

Case No. 5,113.

FREVALL v. BACHE.

[5 Cranch, C. C. 463.]<sup>1</sup>

Circuit Court, District of Columbia.

March Term, 1838.

DEPOSITION—FILING                      INTERROGATORIES                      AND                      CROSS  
INTERROGATORIES—NOTICE.

A commission to take a deposition in a foreign country may issue for the plaintiff ex parte by order of the court, or of a judge in vacation, if the opposite party does not file his cross interrogatories, provided his interrogatories shall have been filed ten days before the rule day; and it is not necessary to give notice to the opposite party of the filing of the interrogatories; nor is it necessary that the party or the commissioner should give notice to the opposite party of the time and place of taking the deposition in a foreign country. But it must appear that the commissioner took the oath annexed to the commission.

Mr. Key, for defendant [Franklin Bache, administrator of J. Dabadie], objected to a deposition of one Fournier, taken under a commission to D. C. Croxall, the United States consul at Marseilles, in France, because (1) the commission was issued ex parte without notice to the defendant of an application for the commission, or of the filing the plaintiff's interrogatories; (2) because it was enclosed in an envelope directed to the chief judge of the court, when, by the commission the commissioner was required to "send the same to the judges;" and (3) because it does not appear that the commissioner took the oath annexed to the commission as he was required by the commission to do. On the 17th of May, 1837, the plaintiff [Peter E. Frevall] filed his interrogatories,

FREVALL v. BACHE.

more than ten days before the rule day, which was the first Monday in June. On the 23d of June, more than five days after the rule day, the plaintiff filed a petition for a commission, which was ordered, and on the 8th of July was issued to Daniel C. Croxall, Esq., United States consul at Marseilles. On the 16th of November, the commission was returned with the deposition in an envelope, directed "To the Hon. William Cranch, Chief Judge of the Circuit Court for the County of Washington, District of Columbia." By the Maryland act of 1785, c. 72, § 14, the parties have a right to be present at the execution of all commissions for taking evidence, &c. For this purpose, the opposite party must have notice. It is also required by the dictates of natural justice.

R. S. Coxe, *contra*. The 26th rule of equity practice for the circuit courts of the United States, says, "All testimony taken under a commission, shall be taken on interrogatories and cross-interrogatories filed in the cause, unless the parties shall dispense therewith, which interrogatories shall be filed in the clerk's office ten days previous to a rule-day; after which the defendant shall be allowed five days to file his cross-interrogatories, unless he waives his right." The act of Maryland is applicable only to commissions executed in that state. In the case of *Grant v. Nailor*, 4 Cranch [8 U. S.] 224, 231, one of the objections overruled by the court was, that there was no notice of the time and place of executing the commission; and no cross-interrogatories were filed.

Mr. Smith, the deputy clerk of this court, stated that the practice, ever since the rule of the supreme court, had been to file the interrogatories ten days before a rule day; and if the opposite party does not file cross-interrogatories within five days thereafter, the commission issues upon the order of the court, or of a judge in vacation, without notice of the motion.

MORSELL, Circuit Judge, stated that such also was the practice in Maryland.

THE COURT (THRUSTON, Circuit Judge, absent) overruled Mr. Key's two first objections, but rejected the deposition because it did not appear that the commissioner had taken the oath annexed to the commission.

[See *Frevall v. Bache*, 14 Pet. (39 U. S.) 95.]

<sup>1</sup> [Reported by Hon. William Cranch, Chief Judge.]