ARNOLD *et al.* *v.* CHESEBROUGH.

(*Circuit Court, E. D. New York.* April 10, 1888.)

EQUITY—PRACTICE—TAKING TESTIMONY.

The power of the circuit court to appoint special examiners, under the sixty-seventh rule in equity, to take testimony outside of its territorial jurisdiction, is not free from doubt, and the practice is objectionable.

In Equity. On application for the appointment of a special examiner to take testimony.

J. H. V. Arnold, for complainants.

W. S. Logan, for defendant.

LACOMBE, J. This is an application for the appointment of a special examiner at Los Angeles, Cal., to take testimony under the sixty-seventh rule in equity. The power of a circuit court to appoint an examiner to act outside of its territorial jurisdiction is not free from doubt. Mr. Justice BRADLEY, sitting at circuit, has held that it has such power. *Railroad Co.* v. *Drew*, 3 Woods, 697. Mr. Justice BLATCHFORD, sitting in this circuit, has repeatedly refused to make such orders as the one now applied for, on the expressed ground of lack of power. Orders appointing special examiners have no doubt since been made here when both parties assented, or where some exceptional and peculiar state of facts was disclosed, but it is not a practice which should be encouraged. No case should come to trial upon evidence as to which there is the slightest doubt that the manner of its taking would sustain a conviction of perjury, if willful false swearing were proved. Where witnesses reside in the district, or within 100 miles of the place of holding the court, their attendance may be compelled before the regular examiner. If they are sick, or live beyond the 100-mile limit, they may be examined by commission; or if an oral examination is deemed more satisfactory, or notice has been given by either party that he desires the evidence to be taken orally, the Revised Statutes (section 863 *et seq.*) provide a simple and efficient mode for taking their testimony. *Bischoffscheim* v. *Baltzer*, 10 Fed. 1. To proceed to take testimony before special examiners, sitting, perhaps, in half a dozen different states, under general notices which do not give the names of the witnesses, thus compelling opposing counsel to attend in person, is alike expensive and unnecessary, and should for that reason be discountenanced, even if there were no doubts as to the power of the court to order the proofs to be taken in that manner. The motion is denied.

CELLULOID MANUF'G CO. *v.* RUSSELL *et al.*

(*Circuit Court, S. D. New York.* April 9, 1888.)

UNITED STATES EXAMINERS—TAKING TESTIMONY OUT OF DISTRICT.

An examiner of the United States circuit court for the Southern district of New York cannot take testimony outside of his district.

In Equity. Motion to strike out testimony.

J. E. Hindon Hyde, for complainant.

H. M. Ruggles, for defendant.

LACOMBE, J. This is a motion to strike out certain testimony taken before one of the examiners of this district, sitting at Waterbury, Conn. There is nothing in the statutes or rules, or in any reported case, which authorizes a person designated as "examiner of the circuit court of the United States for the Southern district of New York" to sit and take testimony outside of his district. The decision cited (*Railroad Co.* v. *Drew*, 3 Woods, 697) does not apply; in that case the examiner was specially appointed for the district in which he took the proof. The proper mode of taking testimony in equity cases pending in this circuit is indicated in a memorandum filed this day in *Arnold* v. *Chesebrough*, *ante*, 16.

FURBER *v.* STEPHENS.

(*Circuit Court, E. D. Missouri, E. D* May 5, 1888.)

BANKS AND BANKING—DEPOSITS—INSOLVENCY—REPLEVIN.

Where plaintiff deposits money with the receiving teller of a bank, a few minutes before the bank closes its doors, to be credited to his account, and the teller, not knowing of the coming failure, after crediting the money in plaintiff's pass-book, puts the money and deposit ticket one side, and before entry is made in the books of the bank, it closes its doors, and the money is, by order of the directors, placed apart, and in that condition delivered to the receiver, plaintiff can maintain replevin for the money so deposited.

At Law. Action of replevin.

John G. Furber, plaintiff, sued L. V. Stephens, receiver. The facts appear in the opinion.

Robert W. Goode, for plaintiff.

Shackelford & Williams, for defendant.

THAYER, J., (*orally*.) This case has been submitted on an agreed statement of facts. From the statement it appears that plaintiff had been a customer of the Fifth National Bank for some time before its failure on November 7, 1887. Only a few moments before the bank closed its doors, he delivered $762.50 in current funds over the counter to the re-