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DEPOSITIONS OF PARTIES ON ORAL INTERROGATORIES, WITHIN THE STATE OF COLORADO

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THE right to take depositions of parties in advance of trial has long been conferred by the Code, but in practice has been very little used. Now, however, lawyers in numerous states are utilizing the deposition for everything from gathering facts for use in drawing the complaint, to taking testimony for actual introduction at the trial. And so widespread is the practice becoming that it is very properly called "Discovery Before Trial" in a new book by George Ragland, published under the auspices of the Legal Research Institute of the University of Michigan.

On July 14th of this year, due to the approval by the Governor of Senate Bills 170 and 171, Colorado will have one of the most liberal deposition statutes in the United States. And if the members of the Bar make proper use of the discovery machinery now available to them, an appreciable proportion of our court trials should be done away with, because the definite ascertainment of the truth in advance of trial will afford a basis for settlement or require an early dismissal of the suit.

Whether or not a party could be called for cross-examination upon a deposition under Sec. 6570 of the Compiled Laws of 1921 was one of the most disputed questions at the Bar, until the Supreme Court, in Taylor vs. Briggs, 18 Pac. (2d) 452, held that no such right was extended except at the trial itself. However the legislature has now broadened the statute to read "A party * * * may be examined upon the trial thereof, or *upon deposition,* or both, as if under cross-examination." And Sec. 376 of the Code has been enlarged to properly define what officers of a *party* corporation may be so examined, viz., "a director, officer, superintendent or managing agent of any corporation."

The right to take depositions in an action at law is purely statutory (18 Corpus Juris 606), while in equity the right had been exercised from an early day (18 Corpus Juris 607). Hence, it is necessary carefully to study the statutes in order to see just what rights are conferred thereunder, bearing in mind, however, that the Code procedure is to be liberally construed.

Colorado Code, Sec. 479.
People vs. District Court, 66 Colo. 424-426.
Ellinger vs. Equitable Life, 125 Wis. 643.

The deposition provisions of the Colorado Code are modeled after those of California (Ragland, p. 280) and many of the other Western States have followed their Pacific neighbor. Hence such citations are of particular value to us.

I.

The Code confers the absolute right to take depositions at any time after the service of the summons or the appearance of the defendant.

There are two distinct chapters of the Code which must be examined in connection with the law of discovery before trial. Chapter XXXIV deals with depositions, Chapter XXXV with inspection of documents. Under the first chapter, for depositions taken in the state, no order of court is required. Under the second chapter, no inspection can be obtained without an order of court. This definite separation into chapters is also found in the codes of many other states, hence their decisions are vital here.

In Chapter XXXIV the Code expressly gives the right to take the deposition of the witnesses specified therein, at any time after the service of the summons or the appearance of the defendant, and this privilege cannot be denied by the Court. In fact mandamus will lie if the Court forbids the taking of a deposition.

Kibele vs. Court, 121 Pac. 412 (Cal.).

The deposition can be taken either by following the Code or by stipulation. If the Code procedure is invoked all that is required is that the adverse party be served with a notice of the time and place where the deposition will be taken and with a copy of the affidavit of the other party, his agent or attorney. And all that has to be stated in this affidavit is that the party served is a party to the action, either plaintiff or defendant.

If the other side will waive this procedure, and as a rule counsel will do so, unless they wish delay, a stipulation has all the force and effect of the affidavit and notice and dispenses with them.

People vs. District Court, 66 Colo. 424.

Except where the time of notice is shortened, there is no provision in the Code for an order of Court for the examination of a witness; there is no provision for an application for an order for such examination; there is no provision for an examination by the Court of the affidavit or other showing on which such discretion is to be exercised. The only statutory duties imposed upon the judge up to the appearance of the parties at the deposition, and a dispute thereat, are to shorten the time of taking the deposition, if asked so to do, or to preside at the examination, if noticed before him.

Of course, under the general powers of the court, the judge, upon application, may change the time or place of holding the examination, or substitute a notary for the judge, or judge for the notary. However, subject to those limitations, counsel have full power to fix the time and place of the hearing (within the county where the party resides) and to designate the judge, justice or notary before whom it is to be taken.

II.

The deposition statute supplants the former equitable bill of discovery.

"The distinction between actions at law and suits in equity * * * are abolished."

Colo. Code, sec. 1.

"Statutory proceedings for the examination of a party before trial have generally been held to operate as a substitute for the chancery bill of discovery."

18 Corpus Juris, 1085.

"Bills of discovery are not authorized in those states in which codes of civil procedure have been adopted, blending law and equity into one system and providing for the discovery of evidence by interrogatories."

9 Ruling Case Law 167.

Olmsted vs. Edson (Neb. 1904), 98 N. W. 415-417.

Fox vs. Clifton Co., *infra.*

III.

No showing is required as to the reason or grounds for taking a deposition.

This is excellently illustrated in a well reasoned case in South Carolina. The action was a personal injury case, and

after answer to the complaint the defendant obtained an order to take the deposition of plaintiff. This the court later revoked, on the ground that, before a party to an action is entitled to examine the adversary, he must show a good and valid reason upon which the court can exercise its discretion, and that as the defendant had made no other showing than that the plaintiff was a party to the action, which in his opinion was not a sufficient showing, the revocation of the order must follow.

The Supreme Court promptly reversed the case, holding the showing was sufficient, and that no discretion rested in the court. It held:

"The defendant takes the position that a party to an action is entitled, as a matter of legal right, to examine his adversary under * * * the Code, without assigning any other reason than the mere fact that the person sought to be examined is a party to the action. This presents the issue of law to be determined; the defendant claims it is an absolute right, the circuit judge holds that it was a matter for the exercise of his discretion upon a proper showing by the defendant.

"No illumination of this question can be found in the rules which regulate the equitable remedy of discovery, for it is held * * * that the right to examine an adversary party, conferred by the Code, is a new remedy and operated to destroy the pre-existing remedies in equity; and * * * that it operated to 'take the place of the former equitable remedy by a bill in discovery.' We are therefore effectually shut into a construction of the provisions of the Code. Nor are we aided at all by the cases which involve the right of a party, * * * to secure an inspection of books, papers and documents in the possession of the adversary party * * * for the reasons that the provisions of Chapter 5, * * * relative to inspection of books, etc., is essentially different in several particulars from Chapter 6, * * * relating to the examination of parties. The subjects are so different as to suggest assigning them to different chapters, chapter 5 being entitled 'Admission or inspection of writings' and chapter 6, 'Examination of parties.' Chapter 5 authorizes an inspection of writings only upon three conditions: (1) Due notice to the adverse party of the application for the order; (2) the issuance of the order by a court or a judge or a justice thereof; (3) the exercise of the judge's discretion in the matter. * * *

"Now turning to Chapter 6, relating to the examination of parties, we do not find any provision for an order by anyone for the examination of the adverse party; consequently no provision for an application for such order, and no provision for notice of such application, naturally finding no provision for an order by a court or a judge or justice thereof, we find nothing indicating the exercise of a discretion by him and of course no implied requirement of an affidavit or other showing upon

which such discretion is to be exercised. The only duties or powers imposed upon a judge in connection with this matter are to preside at the examination, to change the time of notice if good cause be shown, to compel the attendance of the witnesses, and to file the examination, it is assumed, with the clerk of court.

"It has been suggested that the expressions * * * 'may be examined,' 'may be compelled,' denote the existence of a discretion lodged in someone controlling the matter. There would be much force in the suggestion if some officer had been designated to order the examination. As the provisions stand, no order is required and no officer is designated to issue it; the examination is to be had 'at the instance of the adverse party,' and to him is the expression 'may be' referrable."

Fox vs. Clifton Co., 114 S. E. (So. Car.) 700-701.
Ellinger vs. Equitable Life, 125 Wis. 643.
Olmsted vs. Edson, 98 N. W. 415 (Neb.).
Eaton vs. Farmer, 46 N. H. 200.

"The very object of the old bill of discovery was to procure evidence against the opposite party to be used on the trial of an action. * * * The statute undoubtedly goes further than the bill of discovery, and not only allows an examination of the party as to those matters which the party seeking the examination cannot prove by other witnesses or testimony, but it allows an examination as to all the material issues in the action."

Meier vs. Paulus, 70 Wis. 165-170; 35 N. W. 301-3.

IV.

Purposes for which depositions may be taken.

Depositions may be taken either to obtain testimony or to frame pleadings.

(a) To frame the complaint.
Fisher vs. Smith, 243 N. W. 4-5.
Smith vs. Wooding, 94 S. E. 404.
Lockwood vs. Merchant's Dispatch, 254 N. Y. S. 573.
St. John vs. Putnam, 220 N. Y. S. 146.
In many states a skeleton complaint is filed, depositions taken, and the complaint amended. Discovery, Ragland, p. 60.

(b) To frame the answer.
Note L. R. A. 1918 C, 598.
State vs. District Court (Mont. 1925), 236 Pac. 553-4. (And the Montana Statute is taken from California.)

(c) After demurrer sustained to the complaint.
Kibele vs. Court, 121 Pac. 412-413 (Cal.).
Rossbach vs. Superior Court, 185 Pac. 879 (Cal.).
(Note: Colorado deposition statute comes from California.)
Ex parte Munford, 57 Mo. 603.

(d) Before answer.
State vs. District Court, 236 Pac. 553-4 (Mont. 1925).
(Note: Montana statute comes from California.)

(e) Irrespective of the state of the pleadings.
Ex parte Alexander, 163 Mo. 615; 147 S. W. 521.
Bennett vs. Strodtman, 42 S. W. (2d) 43.

(f) After judgment.
Gas Co. vs. Court, 155 Cal. 30; 17 Ann. Cases 933.

V.

Steps to be taken to secure deposition in Colorado before filing the complaint.

The first question to be determined is: Can a deposition be taken in this state to aid in framing the complaint? We believe it can, as the code specifically provides (as before stated), without qualification—that the deposition of a party can be taken "*at any time* after the service of the summons or the appearance of the defendant" (Sec. 376). The main drawback is that of time because Section 34 of the Code requires that the complaint must be filed within ten days after the summons *is issued.*

The procedure would be to file a praecipe for summons, setting out the form of action and relief demanded, and have the summons issued by the clerk and served upon defendant. Section 377 requires five days' notice of the taking of the deposition. If this period is not deemed too long the notice, affidavit and subpoena (issued by the clerk or notary, unless a subpoena *duces tecum* is involved, when a court order should be obtained) should be served subsequent to the summons.

But if five days is considered too long a time, and it usually will be if the deposition is desired to obtain facts to aid in drafting the complaint, an application must be made to the court to shorten the time. In no event should this application be made before summons has been served and returned into court.

Then we must determine what steps to take to shorten this five day interval.

The Code provides (sec. 377) that the five days' notice must be given "unless for a cause shown, a judge, by order, prescribes a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice."

It would seem that the intent of the Code was an *ex parte* application, otherwise there is no possible reason for serving defendant with a copy of the order. But the Court of Appeals has expressly held to the contrary in Troth vs. Crow, 1 A. 455, and decided that unless the order was obtained on notice the deposition should be quashed. In that case, however, the deposition was taken *after* the appearance of the defendant, and the case should not be decisive where no appearance has been entered, as Section 414 of the Code provides "after appearance a defendant * * * shall be entitled to notice of all subsequent proceedings, of which notice is required to be given. *But when a defendant has not appeared, service of notice or papers need not be made upon him.*"

However, if it is imperative that no time be lost, the safer remedy would seem to be to serve the summons, and afterwards, as above outlined, the other papers, fixing the five day time, and accompany them with a motion to shorten the time of taking, and with a twenty-four hour notice thereof. Then call up the motion, get the order, and serve new notice, affidavit, subpoena and copy of the order shortening the time.

When the deposition is taken before the complaint is served, more objections may arise as to the materiality of the questions than would be apt to be made after the complaint is filed. However, the rule is well illustrated in a Missouri case where the court held:

> "The taking of the depositions has no necessary reference to the state of the pleadings at the time of the taking * * * consequently the subjects of proper inquiry are those that pertain generally to the subject matter of the action, and not merely those that are encompassed within the limits of the pleading at the time."
>
> Bennett vs. Strodtman (Mo.), 42 S. W. (2d) 43-45.

VI.

Questions which can be asked.

Before answer, any question is material under the issues made by the complaint (or summons) and any possible defense thereto.

Kibele vs. Court, 121 Pac. 412 (Cal.).
Gas Co. vs. Court, 155 Cal. 30.
Rossbach vs. Court, 185 Pac. 879.
Ex parte Munford, 57 Mo. 603.

Olmsted vs. Edson, 98 N. W. 415 (Neb.).
Eaton vs. Farmers, 46 N. H. 200.
Ex parte Alexander, 163 Mo. App. 615; 147 S. W. 521.
Bennett vs. Strodtman, 42 S. W. (2d) 43.

"In none of the jurisdictions in which deposition procedure is used for purposes of discovery before trial in the scope of the examination restricted to narrower limits than would obtain upon examination at the trial. As a matter of practice the scope is even broader than at the trial. * * * The epithet 'fishing excursion for the adverse party's evidence' has been employed [but has not been successful]. * * * Taft said 'There is no objection that I know why each party should not know the other's case.' "

Ragland, p. 120.

In contradistinction it may be of interest to know what questions the witness cannot be compelled to answer.

1. Those which might tend to incriminate. This privilege can only be claimed by the witness himself, and *not* by his counsel. (Of course, counsel should very carefully consider the bad effect of any such claim in a civil case before having his client make any such excuse.)

Lothrop vs. Roberts, 16 Colo. 250.
Barr vs. People, 30 Colo. 522.
O'Chiato vs. People, 73 Colo. 192-194-195.

2. The names of witnesses, the manner in which a party expects to establish his case, or the confidenital reports or communications of his agent in relation to the controversy.

Armstrong vs. Portland Ry. Co., 52 Ore. 437; 97 Pac. 715.

VII.

In Tort Cases.

Apart from the question, still unsettled in this state, as to the right of a defendant, against whom a body judgment is sought, to refuse to answer interrogatories on the ground of incrimination, and with the exception of the decisions in New York, there seems to be no difference in the right to take depositions in actions *ex contractu* and actions *ex delicto.*

The Appellate Division of the first department of the Supreme Court of New York refuses to allow depositions to be taken in tort cases, the other departments disagree and allow them. And the New York Court of Appeals has re-

fused to declare any uniform rule of practice, holding that it is entirely within the discretion of the lower courts.

Middleton vs. Boardman, 206 N. Y. S. 725.
Schonhaus vs. Weiner, 246 N. Y. S. 73.

VIII.

Procedure at Deposition.

If before the court, interrogatories and objections are the same as at the trial.

If before a notary, the oath should be taken and all proper questions answered. If improper questions are asked, counsel should state his objection in the record, and then pursue one of two remedies, either to have the question answered, or to refuse to allow an answer, and to require an order of court thereon. The first procedure saves the time of court and counsel, and to proceed otherwise may needlessly prolong the taking of the deposition. In any event, unless the party walks out or refuses to answer, all questions should be asked and the deposition finished so that the objections raised will not be presented to the court piecemeal.

No one but the Judge of the Court in which the case is pending has any power to rule on objections. A notary in Colorado is simply an instrumentality of the court who has power to subpoena the witness and to administer the oath. From then on he must sit idly by (or act as reporter) until the deposition is completed. In some states, as Missouri and Nebraska, he has the right to order questions answered and to commit for contempt. But in Colorado in this respect he is in effect a wooden Indian.

In case the witness walks out or refuses to answer questions, or to sign the deposition, the notary should certify the proceedings to the court. Counsel should prepare a petition for an order on the adverse party to answer the interrogatories, or to complete the deposition, and attach the notary's report thereto. The court will then pass upon the questions and determine whether they should be answered or not. And not until such an order is made and disobeyed does contempt of court arise.

IX.

Completion of Depositions.

After the deposition has been reduced to writing the witness should read it over, sign it and then after certification, it should be sealed and filed with the clerk of the court (sec. 378).

After the deposition is filed counsel should protect his rights and have his objections ruled on promptly. Section 388 of the Code provides:

"All objections, exceptions and motions in respect to depositions, shall be made and disposed of before the trial; *provided*, That objections to the competency, relevancy or materiality of the testimony therein, may be reserved and ruled on during the trial. Any party having depositions on file, may, by order of the court or judge, require the opposite party to file any objections, exception or motion he may have in respect thereto within a reasonable time, or be thereafter precluded from making the same."

And a failure to make such objection has been held to be deemed a waiver.

Cowan vs. Cowan, 16 Colo. 335-338.

The deposition can be read by either side at any stage of the action, at which time it "shall be deemed evidence of the party reading it" (Code, sec. 379).

Whether or not one is bound by the testimony of his adversary, until the cross-examination amendment goes into effect, is almost a moot question. However, it has been held that one is not.

Wigmore on Evidence, 912.
Ragland, page 52.

Conclusion.

The writer has taken depositions in a large variety of actions, and has found them to be one of the most valuable weapons of the lawyer. In cases which savor of blackmail a prompt demand for the deposition of the plaintiff usually stops the case at the threshold. In malpractice cases the plaintiff is advised of the technical defense of the physician and learns how to meet it, while the defendant doctor can turn the tables and commit the plaintiff at the inception of the

case to what his *facts* really are. And the same is true in all personal injury cases, because when the actual injuries of plaintiff are ascertained, settlements are greatly simplified. In cases against fraudulent stock salesmen an immediate application for deposition, plus a subpoena *duces tecum* for their books, is conducive to rapid settlement.

As lawyers we seek the truth. Oftimes we find, to our sorrow, that our own client has withheld vital facts. If so, we prefer to have those facts produced at the deposition rather than to meet a non-suit after a battle in court. And if the other party has a questionable case, the sooner we drag it out into the light of day, so that we can reduce it to writing and then check it with the facts, the better for litigants and the Bar.

England and several of our states provide special procedure by which either party may call upon the adversary to admit, for the purposes of the trial, the existence of facts. Our deposition statutes give us that, and more. And with the right of cross-examination, now fully conferred, we look for a widespread adoption of depositions as fact finders, time savers and docket reducers.

Recently graduated law students may in this depression era be forced to the status pictured in the following advertisement copied from the Prescott Miner (Arizona) of August, 1879:

STEPHEN G. MORAN
(Jack of All Trades)

Attorney at Law, will practice in all courts, draws deeds and all papers; veterinary surgeon and General contractor. Cleans vaults, whitewashes fences, digs wells, saws and chops wood. Translates French, German and Spanish papers. Works by the day, hour or job. Office at residence on Goose Flat. Give me a call.

Simon Quiat, Samuel S. Ginsberg and Nathan H. Creamer have associated themselves as co-partners under the firm name of Quiat, Ginsberg & Creamer, 850 Equitable Building, Tabor 1366.