

FOSTER, J. The tenth section of the act of March 3, 1853, contained a provisional enlargement or extension of the tenure of office of certain officers, and continued the liability of the sureties on their official bonds during said term. The question at issue is whether Jameson, the principal defendant, comes within the scope of that provision.

Let us first observe what officers were to be appointed in virtue of that act. They were a surveyor general and register and receiver of the land-office for the state of California, and certain others registers and receivers in said state, in the discretion of the president. Sections 1 and 5.

Now the tenth section enlarges the official term of these officers, and also every other like officer of the United States, *i. e.*, every other surveyor general, register and receiver of the United States, until their successors were commissioned, and holds their bondsmen liable for their official acts during such time. It would be a strained construction of the words used, to say that they meant every other like officer in the state of California. At that time, it is fair to presume, there were no other like officers in California, and no provision for any except such as this act provided for. The act says, *also every other* like officer of the United States. It is broad and sweeping in its terms, and I have no doubt was intended to apply to every other like officer in the United States. The recitation of this section in the bond indicates that the contracting parties so understood it at the time. The demurrer must be overruled, and defendants may have 20 days to answer.

DUNDY, J., being interested, took no part in this case.

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*In re* Extradition of WADGE *alias* ARCHER.\*

(Circuit Court, S. D. New York. April 11, 1883.)

1. EXTRADITION ACT OF 1882—AUTHENTICATION OF DOCUMENT

In extradition proceedings under section 5 of the act of August 3, 1882, the certificate is not the exclusive source of authentication, but may be assisted by other evidence, and it need not appear that the depositions or documentary evidence would be competent evidence upon the trial of the accused in the foreign tribunal, if sufficient to authorize his arrest.

\*Aff. ming S. C. 15 FED. REP. 864.

## 2. SAME—DECISION OF COMMISSIONER—REVIEW.

Where the depositions and proofs present a sufficient case to the commissioner for the exercise of his judicial discretion, his judgment will not be reviewed.

## 3. SAME—REFUSAL TO GRANT ADJOURNMENT.

A refusal to grant an adjournment to enable the accused to procure depositions from England to show an *alibi*, was, in this case, a legitimate exercise of discretion.

*Habeas Corpus.*

*F. F. Marbury*, for the British government.

*L. F. Post* and *E. T. Wood*, for accused.

WALLACE, J. Section 5 of the act of congress of August 3, 1882, regulating the practice in extradition cases, substitutes the provisions of the act of June 22, 1860, so far as they relate to the reception upon the hearing of depositions, warrants, and other papers, in place of those contained in the act of June 22, 1860. The meaning of the act of June 22, 1860, has been judicially declared, and the decisions of this court are controlling in determining whether the depositions, warrants, and other papers introduced upon the hearing before the commission were so authenticated as to render them competent evidence.

It was determined in *Re Henrich*, 5 Blatchf. 414, that any deposition or other documentary evidence or copies of them are competent which are so authenticated as to show that the tribunals of the country where the offense was committed would receive them in support of the same criminal charge. It was announced in that case that the documentary evidence should be accompanied by a certificate of the principal diplomate or consular officer of the United States residing in the foreign country from which the fugitive shall have escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country. The certificate did not state this explicitly, and was precisely such a certificate as that of Mr. Lowell in the present case; but it was deemed sufficient in connection with the certificates of the Prussian officials declaring the deposition to be valid evidence touching the charge of criminality. Evidently, therefore, the certificate is not the exclusive source of authentication, but may be assisted by other evidence.

In *Re Farez*, 7 Blatchf. 345, the same statute was under consideration, and it was held that the documentary evidence would be receivable if it appeared that it would be receivable in the foreign tribunal as sufficient to warrant the arrest and committal for trial of

the accused. In that case the certificate of the minister resident was in the same language as is the certificate of Mr. Russell here; and it was deemed sufficient because assisted by the certificate of the chancellor of the Swiss confederation. This case is authority not only to the effect that other proof may be resorted to to assist the certificate, but also that it need not appear that the depositions or documentary evidence would be competent evidence upon the trial of the accused in the foreign tribunal if sufficient to authorize his arrest.

In the present case the authentication of the depositions by the certificate of the resident minister is supplemented by oral proof that the originals would be competent and sufficient to authorize the arrest and committal of the accused by the tribunals of England. In *Re Fowler*, 18 Blatchf. 430, [S. C. 4 FED. REP. 303,] it was held that the authentication might be made by oral proof, and that while the certificate of the resident minister would be absolute proof, if in proper form, oral proof would also serve to authenticate the documents or depositions. Although that case arose under the act of June 19, 1876, it is in point here, because the mode of authentication under that act and the present act is the same, the only difference being in the purport of the authentication. The oral proof here supplies the defects in the certificate, and the documentary evidence, copies of which were used, shows that a warrant for the arrest of the accused was actually issued upon the depositions by a magistrate of the city of London. The depositions and proofs presented a sufficient case to the commissioner for the exercise of his judicial discretion, and his judgment cannot be reviewed upon this proceeding. He is made the judge of the weight and effect of the evidence, and this court cannot review his action when there was sufficient competent evidence before him to authorize him to decide the merits of the case. His refusal to grant an adjournment to enable the accused to procure depositions from England to show an *alibi*, was under the circumstances a legitimate exercise of discretion.

The order of the district judge dismissing the writ and remanding the prisoner is affirmed.

## DUDLEY and others v. SEARS and others.

(Circuit Court, S. D. New York. 1883.)

## NEW TRIAL—INSTRUCTION—EVIDENCE.

Where an instruction asked assumes the existence of facts that are controverted, a refusal to grant such instruction is not ground for a new trial.

This is an action to recover damages for the breach of a contract for the sale of 40,000 dozen cans of corn. Upon the cross-examination of the plaintiff Uriah Dudley he testified in part as follows:

*Question.* "When did you first have a negotiation with Mr. Thurber on the subject of the joint interest with you in the Sears corn?" *Answer.* "When he got back from Cape May." *Q.* "What date was that?" *A.* "I guess it was the seventeenth or eighteenth of July." *Q.* "You told him what you had accomplished with Mr. Sears?" *A.* "I did." *Q.* "And you gave him an interest in the result?" *A.* "He asked me if I would let him in on half of it. I told him I would if he wanted to." *Q.* "You did?" *A.* "Yes." *Q.* "On the same terms with yourself?" *A.* "Yes, sir."

The only other testimony on this subject was that of Alexander Wiley, an employe of H. K. & F. B. Thurber & Co., who had charge of the canned-goods department of that firm. He testified as follows:

*Question.* "Did your firm, or you representing your firm, have any transaction with Mr. Dudley or his firm with reference to this crop of Sears corn of 1880?" *Answer.* "No, sir. I don't think we did; not to my knowledge." *Q.* "You have no knowledge or information of any negotiation or transaction between H. K. & F. B. Thurber, or any one representing that firm, with Dudley about the Sears crop of 1880?" *A.* "I never heard of it."

*Joseph Larocque and William G. Choate, for the defendants.*

*William Stanley and S. F. Randall, for the plaintiffs.*

COXE, J. The defendants move for a new trial upon the sole ground that the court erred in refusing to charge the following proposition:

"That, it being admitted that the plaintiffs gave Messrs. Thurber a half interest in the contract in question, the plaintiffs, in no aspect of the case, should recover more than one-half the difference between the contract price and the market price at Circleville on September 7, 1880."

In other words, the court was asked to instruct the jury, as matter of law, that the plaintiffs could recover but half the damages demanded in the complaint, for the reason that the proof established an actual subsisting assignment to the Messrs. Thurber; and further, that the plaintiffs admitted this to be so. I cannot regard the refusal as error.