NINTH REVISION

# REVISED STATUTES

OF THE

# STATE OF MAINE

# 1954

---

FIRST ANNOTATED REVISION

---

IN FIVE VOLUMES

## VOLUME 3

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

# Chapter 117.

# Depositions.

Sections 1-21. Depositions in General.
Sections 22-28. Depositions in Perpetuam.
Section 29. Refusing to Appear or to Give Deposition.
Sections 30-32. Commissioners to Take Depositions.

**The right to use depositions is regulated by this chapter.** It does not depend upon judicial discretion. Cooper v. Bakeman, 33 Me. 376.

**The deposition of a party may be taken in the same manner as that of any other witness,** and may be used in a case where his testimony, as a witness upon the stand, is admissible. Kidder v. Blaisdell, 45 Me. 461.

A party to a suit being, by express provision of statute, a witness, the provisions of this chapter relating to depositions are as applicable to him as to any other witness. Bliss v. Shuman, 47 Me. 248.

## Depositions in General.

**All provisions of statute must be complied with.** — Depositions, instead of the personal attendance of the witness, can be used only when authorized by statute and, in order to make them admissible, all the provisions of the statute in relation to them must be complied with. Harris v. Brown, 63 Me. 51.

**But depositions taken the day before the sitting of the court to which they are returnable are admissible.** Wyman v. Wood, 25 Me. 436; True v. Plumley, 36 Me. 466.

**Sec. 1. When depositions used.**—Depositions taken for the causes and in the manner hereinafter mentioned may be used in all civil suits or causes, petitions for partition of land, libels for divorce, libels for forfeiture of personal property, prosecutions for the maintenance of bastard children, petitions for review and in trials before probate courts, arbitrators, referees and county commissioners; and in cases of contested senatorial or representative elections. Depositions or affidavits may also be taken in applications for pensions, bounties or arrears of pay under any law of the United States. (R. S. c. 104, § 1.)

**Cross references.**—See c. 5, § 89, re depositions in contesting seat in house of representatives; c. 45, § 55, re depositions in hearings before public utilities commission by connecting railroads; c. 123, § 1, sub-§ IV, re depositions in petitions for review; c. 154, § 6, re taking of depositions of witness to will.

**Under this section there are but two facts to be established to perfect the right.** These are, that the deposition has been taken for a prescribed cause and in the prescribed manner. Cooper v. Bakeman, 33 Me. 376.

**Cited** in Hall v. Houghton, 37 Me. 411.

**Sec. 2. Before whom taken.**—A justice of the peace or notary public may take depositions to be used in a pending cause in which he is not interested nor is then nor was previously counsel. (R. S. c. 104, § 2.)

**Justices of the peace in taking depositions act in a ministerial and not in a judicial capacity.** Cooper v. Bakeman, 33 Me. 376.

**A relationship within the sixth degree to one of the parties is an interest in the cause,** within the meaning of this section. Call v. Pike, 66 Me. 350.

**Justice who is attorney may issue notice to adverse party.** — See Cutler v. Maker, 41 Me. 594, overruled on another point in Veazie v. Howland, 53 Me. 39.

**Cited** in Hall v. Houghton, 37 Me. 411; Call v. Pike, 68 Me. 217.

**Sec. 3. When cause deemed pending.**—No suit, petition, libel or prosecution is, for the purposes of this chapter, pending until the process therein has been duly served on the respondent or such notice as is required by law or ordered by the court has been given; and no such deposition shall be used in the trial of

any cause, except by consent of parties, unless the notice hereinafter mentioned is given to the adverse party. (R. S. c. 104, § 3.)

**It is only when a civil suit is pending that depositions not in perpetuam are authorized to be taken.** Howard v. Folger, 15 Me. 447.

**Applied** in Hall v. Houghton, 37 Me. 411.

**Quoted** in part in Cooper v. Bakeman, 33 Me. 376.

**Stated** in Russell v. Russell, 69 Me. 336.

**Sec. 4. Reasons for taking.**—Depositions may be taken for any of the following causes:

**I.** When the deponent is so aged, infirm or sick as to be unable to attend at the place of trial.

**Stated** in Brown v. Burnham, 28 Me. 38.

**II.** When the deponent resides out of or is absent from the state.

**Stated** in Brown v. Burnham, 28 Me. 38.

**III.** When the deponent, before the session of the court where the deposition is to be used, is bound to sea on a voyage or is about to go out of the state or more than 60 miles from the place of trial and is not expected to return in season to attend it.

**That "the deponent was about leaving the state" is not a cause** for which this section permits the use of a deposition. Stinson v. Walker, 21 Me. 211.

A deposition of one about to go out of the state after the session of the court commences cannot be used. Stinson v. Walker, 21 Me. 211.

**Stated** in Brown v. Burnham, 28 Me. 38.

**IV.** When the deponent is a justice of the supreme judicial court or of the superior court, or is judge of a court of probate, and is prevented by official duty from attending the trial.

**V.** When the deponent resides in a town other than that in which the trial is to be held; also when he resides in the same town; but in the latter case, the deposition shall not be used unless, at the trial, the party offering it shows the deponent's death or permanent removal from that town, or that he has become so infirm or sick since the taking of the deposition as to be unable to attend the place of trial.

**VI.** When the deponent is confined in prison and such imprisonment is continued until after the trial.
(R. S. c. 104, § 4.)

**Sec. 5. Summons to deponent and notice to adverse party.**—On application of either party to a justice of the peace or notary public, he may issue a summons to any deponent, except the adverse party, to appear at a designated time and place to give his deposition and shall issue a notice to the adverse party to be then and there present; and the deposition may then and there be taken by him or any other justice or notary, but the deposition of such adverse party may be taken by commission as is provided for taking depositions of other witnesses by commission. (R. S. c. 104, § 5.)

**Cross reference.**—See § 21, re deposition taken out of state.

**No restriction as to justice being attorney.**—This section confers general authority upon a justice of the peace to issue notices to the adverse party, without any restriction as to his being or having been counsel or attorney in the cause. Cutler v. Maker, 41 Me. 594, overruled on another point in Veazie v. Howland, 53 Me. 39.

**That the person who was to take the**

**depositions was not designated in the notice is not detrimental,** if it prove that he is a person empowered so to act. Bean v. Camden Lumber & Fuel Co., 125 Me. 260, 132 A. 892.

**Sec. 6. Service of notice.**—The notice to the adverse party shall be served on him or his attorney by reading it in his presence and hearing or by giving to him or leaving at his last and usual place of abode an attested copy thereof; and the service may be made by a sworn officer or by any other person and proved by his affidavit. (R. S. c. 104, § 6.)

**Quoted** in part in Ocean Ins. Co. v. Bigler, 72 Me. 469.

**Stated** in part in Pierce v. Pierce, 29 Me. 69.

**Sec. 7. Who shall be considered attorney of adverse party.**—No person, for the purposes of this chapter, shall be considered such attorney, unless his name is indorsed upon the writ or the summons left with the defendant, or he has appeared for his principal in the cause, or given notice in writing that he is attorney of such adverse party. (R. S. c. 104, § 7.)

**Presence of attorney who had not indorsed writ, etc.** — Deposition was properly excluded where it did not appear that the attorney, who was notified and was present as the attorney of the plaintiff at the taking of the deposition, had before that time acted as his attorney, or had indorsed the writ or had otherwise held himself out as such attorney. Allen v. Doyle, 33 Me. 420.

**An indorsement on the writ "from George B. Moody's office,"** was not such an indorsement of the writ as the statute requires, to authorize the service of the notification upon Moody, as the attorney of the plaintiff. Pierce v. Pierce, 29 Me. 69.

**Applied** in Brown v. Ford, 52 Me. 479.

**Sec. 8. Notice to 1 adverse party sufficient; time of notice; verbal notice; notice to take deposition out of state.**—Where there are several plaintiffs or defendants, notice is sufficient if given by the justice or notary to one or more of them. The adverse party shall be allowed not less than the rate of 1 day, Sundays excepted, for every 20 miles' travel from his usual place of abode to the place of caption, between the service of notice and the time appointed for taking the deposition. Verbal notice to the adverse party by a justice or notary is sufficient; and when a deposition is taken out of the state and not under a commission, the adverse party or his attorney shall have due notice thereof. (R. S. c. 104, § 8.)

**Notice to one defendant.**—An objection to the deposition of one of the defendants because notice of the taking was given to the other defendant cannot be sustained. Chase v. Hathorn, 61 Me. 505.

**What is due notice must depend upon the circumstances** of each case, and must be settled by the sound discretion of the presiding judge. Harris v. Brown, 63 Me. 51.

**Attendance waives defect in notice as to place of taking.**—In a notice for the taking of a deposition, if there be a defect as to the place of the taking, it is waived by the attendance of the party notified. George v. Nichols, 32 Me. 179.

**Travel time after taking of deposition.** —It is not necessary to allow one day for every twenty miles' travel from the place of caption to the place of holding the court, after the taking of a deposition, if a reasonable time be given to travel in the ordinary mode from one place to another. Central Bank v. Allen, 16 Me. 41.

**Applied** in Medcalf v. Seccomb, 36 Me. 71; Porter v. Pillsbury, 36 Me. 278.

**Quoted** in part in Brown v. Ford, 52 Me. 479.

**Stated** in Ocean Ins. Co. v. Bigler, 72 Me. 469.

**Cited** in State v. Wheeler, 64 Me. 532.

**Sec. 9. Form of notice to adverse party.**—The notice to the adverse party, if in the state, shall be in substance as follows:

"....., ss. To ..... ....., of ....., in the county of .....,

Greeting.

Whereas A. B., of ....., has requested that the deposition of C. D., of

....., may be taken to be used in an action of ....., pending between you and the said A. B., and the ..... of ..... ....., in ....., and the ..... day of ....., 19.., at ..... o'clock in the ..... noon, are the place and time appointed therefor; you are hereby notified to be present and put such questions as you think fit. Dated this ..... day of ....., 19...

..... ....., Justice of the Peace."

(R. S. c. 104, § 9.)

**Form need not be exactly pursued.**—This section does not require that the form therein should be exactly pursued, but that it shall be in substance according to that form. Dorrance v. Hutchinson, 22 Me. 357.

**Sec. 10. Form of summons to deponent.**—The justice or notary, when requested, shall issue a summons to the deponent in substance as follows:

"....., ss. To C. D., of ....., in the county of .....,

Greeting.

Whereas A. B., of ....., in the county of ....., has requested that your deposition be taken, to be used in an action now pending between him and E. F., of ....., in the county of ....., and the ..... of ..... ....., in the town of ....., and the ..... day of ....., 19.., at ..... o'clock in the ..... noon, are the place and time appointed therefor; you are therefore required, in the name of the state of Maine, there and then to appear and testify what you know relating to said action. Dated this ..... day of ....., in the year 19...

..... ....., Justice of the Peace."

The summons may be served and the service thereof proved as in section 6. (R. S. c. 104, § 10.)

**Sec. 11. Witness compelled to give deposition.** — A witness may be compelled to attend and give his deposition in like manner and under the same penalties as a witness is compelled to attend and testify in court; but not to travel more than 30 miles to give his deposition; and such deposition shall not be used in any trial, except for the causes mentioned in section 4, unless the adverse party uses the witness at such trial. (R. S. c. 104, § 11.)

**Stated** in Bliss v. Shuman, 47 Me. 248.

**Sec. 12. Deponent sworn; manner of examination.**—The deponent shall be first sworn to testify the truth, the whole truth and nothing but the truth relating to the cause or matter for which the deposition is to be taken; and he shall then be examined, first by the party producing him, on verbal or written interrogatories, and then by the adverse party, and by the justice or the parties afterwards, if they see cause. (R. S. c. 104, § 12.)

**Cross reference.**—See note to § 15, sub-§ I, re certificate as to oath.

**Oath which omits the words "relating to the cause or matter for which the deposition is taken"** is not the oath required by this section. Parsons v. Huff, 38 Me. 137.

**A caption which certifies that the deponent was first sworn according to law to the deposition by him subscribed** does not show a compliance with the statute requirement. Brighton v. Walker, 35 Me. 132; Erskine v. Boyd, 35 Me. 511.

**A deposition taken out of the state** can be used under § 20, notwithstanding the oath was not administered to the deponent before giving his testimony. Blake v. Blossom, 15 Me. 394; Wight v. Stiles, 29 Me. 164; George v. Nichols, 32 Me. 179; Freeland v. Prince, 41 Me. 105; State v. Kimball, 50 Me. 409.

**Stated** in part in Fuller v. Hodgdon, 25 Me. 243; Lord v. Moore, 37 Me. 208.

**Sec. 13. Deposition signed.**—The deposition shall be written by the justice or notary, or by the deponent or some disinterested person, in the presence and under the direction of such justice or notary; and after it has been carefully read to or by the deponent, it shall be subscribed by him. (R. S. c. 104, § 13.)

**Person related to one of parties is not disinterested.**—By this section, if the deposition is written by a person other than justice or notary, or deponent, he must be

a disinterested person, not disinterested in the cause, but disinterested generally. If related to one of the parties within the sixth degree he is not disinterested, and would not be qualified to write the deposition. Call v. Pike, 66 Me. 350.

**That deponents did not sign their several depositions does not compel rejection.** Bean v. Camden Lumber & Fuel Co., 125 Me. 260, 132 A. 892.

**Sec. 14. Rejected for deception; closing.**—If the adverse party is notified to take depositions in the same cause at 2 places at the same time, or any deceptive means are used to prevent his attendance at the taking of any depositions, the court for such reason may reject them; and no deposition shall be closed until the expiration of 1 hour after the time appointed for the taking. (R. S. c. 104, § 14.)

**Sec. 15. Form and requisites of caption.**—The justice or notary shall make out a certificate and annex it to the deposition, therein stating the following facts:

**I.** That the deponent was first sworn according to law, and when.

**This provision may be complied with by the certificate in the words of the statute or by a specification therein of the language used** in the attempt to administer the oath, and if the latter shows that the oath has in fact been administered according to the proper form, it is sufficient. Bachelder v. Merriman, 34 Me. 69.

**Certificate must show that deponent was sworn according to law.**—A certificate which shows that the witness was "sworn agreeably to law" is sufficient evidence that the oath was administered in the terms of the statute and in a mode which practice had sanctioned. Atkinson v. St. Croix Mfg. Co., 24 Me. 171.

A certificate that the deponent was first sworn and was examined according to law is insufficient. Bachelder v. Merriman, 34 Me. 69.

**And "when" this was done.**—See Atkinson v. St. Croix Mfg. Co., 24 Me. 171.

A certificate that "the deponent was examined, and cautioned, and sworn agreeably to law to the deposition aforesaid by him subscribed," does not furnish evidence that the deponent was sworn before he commenced giving his deposition, as required by § 12. Atkinson v. St. Croix Mfg. Co., 24 Me. 171.

A certificate in the caption of a deposition that the deponent was first sworn according to law to the aforesaid deposition by him subscribed, does not sufficiently show that the oath was taken before the deponent had been examined as a witness. Brighton v. Walker, 35 Me. 132; Erskine v. Boyd, 35 Me. 511.

**Omission in certificate not cured by statement in justice's handwriting.** — A statement at the commencement of the deposition, in the handwriting of the justice, that the deponent, "being duly sworn," testified to certain facts therein set forth, does not cure the omission in the certificate. Atkinson v. St. Croix Mfg. Co., 24 Me. 171.

**Sufficient certificates.**— A certificate in the caption of a deposition that "the deponent was first sworn" is, unless controlled by other parts of the caption, sufficiently evidential that the oath was administered before the giving of the deposition. Palmer v. Fogg, 35 Me. 368.

Where the caption recited that the deponent "being first duly sworn, gave his aforesaid deposition," this language fairly imported that he was sworn according to law before giving it and therefore the deposition was legally admissible. Dennison v. Benner, 41 Me. 332.

A certificate of the magistrate that "the aforesaid deponent was first sworn according to law, and then gave the foregoing deposition" is in accordance with the form of caption prescribed by this subsection. Lewis v. Soper, 44 Me. 72.

**II.** By whom the deposition was written; if by the deponent or some disinterested person, he must name him, and that it was written in his presence and under his direction.

**Meaning of "deposition."** — The word "deposition" is used in this subsection to designate the narrative of the witness, made under the sanction of an oath, and reduced to writing. Fuller v. Hodgdon, 25 Me. 243.

**A deposition taken out of the state,** in which it is not stated, in what purports to be the caption of the deposition, by whom the deposition was written, but which purports to have been "written down by the authority of the undersigned justice of the

peace," is admissible in the discretion of the court under the provisions of § 20. State v. Kimball, 50 Me. 409.

**Where the certificates stated that the depositions were "reduced to writing by me** excepting the interrogatories," such depositions were admissible. Fuller v. Hodgdon, 25 Me. 243.

**III.** Whether the adverse party was notified to attend, and did or did not attend.

**Certificate that "the adverse party was duly notified to attend, and was not," is not substantially defective.** Kidder v. Blaisdell, 45 Me. 461.

**But certificate that adverse party was present is insufficient.**—A certificate of the magistrate that the adverse party was present, and did not object to the taking is not a certificate that he was notified to attend and if there is no evidence of a consent of parties that the deposition should be used at the trial, it is inadmissible. Hall v. Houghton, 37 Me. 411.

**IV.** The cause in which the deposition is to be used and the names of the parties thereto.

**Stating names of parties and court in which to be tried sufficient.**—It is a sufficient compliance with the requirements of this subsection to state the names of the parties to the cause and the court in which the same is to be tried. Scott v. Perkins, 28 Me. 22, 33; Knight v. Nichols, 34 Me. 208, overruled on another point in Shaw v. Wilshire, 65 Me. 485.

The intention doubtless was that the adverse party should be apprised of the particular action in which a deposition might be intended to be used. This would be as effectually done by naming the parties and the court where the action was pending, if no other action was there pending between the same parties, as if the kind of action were named. Scott v. Perkins, 28 Me. 22.

**V.** The court or tribunal in which it is to be tried, and the time and place of trial.

**A deposition taken out of the state** may, under § 20, be admitted although there is an error in stating the time of the session of the court to which the deposition purports to be returnable. State v. Kimball, 50 Me. 409.

**Deposition returnable before supreme judicial court.**—When a deposition is taken in any county within the state, and by its caption is made returnable before the supreme judicial court, at a time and place appointed by law, within such county, it is sufficient. Kidder v. Blaisdell, 45 Me. 461.

**VI.** The cause of taking the deposition. (R. S. c. 104, § 15.)

**Editor's note.** — The following paragraphs relate to the section as a whole and not to sub-§ VI alone.

**Certificate is conclusive.**—The certificate of a magistrate, of facts required to be stated in the caption of a deposition taken before him, is conclusive. Cooper v. Bakeman, 33 Me. 376; Medcalf v. Seccomb, 36 Me. 71.

The magistrate's certificate as to the notice, manner and cause of taking a deposition is conclusive proof of the facts certified and parol evidence, to show that the time between the notice and the caption was less than that allowed by the statute, is inadmissible. Cooper v. Bakeman, 33 Me. 376; True v. Plumley, 36 Me. 466.

**And is proof that deposition has been legally taken.**—It must appear affirmatively by the proper proof that depositions, in order to be used as evidence, have been legally taken, and that proof is in the certificate of the magistrate, who acted in administering the oath and in taking the depositions. Bachelder v. Merriman, 34 Me. 69.

**But the magistrate's certificate is evidence of those facts only which he is required to state in the caption.** He cannot extend his certificate to other facts to make them evidence, or to affect the case. A statement by the magistrate, in the certificate, that the adverse party "did not object to the taking of said deposition," was extra-official and unauthorized, and could not be received in evidence. Hall v. Houghton, 37 Me. 411.

**Magistrate's official character and genuineness of his signature are presumed.**—Where a deposition purports, in its caption, to have been taken and subscribed by a magistrate, his official character and the genuineness of his signature, in the absence of any proof upon the point, are to be presumed. Bullen v. Arnold, 31 Me. 583.

**Averments that magistrate not interested nor counsel not required.**—The mag-

istrate is not required to aver in the certificate of caption of a deposition that he was not interested, nor then nor previously counsel in the cause in which it is taken, in order to make the deposition admissible. Call v. Pike, 68 Me. 217.

**And caption is not required to state at whose request deposition was taken.** Knight v. Nichols, 34 Me. 208, overruled on another point in Shaw v. Wilshire, 65 Me. 85.

**Sec. 16. Delivered in court or sealed up.**—The deposition shall be delivered by the justice or notary to the court or referees before whom the cause is to be tried, or shall be enclosed and sealed up by him and directed to such court or referees and kept sealed until opened by their order. (R. S. c. 104, § 16.)

**Time of opening and filing.**—See Witzler v. Collins, 70 Me. 290.

**Sec. 17. When not used.**—When a deposition is so taken, it shall not be used on trial if the adverse party shows that the cause for taking it no longer exists. (R. S. c. 104, § 17.)

**Purpose of section.**—The obvious design of this section was to secure, where it was practicable, the more satisfactory test of the credibility of a witness by an examination before the jury in open court. Hatch v. Brown, 63 Me. 410.

**This section means simply that the deposition shall not be used as a deposition.** Hatch v. Brown, 63 Me. 410.

The deposition of a defendant who was in court, offered, not as a deposition, but as a writing signed by the opposite party containing admissions of which the plaintiffs desired to avail themselves, was rightly received. Hatch v. Brown, 63 Me. 410.

**The reason of this section has no application to the deposition of an opposing party** who can have no temptation to pervert the truth against himself. Hatch v. Brown, 63 Me. 410.

**Burden of proof.**—See Logan v. Monroe, 20 Me. 257; Brown v. Burnham, 28 Me. 38.

**Sec. 18. Objections to competency.**—Objections to the competency of a deponent or to the questions or answers may be made when the deposition is produced, as if the witness were testifying on the trial; but if a deposition is taken on written interrogatories, all objection to an interrogatory shall be made before it is answered; and if the objection is not withdrawn, it shall be noted thereon, otherwise it shall not afterwards be allowed. (R. S. c. 104, § 18.)

**The objections referred to in the first clause must refer only to such as are matters of substance**—the competency of the witness, the legal propriety, the legal admissibility of the subject matter to which the question relates, as whether relevant or not to the matter in issue, as whether hearsay, etc. Parsons v. Huff, 38 Me. 137.

**The objections in the latter clause refer to such as are purely technical and formal**—as whether they are leading questions or not. Parsons v. Huff, 38 Me. 137.

All objections to the mere form of a question must be made and noted at the time the deposition is taken; objections to the competency of a deponent, or to the competency of the questions or answers, may be made when the deposition is offered at the trial. Lord v. Moore, 37 Me. 208; Leavitt v. Baker, 82 Me. 26, 19 A. 86.

**Hence, leading questions should have been objected to at the time the deposition was taken.** Rowe v. Godfrey, 16 Me. 128; Brown v. Foss, 16 Me. 257.

Where depositions are taken before a magistrate, with notice to the opposing party, objections to the form of the questions as leading must be made at the time the questions are put, or they will be considered as waived; and if the opposite party neglects to attend at the taking, he cannot make such objections at the trial. Rowe v. Godfrey, 16 Me. 128.

**But illegal testimony cannot be admitted because it was not objected to before the magistrate** taking the deposition. The proper rule upon this point can go no further than to require that any objection to the form of the question and to the manner of examination should be taken at the time of taking the testimony. Polleys v. Ocean Ins. Co., 14 Me. 141.

Appearing and putting interrogatories to the witness waives only objections to the form of the question, or the manner of examination, if not taken at the time, but does not preclude objections to the legal character of the testimony. Polleys v. Ocean Ins. Co., 14 Me. 141; Howard v. Folger, 15 Me. 447; Lord v. Moore, 37 Me. 208.

**The specific ground of objection to an**

**interrogatory should distinctly appear,** so that the party examining may, if satisfied the objection is well founded, withdraw, or so modify it that it shall no longer exist. Parsons v. Huff, 38 Me. 137.

**Objections to deposition taken by objecting party but used by opponent.**—See Hatch v. Brown, 63 Me. 410.

**Use of written interrogatories in taking depositions before magistrates.**—The provision of § 12 that the witness shall first be examined by the party producing him, on "verbal or written interrogatories," shows clearly that written interrogatories may be resorted to within the meaning of this section, as well in taking depositions before magistrates on notice, as when taken on commissions. Lord v. Moore, 37 Me. 208.

**Stated** in part in Bliss v. Shuman, 47 Me. 248.

**Sec. 19. When depositions used in second suit.**—When a plaintiff becomes nonsuit or discontinues his suit and commences another for the same cause between the same parties or their representatives, all depositions lawfully taken for the first may be used in the second suit, if they were duly filed in the court where the first suit was pending and remained on file until the commencement of the second. (R. S. c. 104, § 19.)

**Applicable where first suit commenced in another state.**—This rule is applicable as well where the first suit was commenced in another state, and the depositions were taken to be there used, as where it was commenced in this state. Folan v. Lary, 65 Me. 11.

**Death of deponent.**—If the party taking a deposition has, by his own negligence in not putting it on file, lost the right to use it while the deponent is still alive, the right to use it will not be revived by the death of the deponent. Folan v. Lary, 65 Me. 11.

Deposition which was not returned to court but remained in the hands of defendant's attorney and was not used in the first trial was rightly excluded in the second suit after deponent's death. Folan v. Lary, 65 Me. 11.

**Refusal to order party to produce deposition not filed in former trial.**—See Webster v. Calden, 55 Me. 165.

**Sec. 20. Taken out of state.**—The court may admit or reject depositions taken out of the state by a justice, notary or other person empowered to take them. (R. S. c. 104, § 20.)

**Meaning of "justice."**—"Justice of the peace," in this provision, was intended to apply to such magistrate, commissioned by the authority of the laws of the state of his residence, and when he affixes to his name, in the certificate, his official character, it is prima facie evidence of qualification to act in that capacity. State v. Kimball, 50 Me. 409.

**Not essential that magistrate be a commissioner.**—It is not essential that the magistrate taking a deposition out of the state be a commissioner, appointed by the authorities of Maine. George v. Nichols, 32 Me. 179.

**Depositions taken within state.**—This section shows that it was not the intention to submit to the discretion of the court the right to use depositions taken within the state for causes and in the manner prescribed. Cooper v. Bakeman, 33 Me. 376.

**The extent of this discretion is undefined.** Freeland v. Prince, 41 Me. 105.

**The court may admit the deposition notwithstanding an omission of some things in the certificate** deemed essential in depositions taken in the state, provided it was taken by a justice of the peace, or a notary, or other person, not a justice of the peace or notary, and provided such other person was lawfully empowered to take it. State v. Kimball, 50 Me. 409.

The courts have discretionary power to admit depositions taken out of the state, though the caption may not be, in all things, in conformity with the statute requirements. Freeland v. Prince, 41 Me. 105.

**Failure to administer oath before testimony given.**—See note to § 12.

**Error in stating time of trial.**—See note to § 15, sub-§ V.

**Applied** in Clark v. Pishon, 31 Me. 503; Bean v. Camden Lumber & Fuel Co., 125 Me. 260, 132 A. 892.

**Quoted** in Brown v. Ford, 52 Me. 479; Harris v. Brown, 63 Me. 51.

**Cited** in Bramhall v. Seavey, 28 Me. 45; Fishing Gazette Publishing Co. v. Beale & Gannett Co., 124 Me. 278, 127 A. 904.

**Sec. 21. Commissions to take such depositions.**—The justices of the supreme judicial court or of the superior court may issue commissions to take

depositions without the state, to be used in suits pending in the state, on such terms and conditions as they think proper. (R. S. c. 104, § 21.)

## Depositions in Perpetuam.

**Cross Reference.**—See c. 168, § 35, re deeds lost before recording.

**Sec. 22. Application for taking a deposition in perpetuam and notice to persons interested.**—When any person wishes to perpetuate the testimony of a witness, he shall make a statement in writing under oath briefly setting forth in substance his title, interest or claim in the subject to which the desired testimony relates, the names of all persons supposed to be interested therein and the name of each witness proposed to be examined; and shall deliver the statement to a judge or register of probate, notary public, clerk of the judicial courts or justice of the peace, requesting him to take the deposition of such witness; and he shall thereupon cause notice to be given of the time and place for taking such deposition to all persons so named in the statement, which may be given and proved as in case of other depositions. (R. S. c. 104, § 22.)

**Former provisions of section.**—For a discussion of justices of the quorum, see Gilbert v. Sweetser, 4 Me. 483. For construction of the provincial statute, see Goodwin v. Mussey, 4 Me. 88.

**Notice to husband insufficient.**—Notice to take a deposition in perpetuam, under this section, is not sufficient, if served on the husband, when the wife who is the owner of the subject or premises to which the testimony relates is not named in the statement or duly notified, although the husband appeared at the time of taking the deposition and put interrogatories to the deponent. Danforth v. Bangor, 85 Me. 423, 27 A. 268.

**Quoted** in Ocean Ins. Co. v. Bigler, 72 Me. 469.

**Sec. 23. How such deposition taken and certified.**—The deponent shall be sworn and examined and the deposition written, read and subscribed, as other depositions; and the person taking it shall annex to it a like certificate, as nearly as the case will admit, and also state therein that it was taken in perpetual remembrance of the thing, and the name of the person at whose request it was taken, and of all who were notified and all who attended. (R. S. c. 104, § 23.)

**Sec. 24. Record in registry of deeds.**—The statement, deposition and certificate shall, within 90 days after the taking, be recorded in the registry of deeds in the county where the land or any part of it lies, if the deposition relates to real estate; if not, in the county where the parties or any of them reside. (R. S. c. 104, § 24.)

**Depositions taken in perpetuam are required to be recorded in the registry of deeds** to be admissible in evidence, and it is not enough that they are recorded upon the books of the notary public. Winslow v. Mosher, 19 Me. 151.

**Sec. 25. Use in evidence.**—All such depositions recorded as aforesaid or a copy thereof attested by the register of deeds may be used in the trial of any cause pending when the deposition was taken or commenced afterwards, between the person at whose request it was taken, and either of the persons named in the statement and duly notified or those claiming under either, concerning the title, claim or interest set forth in the statement, subject to the same objections as if originally taken for the suit. (R. S. c. 104, § 25.)

**Can be used only by party at whose request taken.**—No person can use a deposition taken in perpetuam unless it appears to have been taken at his request, or at the request of those under whom he claims. Smith v. Wadleigh, 17 Me. 353.

**Sec. 26. Commission to take such depositions out of state.**—Depositions to perpetuate the testimony of witnesses living out of this state may be taken in any other state or foreign country upon a commission issued by the superior court; and the persons desiring to procure such depositions may apply to said court and file a statement as aforesaid; and if it relates to real estate in this

state, the statement shall be filed in the county where it lies; if not, in the county where some of the parties reside. (R. S. c. 104, § 26.)

**Should be liberally construed.**—This section and §§ 27 and 28 should receive such construction, consistent with their terms, as will make them most effective to remedy the mischiefs against which they were designed to operate. Their scope and effect should not be unnecessarily restricted by a doubtful construction or labored inference. Ocean Ins. Co. v. Bigler, 72 Me. 469.

**And not limited to cases where person adversely interested resides within state.**—Taking all the provisions of the statute together, the legislature did not intend to limit the power of the court to issue these commissions to cases where some one (or more) of the persons supposed to be adversely interested resides within the state. Ocean Ins. Co. v. Bigler, 72 Me. 469.

**Sec. 27. Court after notice and hearing may issue commission.**—The court shall order notice to be served on each of the persons named in the statement living in the state 14 days before the time appointed for hearing the parties, and on hearing the parties or the applicant, if no adverse party appears, may issue a commission for taking such deposition as in a cause pending. (R. S. c. 104, § 27.)

**Where all persons adversely interested reside out of state.**—In view of the general language contemplating the giving of notice to all persons named in the statement as supposed to be interested therein, without regard to their place of residence, it should not be inferred, from the single provision that a specific period of fourteen days' notice to those living within this state is to be regarded as sufficient, that it is not competent to take the testimony in this mode when all the parties supposed to be adversely interested reside out of the state. Ocean Ins. Co. v. Bigler, 72 Me. 469.

**Sec. 28. Taken on interrogatories; application filed in vacation and notice given.**—The deposition shall be taken on interrogatories filed by the applicant and cross-interrogatories by any party adversely interested, substantially as when taken to be used in pending causes; or the person wishing to take the deposition may file his statement in the clerk's office in vacation and cause notice to be given to the persons named therein as interested, 14 days at least before the next term of the court, at which time the parties may be heard. (R. S. c. 104, § 28.)

See note to § 26, re construction.

## Refusing to Appear or to Give Deposition.

**Sec. 29. Compelling a deponent to appear and depose.** — When a magistrate, duly authorized, has summoned a person before him to give his deposition or affidavit in any case authorized by the provisions of this chapter pending in this or any other state; the summons has been served and returned by a proper officer or other person, and proof thereof is entered on the summons; legal fees have been tendered him a reasonable time before the day appointed for taking the deposition and he refuses to attend, the magistrate may adjourn the time of taking his deposition and issue a capias, directed to a proper officer, to apprehend and bring such person before him; and if at the time of the adjournment he is not apprehended, the magistrate may adjourn from time to time until he is brought before him; and if he then refuses to depose and answer such questions as are propounded to him by either of the parties or persons interested, under his direction, he may commit him to the county jail for contempt, as a court may commit a witness for refusing to testify. The capias may be served by the sheriff, deputy sheriff or any constable of the county in which such person resides; and if he escapes into another county, either of said officers may arrest him there and bring him before said magistrate. (R. S. c. 104, § 29.)

**Cross reference.**—See c. 113, § 124, re penalty for refusal to answer.

**Necessity for new notice to adverse party.**—Where the magistrate before whom a

deposition is to be taken adjourns the time of taking it because the deponent, although duly summoned, did not attend, it is not necessary to give a new notice to the adverse party, where he had been duly notified of the time first appointed and did not attend. Dorrance v. Hutchinson, 22 Me. 357.

**A commitment "until the fine and costs of commitment are paid" is conformable to law.** Call v. Pike, 68 Me. 217.

**Two justices of the peace have no power to imprison** a person for refusing to give his deposition in perpetuam. Pierce's Case, 16 Me. 255.

## Commissioners to Take Depositions.

**Sec. 30. Stenographers as commissioners to take depositions; powers.**—The governor with the advice and consent of the council may, upon the written recommendation of any justice of the superior court, appoint competent stenographers as commissioners to take depositions in all cases and disclosures of trustees, who shall hold office for 4 years. They may act throughout the state and shall have and exercise the same powers in taking depositions and disclosures of trustees as are exercised and possessed by justices of the peace. (R. S. c. 104, § 30.)

**Sec. 31. Depositions and disclosures taken.**—Depositions and disclosures of trustees may be taken by such commissioners stenographically by the consent of the parties to the suit or proceeding, and their notes shall be transcribed in full by questions and answers and read to the deponent or trustee and signed by him. If the deponent or trustee in writing waives such reading, the transcript shall be admissible as his deposition or disclosure without his signature. No change of or addition to the transcript shall be made by the deponent or trustee except in the presence of the counsel who attested the taking of the deposition. The commissioner shall state the facts in his certificate as to reading, signature or waiver and what, if any, changes or additions were made. (R. S. c. 104, § 31.)

**Sec. 32. Fees.** — Commissioners shall receive the same fees for travel, swearing witnesses and notifying parties and deponents as are received by justices of the peace and, in addition thereto, 20¢ a page for their transcripts. (R. S. c. 104, § 32.)

See c. 110, § 23, re fees of trial justices and justices of the peace; c. 168, § 26, re taking of depositions out of the state before commissioners appointed by governor; c. 168, § 35, re depositions to prove copy of lost deed.