

The George.

must decide on the effect of this added article, in the case which has occurred. It will be admitted, that a right once vested does not require, for its preservation, the continued existence of the power by which it was acquired. If a treaty, or any other law, has performed its office, by giving a right, the expiration of the treaty or law cannot extinguish that right. Let us, then, inquire, whether this temporary treaty gave rights which existed only for eight years, or gave rights during eight years which survived it?

The terms of this instrument leave no doubt on this subject. Its whole effect is immediate. The instant *the descent is cast, the right of the *278] party becomes as complete as it can afterwards be made. The French subject who acquired lands by descent, the day before its expiration, has precisely the same rights under it, as he who acquired them the day after its formation. He is seised of the same estate, and has precisely the same power, during life, to dispose of it. This limitation of the compact between the two nations, would act upon, and change all its stipulations, if it could affect this case. But the court is of opinion, that the treaty had its full effect, the instant a right was acquired under it; that it had nothing further to perform; and that its expiration or continuance afterwards was unimportant.

Judgment affirmed.

 THE GEORGE.
Collusive capture.

A question of collusive capture. The capture pronounced to be collusive, and the property condemned to the United States.
The George, 2 Gallis. 249, affirmed.

THIS is the same cause which is reported in the first volume of these reports, p. 408, and which was ordered to further proof upon the points there stated.

*279] *The case was argued by *Webster* and *G. Sullivan*, for the captors, and by the *Attorney-General*, for the United States.

March 15th, 1817. JOHNSON, Justice, delivered the opinion of the court.—This is one of those cases which too often occur in courts exercising admiralty jurisdiction, in which the court is left to decide between the most positive testimony on the one hand, and the most obstinate circumstances on the other.

The privateer *Fly* had captured the schooner *George*, and carried her into the province of Maine. But various circumstances having excited a suspicion that the capture was collusive, a claim was filed in behalf of the United States, and she was adjudged to the government, in opposition to the right set up by the captor.

In all the courts through which this case has passed, the most ample opportunities have been given for the production of testimony. But, unfortunately, this indulgence has only served to thicken the difficulties of the case. We have now before us the most positive depositions of the supercargo and the shippers of the *George* (men whose veracity stands unimpeached), denying in every point, the collusion, and contradicting, in almost every material point, the evidence upon which the adjudications took place in the

The George.

courts below. On the other hand, the characters of Thomas and Rodick, who swear to positive confessions on the subject of the fraud, are amply supported *by the most respectable testimony, whilst the veracity of Wasgate and Stanwood, who testify to the same point, stands wholly [*280 unimpeached. It is painful to a court ever to express an opinion that results in an imputation of wilful perjury, and, as much as it is possible in this case, we will put out of view the clashing testimony of individuals, and consider the case upon those facts concerning the truth of which the evidence leaves no doubt.

It is a notorious fact, and is expressly and repeatedly sworn to in this case, that during the restrictive system, and the late war, English manufactures, in immense quantities, were accumulated in the small ports on the west coast of Nova Scotia, and it is a melancholy truth, which this court has had but too much cause to know, that many unprincipled individuals were actively engaged in introducing those goods into the United States, under innumerable artifices, and to an immense amount. The protection of the British government was openly given to this intercourse, and there were found but too many in our country who countenanced and encouraged it. Hence, this illicit intercourse was actively carried on, and naturally casts a suspicion on such shipments made in that quarter. On the other hand, although an effort has been made to show, that a trade in the same articles was carried on between those provinces and the Havana, but one instance can be shown of such a shipment. All the witnesses agree, that the exports from St. John's to the Havana consisted of fish and lumber. Indeed, from the course of trade at that time, it is notorious, that the Havana, [*281 *as well as other Spanish ports to the southward, were crowded with British manufactures, for the same unprincipled trade carried on at Amelia Island. The shipment, then, in the first instance, is a suspicious one, and leads to the opinion, that the dry-goods were intended for the United States, whilst the fish and lumber were to be used only as the cover under which they were to be introduced. But this reasoning may be consistent with the idea of a destination to any port of the United States, as well as the ports in that vicinity with which this privateer appears to have been connected. Let us, then, examine, if the George was equipped for a voyage of any duration. And here, the evidence is irresistible, to show that she was not. She had no dunnage or platform, for the purpose of preserving the goods from damage by water, and nothing was stowed or packed in such a manner as to indicate preparation for a protracted voyage. Her sails and rigging were old, worn and deficient in quantity, and her mainsail too large both for mast and boom. Her wood and water, and provisions, very scanty; and her crew, before the mast, not more than one-half of what were necessary for a long and a winter's voyage. Add to this, that her master is proved to have been a very young man, scarcely twenty-one years of age, altogether unknown to the shippers, and engaged only four days before the vessel's sailing. It cannot be believed, that so valuable a cargo could have been destined for so long a voyage, with such defective equipments; no court, upon such evidence, would *have hesitated to avoid a policy on [*282 either vessel or cargo. We, therefore, think, that her real destination must have been to some port in the vicinity of that at which her voyage commenced. How, then, was the cargo to be introduced?

The George.

Here, I regret, that it is necessary to notice a part of the testimony of Gregory Vanhorne, which certainly casts a shade upon all the rest of his testimony. The *George*, it appears, had actually sailed, under convoy of the *Beaver*, as far as Etang Harbor. There, the vessel lay in a secure port, under the protection of the *Martin* sloop of war, and at a place occasionally assigned as a place of rendezvous to vessels that were to sail under convoy. Yet, Vanhorne swears, that he heard the commander of the *Martin* expressly order the master of the *George* to depart for the place where she was captured, an open road, without protection, only fifteen miles from Etang Harbor, and there to wait the indefinite arrival of some unascertained convoying vessel. This cannot be true; for, independently of the fact, which appears to be satisfactorily established, that Long Island Harbor, in the island of Grand Magnan, when this vessel was captured, had never been used as a place of rendezvous for a convoy, it is very clear, that such an order would not have been obeyed by a vessel that feared exposure to capture; for it is proved to have been a place often visited by American privateers.

We, therefore, consider the vessel's departure from Etang Harbor to the *283] place where she was captured as voluntary, and her patient stay at that place, as manifesting that she did not fear exposure to American capture. Yet, it does not follow, necessarily, that it was the *Fly* privateer that she was waiting for, nor that she expected to be captured at all. The cargo intended for the American market may, by possibility, have been intended to be introduced into the United States, by being transshipped into some smuggling vessel. So far, everything comports perfectly with the innocence of this capture.

But the privateer *Fly* also draws suspicion upon herself, in the very inception of her voyage. We find, what we pronounce absolutely unprecedented, notwithstanding every effort to prove the contrary, that the captain, Dekoven, is sole owner of the privateer, and every man under him, from the lieutenant down, is engaged on wages. In the case of *The Washington Privateer* (*ante*, p. 169), it was a circumstance of great weight with this court, that nine out of the fifteen of the ship's company were joint-owners, and it was thought improbable, that such a transaction, if there was fraud in it, would have been confided to so many witnesses. But here, no man but the captain is to participate in the prize-money, and he thus presents himself as the most convenient agent possible to be intrusted with such an undertaking. Perhaps, this circumstance may give a leaning to the mind of the *284] court, in considering the effect which ought to be given to other evidence in the cause; but if so, it is Dekoven's misfortune, and one which he has himself furnished the cause for.

It then becomes necessary to consider, whether the arrival of Captain Dekoven was the object of this vessel, in taking the position she did, in the island of Grand Magnan. And here, it is proper to remark, that Etang Harbor, lying up the bay of Passamaquoddy, N. W. and by W. of St. Johns, where this vessel took in her cargo, is off the course to Cuba, and a very convenient situation for intelligence with Machias, in the province of Maine, by means of a chain of islands extending across the bay. One of these islands is Moose Island, about five leagues distant from Grand Magnan, and something less from Etang Harbor. Now, the evidence is very satisfactory, to prove that the *Fly* lay, some time in December, at Machias; that during

The George.

that time, Sebor, the lieutenant and brother-in-law of Dekoven, was absent from the vessel. And Jabez Mowry, who resides on Moose Island, swears, that during that time, Sebor was on Moose Island, and holding communication with certain notorious smugglers from the states; to one of which, of the name of Toler, from New York, he had a letter. Again, the pilot who was on board the Fly swears, that from all he saw on the occasion of the capture, he concluded it was amicable; and Aaron Gale, a witness, resident upon the island of Grand Magnan, who saw the whole transaction, swears to the same fact, and adds, that after the capture, the captain of the privateer and his prize-master came on shore to *a [*285 neighboring house, where the witness then was, and got something to drink. This looks very little like a consciousness of being among enemies. To this he adds, that he heard a British officer, who was at the time recruiting upon the island, threaten Vanhorne, the supercargo, who, together with all the crew, except the supposed captain, were immediately put on shore, to put him in irons for the fraud in thus colluding with the enemy.

I will notice but two more pieces of testimony which the case affords, and which, taken with the rest, we think too strong to be resisted. The first is, that of Richard Higgins, who testifies that, on the arrival of the George off the harbor called Frenchman's Bay, or, as he expresses himself, at Mount Desert, he, the deponent, was the first person who boarded her; that Sebor, the lieutenant of the Fly, who was the prize-master, told him where they had captured the George; upon the witness's inquiring what she was loaded with, he replied, fish and lumber. The witness remarked, that she floated very light for such a load, upon which Sebor replied, he did not know what the cargo consisted of, and that he wanted to get farther to the westward. The witness then told him, distinctly, "that he presumed the capture had been made by some previous understanding, and that if such were the case, he thought he would be likely to fare better, and undergo a less rigorous scrutiny, if he put into this district, than he would, if he went into any of the more western districts, upon which, after consulting with some one of his crew, he went in." This testimony is important, in [*286 *two views, 1st. The plot here develops itself, and we find the fish and lumber actually resorted to as the means of cloaking the introduction of the British goods. And the resort of Sebor to this deception (for he must have known it to be such, had it been only from the inspection of the invoice), shows his privity to the secrets of the machinery. 2d. Going into the port, after the suggestion of Higgins, amounts to a passive acquiescence in the correctness of his suggestions, and an acceptance of the facilities held out to him to induce him to enter that port.

The last and only remaining piece of testimony that we shall notice, is that of Joseph Grindel, of Penobscot, who swears, that he was in St. Johns, at the time the George was lading; that he was familiarly acquainted with Vanhorne, the supercargo, and that he held a conversation with him, respecting a passage, and the shipment of a hogshead of molasses to the states, and remitting the money to his mother, at Penobscot, which, if it be true (and we have no cause to doubt his veracity), puts to rest every question relative to the fraudulent design with which this adventure was undertaken. And the same witness further swears, that after consenting to take his adventure on board (an adventure that never could have been intended for the

The Argo.

Havana market), Vanhorne sailed a day or two sooner than he had intimated to the witness. That upon this, he complained to Nehemiah Merrit, the shipper, and received from him this notable answer, "He suspected your politics and was afraid you would betray him."

*287] *Upon the whole, we are of opinion, that it was a case of collusive capture, and that the decree below should be affirmed.

Decree affirmed.

THE ARGO.

Depositions de bene esse.

The provision in the judiciary act of 1789, § 30, as to taking depositions *de bene esse*, does not apply to cases pending in this court, but only to cases in the district and circuit courts. Testimony by depositions can be regularly taken for this court, only under a commission issuing according to its rules.

APPEAL from the Circuit Court for the district of Massachusetts. This was an information for a violation of the non-importation acts. On the part of the appellants, it was alleged, that the vessel (which sailed from Portland, in the district of Maine, in April 1813, and returned to that port, laden with a cargo of molasses, in the month of August, of the same year), instead of going to Cumana, her ostensible port of destination, had proceeded to Guadaloupe, then a British possession, and there took in her cargo. This was the sole question of fact in the cause; on which the court below decreed restitution to the claimant, from which decree, an appeal was entered, on behalf of the United States, to this court.

*288] *March 7th. *Webster*, for the claimants, objected to the reading of the depositions taken *de bene esse* in this cause. He argued, that there is no provision in the laws, by which testimony in writing can be taken, to be used here, without a commission issuing from this court. The provisions of the judiciary act of 1789, § 30, do not extend to the supreme court; and the act of 1803, ch. 93, does not prescribe any new mode of taking testimony, but only declares that new evidence may be used in prize and instance causes. *Ex parte* testimony may be taken, to be used in the courts below, but here it may not; because this is the tribunal of last resort, and the other party might be surprised by the production of such proof, to his irretrievable injury. It was to guard against this consequence, that the laws omitted any provision for such testimony to be used in this court.

The *Attorney-General*, *contra*, stated, that it had been the uniform practice, to take testimony to be used in this court, in the same manner as if taken for the district and circuit courts; and that the practice had been uniformly acquiesced in. He argued, that this court, sitting as a court of admiralty, had a right to receive *ex parte* affidavits, in the same manner as the circuit and district courts, or the courts of admiralty abroad, who received affidavits and permitted them to be read, whether taken *ex parte*, or under a commission.

March 11th, 1817. MARSHALL, Ch. J., delivered the opinion of the court.
*289] —*On considering the 30th section of the judiciary act of 1789, the court is of opinion, that the provision, as to taking depositions *de*