

and the evidence adduced, and ought not to be disturbed. The motion for a new trial is therefore refused.

BILLINGS, J., concurs.

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GILES v. PAXSON *et al.*

(Circuit Court, N. D. Iowa, E. D. December 8, 1888.)

1. **DEPOSITIONS—DEDIMUS—CERTIFICATE—DISINTERESTEDNESS OF COMMISSIONER.**  
Depositions taken for use in the federal courts of Iowa under Rev. St. U. S. § 866, by virtue of a *dedimus* to a commissioner need have no certificate that the commissioner is disinterested, as the section provides that the depositions shall be taken according to "common usage," which means the statutory provisions of the state; and under the Code of Iowa such certificate is unnecessary, sections 863-865, providing for taking depositions before a disinterested commissioner upon notice, without a *dedimus*, not applying to testimony taken under section 866.
2. **SAME—REDUCTION TO WRITING.**  
For like reasons the commissioner need not certify that the testimony taken by a clerk was reduced to writing in his presence, as provided in section 864.
3. **SAME—SIGNATURE OF WITNESS—JURAT.**  
Where, in accordance with Code Iowa, § 3737, the commissioner certifies that the deposition was subscribed and sworn to by the deponent at the time and place mentioned, it is unnecessary to follow the signature of the witness with a jurat.
4. **SAME—WRITING ANSWERS SEPARATELY FROM INTERROGATORY.**  
While under Code Iowa, § 3735, the answer of a witness should be written under the interrogatory, it is sufficient that the interrogatories are numbered, and the answers thereto are written down separately, with corresponding numbers, when the certificate shows that both the interrogatories and answers were read over to the witness before signing, as under section 3741 an unimportant deviation from the statutory directions will not vitiate the depositions where no prejudice can result from such deviation.
5. **SAME—IDENTITY OF WITNESS.**  
Where a commission issues to take the testimony of "W. E. F., of A.," and the caption recites that it is the "deposition of W. E. F., taken at A.," the deposition is properly signed, and the certificate shows that pursuant to the commission the notary caused the witness to come before him, etc., and that he subscribed and swore to the deposition, the deposition sufficiently appears to be that of the person mentioned in the commission.
6. **SAME—RETURNING EXHIBITS.**  
It is proper to return with the deposition of a witness a copy of a deed referred to by him, whether the deed is admissible in evidence at the trial or not.

At Law. On motion to suppress depositions.

Action by William A. Giles against Charles Paxson and others. Defendants filed exceptions to certain depositions taken by plaintiff.

*Adams & Mathews*, for plaintiff.

*Ed. P. Seeds* and *Henry C. Noyes*, for defendants.

SHIRAS, J. The defendants move to suppress the depositions of Joseph W. Martin and other witnesses on several grounds, the first being

that the commissioner does not certify that he had no interest in the case, as required by the provisions of section 863, Rev. St. U. S. There are two general methods for taking depositions to be used on the trial of law cases provided for in the Revised Statutes; the one being the mode pointed out in section 863, and the other in section 866. When taken under the provisions of the former section, a commission to the officer is not sued out from the court in which the cause is pending, but the party desiring to take the testimony gives notice to the opposite party or his attorney of the time and place when and where the testimony is to be taken, and selects as the commissioner any one of the parties named in the section. When depositions are thus taken, no opportunity is afforded to the opposite party to be heard upon the matter of the selection of the commissioner. Hence it is required of the party taking the deposition that he shall select a disinterested commissioner, and the statute requires the party selected to certify that he is not of counsel for either party, nor interested in the event of the suit. If, however, the depositions are not taken under section 863, but under the authority granted in section 866, then, by the express terms of the latter section, the provisions of sections 863, 864, and 865 are not applicable thereto. Section 866 provides for the court granting a *dedimus*, and in so doing it is presumed that the court will select a proper person to act as the commissioner, and the parties can be heard upon the question of the appointment before the commission issues. The authority conferred by section 866 is the granting a *dedimus* to take depositions according to common usage. In *McLennan v. Railroad Co.*, 22 Fed. Rep. 198, it was held:

“When, however, the facts are such in a given case that, under the provisions of statutes of the United States, the right to take the testimony of witnesses by deposition exists, then, as to the mere mode of procuring the deposition, parties may follow, at their election, either the provisions of the state law or of the act of congress.”

In other words, if the right to take depositions existed, then the party desiring to take the same might do so under the provisions of section 863 or according to common usage, which, in an action at law, would be deemed to be in accordance with the mode provided for by the statutes of the state. An examination of the depositions moved against shows that the same were not taken under the provisions of section 863, but that a *dedimus* was issued under the seal of the court directed to Ralph L. Goodrich, clerk of the circuit court of the United States for the Eastern district of Arkansas. The requirements, therefore, of sections 863, 864, and 865 do not apply to these depositions. The Code of Iowa does not require that the commissioner shall certify that he is not of counsel, or is not interested in the suit. The fact that, when notified that a commission would be sued out from the court on a given day, directed to a party named as commissioner, the defendants did not object thereto, and the fact that the person named was selected and appointed in the commission issued as a proper person to act in the premises, certainly makes out at least a *prima facie* presumption that he was a proper party to act as commissioner; and, in the absence of proof to the con-