ATKINSON v. GLENN.

Case No. 610.
{4 Cranch, C. C. 134.}[1]

Circuit Court, District of Columbia. April Term, 1831.

DEPOSITION—COMMISSION—NOTICE—VERIFICATION OF AFFIDAVIT.

1. Notice on the 28th of December, to take a deposition in Alexandria, on the 29th, is not too short, all the parties residing in that town.

2. An affidavit may be sworn before the counsel of the party, and may be wholly in his handwriting.

{See note at end of case.}

The plaintiff's counsel, Mr. Neale, offered to read the deposition of Thomas Lee taken by commission under the act of Virginia of November 29th, 1792, § 12, p. 279, {providing for the examination by a commission of witnesses who are about to leave the country, or are unable to attend court}

Mr. Hodgson, for the defendant, objected that the notice was too short, it having been given on the 28th of December; to take the deposition on the 29th of December, at Alexandria, all the parties residing in that town. He also objected, that the affidavit that the plaintiff's claim depended, in a material part, upon the testimony of a single witness who was about to depart, was sworn before the plaintiff's counsel as a justice of the peace; and that the deposition also was wholly in his handwriting.

But THE COURT (MORSELL, Circuit Judge, absent) overruled the objections, and permitted the deposition to be read. Verdict for the plaintiff.

{NOTE. The question arose in U. S. v. Pings, 4 Fed. 714, as to whether or not it was a fatal objection to a deposition, taken under a commission "according to common usage," that the attorney for one of the parties to the action wrote down the answers for the commissioner, the other party to the suit not being represented; and plaintiff's counsel cited this case and Nichols v. White, Case No. 10,235, as authorities for the proposition that a commission, so executed, was executed "according to common usage." In considering the effect of these cases, Choate, District Judge, said: "In neither does it certainly appear that the party making the objection was not represented by his counsel upon the taking of the testimony. If he was, the objection might well have been considered waived, if not taken at the time. If, however, it was otherwise, and the cases were like the present yet a practice, which at one time may appear to the courts harmless, may, at a different period and in a different state of things, be seen to involve such possibility of abuse that it should not be permitted."}

[1] {Reported by Hon. William Cranch, Chief Judge.}