

SHEIDLEY, Adm'r, etc., v. AULTMAN and others.

(Circuit Court, N. D. Ohio, W. D. June Term, 1883.)

1. PRACTICE—USE OF DEPOSITIONS AFTER DEATH OF THE DEPONENT, IN SUIT BROUGHT BY ADMINISTRATOR.

The rule in chancery is that if the testimony was competent when the deposition was taken and filed, it remains competent, and the subsequent death of the party does not affect its use on the trial. The administrator merely takes up the case as it stood when the intestate party died.

Motion to Suppress Testimony made by Complainant.

Lee, Brown & Lee, for motion.

Lynch & Day, for respondents.

WELKER, J. The complainant, Benjamin A. Sheidley, in his life-time, filed his bill in chancery against C. Aultman, Jacob Miller, H. R. Wise, and G. M. Ogden, alleging that there had been a partnership venture in cattle in the state of Nevada, which had not been settled, and setting forth the proportionate interest of himself and other partners in the partnership transaction. Aultman, Miller, and Wise make a joint answer, and deny the terms on which Sheidley alleges the parties agreed to in said partnership contract, and stating different terms in the agreement, and also filed a cross-bill, alleging in it a great loss sustained by them in the enterprise, and charge fraud against the complainant. This is denied by the complainant. In his life-time the deposition of complainant, Sheidley, was taken in his behalf; and after such deposition was taken and filed, the defendants, Aultman, Miller, and Wise, gave their depositions in their own behalf; but during the time their depositions were being taken Sheidley was sick, and unable to be present and attend to the examination of the respondents, and after the completion and the filing of these depositions the complainant died. The suit has been revived in the name of the administrator, and he files this motion to suppress the testimony of the respondents so taken, because the suit is now between the administrator of Sheidley and the respondents, and is incompetent to be used on the trial, under section 858 of the Revised Statutes. The complainant now offers to withdraw the deposition of Sheidley, the original complainant.

This raises a question of practice in our national courts of considerable importance. The rule in chancery is that if the testimony was competent when the deposition was taken and filed, it remained competent, and the subsequent death of the party does not affect its use in the trial; that the administrator merely takes up the case as it stood when the intestate party died. 2 Abb. Pr. p. 707, § 208; *Vattier v. Hinde*, 7 Pet. 252.

I do not think the statute cited changes this rule of equity. The motion is therefore overruled.

BAXTER, C. J., concurs.

CORTES CO. v. TANNHAUSER.

CHITTENDEN v. SAME.

(Circuit Court, S. D. New York. December 15, 1883.)

TAKING TESTIMONY IN FOREIGN COUNTRY—REV. ST. § 863.

Depositions of witnesses in a foreign country cannot be taken under Rev. St. § 863.

WALLACE, J. The defendants cannot take the testimony of these witnesses in a foreign country, under section 863 of the Revised Statutes. That section only applies to the taking of depositions within the United States. All the officers named, before whom depositions may be taken, are those of courts of some of the states of this country, except notaries public, and it is not to be assumed that notaries public of foreign countries were intended to be delegated with a power which, in the case of higher officials, is confined to those of our own country. The proper course is by commission. The cases seem to be such as to render an oral examination of the witnesses expedient upon the execution of the commission. As the rest of the proofs have been so taken, the defendants are especially entitled to insist upon the same course on the examination of their foreign witnesses.

WELLS v. OREGON & C. RY. CO.

(Circuit Court, D. Oregon. December 24, 1883.)

1. DUTY OF RAILWAY COMPANY TO EXPRESS COMPANIES DOING BUSINESS ON ITS ROAD—MUST FURNISH EQUAL FACILITIES TO ALL.

The defendant was enjoined by this court to continue to furnish the plaintiff such express facilities on its road as it had been furnishing under an agreement between the parties, one provision of which is to the effect that the defendant will carry for the plaintiff not exceeding 8,000 pounds of "freight and express matter" over its road daily on a fast train for the sum of \$1,000 per month, but the plaintiff must not deliver any such "freight" or "matter" at less than a stipulated price per pound. Thereafter the defendant commenced to furnish express facilities to the Northern Pacific Express Company upon the same terms and conditions, as it alleges, that it furnished them to the plaintiff, but allowed said Northern Pacific Express to deliver freight at a lower rate than the plaintiff was permitted to do, and thereupon the latter commenced to deliver freight for the same rates as said Northern Pacific, whereupon the defendant, conceiving itself aggrieved thereby, moved the court to modify the injunction so as to prevent the plaintiff from carrying any freight or express matter at the reduced rates, or to permit the defendant to increase the compensation to be paid it by the plaintiff so as to prevent the same. *Held*, (1) that the defendant has no right to discriminate between the express companies, but must furnish equal facilities to both; (2) that although the plaintiff is in effect required by the decree to deliver this 8,000 pounds of matter, or any portion of it, at not less than the prescribed rate, still, if the defendant permits the North-