Courts of Common Law in England seem not to have asserted this power in a direct manner, and of their own authority; but have been in the habit of using indirect means to coerce the adverse party into a consent to the examination of witnesses, who were absent in foreign countries, under a commission for that purpose. These means of coercion were various, such as putting off the trial, or refusing to enter judgment, as in case of nonsuit, if the defendant was the recusant party; or by a stay of proceedings, till the party applying for the commission could have recourse to a Court of Equity, by instituting a new suit there, auxiliary to the suit at law.[1] But subsequently, the learned Judges appear not to have been satisfied that it was proper for them to compel a party, by indirect means, to do that which they had no authority to compel him to do directly; and they accordingly refused to put off a trial for that purpose.[2] This inconvenience was therefore remedied by statutes,[3] which provide, that in all cases of the absence of witnesses, whether by sickness, or travelling out of the jurisdiction, or residence abroad, the Courts, in their discretion, for the due administration of justice, may cause the witnesses to be examined under a commission issued for that purpose. In general, the examination is made by interrogatories, previously prepared; but in proper cases, the witnesses may be examined *vivâ voce*, by the commissioner, who in that case writes down the testimony given; or he may be examined partly in that manner and partly upon interrogatories.[4]

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[1] Furly *v.* Newnham, Doug. 419; Anon. cited in Mostyn *v.* Fabrigas, Cowp. 174; 2 Tidd's Pr. 770, 810.

[2] Cailland *v.* Vaughan, 1 B. & P. 210. See also Grant *v.* Ridley, 5 Man. & Grang. 203, per Tindal, C. J.; Macaulay *v.* Shackell, 1 Bligh, 119, 130, 131, N. S.

[3] 13 Geo. 3, c. 63, and 1 W. 4, c. 22; Report of Commissioners on Chancery Practice, p. 109; Second Report of Commissioners on Courts of Common Law, p. 23, 24.

[4] 2 Tidd's Pr. 810, 811; 1 Stark. Evid. 274–278; Phil. & Am. on Evid. p. 796–800; 2 Phil. Evid. 386, 387, 388; Pole *v.* Rogers, 3 Bing N. C. 780.

§ 321. In the United States provisions have existed, in the statutes of the several States, from a very early period, for the taking of depositions to be used in civil actions in the Courts of Law, in all cases where the personal attendance of the witness could not be had, by reason of sickness or other inability to attend; and also in cases where the witness is about to sail on a foreign voyage, or to take a journey out of the jurisdiction, and not to return before the time of trial.[1] Similar provisions have also been made in many of the United States for taking the depositions of witnesses *in perpetuam rei memoriam*, without the aid of a Court of Equity, in cases where no action is pending. In these latter cases there is some diversity in the statutory provisions, in regard to the magistrates before whom the depositions may be taken, and in regard to some of the modes of proceeding, the details of which are not within the scope of this treatise. It may suffice to state, that, generally, notice must be previously given to all persons known to be interested in the subject-matter to which the testimony is to relate; that the names of the persons thus summoned must be mentioned in the magistrate's certificate or caption, appended to the deposition; and that the deposition is admissible only in case of the death or incapacity of the witness,[2] and against those only who have had opportunity to cross-examine, and those in privity with them.

§ 322. In regard also to the other class of depositions, namely, those taken in civil causes, under the statutes alluded to, there are similar diversities in the forms of proceeding. In some of the States, the Judges of the Courts of Law are empowered to issue commissions, at chambers, in their discretion, for the examination of witnesses unable or not compellable to attend, from any cause whatever. In others, though

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[1] See Stat. U. States, 1812, ch. 25, § 3.

[2] The rule is the same in Equity, in regard to depositions taken *de bene esse*, because of the sickness of the witness. Weguelin *v.* Weguelin, 2 Curt. 263.

with the like diversities in form, the party himself may, on application to any magistrate, cause the deposition of any witness to be taken, who is situated as described in the acts. In their essential features these statutes are nearly alike; and these features may be collected from that part of the Judiciary Act of the United States, and its supplements, which regulate this subject.[1] By that act, when the testimony of a person is necessary in any civil cause, pending in a Court of the United States, and the person lives more than a hundred miles[2] from the place of trial, or is bound on a voyage to sea, or is about to go out of the United States, or out of the District, and more than that distance from the place of trial, or is ancient, or very infirm, his deposition may be taken, *de bene esse*, before any Judge of any Court of the United States, or before any Chancellor or Judge of any superior Court of a State, or any Judge of a County Court or Court of Common Pleas, or any Mayor or chief magistrate of any city,[3] in the United States, not being of counsel, nor interested in the suit; provided, that a notification from the magistrate, before whom the deposition is to be taken, to the adverse party, to be present at the taking, and put interrogatories, if he think fit, be first served on him or his attorney, as either may be nearest, if either is within a hundred miles of the place of caption; allowing time, after the service of the notification, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel. The witness is to be carefully examined, and cautioned, and sworn or affirmed to testify the whole truth, and must subscribe the testimony by him given, after it has been reduced to writing by the magistrate,

1 Stat. 1789, ch. 20, § 30; Stat. 1793, ch. 22, § 6. This provision is not peremptory; it only enables the party to take the deposition, if he pleases. Prouty *v.* Ruggles, C. C. U. S. Mass. May, 1842, 4 Law Rep. 161.

2 These distances are various in the similar statutes of the States, but are generally thirty miles, though in some cases less.

3 In the several States, this authority is generally delegated to Justices of the Peace.

or by the deponent in his presence. The deposition so taken must be retained by the magistrate, until he shall deliver it with his own hand into the Court, for which it is taken; or it must, together with a certificate of the causes or reasons for taking it, as above specified, and of the notice, if any, given to the adverse party, be by the magistrate sealed up, directed to the Court, and remain under his seal until it is opened in Court.[1] And such witnesses may be compelled to appear and depose as above mentioned, in the same manner as to appear and testify in Court. Depositions, thus taken, may be used at the trial by either party, whether the witness was or was not cross-examined,[2] if it shall appear, to the satisfaction of the Court, that the witnesses are then dead, or gone out of the United States,[3] or more than a hundred miles from the place of trial, or that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at Court.

§ 323. The provisions of this act being in derogation of the Common Law, it has been held, that they must be strictly complied with.[4] But if it appears on the face of the deposition, or the certificate which accompanies it, that the magis-

1 The mode of transmission is not prescribed by the statute; and in practice it is usual to transmit depositions by post, whenever it is most convenient; in which case the postages are included in the taxed costs. Prouty *v.* Ruggles, 4 Law Reporter, 161. Care must be taken, however, to inform the clerk, by a proper superscription, of the nature of the document inclosed to his care; for, if opened by him out of Court, though by mistake, it will be rejected. Beal *v.* Thompson, 8 Cranch, 70. But see Law *v.* Law, 4 Greenl. 167.

2 Dwight *v.* Linton, 3 Rob. Louis. R. 57.

3 In proof of the absence of the witness, it has been held not enough to give evidence merely of inquiries and answers at his residence; but, that his absence must be shown by some one who knows the fact. Robinson *v.* Markis, 2 M. & Rob. 375. And see Hawkins *v.* Brown, 3 Rob. Louis. R. 310.

4 Bell *v.* Morrison, 1 Peters, 355; The Thomas & Henry *v.* The United States, 1 Brockenbrough's R. 367; Nelson *v.* The United States, 1 Peters, C. C. R. 235.

trate before whom it was taken was duly authorized, within the statute, it is sufficient, in the first instance, without any other proof of his authority;[1] and his certificate will be good evidence of all the facts therein stated, so as to entitle the deposition to be read, if the necessary facts are therein sufficiently disclosed.[2] In cases where, under the authority of an act of Congress, the deposition of a witness is taken *de bene esse*, the party producing the deposition must show affirmatively that his inability to procure the personal attendance of the witness still continues; or, in other words, that the cause of taking the deposition remains in force. But this rule is not applied to cases where the witness resides more than a hundred miles from the place of trial, he being beyond the reach of compulsory process. If he resided beyond that distance, when the deposition was taken, it is presumed that he continues so to do, until the party opposing its admission shows that he has removed within the reach of a *subpœna*.[3]

§ 324. By the act of Congress already cited,[4] the power of the Courts of the United States, as Courts of Common Law, to grant a *dedimus potestatem* to take depositions, whenever it may be necessary, in order to prevent a failure or delay of justice, is expressly recognised; and the Circuit Courts, when sitting as Courts of Equity, are empowered to direct depositions to be taken *in perpetuam rei memoriam*, according to the usages in Chancery, where the matters to which they relate are cognizable in those Courts. A later statute[5] has facilitated the taking of depositions in the former of these cases, by providing, that when a commission shall be issued by a Court of

[1] Ruggles *v.* Bucknor, 1 Paine, 358; The Petapsco Ins. Co. *v.* Southgate, 5 Peters, 604.

[2] Bell *v.* Morrison, 1 Peters, 356.

[3] The Petapsco Ins. Co. *v.* Southgate, 5 Peters, 604, 616, 617, 618; Pettibone *v.* Derringer, 4 Wash. 215; 1 Stark. Evid. 277.

[4] Stat. 1789, ch. 20, § 30.

[5] Stat. 1827, ch. 4. See the practice and course of proceeding in these cases, in 2 Paine & Duer's Pr. p. 102 – 110; 2 Tidd's Pr. 810, 811, 812.

the United States, for taking the testimony of a witness, at any place within the United States or the territories thereof, the Clerk of any Court of the United States for the District or Territory where the place may be, may issue a *subpœna* for the attendance of the witness before the commissioner, provided the place be in the county where the witness resides, and not more than forty miles from his dwelling. And if the witness, being duly summoned, shall neglect or refuse to appear, or shall refuse to testify, any Judge of the same Court, upon proof of such contempt, may enforce obedience, or punish the disobedience, in the same manner as the Courts of the United States may do, in case of disobedience to their own process of *subpœna ad testificandum*. Some of the States have made provision by law for the taking of depositions, to be used in suits pending in other States, by bringing the deponent within the operation of their own statutes against perjury; and national comity plainly requires the enactment of similar provisions in all civilized countries. But as yet they are far from being universal; and whether, in the absence of such provision, false swearing in such case is punishable as perjury, has been gravely doubted.[1] Where the production of papers is required, in the case of examinations under commissions issued from Courts of the United States, any Judge of a Court of the United States may, by the same statute, order the clerk to issue a *subpœna duces tecum*, requiring the witness to produce such papers to the commissioner, upon the affidavit of the applicant to his belief, that the witness possesses the papers, and that they are material to his case; and may enforce the obedience and punish the disobedience of the witness, in the manner above stated.

§ 325. But independently of statutory provisions, Chancery has power to sustain bills, filed for the purpose of preserving the evidence of witnesses *in perpetuam rei memoriam*, touching any matter which cannot be immediately investigated in a

[1] Cailland *v.* Vaughan, 1 B. & P. 210.

Court of Law, or where the evidence of a material witness is likely to be lost, by his death, or departure from the jurisdiction, or by any other cause, before the facts can be judicially investigated. The defendant, in such cases, is compelled to appear and answer, and the cause is brought to issue, and a commission for the examination of the witnesses is made out, executed, and returned, in the same manner as in other cases; but no relief being prayed, the suit is never brought to a hearing; nor will the Court ordinarily permit the publication of the depositions, except in support of a suit or action; nor then, unless the witnesses are dead, or otherwise incapable of attending to be examined.[1]

[1] 1 Smith's Chancery Practice, 284-286.

CHAPTER II.

OF THE COMPETENCY OF WITNESSES.

§ 326. Although, in the ordinary affairs of life, temptations to practise deceit and falsehood may be comparatively few, and therefore men may ordinarily be disposed to believe the statements of each other; yet, in judicial investigations, the motives to pervert the truth, and to perpetrate falsehood and fraud, are so greatly multiplied, that if statements were received, with the same undiscriminating freedom as in private life, the ends of justice could with far less certainty be attained. In private life, too, men can inquire and determine for themselves, whom they will deal with, and in whom they will confide; but the situation of Judges and Jurors renders it difficult, if not impossible, in the narrow compass of a trial, to investigate the character of witnesses; and from the very nature of judicial proceedings, and the necessity of preventing the multiplication of issues to be tried, it often may happen that the testimony of a witness, unworthy of credit, may receive as much consideration as that of one worthy of the fullest confidence. If no means were employed totally to exclude any contaminating influences from the fountains of justice, this evil would constantly occur. But the danger has always been felt, and always guarded against, in all civilized countries. And while all evidence is open to the objection of the adverse party, before it is admitted, it has been found necessary, to the ends of justice, that certain kinds of evidence should be uniformly excluded.

§ 327. In determining what evidence shall be admitted and weighed by the Jury, and what shall not be received at all, or, in other words, in distinguishing between competent and incompetent witnesses, a principle seems to have been applied,