

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. ACA and GRIFFIN, the presiding Commissioners, in the following terms:

The Erstern.

BY THE COURT.—Upon the evidence in this case, we are of opinion, that the brig, at the time of her capture, was the property of Imperial subjects at Ostend, and that the cargo was British property, unprotected by the capitulation of Dominica.

It is objected, “the brig is not prize, because neutral property.” Neutral property cannot be captured: for while the character of neutrality is preserved, such property is the property of a friend, on which the rights of war cannot attach; but the owners of a ship may violate their neutrality, by taking a decided part with the enemy: in what light is such a ship then to be considered, and what is to be done with her? The law of nations says, that a ship, under those circumstances, is in the predicament of enemy's property, and subject to seizure and confiscation.

But it is said, “the ordinance of congress ascertains in what cases the rights of neutrality are forfeited; that the present case is not comprehended; and therefore, if not protected by the law of nations, yet it is protected by the ordinance of congress.”

We are of opinion, that congress did not mean, by their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, in exclusion of all other cases; for the instances not mentioned are as flagrant as the cases particularized. The ordinance does not specify the case of a neutral vessel employed in carrying provision to a place which is besieged, and in want of bread: for although one of the articles says, “you shall permit all neutral vessels freely to navigate on the high seas, or the coasts of America, except such as are employed in carrying contraband goods or soldiers to the enemy;” yet another article says, that the term *contraband* shall be confined to the articles there enumerated, and provision is omitted.

*35] Were congress asked, whether they meant to protect from capture, a neutral ship loaded with provision, and destined for York and Gloucester, when besieged by the armies of the United States and France, no one could possibly doubt what their answer would be. The plain and obvious construction of the ordinance is, that while neutral vessels observe the rights of neutrality, they shall not be interrupted by American captures: Congress meant to pay a regard to the rights, and not to the violations of neutrality.

But it is objected, “that in this case, if the brig has violated the rights of neutrality, it is because she intended a violation of the capitulation of Dominica; that the capitulation of Dominica can only be considered as a local law, of which there can be no breach, until the offending ship comes within the civil jurisdiction of the island; that the brig was captured before the arrival within the jurisdiction of Dominica; and that, therefore, she was captured, before there was any violation of the rights of neutrality.” If nothing could be objected against the brig, but an intentional violation of the capitulation, abstractedly from the consequences, with regard to the war between Great Britain, France and the United States, possibly, such reasoning might be conclusive: but we are of opinion, that the brig has done more than a mere intentional offence, with regard to the capitulation.

The subjects of a neutral nation, cannot, consistently with neutrality, combine with British subjects, to wrest out of the hands of the United States and of France, the advantages they have acquired over Great Britain by the rights of war; for this would be taking a decided part with the

The Erstern.

enemy. On the conquest of Dominica a capitulation took place, and by that capitulation, a commercial intercourse between Great Britain and that island was prohibited: the object was, to weaken the power of Great Britain, by lessening her naval and commercial resources. But what has been the conduct of the brig, and the Imperial subjects, her owners? Kender Mason, a British subject, establishes a plan at Ostend, by which the commerce of Great Britain with Dominica is to be kept up and preserved, through the intervention of that port. On this plan, Liebert, Beas, Dardine & Co., Imperial subjects, purchase at London the brig Erstern: Kender Mason puts on board a cargo of British merchandise, the property of British subjects: the brig clears out from London, ostensibly for Ostend, and there arrives: Liebert, Beas, Dardine & Co. supply her with false and colorable papers, assume upon themselves the ownership of the cargo, and dress it up in the garb of neutrality, to screen it from detention and capture: the brig then clears out for Dominica, and sails for that island with the cargo she took on board at London.

*Can such conduct consist with neutrality? Can there be a more flagrant violation of it? Does it not aim to wrest from France and the United States, the advantages they acquired by the conquest of Dominica: And does it not evince a fraudulent combination with British subjects, and a palpable partiality? [*36

But, "why shall the rights of neutrality be broke by works of supererogation? If the cargo was British property, unprotected by the capitulation, it was then the property of enemies, and as it did not consist of contraband articles, it was protected from capture, by the ordinance of congress: the brig, therefore, needed not to employ fraud and stratagem, to give it the garb of neutrality, in order to screen it from capture."

If the offence which the brig has committed, consisted in employing fraud and stratagem, merely to protect property which belonged to an enemy, the objection might, in consequence of the ordinance of congress, be of some force. But the offence is not of so limited a nature; it is far more extensive, and comprehends a flagrant violation of the rights of neutrality: it results from a fraudulent combination with British subjects, to give weight and energy to the arms of Great Britain, by the re-establishment of a commerce, and its emoluments, which she had lost by the conquest of Dominica.

But it is objected, "The cargo is not prize, because it is not contraband, and all the other effects and goods, though the property of an enemy, are exempted from capture by the ordinance of congress." If the Erstern had been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be prize; because congress have said, by their ordinance, that the rights of neutrality shall extend protection to such effects and goods of an enemy. But if the rights of neutrality are violated, congress have not said, that such a violated neutrality shall give such protection: nor could they have said so, without confounding all the distinctions between right and wrong.

Upon the whole, we are of opinion, that the decree below be reversed, and that the said brig and cargo be condemned, as prize, for the use of the captors, without costs.