

## BALLARD v. McCLUSKEY.

(Circuit Court, S. D. New York. July 26, 1892.)

**DEPOSITIONS—AGREEMENT FOR TAKING—ABANDONMENT.**

Where, under equity rule 67, counsel have agreed that the deposition of a witness may be taken down by a typewriter in their presence, at the office of one of them, in the absence of the examiner, but under his constructive direction, one of the counsel cannot abandon such examination without adequate cause shown to the court on a subsequent motion to compel the production of the witness before the examiner, and, if he does abandon it without such cause, the testimony of the witness will be closed.

In Equity. Bill by Charles W. Ballard against James J. McCluskey for infringement of a patent. On motion to compel production of a witness before the examiner. Proper practice stated.

*W. D. Edmonds*, for complainant.

*A. B. Carrington*, for defendant.

SHIPMAN, Circuit Judge. This is a motion to compel the complainant to produce Charles H. Treat, a witness, for further cross-examination. The action is a bill in equity for the infringement of a patent, and the testimony of the witness, so far as it had progressed, had been taken orally under rule 67, and had been by agreement taken down by a typewriter, at the office of one of the counsel, in the absence of the examiner, but under his constructive direction. Some differences of opinion having occurred between the counsel, the cross-examining counsel stated that the cross-examination was closed until the witness should be produced before the examiner for further examination, on the ground that the opposing counsel were "unable to agree as to the cross-examination, and defendant's counsel refuses to proceed in the absence of the examiner." The complainant insisted that the cross-examination should then proceed, or that the witness should sign his deposition, and his examination be considered as closed.

The record does not disclose an adequate cause for the refusal to continue the examination. The defendant's counsel did not proceed, the deposition was signed, and the witness dismissed. Since the new rule 67 was promulgated, the practice has been for counsel to agree that the depositions may be taken down by a typewriter, in their presence, at the office of one of them, in the absence of the examiner, but under his constructive direction. The question under this motion is as to the right of one counsel to refuse to continue the examination, and to demand the production of the witness before the examiner; in other words, to declare the agreement at an end.

When counsel have entered upon the taking of a deposition under such an agreement as I have stated, the examination cannot be abandoned until the witness is produced before the examiner, without adequate cause. If counsel abandon the agreement without adequate cause which shall be satisfactory to the court, the testimony of the witness under examination will be closed. Counsel are not at liberty to enter

upon the taking of testimony under a stipulation, and to abandon the examination for any reason. Such a course of procedure is not only irritating, but exceedingly expensive. On the other hand, they will be permitted to abandon, if, upon motion to compel the reproduction of the witness for examination, such abandonment is shown to have been required by the necessities of the occasion. In this case, I do not think that the defendant's counsel had adequate reason for his dissatisfaction; but this is the first question of the kind which has arisen under the new practice, and, as counsel acted under both lack of knowledge and impatience, I am not disposed to be rigorous, but, announcing what will be the course in the future, permit an additional cross-examination of the witness Treat, in accordance with the original agreement, especially as he is employed in New York city, and can manifestly be produced without trouble or much expense.

FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, C. & C. R. Co.,  
(SHAND *et al.*, Interveners.)

(Circuit Court, D. South Carolina. October 28, 1892.)

1. RAILROAD COMPANIES—FORECLOSURE OF MORTGAGE—PRIORITY OF LIENS—LEGAL SERVICES.

Legal services rendered to a railroad company in maintaining before the courts the validity of municipal aid bonds are not of a character to take precedence of the company's mortgage bonds, within the doctrine of *Foadick v. Schall*, 99 U. S. 235, and equity has no authority to give them such precedence, especially when the services were rendered two years before the appointment of the receiver.

2. SAME.

The fact that such services resulted in benefit to the bondholders will not justify displacing the latter's lien, when they were not parties to the contract of employment.

In Equity. Suit by the Finance Company of Pennsylvania and others against the Charleston, Cincinnati & Chicago Railroad Company to foreclose a mortgage. Heard on the separate intervening petitions of Robert W. Shand and the firm of Sheppard & Bro., asserting claims for legal services, and asking payment prior to the satisfaction of the mortgage bonds. Petitions dismissed.

For prior opinions delivered in the course of this litigation, see 45 Fed. Rep. 436, 48 Fed. Rep. 45, 188, and 49 Fed. Rep. 693.

*Mitchell & Smith*, for petitioners.

*Samuel Lord* and *A. T. Smythe*, for respondents.

SIMONTON, District Judge. These two petitions were heard together. Several townships in South Carolina had subscribed to the capital stock of the Charleston, Cincinnati & Chicago Railroad Company, the subscription payable in coupon township bonds. The townships were created corporations and given the power to subscribe in this way by the