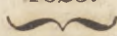


force by the act of March 2, 1811, c. 306. thereby 1823.  
 broke the condition of the bond given pursuant   
 to the third section of the statute of June 26th, The Experi-  
 1812, c. 430. requiring " that the owners, officers, ment.  
 and crew, who shall be employed on board such  
 commissioned vessel, shall and will observe the  
 treaties and laws of the United States.

2. That where such breach appears upon demurrer, the defendants cannot, by law, claim a hearing under the Judiciary Act of September 24th, 1789, c. 20. s. 26.

All which is directed to be certified to the Circuit Court of the United States for the first circuit and District of Maine.

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 [PRIZE.]

### The EXPERIMENT.

In cases of collusive capture, papers found on board one captured vessel may be invoked into the case of another captured on the same cruise.

A commission obtained by fraudulent misrepresentations, will not vest the interests of prize.

But a collusive capture made under a commission, is not, *per se*, evidence that the commission was fraudulently obtained.

A collusive capture vests no title in the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

APPEAL from the decree of the Circuit Court of Massachusetts, affirming the decree of the District Court of Maine, by which the sloop Experiment, and cargo, were condemned to the United States, as having been collusively captured by

1823. the private armed schooner *Fly*. The facts (so far as necessary) are stated in the opinion of this Court.

The Experiment.

Feb. 11th.

Mr. *Webster*, for the appellants, argued, that this case was distinguishable in its circumstances from that of the *George*,<sup>a</sup> captured by the same privateer, and adjudged by this Court to be a collusive capture.

Mr. *Pitman*, for the United States, argued upon the facts with great minuteness and ability, to show, that the capture was made *mala fide*. He, also, contended, that the captors, who had obtained their commission for the fraudulent purpose of violating the laws of the United States, and who had been detected by this Court in an attempt to impose on it in a former case,<sup>b</sup> could not be entitled to derive any benefit from their commission, even supposing the capture in the present instance not to be collusive. The Court had already settled certain principles analogous to that on which he insisted. Thus, it has been determined, that if a neutral ship-owner lend his name to cover a fraud with regard to the *cargo*, this will subject the *ship* to confiscation.<sup>c</sup> So, if a party attempt to impose upon the Court by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not

<sup>a</sup> 1 *Wheat. Rep.* 408. 2 *Wheat. Rep.* 278.

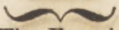
<sup>b</sup> *Ib.*

<sup>c</sup> The *St. Nicholas*, 1 *Wheat. Rep.* 417. The *Fortuna*, 3 *Wheat. Rep.* 236.



be entitled to restitution of that portion which he may ultimately establish as his own.<sup>a</sup> And in the case of the *Anne*, the Court distinctly recognise the principle, that fraud will forfeit all rights to which captors might otherwise have been entitled under their commission.<sup>b</sup> He also cited authorities to show, that the Court would take notice of facts which came judicially into their view in the case with which this was so closely associated, and would severely scrutinize the conduct of the same parties in a similar transaction.<sup>c</sup>

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Mr. Justice STORY delivered the opinion of the Court. This is a prize cause, brought by appeal from the Circuit Court of Massachusetts, affirming, *pro forma*, the decree of the District Court of Maine. The sloop *Experiment*, and cargo, are confessedly British property, and were captured by the privateer *Fly* during the late war, and brought in port, and proceeded against by the captors in the proper Court, for the purpose of being adjudged lawful prize. No claim was filed in behalf of the captured; but the United States interposed a claim, upon the ground, that the capture was fraudulent and collusive, and the cargo was introduced into the country in violation of the non-importation acts then in force, which prohibited the importation of goods of British manufacture,

Feb. 14th.

<sup>a</sup> The *Dos Hermanos*, 2 *Wheat. Rep.* 76.

<sup>b</sup> 3 *Wheat. Rep.* 448.

<sup>c</sup> The *Argo*, 1 *Rob. Rep.* 158. The *Juffrow Elbrecht*, *Id.* 126.

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as the goods comprising this cargo certainly were. Upon the trial in the Court below, the claim of the United States was sustained, and the capture being adjudged collusive, a condemnation was decreed to the government. From that decree the captors have appealed to this Court ; and the cause now stands for judgment as well upon the original evidence, as the farther proofs which have been produced by the parties in this Court.

The privateer is the same, whose conduct came under consideration in the case of the *George*, reported in 1 *Wheat. Rep.* 408. and 2 *Wheat. Rep.* 278. and was there adjudged to have been collusive. The present capture was made during the same cruise, by the same crew, and about six days only before the capture of the *George*. Under an order of the Court, the original papers and proceedings in the case of the *George*, have been invoked into this cause ; and after a long interval, during which the parties have had the most ample opportunities to clear the case of any unfounded suspicions, the decision of the Court upon the arguments at the bar, is finally to be pronounced.

At the threshold of the cause, we are met by the question, whether a party claiming under a commission which he has obtained from the government by fraud, or has used in a fraudulent manner, can acquire any right to captures made in virtue of such commission. Undoubtedly a commission may be forfeited by grossly illegal conduct ; and a commission fraudulently obtained, is, as to vesting the interests of prize, utterly void. But a commission may be lawfully obtained, al-



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though the parties intend to use it as a cover for illegal purposes. It is one thing to procure a commission by fraud, and another to abuse it for bad purposes. And if a commission is fairly obtained, without imposition or fraud upon the officers of government, it is not void merely because the parties privately intend to violate, under its protection, the laws of their country. The abuse, therefore, of the commission, is not, *per se*, evidence that it was originally obtained by fraud and imposition. The illegal acts of the parties are sufficiently punished by depriving them of the fruits of their unlawful enterprises. A collusive capture conveys no title to the captors, not because the commission is thereby made void, but because the captors thereby forfeit all title to the prize property.

And, after all, while the commission is unrevoked, it must still remain a question upon each distinct capture, upon the evidence regularly before the Prize Court, whether there be any fraud in the original concoction, or in the conduct of the cruise. We cannot draw in aid the evidence which exclusively belongs to another cause, to fix fraud upon the transaction, unless so far as, upon the general principles of prize proceedings, it may be properly invoked. The present case, then, must depend upon its own circumstances.

It cannot, however, escape the attention of the Court, that this privateer has already been detected in a gross case of collusive capture, on the same cruise, and under the same commission. This is a fact, of which, sitting as a Court of Ad-

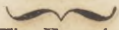
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miralty, we are bound to take notice ; and it certainly raises a presumption of ill faith in other transactions of the same parties, which can be removed only by clear evidence of honest conduct. If the circumstances of other captures, during the same cruise, are such as lead to serious doubts of the fairness of their character, every presumption against them is greatly strengthened; and suspicions once justly excited in this way, ought not to be easily satisfied. The captors have had full notice of the difficulties of their case, and after an order for farther proof, which should awaken extraordinary diligence, they cannot complain that the Court does not yield implicit belief to new testimony, when it comes laden with grave contradictions, or is opposed by other unsuspected proofs.

Many of the circumstances, which were thought by the Court to be entitled to great weight in the decision of the *George*, have also occurred in the present case. The original equipment, ownership, shipping articles, and conduct of the cruiser, are of course the same. The stay at Machias, the absence of Lieut. Sebor, the very suspicious nature of his journey, the apparent connexion of that journey with persons and objects in the immediate vicinity of the place where the voyage of the prize commenced, are distinctly in proof. The bad equipment of the prize, her indifferent condition, and small crew for the voyage, the nature of her cargo, and the flimsy pretences set up for the enterprise, in the letters on board, are circumstances of suspicion, quite as strongly made

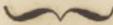


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out as in the *George*. The conduct of the prize, during her ostensible voyage, was still more striking. She was far out of the ordinary course of the voyage, without any necessity, or even plausible excuse. She chose voluntarily to sail along the American coast, out of the tract of her voyage, even at the moment when she affected to have notice that the *Fly* was on a cruise; and she exposed herself to capture, in a manner that can scarcely be accounted for, except upon the supposition of collusion. The pretence set up for this conduct, is exceedingly slight and unsatisfactory. The circumstances of the capture, too, as they come from the testimony of some of the captors, as well as from a disinterested witness, are not calculated to allay any doubt. Here, as in the *George*, all of the prize crew, excepting one, were dismissed without any effort to hold them as prisoners, and without any apparent reason for the dismissal. And if the testimony of one of the captors is to be believed, there is entire proof that the prize was long expected, and came as a known friend under preconcerted signals. It may be added, that the testimony of the captors is, in some material respects, inconsistent; and if the testimony of two disinterested and respectable witnesses is to be credited, the master of the prize, in opposition to his present testimony, admitted, in the most explicit manner, that the capture was collusive.

We do not think that it would conduce to any useful purpose to review the evidence at large. It appears to us to be a case, where the circum-

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stances of collusion are quite as strong, if not stronger, than in the *George*. And we are therefore of opinion, that the decree of condemnation of the prize and her cargo, to the United States, ought to be affirmed, with costs.

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[CHANCERY. LIEN. ASSIGNMENT.]

SETH SPRING and Sons, Appellants,

v.

THE SOUTH CAROLINA INSURANCE COMPANY, GRAY  
 & PINDAR, WILLIAM LINDSAY, and JOHN HAS-  
 LETT, Respondents.

An insolvent debtor has a right to prefer one creditor to another in payment by an assignment *bona fide* made, and no subsequent attachment, or subsequently acquired lien, will avoid the assignment. Such an assignment may include choses in action, as a policy of insurance, and will entitle the assignee to receive from the underwriters the amount insured in case of a loss. It is not necessary, that the assignment should be accompanied by an actual delivery of the policy.

Upon a bill of interpleader, filed by underwriters against the different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debtor, some on the ground of special liens, and others under the assignment, the rights of the respective parties will be determined. But, on such a bill, those of the co-defendants who fail in establishing any right to the fund, are not entitled to an account from the defendant whose claims are allowed, of the amount and origin of those claims.

On a bill of interpleader, the plaintiffs are in general entitled to their costs out of the fund. Where the money is not brought into Court, they must pay interest upon it.