

Case No. 8,610.  
[1 Newb. 4.]<sup>1</sup>

LUTHER V. THE MERRITT HUNT.

District Court, D. Michigan.

1852.

EX PARTE DEPOSITION—WHEN NOT RECEIVED.

1. An ex parte deposition, taken under the act of congress [1 Stat. 73], de bene esse, will not be received unless all the provisions of the act be strictly followed.
2. When the officer taking the deposition ex parte, did not certify that the witness was “cautioned” as well as “carefully examined and sworn,” as provided by law, the deposition will not be received.  
[This was a libel by Job S. Luther, A. A. Smalley intervening, against the schooner Merritt Hunt.]

Barstow & Lockwood, for Smalley.

Hunt & Newberry, for respondent.

WILKINS, District Judge. When this case was called for hearing, the counsel for libelants, to sustain their case, offered to read certain ex parte depositions taken at Green Bay, Wisconsin. To this objection was raised, that the depositions were inadmissible, because the provisions of the act of congress [1 Stat. 73] were not complied with.

That part of the judiciary act providing for the taking of ex parte depositions, has ever been construed strictly. The act requires, that the witnesses “shall be carefully examined and cautioned and sworn,” &c. The act requires that the witness shall be cautioned as well as sworn. It does not appear from the certificate of the officer before whom the deposition was taken, that this was done.

The objection is sustained, and the deposition rejected. The cause will be continued, to allow the libelant to retake the deposition.

<sup>1</sup> [Reported by John S. Newberry, Esq.]