

INGHAM *et al.* v. PIERCE *et al.*

(Circuit Court, W. D. Michigan, S. D. July 30, 1888.)

COSTS—ATTORNEYS' FEES FOR DEPOSITIONS.

Rev. St. U. S. § 824, allowing solicitors \$2.50 fees "for each deposition taken and admitted in evidence in a cause," includes as well depositions taken in the ordinary way under equity rule 67 as those taken otherwise. Overruling *Tuck v. Olds*, 29 Fed. Rep. 883.

Appeal from Taxation of Costs in District Court.

In this case, a decree having been entered dismissing the bill with costs to the defendants, the clerk, on the application of the defendants being required to tax them, disallowed an item for solicitor's fees of "23 depositions at \$2.50, \$57.50," on the authority of *Tuck v. Olds*, 29 Fed. Rep. 883. The depositions were taken at various places, some within and some without the district, before notaries public, under a stipulation that they should be treated as of the same force and effect as if taken under the sixty-seventh rule before regularly appointed special examiners. An appeal having been taken from this disallowance, the district judge, then presiding, reserved the question until the circuit judge should be in attendance.

Ross Shinn, (*Dryenforth & Dryenforth*, of counsel,) for complainants.

Taggart & Denison, for defendants.

Before JACKSON and SEVERENS, JJ.

JACKSON, J., (*orally.*) The district judge, in deciding the present point in *Tuck v. Olds*, 29 Fed. Rep. 883, followed the course of practice indicated by Judge TREAT in *Strauss v. Meyer*, 22 Fed. Rep. 467. In the latter case the language employed by the judge was somewhat wider than the decision. We do not think it is necessary to criticise that case, however, for it is made to appear to us that throughout this circuit, at least, and as it would seem in the others generally, the practice has been, and is, to allow such costs in like circumstances. Rev. St. § 824. And among the reported cases, see *Jerman v. Stewart*, 12 Fed. Rep. 271; *Stimpson v. Brooks*, 3 Blatchf. 456; *Factory v. Corning*, 7 Blatchf. 16; *Wooster v. Handy*, 23 Blatchf. 112, 23 Fed. Rep. 49. Without examining the question on its original merits, we are satisfied that the practical interpretation of the statute in the other direction has been generally in the courts of this circuit so long established, and for the sake of uniformity, as well, we should overrule the decision in *Tuck v. Olds* in this particular, and allow this item to be taxed. Ordered accordingly.

SEVERENS, District Judge, desires that I should express his concurrence in this opinion.

*In re McLEAN, Acting Commissioner of Pensions.*¹*(District Court, E. D. New York. December 28, 1888.)*

WRITS—SUBPOENA—WITNESS—ATTENDANCE BEFORE PENSION EXAMINER.

The power of a district court of the United States cannot be invoked to secure, by its subpoena, the attendance of a witness before a special examiner of the pension bureau in the matter of a pension claim.

Application of William McLean, acting commissioner of pensions, for an order upon a witness.

BENEDICT, J. On the 23d day of November, 1888, there was presented to me a request in the following words:

"DEPARTMENT OF THE INTERIOR, BUREAU OF PENSIONS.

"WASHINGTON, D. C., November 19, 1888.

"*To any Judge or Clerk of the United States having Jurisdiction—SIR:* In pursuance of sections 184, 185, 186 of the Revised Statutes, and the act of July 25, 1882, I have the honor to request that a subpoena may issue commanding Mr. Patrick Callahan, a draw-bridge tender, foot of Manhattan avenue, Brooklyn, New York, to appear at a time and place named therein, and make true answers to such written interrogatories and cross-interrogatories as may be submitted to him by Mr. J. W. G. Atkins, a special examiner of this bureau, and be orally examined and cross-examined upon the subject of the claim for pension of John Horton, Navy, No. 10,977.

"Very respectfully,

WILLIAM E. McLEAN,

"Acting Commissioner."

The presentation of this request has raised for decision the question whether the statutes referred to in the request furnish the court authority to issue its process for the purposes mentioned. It will be observed that the subpoena is not required for conducting an investigation into the facts of any case pending in this court, or in any other court. The request—which is assumed to be in conformity with the statutes referred to in it—shows that the subpoena was desired for the purpose of enabling the bureau of pensions to make an examination into the facts bearing upon a certain claim for a pension pending in that bureau. To secure this end, the commissioner of pensions asks this court by its process to compel the person named to appear before a special examiner of the pension bureau, and there submit to an examination by such examiner touching the claim referred to in the request. For such purpose the aid of this court cannot in my opinion be invoked. The pension bureau is not a court, nor can any officer thereof be vested with judicial functions. The proceeding in aid of which the process of this court is asked is an executive examination, pending in an executive department of the government, not a judicial inquiry, pending before a court. In cases or controversies pending before the courts of the United States those courts have power to compel the attendance of persons as witnesses, but, in my opinion,

¹Reported by Edward G. Benedict, Esq., of the New York bar.