

Commissions to Take Testimony Out of This State.

An. Code, 1924, sec. 16. 1912, sec. 16. 1904, sec. 16. 1888, sec. 15. 1773, ch. 7, sec. 7. 1843, ch. 348. 1884, ch. 82.

21. The several courts of law and any of the judges thereof in recess, upon written application to be filed in the cause made to them by a party to or interested in a suit, action or other proceeding therein depending, either original or on appeal from a justice of the peace, and the orphans' court of this State, in any proceeding pending before them, and on being satisfied, by affidavit or otherwise that there are material and competent witnesses in such cause residing or living out of this State, or who, for any reason cannot be brought before them, may direct the respective clerks of such court, or the register of wills, as the case may be, to issue a commission for taking the depositions of such witnesses; and such commission shall issue, and the commissioners shall be appointed and qualified, interrogatories be proposed or exhibited, the commissions be executed and returned; and the depositions taken in pursuance thereof shall be published in the same manner and form as heretofore has been the practice in the case of a commission from a court of equity for the examination of witnesses residing and living out of this State; and the depositions which shall be duly taken in virtue of any such commission, or copies thereof duly attested, shall be admitted as evidence at the trial of the cause or the proceeding for which the same may have been taken.

Issue of commission; notice; waiver.

There are two modes of giving notice of execution of a foreign commission: first, actual notice given directly by commissioner; second, constructive notice by filing interrogatories in clerk's office before commission goes out. Time of filing interrogatories. *Hatton v. McClish*, 6 Md. 407. And for other cases involving sufficiency of notice of taking of depositions, and time of filing interrogatories, see *Parker v. Sedwick*, 5 Md. 281; *Young v. Mackall*, 4 Md. 362; *Stockton v. Frey*, 4 Gill, 424; *Parker v. Sedwick*, 4 Gill, 318; *Calvert v. Coxe*, 1 Gill, 95; *Law v. Scott*, 5 H. & J. 438; *Snively v. McPherson*, 5 H. & J. 150; *Boreing v. Singery*, 2 H. & J. 455; *De Sobry v. Laistre*, 2 H. & J. 191; *Owings v. Norwood*, 2 H. & J. 96. (For other cases not referring to the statute, see Md. Digest.)

While this section (in connection with art. 16, secs. 294 and 295), requires the commission to issue to two commissioners unless the parties agree to contrary, if defendant receives notice of name of plaintiff's commissioner, his neglect to name another commissioner, is a waiver of his right to have two commissioners. *Billingslea v. Smith*, 77 Md. 516; *Sewell v. Gardner*, 48 Md. 182. And as to a waiver of irregularities in the issue of a commission, see *Cherry v. Baker*, 17 Md. 75. *Cf. Brandt v. Mickle*, 28 Md. 447.

Execution of commission.

The depositions must show on their face that they were taken on the day and at the place designated in the notice. *Young v. Mackall*, 4 Md. 362; *Young v. Mackall*, 3 Md. Ch. 404; *Collins v. Elliott*, 1 H. & J. 1.

Where the return of the commission shows that commissioners took oath before A. B., the presumption is that latter had authority to administer oath. *Snively v. McPherson*, 5 H. & J. 155. And see *Wilson v. Mitchell*, 3 H. & J. 91; *State v. Levy*, 3 H. & McH. 591.

The authority to commissioners to take testimony is special and must be pursued. The commissioners named in the commission alone must act, and no other questions than those sent out with commission must be asked. *Maryland Ins. Co. v. Bossiere*, 9 G. & J. 157; *Chappeau v. Middleton*, 1 H. & G. 159; *Young v. Mackall*, 4 Md. 362.

It is not necessary that the commissioners should appoint a clerk. *Beard v. Heide*, 2 H. & J. 442.

There is no express provision in this section requiring witnesses to sign their deposition—see notes to sec. 22. *Potomac Works v. Barber*, 103 Md. 511.

Where testimony is taken under this section, unless a question is objected to as leading at the taking of testimony, such objection cannot be made at hearing, and this is true although the objector was not represented at the taking of the testimony. *Doggett v. Tatham*, 116 Md. 151.