now here ordered and decreed by this court, that this appeal be and the same is hereby dismissed for the want of jurisdiction.

N. and J. Dick and Company *v.* Hardin D. Runnels.

By the 30th section of the Judiciary Act of 1789 (1 Statutes at Large, 88), depositions may be taken in certain cases, and notice thereof must be served on the adverse party or his attorney, provided either of them is within one hundred miles of the place where such deposition is taken.[1]

A certificate of the person before whom the deposition was taken, that neither the adverse party nor his attorney lived within one hundred miles of such
*8] place, and *that therefore no notice was made out, is sufficient. It is not necessary for him to state that they were not actually within one hundred miles. If they had been temporarily within that distance, and the certifying officer did not know it, the certificate would still have been good.

If either of the two facts, viz. that the party resided within one hundred miles, or that he was temporarily within that distance, and that the magistrate knew it, were established by parol proof, the certificate would then be irregular and void.

This case came up from the Circuit Court of the United States for the District of Mississippi, on a certificate of division in opinion between the judges thereof.

The only question involved was the construction of a part of the 30th section of the Judiciary Act of 1789 (1 Stat. at L. 88), which part is as follows. After providing for taking the testimony of persons "who shall live at a greater dis-

[1] The authority or jurisdiction conferred on the magistrate is special, and confined within certain limits or conditions; and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. Therefore, where the magistrate, in his notice to the opposite party, only said that the witness was about to "depart the State," and in his certificate omitted to state the reason for taking the deposition, it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States. *Harris* v. *Wall*, 7 How., 693.

A deposition must be suppressed when it does not affirmatively appear that the witness resided more than one hundred miles from the place where the cause was to be tried. *Dunkle* v. *Worcester*, 5 Biss., 102; nor is it competent for the court to supply a jurisdictional word, though the omission may appear to be merely clerical. Ib.

After the deposition is taken, and before trial, if the witness moves within one hundred miles, still the deposition may be read, unless the party objecting shall show that fact, and that it was known to the opposite party in time to have had the witness subpœnaed. *Russel* v. *Ashley*, Hempst., 546.

The residence of the witness and the distance from the place are facts proper for the inquiry of the officer taking the deposition; and his certificate of those facts is competent evidence, and sufficient to authorize the deposition to be read. *Merrill* v. *Dawson*, Hempst., 563.

tance from the place of trial than one hundred miles," the section proceeds thus: — "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 of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles' travel."

On the trial of the cause, in June, 1838, the plaintiffs' counsel offered in evidence a deposition, attached to which was a certificate in these words, viz.: —

"And I, the said Paul Bertus, recorder of the first municipality, and acting mayor of the city of New Orleans aforesaid, do certify, that the deposition of the said William Christy was taken as aforesaid, because he, the witness, lives at New Orleans aforesaid, a greater distance than one hundred miles from Jackson, the place of trial of the suit or matter of controversy aforesaid, and I caused no notification of the time and place of the taking of said deposition to be made out and served upon Harden D. Runnels, the adverse party, or his counsel, to be present at the taking of said deposition, and to put interrogatories, if he or they thought proper, because neither the said Hardin D. Runnels nor his counsel live within one hundred miles of the place of caption to this deposition, being the place where the same is taken; and I do further certify, that the deposition was taken down by the witness, and signed by him in my presence, after being duly sworn; and I do further certify, that I am not of counsel or attorney to either of the parties aforesaid, or interested in the event of the cause or controversy aforesaid.

"In testimony whereof I have hereunto set my hand and seal, the day and year first before written.

[SEAL.] Signed, PAUL BERTUS,
Recorder No. 1, *Mayor pro tem.*"

*And thereupon a motion was made by the defendant's counsel to exclude the deposition, on the ground [*9
"that the commissioner taking said deposition did not certify, that neither the said defendant or his attorney was within one hundred miles of New Orleans, the place of taking the deposition, at the time of taking the same."

Upon which question the judges were opposed in opinion, which is ordered to be certified to the Supreme Court of the United States, which is done accordingly.

Mr. Bibb, counsel for the defendant, submitted the case to the Court.

Mr. Justice McLEAN delivered the opinion of the Court.

The only point raised in this case is, whether the certificate of the officer who took the deposition objected to is sufficient. He states that he did not give the defendant Runnels, nor his counsel, notice, as neither lived within one hundred miles of the place where the deposition was taken. This may be true, it is alleged, and yet one or both of them might have been in New Orleans, or near to it, at the date of the certificate.

The law requires that a "notice shall be made out and served on the adverse party or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption," &c. The officer taking the deposition is presumed to know the residence of the party entitled to notice, as the person at whose instance the deposition is taken is bound to communicate that fact to him. But beyond this, he cannot be presumed to know or required to certify. If, in the words of the act, he certifies "that the adverse party or his attorney is not within one hundred miles," he is presumed so to state from the known fact that the residence of neither is within the distance specified. If the party or his counsel live within the hundred miles, a notice left at his residence would be good.

Where the party entitled to a notice lives more than one hundred miles from the place where the deposition is taken, and the officer so certifies, it would be sufficient, although it might be proved that such party was within the distance specified at the time, if the fact were unknown to the officer and the person in whose behalf the deposition was taken. The certificate may be controverted by parol proof, especially in regard to the facts stated of which the magistrate is not supposed to have official knowledge. And if it were made to appear that the person entitled to notice did not live one hundred miles from the place of the caption of the deposition, or if he were known to the magistrate or the party to be temporarily within that distance, where a notice might be served on him, though his residence might be more than one hundred miles distant, without a notice, the proceeding would be irregular and the deposition inadmissible.

*10] *Upon the whole, we think the certificate under consideration was sufficient, and that the deposition, on the ground stated, ought not to be overruled.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the Judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court that the certificate under consideration was sufficient, and that the deposition, on the ground stated, ought not to be overruled. Whereupon it is now here ordered and adjudged that it be so certified to the said Circuit Court.

THE UNITED STATES, APPELLANT, *v.* JOSEPH LAWTON, EXECUTOR OF CHARLES LAWTON, MARTHA POLLARD, HANNAH MARIA KERSHAW, WIFE OF JAMES KERSHAW, ET AL.

A Spanish grant of land in Florida, for six miles square, "at the place called Dunn's lake, upon the river St. John's," is too vague to be confirmed, even with the additional knowledge that the object of the grantee was to establish machinery to be propelled by water-power.[1]

The river St. John's meanders so much that it is near Dunn's lake for thirty miles. The survey might therefore commence at any point of this distance with as much propriety as at any other point.

This concession cannot be distinguished from various others which have been brought before this court. The land granted was not severed from the king's domain. It remained a floating grant, not recognized by the government of Spain before the cession, nor by this government since, as conferring an individual title to any specific parcel of land.

Nor is the grant in this case aided by two surveys, one purporting to have been made in December, 1817, and the other in the spring of 1818. The first must have been fictitious, not actually made upon the ground, but merely upon paper; and the second was too imperfect to be effectual.

Previous to the act of May 26, 1824, Congress alone could act upon these incipient titles. By that act power was given to the court to pass a decree for the land, provided its locality, extent, and boundaries could be found. But, in the present case, this cannot be done.

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[1] An actual survey of an open and floating concession is a necessary ingredient to its validity; and it must also be an authorized survey to sever any land from the public domain; — so decided with reference to the Spanish claims. *Wherry* v. *United States*, 10 Pet., 338; *Smith* v. *United States*, Id., 327; *United States* v. *Forbes*, 15 Id., 180; *Buyck* v. *United States*, Id., 215; *O'Hare* v. *United States*, Id., 297; *United States* v. *Delespine*, Id., 328; *United States* v. *Miranda*, 16 Id., 155; *United States* v. *Hanson*, Id., 198; *United States* v. *Clarke*, Id., 228; *United States* v. *King*, 3 How., 784; *Winter* v. *United States*, Hempst., 344, 383; *Glenn* v. *United States*, Id., 394; s. c., 13 How., 250; *De Villemont* v. *United States*, Hempst., 389.