

THE RUBY.

[5 Mason, 451.]¹

Circuit Court, D. Maine.

May Term, 1830.

SEIZURE—COMMISSION TO TAKE
 TESTIMONY—NEWLY DISCOVERED
 EVIDENCE—PRACTICE.

Notwithstanding an order of the court, closing all testimony in a cause, after a limited time, under a commission, the court will enlarge it, upon proof of newly discovered evidence, which the party could not procure to be taken under such commission, the same having come to his knowledge after the execution thereof.

This was a case of seizure. At the last May term of this court (1829), upon motion, the following order was made: "The court order this cause to be continued, on the motion of the district attorney, he assenting to the following terms and conditions: (1) That the testimony of any of the witnesses of the defendant, who have attended at the present term in behalf of the defendant, may be taken down by the clerk and used as evidence in the court (2) That all other testimony, taken hereafter in the cause, shall be by commission, according to the common rules of the court. (3) That the commissions taken out by the United States, shall contain the names of all the witnesses to be examined under the commission, and shall be filed within sixty days after the end of the present term. And such commissions, when executed, shall be returned as soon as may be to the clerk's office, and opened by the clerk, and be subject immediately to the inspection of either party. (4) That the defendant shall be entitled to take out any commission to meet such testimony after inspection, so that the cause may be heard at the next term."

Mr. Shepley, Dist Atty., now moved the court to enlarge the rule, so as to allow new evidence, which

had come to the knowledge of the district attorney since the former order of the court had been complied with, to be taken under the commission, and admitted in the cause.

Mr. Emery, for claimants, objected, upon the ground that the application was not justified by the former order of the court, which, having been made with the assent of the district attorney, was conclusive.

STORY, Circuit Justice. We are of opinion that the former order of the court ought not to govern us under the circumstances of the present application. It would be conclusive as to any testimony known to the district attorney, and which might have been 1300 taken by him under the authority of the former order. But this is the case of new evidence discovered since that order was made, and not in the contemplation of the parties when the former commission was executed. It is therefore the common case of an application by the party, to avail himself of new evidence material to the merits, where there has been no prior knowledge, and of course no laches on his part to affect his rights. Even after a trial, courts of law are in the habit of granting new trials under circumstances of this sort. And if so, there can be no just reason why the application should not be entertained in a suit in admiralty, addressing itself to the sound discretion of the court. The former must be necessarily restrained in its operation to evidence antecedently existing and known to the district attorney, so that it might be taken under the former commission. Motion granted.

{NOTE. The decree of acquittal pronounced in the district court (case unreported) was affirmed on appeal by the circuit court. Case No. 12,104.}

¹ [Reported by William P. Mason, Esq.]

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