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CROSS EXAMINATION UNDER THE STATUTE

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SECTION 376 of the Colorado Code provides that the testimony of a party to the action or proceeding or a person for whose immediate benefit the action or proceeding is prosecuted or defended, may be taken at any time after the service of summons or the appearance of the defendant. This provision of the Code has been in force since 1887.

In 1899, Section 6570 of the 1921 Compiled Laws was passed. It provides in substance that in a civil action a party to the record for whose immediate benefit the action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record, MAY BE EXAMINED UPON THE TRIAL THEREOF, as if under cross-examination, at the instance of the adverse party. The Section further goes on to provide that the party calling for such examination is not concluded thereby but may rebut it by counter-testimony.

It will be noted that under the Code, the time when the deposition may be taken is fixed "at any time after the service of the summons or the appearance of the defendant", while under the cross-examination statute it is stated that the adverse party "may be examined upon the trial thereof". A number of states, including Arizona, Connecticut, Idaho, Illinois, Massachusetts, North Dakota, New Hampshire, Ohio, Pennsylvania, Vermont, Wisconsin and Tennessee, have similar statutes permitting the adverse party to be called as a witness in the same manner as other witnesses. Most statutes provide that the adverse party shall be compelled to testify "as a witness at the trial or by deposition", while others provide that the examination shall be subject to the rules applicable to the examination of other witnesses. Because of the limited time, it is impossible to discuss the decisions in some of these states. Most of them, however, have been considered by the various District Judges before whom the question has been argued.

The first case in this district, of which I have been able to find any definite record, involving the right to take deposi-

tions before trial as under cross-examination, arose in 1915. (*Whitt v. Orchard Products Co.*). Judge Denison, then sitting as District Judge, held that the deposition of the adverse party could be taken before trial as under cross-examination.

The question again arose in 1919 (*Davis v. Robinson,* No. 68054) in a case where the plaintiff, through Edgar McComb as his counsel, sought to take defendant's deposition as under cross-examination before trial. The defendant, represented by N. Walter Dixon, refused to appear for cross-examination upon the advice of counsel. Judge Hersey, in a lengthy opinion, agreed with Judge Denison, and held the defendant guilty of contempt. He reasoned as follows: First, that under the common law, disregarding the statute, one had the right to cross-examine an adverse or hostile witness (40 Cyc. 2159; 120 N. W. 264) and since the deposition could be taken before trial under the Code, such deposition might properly be taken as under cross-examination. Those taking the other side of the question argue that the foregoing reasoning does not apply because the cross-examination statute was passed after the Code provision and the later statute should therefore govern, in determining the intention of the legislature. This argument may be answered by calling attention to the Decision of our Supreme Court in *Purse v. Purcell,* 43 Colo. 50 at 53, which holds that our cross-examination statute does not abridge any right which a party had at common law. Judge Hersey held, second, that the cross-examination statute was remedial in character and therefore was entitled to a liberal construction for the purpose of accomplishing the object sought to be obtained thereby. Third, that under the common law (40 Cyc. 2473) and under the Code, the time at which a party might examine his adversary was within the discretion of the trial Court.

In 1926 the question again arose before Judge Butler, sitting as District Judge in the case of *Lednum v. Lednum* (No. 90503). In that case Judge Butler in a written opinion, after having read Judge Hersey's opinion, stated that although he entertained a very high regard for Judge Hersey he could not agree with him and that the words "upon the trial", meant upon the trial and not before the trial and that any other construction was not liberal but was doing violence to the plain

language of the statute. There are numerous decisions which hold that the proceedings, motions, arguments and pleadings prior to the taking of evidence in Court are no part of a trial in its generally accepted meaning. (*Lipscomb v. State,* 76 Miss. 253; *Hunnell v. State,* 86 Ind. 431; *State v. Hazledahl,* 2 N. Dak. 521; *Wagner v. State,* 42 Ohio State 537; *Ward v. Territory,* 8 Okla. 25. See also "Trial", Webster's New Internat. Dictionary, 1918).

Judge Butler went on to state, however, that in his opinion the importance of the cross-examination statute has been over-estimated for the reason that under the Code the adverse party could be subpoenaed and examined as a hostile or adverse witness. This right, in his opinion, included practically all the benefits to be gained by the cross-examination statute. He goes on to point out that the only fundamental difference between the examination of an adverse witness and the cross-examination of a witness under the statute is that in the former case evidence might not be permitted attacking the general reputation of the adverse party for truth and veracity, whereas under the statute the party calling his opponent for cross-examination would not be precluded from attacking his general reputation. In other respects the party calling the adverse party would not be concluded or bound by his testimony but could call other witnesses to contradict him. (*Brown v. Tourtelotte,* 24 Colo. at 216; *C. B. & Q. R. R. v. Roberts,* 35 Colo. 501; *Pacific Life Co. v. Van Fleet,* 47 Colo. at 405).

From a practical standpoint, if information is all that is desired by the deposition and the party taking the deposition does not desire to be bound, even to the extent of being precluded from introducing testimony attacking the general reputation of the adverse party, he may proceed to take the deposition and need not introduce it in evidence, in which event he is not bound by the deposition.

Upon inquiry I am advised that three District Judges outside of our own District, have taken the position that the deposition can be taken before trial as under cross-examination. In our own District, viz. Denver, all of the District Judges have ruled on the proposition except Judge Steele. With the exception of Judge Holland, they have followed Judge Butler's decision in the Lednum case and have refused

to permit the depositions to be taken as under cross-examination. Judge Holland, on the other hand, agreeing with Judges Denison and Hersey before him, has permitted the taking of the deposition as under cross-examination, and in addition to the reasoning expounded by Judge Hersey, takes the position that the purpose of both the Code and the Statute is to permit the adverse party to get the facts before trial and that he should be given every opportunity to do so. He says that if the witness called is forced to divulge any fact that the other party is entitled to, justice has been done and the intention of the Legislature carried out. He takes the position that in his opinion it was not the intention of the Legislature by the statute to handicap the party desiring to take the deposition, even to the extent of being unable to impeach the general reputation of his adversary.

In connection with the cross-examination statute an interesting question arose sometime ago before Judge Sackmann, in a suit involving fraud, in which exemplary damages was asked. (*Hart v. Hammond*). It involved the right, upon the trial, to call the defendant for cross-examination under the statute. There is authority to the effect that the privilege of a witness not to furnish evidence which might incriminate him, is not limited merely to a criminal proceeding but that it can be invoked in a civil proceeding in which a penalty (based on a non-remedial statute) is asked, or where the testimony of the witness might tend to prove an offense punishable as a crime.

A number of decisions have held that where the purpose of a suit is to recover a penalty, the defendant cannot be compelled to testify. (29 L. R. A. 811). In *Counselman v. Hitchcock,* 142 U. S. 547 at 563, the Supreme Court of the United States says:

> "It is an ancient principle of the law of evidence, that a witness shall not be compelled in any proceedings to make disclosures or to give evidence which will tend to criminate him, or subject him to fines, penalties or forfeitures."

Both the Supreme Court of the United States and our own Supreme Court have stated that the object of the constitutional provision was not merely for the protection of the individual in a criminal prosecution against himself, but its purpose was to insure that a person could not be required

when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. (*Tuttle v. People,* 33 Colo. 243 at 254).

Our Supreme Court, as you know, has held that exemplary damages are penal in character. (*French v. Dean,* 19 Colo. 504; *Ristine v. Blocker,* 15 Colo. App. 224 at 230).

Judge Sackmann accordingly held that since the answers of the defendant called for cross-examination, might subject him to a penalty, viz. exemplary damages, such defendant could not be compelled to testify. This same reasoning would, of course, apply in a suit in which fraud or similar facts, constituting a crime are sought to be elicited.

There is some question whether a dicta of our Supreme Court in *Radinsky v. People,* 66 Colo. 179 at 183, does not indicate a contrary view.

In that case plaintiff refused to testify before the grand jury because it might prejudice his interests in an election contest. Our Supreme Court said:

"One is not relieved of the duty to testify in preliminary examinations, or before grand juries, or in criminal cases, merely because such testimony may have a tendency to influence claims made by him in civil actions. (Citing Cases).

"Furthermore, under our statute, his adversary may require him to answer, as upon cross-examination, in such actions."

Since preparing these remarks, I have been advised that the first question discussed by me is now being taken to the Supreme Court. (*Taylor v. Briggs, et al.,* No. 12937).

No doubt the decision in this case will clarify the controversial question discussed in this article.

BAR POLL UPON PROHIBITION

At a meeting of the Denver Bar Association held May 2, 1932, the following resolution was adopted:

BE IT RESOLVED by The Denver Bar Association that a written poll of the membership be forthwith taken to determine the sentiment of the Association upon the following alternatives:

1. For continuance and enforcement of the existing prohibition laws.
2. For repeal of the Eighteenth Amendment and laws passed in pursuance thereof.