THE JACOB BRANDOW.
SCHIAFFINO *v.* THE JACOB BRANDOW.

District Court, E. D. South Carolina. December 28, 1887.

DEPOSITION—INTERRUPTION OF TAKING—ADMISSIBILITY OF PART TAKEN.

In an action in admiralty, while the deposition of libelant was being taken *de bene esse,* and before respondent had completed the cross-examination, the interpreter, whose services were necessary, refused to act further, and another could not be obtained before the witness left port. That part of the deposition that had been taken was signed by the Witness, and produced upon the trial *Held* inadmissible.

In Admiralty.

J. P. K. Bryan, for libelant.

J. N. Nathans, for respondent.

SIMONTON, J. This case came on to be heard this day. It appears that the testimony of the master was being taken *de bene esse,* under order, before the clerk of this court, some months ago. During cross-examination, the interpreter, whose services had become necessary because of the ignorance of the English language on the part of the witness, lost his temper and left the clerk's office. The cross-examination could not be resumed or continued from the impossibility of obtaining another interpreter. The vessel left port the next day, (Sunday,) and witness went in her. The testimony, as far as it was taken, was produced, signed by the master. It was objected to by Mr. Nathans, for respondent.

The fixed and invariable practice of courts of justice has been, and is, not to admit testimony when the opposite party has not had full opportunity of cross-examination. 1 Greenl. Ev §§ 445, 554. The point is discussed in *Gass* v. *Stinson,* 3 Sum, 98. The general rule is stated as above, at least in the law courts, with the possible exception of the death of the witness before the cross-examination is concluded. A case was quoted in the opinion in which the testimony, taken before trial and interrupted in the cross-examination, was rejected, "because it was taken before issue joined, and might have been taken after." No other reason was given. Judge STORY, who delivers the opinion, says in substance that sometimes, in equity, (and the same practice, perhaps, should govern this court,) the testimony of a witness who has not been cross-examined is admitted. But he confines this doctrine to cases in which the failure to cross-examine was the fault of the party having the right to do so, and to cases in which it became impossible to get at the witness again. In the present case the respondent was not in fault. He was not bound to find an interpreter. The witness was examined *de bene esse* for his own convenience. He departed the country of his own accord, and so prevented further examination. He can be examined again, as he is within reach of a commission.

The testimony will not be admitted, and the case is continued.