state, if there be so many, one of which shall be the gazette in which the laws of such state shall be published by authority, if any such there be, to proceed to sell, &c. The purchaser ought to preserve these gazettes, and the proof that these publications were made. It is imposing no greater hardship on him, to require it, than it is to require him to prove, that a power of attorney, in a case in which his deed has been executed by an attorney, was really given by the principal. But to require from the original proprietor proof that these acts were not performed by the collector, would be to impose on him a task always difficult, and sometimes impossible, to be performed.

Although this question may not have been expressly, and in terms decided in this court, yet decisions have been made which seem to recognise it. In the case of *Stead's Executors* v. *Course*, 4 Cranch 403, in which was drawn into question the validity of a sale made under the tax laws of the state of Georgia, this court said, "it is incumbent on the vendee to prove the author-
*83] ity *to sell." And in *Parker* v. *Rule's Lessee*, 9 Ibid. 64, where a sale was declared to be invalid, because it did not appear in evidence, that the publications required by the 9th section of the act, had been made, the court inferred, that they had not been made, and considered the case as if proof of the negative had been given by the plaintiff in ejectment. The question, whether the deed was *primâ facie* evidence, it is true, was not made in that case; but its existence was too obvious, to have escaped either the court or the bar. It was not made at the bar, because counsel did not rely on it, nor noticed by the judges, because it was not supposed to create any real difficulty.

It has been said in argument, that in cases of sales under the tax laws of Kentucky, a deed is considered by the courts of that state, as *primâ facie* evidence that the sale was legal. Not having seen the case or the law, the court can form no opinion on it. In construing a statute of Kentucky, the decisions of the courts of Kentucky would, unquestionably, give the rule by which this court would be guided; but it is the peculiar province of this court to expound the acts of congress, and to give the rule by which they are to be construed.

Judgment affirmed, with costs.

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*84] *The Experiment.

Evidence in prize causes.

Depositions, taken on further proof, in one prize cause, cannot be invoked into another.

Appeal from the Circuit Court of Massachusetts. This was a question of collusive capture.

The *Attorney-General* moved to invoke into this cause depositions taken, on further proof, in the case of *The George*, reported 1 Wheat. 408.

Marshall, Ch. J.—Original evidence and depositions taken on the standing interrogatories, may be invoked from one prize cause into another.

But depositions taken as further proof in one cause, cannot be used in another.

Motion refused.(*a*)

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*Weightman v. Caldwell. [*85

Statute of frauds.

E. B. C., having an interest in a cargo at sea, agreed with J. W. for the sale of it, and J. W. signed the following agreement in writing: "J. W. agrees to purchase the share of E. B. C. in the cargo of the ship Aristides, W. P. Z., supercargo, say at $2522.83, at fifteen per cent. advance on said amount, payable at five months from this date, and to give a note or notes for the same, with an approved indorser." In compliance with this agreement, J. W. gave his notes for the sum mentioned, and in an action upon the notes, the want of a legal consideration, under the statute of frauds, being set up as a defence, on the ground of the defect of mutuality in the written contract, the court below left it to the jury, to infer from the evidence, an actual performance of the agreement: the jury found a verdict for the plaintiff, and the court below rendered judgment thereon, the judgment was affirmed by this court.

Error to the Circuit Court for the district of Columbia.

This cause was argued by *Jones* and *Key*, for the plaintiff in error,(*b*) and by *Caldwell* and *Swann*, for the defendant in error.(*c*)

*Johnson, Justice, delivered the opinion of the court.—The suit below was instituted on a promissory note by the defendant in error. [*86 Although it is, in fact, an indorsed note, and so declared on, yet it is admitted to have originated in a negotiation between the maker and indorser, and whatever defence would be good as against the promisee, is admitted to be maintainable against this indorser, the indorser standing only on the ground of a security or ordinary collateral undertaker to the maker. The defence set up is the statute of frauds, not under the supposition that a promissory note is a contract within the statute, but on the ground, that this note was given for a consideration which was void under the statute.

The case was this: Caldwell having an interest in a cargo afloat, agrees with Weightman for the sale of it, and Weightman signs the following memorandum, expressive of the terms of their agreement:

(*a*) But in other respects, cases of collusive and joint captures form an exception to the general rules of evidence in prize causes. In cases of this nature, the usual simplicity of the prize proceedings is departed from, because the standing interrogatories are more peculiarly directed to the question of prize or no prize, as between the captor and captured, and are not adapted to the determination of questions of joint or collusive capture. It is, therefore, almost a matter of course, to permit the introduction of further proof in these cases. The George, 1 Wheat. 408. But this further proof must be of such a nature as is admissible by the general rules of prize evidence. Under what circumstances, these rules permit the invocation of papers and depositions, may be seen, 2 Wheat. Appendix, Note I., p. 23.

(*b*) They cited Wain *v.* Warlters, 5 East 10; Champion *v.* Plummer, 4 Bos. & Pul. 252; Symonds *v.* Ball, 8 T. R. 151; Saunderson *v.* Jackson, 2 Bos. & Pul. 238; Bayley and Bogert *v.* Ogdens, 3 Johns. 399; Roberts on Frauds 113, 116.

(*c*) They cited Ballard *v.* Walker, 3 Johns. Cas. 60; Leonard *v.* Vredenburgh, 8 Johns. 29; Slingerland *v.* Morse, 7 Id. 463; Ex parte Minet, 14 Ves. 189; Roberts on Frauds 117, note 58; Id. 121; Stapp *v.* Lill, 1 Camp. 242.