

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*

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bene esse, does not apply to cases pending in this court. In terms, the provision refers 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. A practice has hitherto prevailed, to take depositions *de bene esse*, in causes pending here, and as no objection has been made at the bar, it has passed *sub silentio*. Under such circumstances, we cannot say, that the United States are in default in taking depositions, according to the usual practice. We shall, therefore, continue this cause to the next term, to enable the parties, if they choose, to take testimony under commissions issued under the rules prescribed by this court.

Cause continued.(a)

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Jurisdiction.—Parties in equity.—Specific performance.

The jurisdiction of the circuit court having once vested, between citizens of different states, cannot be divested by a change of domicil of one of the parties, and his removal into the same state with the adverse party, *pendente lite*.¹

In a suit demanding a specific performance of a contract, by conveying lands, in the state of Ohio, stipulated to be conveyed as the consideration for other lands sold, in the state of Kentucky, or, in lieu thereof, requiring indemnification by the payment of money; it was held, that all the co-heirs of the vendor, deceased, ought to be made parties to the bill, and that the death of one of the heirs ought to be proved, in order to excuse his omission as a party to the bill.²

It is a universal rule of equity, that he who asks for a specific performance, must be in a condition to perform himself; therefore, the vendor, being unable to make a title, free from incumbrances, to the lands sold in Kentucky, was held not to be entitled to a decree for a specific performance.³

APPEAL from the Circuit Court of Kentucky. This was a bill in equity, filed by the complainants in the court below (who are the defendants here), founded on a bond, conditioned for the conveyance of 5000 acres of land, to be situated within certain bounds of the state of Ohio; for which land a conveyance was prayed, if the defendant was possessed of, or had the means of acquiring, the title thereto, and in the event of such inability on the part of the defendant, to comply specifically with his stipulation, a compensation in damages in lieu thereof; *and in this latter case, that a tract of [*291 1000 acres of land, situate in the county of Bourbon, in the state of Kentucky, which formed the consideration on the part of the complainants, for the 5000 acres of Ohio land, and for the conveyance of which the ances-

(a) See the rule of the present term, as to the mode of taking depositions, by commission, out of this court, or the circuit courts, in causes of admiralty and maritime jurisdiction. This rule applies both to prize and instance causes. Further proof is admissible in the latter as well as the former. (The *James Wells*, 7 Cranch 22; The *Clarissa Claiborne*, Id. 107.) But it must not be understood, that instance or revenue causes stand on the same footing with prize causes, in respect to the inadmissibility of further proof, until they are heard on the original evidence. * Further proof may be exhibited in these cases, in the first instance, and if the courts have doubts on the hearing, still further proof may be ordered.

¹ *Mollan v. Torrance*, 6 Wheat. 537; *Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 Id. 164; *United States v. Myers*, 2 Brock. 516; *Kanouse v. Martin*, 15 How. 208.

² See *Shields v. Barrow*, 17 How. 130, 142.

³ *Bank of Columbia v. Hagner*, 1 Pet. 455; *Garnett v. Macon*, 2 Brock. 186.