Case No. 7,483.

JONES v. NEALE et al.

{1 Hughes, 268;[1] 2 Mart (N. C.) 81.}

Circuit Court, D. North Carolina. 1796.

EVIDENCE—DEPOSITION DE BENE ESSE—WHEN ADMITTED.

Where a deposition was taken de bene esse under the 30th section of the judiciary act of 1789 {1 Stat. 88}, of a witness who resided at a distance greater than a hundred miles from the place of trial, but within the process of the court, and the witness was in good health at the time of trial, and had been duly subpoenaed to appear at the trial, and had failed to appear, but the deposition had not been delivered into court by the magistrate who took it, nor sealed and directed to the court as required by the statute, *held*, that it could not be read.

Debt on bond {against Neale & Blount}.

To prove the execution of the bond, the plaintiff's counsel offered a deposition of the subscribing witness, who resided at Newbern, about one hundred and thirty miles from Raleigh. It appears that the witness had been subpoenaed by the plaintiff, but did not attend, and that he was at home in good health. The deposition was offered as one taken in pursuance of the thirtieth section of the acts of congress, entitled "An act to establish the judicial courts of the United States," approved 24th December, 1789, which provides for the taking depositions de bene esse in certain cases, one of which is, where the witness shall live at a greater distance from the place of trial than one hundred miles. Two objections were made by defendants' counsel to the reading this deposition: 1. That it was taken de bene, esse only, and therefore could not be read unless the party offering it first proved that the personal attendance of the witness could not be obtained. But here it appeared that, he was within reach of the process of the court, and in sufficient health to attend, 2. That the certificate of the magistrate who took the deposition did not set forth the reasons of taking it, which is made necessary by the act of congress. To the first objection it was answered by the plaintiff's counsel that the manifest intention of the act is, that those circumstances which authorize the taking of a deposition de bene esse should, if they exist at the time of trial, entitle it to be heard. That the residence of the witness at a greater distance from the place of trial than one hundred miles is by the act placed on the same footing with his age, infirmity, going to sea, etc., and is equally a good cause for taking his deposition de bene esse. But the age or infirmity of a witness would without doubt excuse his non-attendance, and entitle his deposition to be read, and there is good ground to infer the same of his residence at a greater distance from the place of trial than one hundred miles. This construction is greatly corroborated by that clause of the act which defines the evidence admissible on appeals, but if a contrary construction should prevail, it appeared that the plaintiff had caused the witness to be subpoenaed, which was all that could be required to enforce his attendance, and if that proved inef-

fectual, the deposition ought to be read. To the second objection, that the act of congress requires the magistrate taking the deposition to certify the reasons of taking it, in order to save the party at whose instance

it is taken the trouble and expense of bringing witnesses from a great distance to prove the age, infirmity, etc., of the witness examined, but it left the party at liberty to Incur this trouble and expense if he thought proper, as in taking depositions under commissions issued from the state courts of this state, the party at whose instance the deposition is taken may procure the commissioner to certify that notice of the time and place of caption was given to the adverse party, and such certificate is received by the court as conclusive evidence as to that point, but if the commissioner fail to certify, the party must establish the fact.

Badger & Taylor, for plaintiff.

Mr. Woods, for defendants.

Before PATERSON, Circuit Justice, and SITGREAVES, District Judge.

It appears to be the true construction of the act of congress that those circumstances which will warrant the taking of a deposition de bene esse should, if they exist at the time of trial, authorize the reading of it. But as this act is made in derogation of the common law, it must be strictly construed and literally observed. To fail in one Iota of the ceremonies prescribed by it is to fail in the whole. The act requires that the deposition shall be retained by the magistrate taking it until he delivers the same with his own hands into the court for which it is taken, or {shall, together with the reasons of its being taken, and of notice, etc.}[2] be by him sealed up and directed to such court. This part of the act has not been observed, therefore the deposition cannot be read.

[2] {From 2 Mart (N. C.) 81.}

[1] {Reprinted in 1 Hughes, 268, from Francis Xavier Martin's Notes of North Carolina Decisions, 81, and here republished by permission.}

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