

ACTS OF THE NINETEENTH CONGRESS

OF THE

UNITED STATES,

Passed at the second session, which was begun and held at the City of Washington, in the District of Columbia, on Monday the fourth day of December, 1826, and ended on the third day of March, 1827.

JOHN QUINCY ADAMS, President; J. C. CALHOUN, Vice President of the United States and President of the Senate; NATHANIEL MACON, President of the Senate, pro tempore; J. W. TAYLOR, Speaker of the House of Representatives.

STATUTE II.

CHAP. IV.—*An Act to provide for taking evidence in the courts of the United States in certain cases.*(a) Jan. 24, 1827.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, whenever a commission shall be issued, by any court of the United States, for taking the Whenever a commission shall be issued,

(a) The decisions of the courts of the United States upon the laws relating to commissioners to take testimony have been:

Depositions taken under a commission issued at the instance of the defendant, may be read in evidence by the plaintiff, although the plaintiff had no notice of the time and place of taking them. *Yeaton v. Fry*, 5 Cranch, 335; 2 Cond. Rep. 273.

The court will not award a commission to take the testimony of absent witnesses until the commissioners are named. *Van Stephorst v. The state of Maryland*, 2 Dall. 401; 1 Cond. Rep. 2.

Under particular circumstances the court allowed a special commission, to take the depositions of witnesses, with instructions: 1. That the interrogatories should be filed in the court here by both parties previous to the issuing of the commission. 2. That the commissioners should be directed not to admit any additional interrogatories. 3. That neither parties nor counsel should be allowed to appear before the commissioners. *Cunningham v. Otis*, 1 Gallis. C. C. R. 166.

Commissioners to take depositions of witnesses, act under a special authority derived from the court, which must be strictly pursued; and, therefore, where a commission had issued to four commissioners jointly to take depositions, and it was executed and returned by three only, although both of the commissioners nominated by the defendant, had acted; yet he may object to the reading of the depositions, and the objections will be sustained. *Armstrong v. Brown*, 1 Wash. C. C. R. 34.

A commission to take testimony, which had issued in a case in which the United States was a party, was set aside, because it had been opened by an officer of the government before it came into the hands of the clerk, and a new commission was ordered, to which the original papers, which had been annexed to the first commission, were attached. *The United States v. Price's Adm'rs*, 2 Wash. C. C. R. 356.

A commission to take evidence in an enemy's country, in a prize cause, is contrary to the established practice in a prize court. *The Diana*, 2 Gallis. C. C. R. 93.

Each interrogatory, annexed to the commission, should be substantially answered, at least; and the omission, so to answer, is fatal to the whole testimony of the witness: although, in his answer to the general interrogatory, the witness has said he knows nothing material to either party. *Ketland v. Bissett*, 1 Wash. C. C. R. 144.

Where a commission to take evidence was executed in a foreign country, the government of which refused to let the commissioners act, considering it an assumption of the sovereign power, but the commission was executed by a judge of the court in the presence of the commissioners; the depositions were permitted to be read, as otherwise the course of justice might be impeded. In such a case the evidence must be fairly taken; all the evidence on each side must be put and answered. If, however, the interrogatories had been substantially put and answered, it is sufficient. *Winthrop v. The Union Ins. Co.*, 2 Wash. C. C. R. 7.

It is no objection to the reading of a deposition, taken under a commission to a foreign country, that the same witness had been previously examined and cross-examined in the United States. *Ibid.*

A joint commission to take the depositions of witnesses, must be executed by all the commissioners,

by any court of the United States, for taking the testimony of a witness or witnesses, at any place within the United States, or the territories thereof, it shall be lawful for the clerk of any court of the United States, for the district or territory within which such place may be, and he is hereby enjoined and required, upon

to make the depositions evidence, although the commissioners named by the party making the objection, after proceeding some length in the examination of the witnesses, withdrew. *Muns v. Dupont*, 2 Wash. C. C. R. 563.

The provision of the judiciary act of 1789, ch. 20, sec. 30, as to taking depositions, *de bene esse*, does not apply to cases pending in the Supreme Court of the United States, but only to cases in the district and circuit courts. Testimony, by depositions, can only be regularly taken for the Supreme Court, under a commission issuing according to the rules of the court. *The Argo*, 2 Wheat. 287; 4 Cond. Rep. 119.

Depositions taken according to the proviso in the 13th section of the judiciary act of 1789, ch. 20, under a "*dedimus potestatem*," "according to common usage, where it may be necessary to prevent a failure or delay of justice," are, under no circumstances, to be considered as taken *de bene esse*, whether the witness reside beyond the process of the court, or within it: the provision of the act relative to depositions, *de bene esse*, being confined to those taken under the enacting part of the section. *Sergeant's Lessee v. Biddle et al.* 4 Wheat. 508; 4 Cond. Rep. 522.

A commission was issued in the name of Richard M. Meade, the name of the party being Richard W. Meade. This is a clerical error in making out the commission, and does not affect the execution of the commission. *Keene v. Meade*, 3 Peters, 1.

It is not known that there is any practice in the execution or return of a commission, requiring a certificate, in whose handwriting the depositions returned with the commission were set down. All that the commission requires, is, that the commissioners, having reduced the depositions taken by them to writing, should send them with the commission, under their hands and seals, to the judges of the court out of which the commission issued. But it is immaterial in whose handwriting the depositions are; and it cannot be required that they should certify any immaterial fact. *Ibid.* 8.

A certificate by the commissioners, that A. B., whom they were going to employ as a clerk, had been sworn, admits of no other reasonable interpretation than that A. B. was the person appointed by them as clerk. *Ibid.* 9.

It is not necessary to return with the commission the form of the oath administered by the commissioners to the witnesses. When the commissioners certify the witnesses were sworn, and the interrogatories annexed to the commission were all put to them, it is presumed that they were sworn and examined as to all their knowledge of the facts. *Ibid.* 10.

The plaintiffs issued a commission to take testimony abroad, and the defendant joined in the same, by filing cross-interrogatories, but the plaintiffs afterwards found a witness to prove the facts they desired to establish by the commission; and they abandoned it. The court said a trial under those circumstances, would be a surprise on the defendant. *Le Roy v. The Delaware Ins. Co.*, 2 Wash. C. C. R. 223.

If the cross-interrogatories are not put to a witness examined under a commission to take testimony, the examination of the witness cannot be read on the trial. *Gilpins v. Consequa, Peters'* C. C. R. 86.

It is no objection to a deposition taken under a commission to Holland, that it is in the English language, the commissioners before whom it was taken being Dutchmen, and not stating that they had the assistance of an interpreter. *Ibid.*

It is not an objection to the evidence taken under a commission, that the cross-interrogatories were not put to each witness, immediately after he had answered the chief interrogatories, but were put to him after all the chief interrogatories had been answered by all the witnesses. *Ibid.*

A commission is not defectively executed, because the commissioners and their clerk were not sworn. *Ibid.*

Those who execute a commission are appointed by the court, and although they may be nominated by the parties, they are not their agents. *Ibid.*

If all the interrogatories, which accompany a commission, are substantially, although not severally answered, it is sufficient; and this principle applies as well to the answers given to the interrogatories annexed to letters rogatory, as to answers under a commission. *Nelson v. The United States, Peters'* C. C. R. 235.

The circuit court of the United States will issue letters rogatory, for the purpose of obtaining the testimony of witnesses, when the government of the place where the evidence is to be obtained will not permit a commission to be executed. *Ibid.*

The testimony of a witness, taken under a commission, directed to five persons, or any one of them, cannot be read in evidence if another person than the commissioner, and who was not named in the commission, assisted in taking the examinations of the witnesses. *Willings v. Consequa, Peters'* C. C. R. 301.

A commission directed to A. to be executed in one county, cannot be executed by him in another. The commissioner ought to state when and where the commission was executed. He acts under a special authority. The depositions were rejected, being obnoxious to this principle. *Bourdureau et al. v. Montgomery et al.*, 4 Wash. C. C. R. 186.

If the general interrogatory, under a commission, is not answered, it is a fatal objection to the whole deposition; all the interrogatories must be substantially answered. *Dodge v. Israel*, 4 Wash. C. C. R. 323.

Query, If it is not an objection to a deposition, that it was committed to writing by the witness before he was sworn; and whether exhibits, referred to in a deposition, ought not to be annexed by the commissioners to the deposition, or so designated by them as to leave no reasonable doubt of their identity. *Ibid.*

If reasonable notice of formal objections to the depositions taken under a commission, be not given, the court may be induced to set aside a verdict or nonsuit rendered in consequence of this objection, without costs. *Ibid.*

Depositions taken, under a commission, to another state, cannot be read, unless proof be given

the application of either of the parties in the suit, cause, action, or proceeding, in which such commission shall have been issued, his, her, or their agent or agents, to issue a subpoena, or subpoenas, for such witness or witnesses, residing or being within the said district or territory, as shall be named in the said commission, commanding such witness or witnesses to appear and testify before the commissioner or commissioners, in such commission named, at a time and place in the subpoena to be stated, and if any witness, after being duly served with such subpoena, shall refuse or neglect to appear, or after appearing, shall refuse to testify, (not being privileged from giving testimony,) such refusal or neglect being proved to the satisfaction of any judge of the court, whose clerk shall have issued such subpoena or subpoenas, he may thereupon proceed to enforce obedience to the process, or to punish the disobedience, in like manner as any court of the United States may do in case of disobedience to process of *subpœna ad testificandum*, issued by such court; and the witness or witnesses, in such cases, shall be allowed the same compensation as is allowed to witnesses attending the courts of the United States: *Provided*, That no witness shall be required to attend at any place out of the county in which he may reside, nor more than forty miles from his place of residence, to give his or her deposition, under this law.

SEC. 2. *And be it further enacted*, That whenever either of the parties in such suit, cause, action, or proceeding, shall apply to any judge of a court of the United States, in the district or territory of the United States, in which the place for taking such testimony may be, for a *subpœna duces tecum*, commanding the witness, therein to be named, to appear and testify before the said commissioner or commissioners, at the time and place in the said subpoena to be stated, and also to bring or carry with him or her, and produce to such commissioner or commissioners, any paper, writing, or written instrument, or book, or other document supposed to be in the possession or power of such witness, such judge being satisfied, by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document, is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of the court, of which he is a judge, to issue such *subpœna duces tecum*, accordingly, and if such witness, after being duly served with such subpoena duces tecum, shall fail to produce any such paper, writing, written instrument, book, or other document, being in the possession or power of such witness, and described in such

witness or witnesses, at any place within the United States, or the territories thereof, it shall be lawful for the clerk of any court of the United States, for the district or territory within which such place may be, to issue a subpoena, or subpoenas, for such witness or witnesses named in said commission.

Proviso.

Any judge of the United States to issue a subpoena duces tecum, in certain cases.

that a copy of the interrogatories, and a written notice of the rule for a commission, and the names of the commissioners, were served on the opposite party or his attorney, according to one of the rules of the circuit court of Pennsylvania. *Lessee of Rhoads and Snyder v. Selin*, 4 Wash. C. C. R. 715.

It is no objection to a deposition, that a material part of the evidence comes out under the general interrogatory. *Ibid*.

A commission was issued under a rule to take depositions at Selinsgrove, and was endorsed "commission to Selinsgrove." It should appear, by the certificate of the commissioners, or otherwise, that the depositions were taken at the place indicated, or they cannot be read. *Ibid*.

Affidavits to be used as further proof, in causes of admiralty and maritime jurisdiction in the Supreme Court, must be taken by commission. *The London Packet*, 2 Wheat. 371; 4 Cond. Rep. 162.

A deposition taken under a commission is fatally defective, if the general interrogatory, "Do you know any thing further," &c., is not answered. *Richardson v. Golden*, 3 Wash. C. C. R. 109.

If a commission issue to A. & B., or either of them, to take the depositions of witnesses, the depositions of A. may be taken before B. *Lonsdale v. Brown*, 3 Wash. C. C. R. 404.

Evidence to establish heirship and pedigree, had been obtained under a commission issued for that purpose to France, in an action of ejectment, in which the plaintiffs had recovered the lots of ground for which the suit was instituted. In the course of that trial, a bill of exceptions was tendered by the plaintiffs and sealed by the court, in which the evidence contained in the commission was inserted. The commission, and the testimony obtained under it, were afterwards lost. In an action for mesne profits brought by the plaintiffs in the ejectment, against the landlord of the defendant in the suit, who had employed counsel to oppose the claims of the plaintiffs, but who was not a party to the suit on record; it was held, by the Supreme Court, that the testimony, as copied into the bill of exceptions, was legal and competent evidence of pedigree. *Chirac v. Reinecker*, 2 Peters, 613.

subpœna duces tecum, before, and to such commissioner or commissioners, at the time and place in such subpœna stated, such failure being proved to the satisfaction of the said judge, he may proceed to enforce obedience to the said process of *subpœna duces tecum*, or to punish the disobedience, in like manner as any court of the United States may do in case of disobedience to a like process, issued by such court; and when any such paper, writing, written instrument, book, or other document, shall be produced to such commissioner or commissioners, he or they shall, at the cost of the party requiring the same cause to be made, a fair and correct copy thereof, or of so much thereof as shall be required by either of the parties: *Provided*, that no witness shall be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of this act, unless his fees for going to, returning from, and one day's attendance at the place of examination, shall be paid or tendered to him at the time of the service of the subpœna.

Proviso.

APPROVED, January 24, 1827.

STATUTE II.

Jan. 24, 1827.

[Obsolete.]

Certain lands to be selected for seminaries of learning.

CHAP. V.—*An Act concerning the selection of certain lands heretofore granted by compact, to the state of Missouri, for seminaries of learning.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That it shall be the duty of the President of the United States, as soon as may be, to cause to be selected, from any of the public lands of the United States in Missouri, the sale of which is authorized by law, and in quantities not less than a section, according to the divisional lines of the public surveys, the several townships of land heretofore secured by compact to the state of Missouri, for the purposes of a seminary or seminaries of learning in that state, and to cause one descriptive list of such selections to be filed with the governor of Missouri, in the office of the secretary of that state; and another like list to be filed in the general land office of the United States; and the lands so selected shall, immediately thereupon, vest in the state of Missouri, according to, and in satisfaction of, the above-mentioned compact with the United States.

APPROVED, January 24, 1827.

STATUTE II.

Jan. 29, 1827.

[Obsolete.]

Members of the legislative council to be hereafter chosen by the people.

Act of Feb. 16, 1819, ch. 22.

Act of March 3, 1823, ch. 36.

Act of Feb. 5, 1825, ch. 6.

CHAP. VI.—*An Act to allow the citizens of the territory of Michigan to elect the members of their legislative council, and for other purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That at the next, and at each succeeding election of members of the legislative council of the territory of Michigan, the qualified electors of the said territory may, instead of choosing twenty-six, as heretofore directed, elect thirteen fit persons as their representatives, in the manner, and with the qualifications now, or hereafter to be, prescribed by law; which said representatives, so elected, shall be and constitute the said legislative council. And for the purpose of securing an equal representation, the governor and legislative council of said territory, are hereby authorized and required to apportion the representatives, so to be elected as aforesaid, among the several counties or districts, in the said territory, in proportion, as near as may be, to the whole number of inhabitants in each county or district, exclusive of Indians not taxed.

One or more judges of the supreme court, to hold, annually, a court or

SEC. 2. *And be it further enacted*, That the said governor and legislative council be, and they are hereby, authorized to provide by law for holding, annually, one or more courts, by one or more of the judges of the supreme court of said territory, in each of the counties in that part