

UNITED STATES *v.* WILDER.\*

*Circuit Court, S. D. Georgia.*                      November, 1882.

## CRIMINAL PRACTICE—REV. ST. § 866.

A commission will be allowed to the defendant in a criminal case to take depositions of witnesses residing abroad, under section 866 of the Revised Statutes. Whether such depositions can be admitted in evidence upon the trial of the case, is a question that does not need to be decided until then; and if they be not allowed to go before the jury, in case of conviction will certainly be considered by the judge who shall be called upon to exercise the large discretion given by the statute in imposing sentence.

Information for Smuggling.

*S. A. Darnell*, Dist. Atty., for plaintiff.

*Henry R. Jackson*, for defendant.

PARDEE, C. J. The defendant, who is charged by the United States attorney with smuggling, submits a petition and affidavit showing that he has witnesses beyond the United States who are material to his defense, and he asks a *dedimus potestatem* to take the depositions of said witnesses under section 866 of the Revised Statutes. The application is resisted by the district attorney on the grounds that it is unprecedented, and without authority, to take the evidence if witnesses in criminal cases by commission, and that the evidence, if taken, would be inadmissible on the trial.

It is so abhorrent to all ideas of justice that a person charged with crime shall not have full opportunity to make his defense by witnesses, that although I am not prepared to hold that evidence taken as proposed in this case will be admitted on the trial, I am of the opinion that the commission and opportunity prayed for ought to be granted. Taking evidence in the manner asked in this case may be and probably is unprecedented in the United States courts in criminal

cases, but I am informed is permitted in state courts of Georgia, and is allowed by statute in other states. At all events, the government cannot be seriously prejudiced by allowing this commission, as it will, of course, be at the expense of the defendant, and its admissibility will be determined on the trial. When the evidence is taken and the case comes on for trial, its scope, force, and effect can be seen, and its admissibility to go before the jury determined and if the defendant shall be deprived of his testimony before the jury because the law will not allow its consideration, and the defendant shall be convicted 394 the testimony will certainly be considered by the judge who shall be called upon to exercise the large discretion given by the statute in imposing sentence in the case.

Let the commission issue as prayed for; the district attorney to be served with the interrogatories to be propounded to witnesses, and to have three days thereafter to file cross-interrogatories, and the commission to be returned 10 days before the next term of this court.

\* Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

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