it is adduced to prove the owners or shippers of the cargo British capitulants, is objected to, on another ground. It is said, "These certificates are not the best evidence the nature of the case will admit, and which the party has in his power to produce: an attested copy of the articles of capitulation, and the names subscribed, ought to have been produced."

This principle of evidence applies forcibly against the captors, but does not affect the claimants. The articles of capitulation bind Great Britain, *25] France and America. It is a solemn compact *or treaty. All the parties to it, the citizens of each nation, are morally bound by it: and it is not only admitted, but contended for, by the counsel for the captors, that even neutral nations are under a moral obligation to regard it; and that it is upon this principle, the law of nations takes cognisance of and determines upon it.

The papers on board show a fair commerce, and affirm the cargo to be the property of capitulants, except in the instances mentioned. If they are not capitulants, and yet British subjects, they have violated the capitulation,

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engaged in a fraudulent and illicit commerce, and are chargeable with a breach of moral obligation. The claimants stand upon two grounds of presumption : First, the presumption which arises from the papers ; and then the presumption that no man would do that which he is morally bound not to do. The claimants cannot be affected, while these presumptions remain uncontested. How are they to be contested ? By what evidence ? Certainly, the best evidence that the nature of the case will admit, and which the captors have in their power to produce. And if an attested copy of the articles, and of the names subscribed is the best evidence to prove who are capitulants, it is the best to prove who are not capitulants ; and therefore, the captors ought, on their own principles, to produce it ; they having it as much in their power to produce such copy as the claimants.

But it is said, " the ship's papers are defective ; the register is not produced ; it is withheld, and gives a ground of suspicion." We have no doubt, a register was on board at the time of the capture : but we do not think there is any ground for suspicion, under the circumstances of the case. The Resolution was captured by a British privateer. The British captain took possession of the ship's papers, and Captain Waterburgh, the captain of the Resolution, was made prisoner. Afterwards, the Resolution was captured by the American privateer, and the American captain took possession of such papers as the British captain had suffered to remain on board the Resolution. Captain Waterburgh was not brought into port with his ship. It was the interest of both the British and American captains to withhold the register, if it proved the ship to be the property of subjects of the States General ; and neither the British captain nor the American captain have made oath, that the papers produced to the court are all the papers which were found on board, and came respectively to their hands and possession.

But it is said, " no credit or faith is to be given to those papers, because replete with contradiction and absurdity. The *manifest, it is said, [*26 contradicts the bill of lading: the manifest purports the property of the cargo to be in the persons named therein as the shippers, and the bills of lading show, in many instances, that the property is in others."

The manifest exhibits a column under the description of shippers ; and it also exhibits a column under the description of marks, and other columns for the cargo. The bills of lading correspond with the column of marks ; and the persons described as shippers in the manifest, are ascertained by the bills of lading to be persons, who acted principally as attorneys, managers or agents for those who are mentioned in the bills to own the property for which the bills are taken ; the property in the bills being in the general produce of such owners' estates in Dominica. There is, therefore, no contradiction between the manifest and bills of lading ; for the term shippers does not imply the property to be in such shippers ; the term as properly applies to a factor, or attorney or agent, as to the owner.

" But," it is said, " Governor Duchilot was imposed upon ; that he refers in his passport and certificate, which is indorsed on the manifest, to the 17th article of the capitulation ; that the 17th article speaks of such merchants as have goods or merchandise ; and that, therefore, the governor must have been informed that the shippers were the owners of the cargo." It is true, the 17th article says, the merchants may sell their merchandise, and carry

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on their trade, and the term *their* implies the property to be in them : but the term *their* may also apply to the property which a factor, agent or attorney has the possession, management and shipment of, for others; for, although they have not the general, yet they have the special property.

"But," it is said, "the shippers dared not to avow the names of the persons mentioned in the bills of lading, from a consciousness that they were not capitulants, and that the governor would have refused them a license, passport and certificate." If the shippers felt such a consciousness, why avow the names of such in the bills of lading? It was not only necessary to take measures to prevent discovery on the island, but also to guard against detention, on a capture at sea. Why was the governor's passport and certificate obtained? Was it not to protect the ship and cargo from capture? But if the manifest, passport and certificate had no reference to the bills of lading, but were contradictory and inconsistent, and the persons avowed by the bills of lading to be the owners of the property were not capitulants, is it not a novelty in the game of fraud, to furnish a ship with *27] such papers as proclaimed a contradiction to the manifest, *passport and certificate, announced the criminality of the commerce, and exposed both ship and cargo to capture and confiscation?

Prudence required, and very probably it was enjoined by the government, that before a ship should be suffered to clear out, and proceed on her voyage, proofs should be made and taken with her, not only that the shippers of the cargo were capitulants, but also, that the owners of the cargo were capitulants. It appears, in this case, that above three-fourths of this cargo were shipped by agents, and attorneys and factors. The governor certifies the shippers to be capitulants. The chief justice certifies the owners to be capitulants, and where his certificates are deficient, the depositions prove it. All this may be done, in conformity to the law, usage and practice of the island.

But another contradiction is objected: It is said, "the bills of lading contradict the other papers, which import the property of the ship to be in Brantlight & Son; for the bills consign the cargo to Brantlight & Son; and therefore, it is contended, the property of the ship could not be in Brantlight & Son; because, it is observed, to direct a man to pay freight to himself." The bills of lading are not chargeable with any such absurdity. The freight is not directed to be paid to Brantlight & Son; the freight is to be paid to the master; he is responsible for the wages of his crew, and other debts, contracted on account of the ship. Freight is answerable for all such claims, and the master is entitled to receive it, to indemnify himself: he may, therefore, refuse to deliver the cargo until the freight is paid. And by this means, in case of the bankruptcy of his owners, he is sure of an indemnification, to the extent of the freight.

But still another contradiction is objected: It is said, "that both the bills of lading, and the oath of Morson, on the back of the manifest, contradict the assertion of the other papers, that the ship is the property of Brantlight & Son: for they prove the consignment of ship to Brantlight & Son; and therefore, it is contended, the property could not be in them, because it is absurd to consign a ship to the owners." We do not see any such absurdity. Consignment is a mercantile phrase, adopted to distinguish the person to whose care a ship is addressed, and when applied to the owners, it

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is merely in conformity to forms. It is the common usage and practice of merchants, to apply the phrase, indiscriminately, to owners and others.

“But,” it is said, “the papers found on board the Resolution, do not sufficiently prove the ship to be the property of Brantlight & Son, when she arrived at St. Eustatius, from Amsterdam, early in 1780.” It is proved, by the oath of Morson, and captain Waterburgh, indorsed on the back of the manifest, that this property *was subsisting, if not, at the time of the deposition, yet, at least, on the arrival of the ship at Dominica, Octo- [*28
ber 1780. And Morson & Company’s letter, to Brantlight & Son, dated 6th March 1781, after the rupture with Holland, and shortly before the ship left Dominica, and which was found on board, proves the property to be then subsisting: for, in the close of the letter, they say, “captain Waterburgh has drawn on you, in our favor, for disbursement, 191*l.* 15*s.*,” which disbursement plainly refers to disbursements of the ship, which Brantlight & Son could not be chargeable with, if they had parted with the property, and were no longer owners.

No evidence at all is produced to show a change of property, or transfer of the ship. And therefore, the fact being admitted, that she was the property of Brantlight & Son, on her arrival at St. Eustatius, in 1780, and the property being proved to be subsisting in October 1780, and proved, to be subsisting in March 1781, a few days before she sailed from Dominica, we cannot doubt, but that the property was subsisting, at the time of her capture. She was then no prize to the British privateer; because protected by the British proclamation: she was no prize to the American privateer; because she was the property of the subjects of the States General, a nation in peace and friendship with America.

“But the papers,” it is said, “prove the cargo to be the property of persons, not capitulants: for Morson & Company, in their letter of the 6th March 1781, speak of Kender Mason, as a shipper, who is not a capitulant.” What does this letter say? It is addressed to Brantlight & Son, and informs them, that the rupture with Holland, occasioned all shipments to stop; that afterwards, the British proclamation, protecting the Holland vessels from capture, for a limited time, on their passage back from Dominica, came to hand; that even then, no one but Kender Mason and themselves would ship; that, afterwards, shipment went generally on. This letter proves clearly, that the cargo was shipped by many different persons. Not only Kender Mason shipped, but Morson & Company also shipped, and there were other shippers, who were alarmed, notwithstanding the British proclamation, and would not immediately ship, though afterwards they proceeded to ship.

To what extent did Kender Mason ship? Morson & Co.’s letter, which is the only evidence that he shipped at all, goes no further than to prove, that he shipped a part of the cargo. How shall this part be ascertained? The ship, it is admitted by counsel on both sides, was consigned to Morson & Co., and Alexander Henderson; and it appears from the papers on board, that upwards of two-thirds of *the cargo were shipped by Henderson, as agent and attorney for the British capitulants; the residue of the cargo was shipped, partly by James Morson, agent and attorney for British capitulants, partly by Morson & Co., and partly by others, in their own right, as agents and attorneys for others. [*29

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The letter of correspondence which Henderson addressed to Brantlight & Son, to whom the ship and cargo were consigned, and his letters of correspondence, addressed to the gentleman at London, for whom he was agent and attorney; the bill of lading he took for the property shipped, and his deposition annexed to the said bill, give a fair history of such part of the cargo, as was shipped by him: they prove it to be the property of British capitulants, and not the property of Kender Mason. The depositions of James Morson, the bills of lading, and the certificates of the chief justice, point out and ascertain, what part of the cargo he shipped as agent and attorney, and prove it to be the property of British capitulants, and not the property of Kender Mason. The depositions, bills of lading, manifest, letters of correspondence, the governor's passport and certificate, and the deposition of Morson and Fitzgerald prove that the residue of the cargo, except what was shipped by Morson & Co., Morson, Vance & Co., and Lovell, Morson & Co. was the property of British capitulants, and not the property of Kender Mason.

If Mason, then, had any property on board, that property must have been in such parts of the cargo as were shipped by Morson & Co., Vance & Co., and Lovell, Morson & Co. With regard to this part of the cargo, the evidence is not full and complete: for although Morson is proved to be a capitulant, yet the company is neither ascertained, nor proved to consist of capitulants.

But it is contended, that the property shipped by Henderson was the property of Kender Mason. On what ground is the idea taken up, that Mason had any property at all on board? It is founded solely on that part of Morson & Co's. letter, which mentions Kender Mason as a shipper. Exclusively of this letter, there is nothing, besides mere conjecture and possibility, to prove that he had any property at all on board.

This much must be clear; that if Henderson was meant, then Mason was not meant. Morson & Co. say in their letter, "that even after the arrival of the British proclamation, no one but Kender Mason and ourselves, would immediately ship." If Henderson was not meant for Kender Mason, then Henderson was amongst those who were still alarmed, and would not immediately ship, on the arrival of the British proclamation; and, consequently, Kender Mason could have no property in what was shipped by Henderson:

*30] *for it is absurd to say, that Kender Mason proceeded to ship, and Henderson did not, if what Henderson shipped was the property of Kender Mason.

But it is objected, "that although Kender Mason is mentioned in the letter, as a shipper, yet it is to be understood, that he is there described as principal to Henderson, and therefore, what was shipped by Henderson, may with propriety be said to have been shipped by Kender Mason."

What evidence is there of such a connection between Mason and Henderson? Mason's letters of correspondence are all addressed to Morson, and the ship is consigned to Morson and Henderson, as persons in separate and distinct interests. The idea too, of such a connection, is contradicted by the whole tenor of the papers found on board. If Henderson was the agent or attorney for Kender Mason; if he was the person, with whom Mason was so extensively interested, in his commercial connections, then the idea of his connection with Morson & Co., Morson, Vance & Co., and Lovell, Morson &

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Co., ought to be abandoned: for it is not to be believed, that Mason should engage in three partnerships, and yet employ an agent or attorney, who ships forty times the quantity of produce shipped by all the three partnerships.

But it is contended, "that both ship and cargo are the property of Morson and Mason, in consequence of a plan concerted at London, between Kender Mason and Heshuysen, agent for Brantlight & Son, while the Ship Resolution lay at Eustatius." We have no doubt the voyage of the Resolution was planned at London, by Kender Mason and Heshuysen; but the plan must have been very different from the one suggested.

One of two propositions must be true; either Morson and Mason did not purchase the ship, and ship the cargo, in consequence of the plan suggested, or Morson has sworn falsely, and committed a perjury. Morson, the 7th March 1781, near twelve months after the Resolution's voyage was concerted at London, swears that the Ship Resolution, belonging to the port of Rouseau, and owned by Brantlight & Son, arrived at Dominica, Oct. 1780; for the purpose of taking on board a cargo of sugar and coffee, the property of capitulants. This oath flatly contradicts the assertion, that the ship was purchased; it also directly contradicts the assertion, that the plan was to ship a cargo, the property of Kender Mason; for Kender Mason is not a capitulant.

Morson's knowledge was competent to the facts he swore: He precisely knew what the plan was that was really concerted at London; for it is strenuously contended by the counsel for the captors, that Kender Mason, in his letter to Morson & Heshuysen, *inclosed to Waterburgh, contained [*31 a full communication of it.

"But the papers," it is said, "found on board the Erstern, throw great light upon the subject; they pluck off the mask, and exhibit Mason in his proper colors; they prove, that an illicit commerce has taken place, and that the articles of capitulation have been repeatedly violated." Admit, for argument sake, the fact, that the Erstern was engaged in an illicit commerce, how can the conduct of the Erstern affect the Resolution?

But what is this illicit commerce, which is charged to have taken place? Let it be ascertained, and we shall find, it cannot possibly apply to the Resolution.

"British goods," it is said, "have been shipped from London, to Dominica, through the intervention of neutral ports." Can this species of illicit commerce apply to the Resolution? It is impossible; for she was never engaged in this Dominica trade, until after her arrival at Eustatius, early in 1780; and from thence she sailed to Dominica, where she lay, until the rupture between Great Britain and Holland took place; nor were Brantlight & Son ever engaged in such a commerce, for Morson & Co.'s letter, of the 6th March 1781, after the rupture, speaks of this house, as a new house, with which the people of Dominica were unacquainted; and mentions the difficulties he had, from that circumstance, to procure consignments.

"But the papers," it is said, "of the Erstern, prove that the produce of Dominica has been exported to London, through the intervention of neutral ports." Was the Resolution ever engaged in this species of illicit commerce? The peculiar circumstances of her case show, that she never was. The rupture with Holland took place while she lay at Dominica; it stopped all shipments. On the arrival of the British proclamation, protecting Holland

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vessels, for a limited time, on their passage back, shipments went on; but the protection, which the proclamation gave, ceased on the arrival of Holland vessels back to their ports in Holland.

What ground, then, is there to think, that the Resolution, with her cargo, were destined, after her arrival at Amsterdam, to proceed to London, where both ship and cargo would have been liable, after her departure from Amsterdam, not only to British capture; but, as contended by the counsel for the captors, liable also to Dutch capture, war prohibiting all commerce between the belligerent powers; and not only liable to British and Dutch capture; but, as the law of nations has been stated by the counsel of the captors, liable also to French, Spanish and American capture?

“But the papers,” it is said, “of the Erstern, prove that Morson and *32] Mason, who planned the voyage of the Resolution, *also planned the voyage of the Erstern; and, therefore, if the Erstern was engaged in an illicit commerce, the presumption is, that the Resolution was also employed in such commerce.” We have already observed, that the Resolution could not possibly be engaged in the illicit commerce, with which the Erstern is charged; but if Morson and Mason planned both voyages, Morson knew the plan on which the Resolution was chartered, and he has proved it, on oath, to be a fair one, and in perfect conformity to the articles of capitulation.

“But Mason, in his letter from Ostend, August 1781, found on board the Erstern, writes to Morson, that he has nearly accomplished the plan, which he informed him of in his letter dated October 1780, from Rotterdam, and it is contended, that this letter proves, that a plan is established at Ostend, to centre there the whole Dominica trade, and to furnish British goods for Dominica, through that channel.” Admit the facts to be so; how does it affect the Resolution and her cargo? The rupture with Holland had taken place, and the Resolution was captured, and brought into port, several months before the plan was accomplished at Ostend, and, consequently, whatever illicit practice that plan points at, cannot apply to the Resolution.

But it is said, that the plan established at Ostend, was the plan, which was concerted at London, and established at Amsterdam and Rotterdam, and shifted from those cities to Ostend, on account of the rupture with Holland. If the plan, now established at Ostend, is nothing more than the plan adopted at London, with regard to the Resolution, then it is a fair one; for Morson has told us, what the plan was, and he has declared it on oath. But we are of opinion, that the system now established at Ostend is a new one, and that it is not a former plan, shifted from Holland to Ostend, on account of the rupture. It originated, indeed, before the rupture, and might have taken place in Holland, had it been completed before that event. It is of such a nature as requires Morson to take his residence at Ostend. It occasioned a change in his commercial connection at London, and a dissolution of the partnership, in which he was there engaged. The cargoes shipped from Dominica, though consigned to Liebert, Baas, Dardine & Co. were nevertheless to be disposed of, under his superintendency. It was upon this plan, whatever it was, that the Erstern sailed; she may be affected by it, but the Resolution never can.

We have said, the whole cargo of the Resolution is disproved to be the property of Mason; except such parts of it as were shipped by Morson & Co., and therefore, if Mason had any property at all on board, it must be in

The Erstern.

such part of the cargo. *We feel the force of the reasoning which has been employed to show, that the name of Kender Mason was inserted by mistake; but, as Mason, who appears to us to be a partner in three partnerships, and to have been the active person in shipping this part of the cargo, has acknowledged, for himself and company, that Kender Mason was a shipper, and the evidence, upon a careful review of it, leaves an opening to apply that acknowledgment to a concern in the three partnerships, we are led to change the opinion we had entertained on the first argument, with regard to this point, and now think, that this part of the cargo must be condemned as prize; and not only Mason's proportion of it, but also the whole interest of the three partnerships: for the shipping of produce by Mason, who is not a capitulant, is a violation of the capitulation; and as the three partnerships were consenting to it, and neglected their interest with Mason, they are *participes criminis*, and must equally suffer. So far we have thought proper to animadvert on the new evidence, and the argument and observations of the counsel upon it. And although, on a decree of acquittal, almost the whole cargo will go into the hands of those who are not the friends of America, notwithstanding they have stipulated a neutrality during the war; yet, as they are entitled to it, by the articles of capitulation, which bind America, the law of nations operating on those articles as a solemn compact, commands that such a decree must be given. We hope, we feel just impressions of the wrongs and cruelties of Great Britain; but public faith must be maintained; the honor and dignity of the United States preserved and the law of nations dispassionately and righteously administered.

We, therefore, adjudge and decree, that the order of this court, suspending the original decree, be discharged, and the said original decree be affirmed in all its parts, except with regard to such parts of the cargo, as were shipped by Morson & Co., Morson, Vance & Co., and Lovell, Morson & Co., which parts of the cargo we do adjudge and decree to be condemned, for the use of the captors, chargeable, nevertheless, with the stipulated freight,

 JANUARY SESSION, 1782.

*THE ERSTERN.

[*34

DARBY *et al.*, appellants, *v.* The BRIG ERSTERN *et al.*

Neutral property.--Prize.

If the owners of a neutral vessel violate their neutrality, by taking a decided part with the enemy, their ship is in the predicament of enemy's property, and subject to seizure and confiscation, as lawful prize.

THIS was an appeal from the admiralty of the state of Massachusetts-bay, where the brig and her cargo had been acquitted. The case was argued on the 28th, 29th and 30th of January; and on the 5th February 1782, the definitive sentence of the court was pronounced by P. A. C. A. and GRIFFIN, the presiding Commissioners, in the following terms: