

An. Code, 1924, sec. 21. 1912, sec. 21. 1904, sec. 21. 1888, sec. 19. 1828, ch. 165, sec. 2.

**26.** Either party in any action depending in said courts, after due notice to the other party or his attorney, agreeably to such rule as shall be made by the said courts, respectively, may take the deposition of any witness before any of the said commissioners, to be used as testimony on the trial of such action, in case only of the death of such witness, or on proof to the satisfaction of the court of the inability of the party to procure the attendance of such witness at the time of trial and the probable continuance of said inability until and at the next term, before the court shall permit such testimony to be used; and the opposite party shall be entitled to cross-examine any witness whose deposition shall be so taken, or to examine him or her on notice, before the same or any other commissioner.

Where testimony is taken under this section but the witness testifies at the trial, the depositions no longer have any validity and cannot be used upon a second trial in case witness is not present. Purpose of this section; this section contrasted with sec. 21. Consolidated Ry. Co. v. O'Dea, 91 Md. 512. And see Darnell v. Goodwin, 1 H. & J. 282; Wilmer v. Placide, 137 Md. 109.

Where a rule of court passed in conformity with this section provides that "reasonable notice" of the taking of testimony shall be given and such notice is given, the fact that the rule does not prescribe a definite notice is not material. A defect in the notice is waived if the opposing counsel appears and cross-examines the witnesses. Waters v. Waters, 35 Md. 546; Williams v. Banks, 5 Md. 200. Cf. Brandt v. Mickle, 28 Md. 447.

The refusal to admit testimony *de bene esse*, upheld, as there was nothing in the record to show that the witness was dead or unable to attend; lower court presumed to have acted correctly. Evidence inadmissible. Wilmer v. Placide, 137 Md. 109.

Where a standing rule of the court requires a certain notice to be given of the taking of testimony, it is not competent for the court to decrease such notice by special order. Quynn v. Carroll, 22 Md. 294.

This section contemplates a case where both plaintiff and defendant are in existence and parties to the litigation upon the record at the time notice is given by commissioner and the depositions taken. Where defendant is dead and no new party has been made, depositions are improperly taken and are not admissible in evidence. Mitchell v. Mitchell, 1 Gill, 83.

A voluntary affidavit or protest of the captain of a vessel, held not to be a deposition *de bene esse*. Patterson v. Maryland Ins. Co., 3 H. & J. 74.

As to testimony *de bene esse* in equity, see art. 16, sec. 289.

Cited but not construed in Bielski v. Rising, 163 Md. 495.

See notes to secs. 29 and 34.

An. Code, 1924, sec. 22. 1912, sec. 22. 1904, sec. 22. 1888, sec. 20. 1828, ch. 165, sec. 2.

**27.** All depositions and examinations taken by such commissioner shall be certified and returned by the commissioner taking them, under his hand, to the clerk of the court in which it shall be intended to use them; and if such court shall be any other than that by which such commissioner was appointed, there shall be annexed to his return a certificate by the clerk, under the seal of the court, that he is commissioner.

See notes to sec. 24.

An. Code, 1924, sec. 23. 1912, sec. 23. 1904, sec. 23. 1888, sec. 21. 1828, ch. 165, sec. 2.

**28.** All depositions so taken and returned shall be subject to the same exceptions and objections as the testimony of the same witness would be if examined in open court and shall have the same effect and validity.

An. Code, 1924, sec. 24. 1912, sec. 24. 1904, sec. 24. 1888, sec. 22. 1779, ch. 8, sec. 2. 1828, ch. 165, sec. 3. 1832, ch. 111, sec. 2.

**29.** Any person may have the deposition of any witness who may have knowledge of any fact, in proving which such person may apprehend himself to be interested, taken before any of said commissioners upon ten days' notice to each party against whom such depositions shall be intended to be