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DISCOVERY

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1. INTRODUCTION

Article 8 of the Proposed General Code of Civil Procedure for the State of Missouri deals with discovery.

A headnote says that the advisory committee of the supreme court did not approve much of the material prepared by the subcommittee which originally drafted the code. It further states that Section 1 does not supplant the existing provisions regarding depositions contained in articles 4 and 6 of Chapter 8 of the Missouri Revised Statutes 1939, but is in addition thereto. The remaining sections deal with discovery which is covered by Missouri Revised Statutes 1939, Sections 1075 to 1080.

Section 1 of article 8, which was not approved by the advisory committee, but which is included in the code as published for distribution to Missouri lawyers, permits depositions without leave after an answer has been served, and with leave after jurisdiction has been obtained over any defendant or over any property which is the subject of the action, but before answer. Section 1917 of the present law seems broader, since it permits any party to a suit to obtain a deposition. It says nothing about obtaining leave of court.

There seems no need in this discussion to outline in detail the present statutes, for they are well known to most of the profession. Rather, the writer will suggest differences between the Revised Statutes and the Proposed Code.

2. SUBPOENA DUCES TECUM

At the outset, we discover that Section 1(b) of the code *permits* the court in which a cause is pending to order the issuance of a *subpoena* commanding the production of documentary evidence on the taking of a deposition. Moreover, a *party* may be required to produce such evidence when a deposition is being taken. This is permitted by Rule 45(d) of the Federal Rules, but our *statutes* have been said not to allow it on the ground that no statute provides for such production.¹

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1. State *ex rel.* Stroh v. Klene, 276, Mo. 206, 207 S.W. 496 (1918).

Already this rule has been interpreted by the federal courts. Among other decisions, it has been held that a *subpoena duces tecum* of this type is obtainable only on order,² but this may be made *ex parte* by endorsement on the *subpoena*.³

3. LIMITATION OF EXAMINATION

Section 1(c) of article 8 allows the court, on the motion of a party or deponent, to order the cessation of a deposition or the limitation of its scope, if it is shown that the examination is being conducted in bad faith. In granting or refusing such an order, the court may impose costs which it deems reasonable on a party or witness. This section is very much like Federal Rule 30(d).

It should be noticed that the court's discretion determines the extent of limitation of an examination.

4. FORMALITIES

Section 1(d) of article 8 relates to the essential formalities of a valid deposition. This proposed statute is more complete than Section 1938 of Missouri Revised Statutes 1939, in some respects. .

It states that when the testimony has been completely transcribed, the deposition shall be submitted to the witness for examination. It shall be read to or by him, unless both he and the parties waive the reading. The officer before whom the deposition is taken may make any changes requested by the witness, stating the reasons of the deponent for such variations. The witness then signs the deposition, unless the parties stipulate that there need be no signature or unless the witness is dead, ill, cannot be found, or refuses to sign. If any such circumstance leads to the lack of signature by the deponent, the presiding officer shall sign the deposition and state on the record the reasons for the omission of the signature. The court may reject the deposition in whole or part when it is offered at the trial, on the ground that the explanation given for the refusal to sign was inadequate.

Section 1938 of the present law adds that the person presiding at the taking of a deposition shall append thereto a certificate showing that the examination was reduced to writing in his presence and was subscribed and sworn to by the witness, if that was the case. It shall also indicate the place at which and the days and hours thereof when the hearing was held.

2. Fox v. House, 29 F. Supp. 673 (E.D. Okla. 1939).

3. Cooney v. Guild Co., 1 F.R.D. 246 (S.D. N.Y. 1940).

5. INTERROGATORIES

a. *To Whom Presented—Number*

Under Section 2 of article 8 of the Proposed Code, a very broad right to submit interrogatories is given. According to its terms, any *party* may serve one, and only one, set of written interrogatories upon any adverse *party* to be answered by him or by any officer, director, or managing agent, if the adverse party is a corporation, partnership, or association, unless the court permits the putting of several sets of interrogatories to the same party.

b. *When Presented*

The interrogatories can be presented only after an action has been begun,⁴ for the statute says it is a *party* who puts them, and one is not a party before commencing a suit. However, they may be served before *answer*.⁵

c. *Number of Interrogatories*

It is usually held that interrogatories should be addressed to important matters, and relatively few in number,⁶ but the opposite view has been expressed.⁷

d. *Scope*

It seems that the scope of discovery by interrogatories should be as broad as that by ordinary oral depositions, for the suggested provision makes no limitation.⁸ Interrogatories should be permitted to obtain evidence as well as to aid one in the preparation of pleadings.⁹

e. *Objections to Interrogatories*

1. Time to present

Objections to interrogatories must ordinarily be presented to the court within ten days after service thereof, with notice as in the case of a motion.

2. Waiver of objection

Since the right to make an objection is a privilege, it may be waived.¹⁰

4. *C. F. Simonin's Sons, Inc. v. American Can Co.*, 26 F. Supp. 420 (E.D. Pa. 1939).

5. *United States v. American Solvents & Chemical Corp. of Cal.*, 30 F. Supp. 107 (D. Del. 1939).

6. *Coca-Cola Co. v. Dixi-Cola Laboratories, Inc.*, 30 F. Supp. 275 (D. Md. 1939).

7. *J. Schoeneman, Inc. v. Brauer*, 1 F.R.D. 292 (W.D. Mo. 1940).

8. *Ibid.*

9. *United States v. Crescent Amusement Co.*, 31 F. Supp. 730 (M. D. Tenn. 1940).

10. *Munzer v. Swedish-American Line*, 35 F. Supp. 493 (S.D. N.Y. 1940).

3. Ruling on objections

The court should rule on the objections as soon as is practicable.

f. *Answers to Interrogatories*

1. Time to answer

The answers shall be served on the party submitting the interrogatories within fifteen days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. However, the statute suggested says answers shall be deferred until objections to them are determined.

2. Form of answers

The answers shall be made separately, fully, and in writing to each interrogatory. They shall also be signed by the person interrogated. When an answer comes from a corporation, signature should be by an officer thereof, rather than by its attorney.¹¹

6. PRODUCTION OF THINGS AND ENTRY ON PROPERTY

a. *In General*

Section 3 of article 8 of the suggested practice code provides for production of writings and other things for their inspection and copying or photographing and for entrance upon property for any designated relevant object or operation thereon.

b. *Persons Involved*

By the very words of the statute, only *parties* may use, or be forced to comply with, the terms thereof.

c. *Time Involved*

Rights under this law may be enforced only while an action is *pending*.¹² But one does not have to wait until joinder of issue.¹³

d. *Things Inspected—Their Nature*

1. Privileged

The very statute says the things involved shall not be privileged from being dealt with in the evidence at the trial. Of course, one may waive this

11. Pitman v. Florida Citrus Exchange, 2 F.R.D. 25 (S.D. N.Y. 1941).

12. Okun v. Kastner, 1 F.R.D. 599 (D.R.I. 1941).

13. Courteau v. Interlake S.S. Co., 1 F.R.D. 525 (W.D. Mich. 1941).

immunity and permit inspection of things not otherwise subject to examination.¹⁴

2. Evidential

It is also stated that the objects involved must constitute or contain evidence material to *any matter involved in the action*.

The meaning of this presents a real problem, which has been answered differently by federal courts operating under a similar rule.

At the present time, most of the cases support the idea expressed by the following quotation: "It is sufficient that the inquiry be made as to matters generally bearing on the issue and relevant thereto, or that there is reasonable probability that the document in question contains material evidence."¹⁵

3. Custody

The things involved must be in the possession, custody, or control of the person against whom the order is produced. It should be noticed that it is sufficient, according to most authorities interpreting law like this, if the thing or property is *under the control* of the one ordered to produce or permit entry.¹⁶

e. *The Motion*

One who wishes an order under this statute should make a motion showing good cause why the mandate should be issued. It would appear that this would require the motion to show the existence of a situation which might be the basis of an order. Yet, it has been decided that possession or control need not be alleged as to records pertaining to an adversary's business, since that will be assumed.¹⁷

f. *The Notice*

Notice of a request under this statute must be sent to all parties other than the movant.

g. *The Order*

1. Court granting

The provision is that the court in which the action is pending makes the order.

14. See note 10, *supra*.

15. *Kane v. News Syndicate Co., Inc.*, 1 F.R.D. 738 (S.D. N.Y. 1941).

16. *United Mercantile Agencies v. Silver Fleet Motor Express*, 1 F.R.D. 709 (W.D. Ky. 1941).

17. *Ibid.*

2. Contents

The statute declares that "the order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just."

It has been decided that the order should designate the documents to be produced.¹⁸

Also, an order for production may reserve the question of materiality and privilege as to whether or not inspection should be permitted until the documents are submitted to the court, since reasonable certainty as to materiality may be the basis of an order.¹⁹

An order may provide for the adequate protection of the producing party.²⁰

This matter is now covered by Missouri Revised Statutes 1939, Sections 1075-1077, 1079. Their coverage is not as broad as that in the Proposed Code.

7. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

a. *In General*

Section 4 of article 8 of the suggested procedure code deals with the physical and mental examination of parties to an action. There is now no state legislation on this matter, yet it is covered by case law. Section 4 differs from Federal Rule 35, for it does not cover the report of the physician, as does Rule 35(b), and it makes additions to Rule 35(a).

b. *Persons Involved*

Only *parties* may request and be forced to submit to the examination.

c. *Time Involved*

Only after a controversy has begun may an examination be requested, for the statute says an action must be pending.

d. *Type of Action*

The action must be one involving the mental or physical condition of a party. The law is not limited to personal injury cases, for the wording thereof contains no such restriction.²¹ Nor is a request for an examination

18. R.C.A. Mfg. Co., Inc. v. Decca Records, Inc., 1 F.R.D. 433 (S.D. N.Y. 1940).

19. Bruun v. Hanson, 30 F. Supp. 602 (D. Idaho 1939).

20. Laird v. United Shipyards, Inc., 1 F.R.D. 772 (S.D. N.Y. 1941).

21. Beach v. Beach, 114 F. (2d) 479 (C.C.A. 2d, 1940). But see Wadlow v. Humberd, 27 F. Supp. 210 (W.D. Mo. 1939).

limited to the purposes of the main trial. It can be had whenever it is important to ascertain the truth:²²

e. *The Motion*

An order for examination must be made upon motion for good cause shown.

f. *Notice*

Notice of the motion must be given to the party to be examined and to all other *parties not in default*. The last *three* words are not found in the Federal Rule.

g. *The Order*

1. Form

The order, when required, shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

2. The examiner

The examination shall be made by a physician *chosen by the party requesting the examination*. The italicized words are not found in the Federal Rule.

3. Discretionary

The making of the order is within the discretion of the court *in which the action is pending*, since the law declares that the court *may* give the order.²³

4. Waiver of

If one consents to be examined, no order is necessary.²⁴

8. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS

a. *In General*

Section 5 of article 8 of the Proposed Code deals with admissions of facts and of the genuineness of documents. It is broader than Missouri Revised Statutes 1939, Section 1080, which merely covers the authenticity of documents, but it corresponds with Federal Rule 36.

b. *Persons Involved*

The statute says specifically that a *party* may serve another *party* a request for admissions.

22. *Teche Lines, Inc. v. Boyette*, 117 F. (2d) 579 (C.C.A. 2d, 1940).

23. *The Italia*, 27 F. Supp. 785 (E.D. N.Y. 1939).

24. *Kelleher v. Cohoes Trucking Co.*, 25 F. Supp. 965 (S.D. N.Y. 1938).

c. *Time for Making Request*

The law declares that request may be made at any time after pleadings are closed.

d. *The Request*

The request must be in writing. It may demand the admission of the genuineness of *relevant* documents described in the request or of the truth of any *relevant* matters of facts set forth in the written request. The facts, it has been decided, need not be within the present knowledge of the person who is called upon to make the admission, if he can secure the information.²⁵ But the contrary has been held, if the facts are provable by the testimony of third parties.²⁶ At any rate, one should not have an unfair burden put upon him to determine the truth or falsity of facts or the genuineness of documents. Requests may be made for admissions of facts within the knowledge of the requesting party, since the admissions may shorten the trial.²⁷

e. *Accompanying Documents*

Copies of documents, the admissibility of the genuineness of which is requested, must be delivered with the request, unless copies of such documents have already been furnished to the person whose admission is desired.

f. *Time for Answer*

The request must be answered within a period designated in the request, which period shall not be less than ten days after service of the request, or within such further time as the court may allow on motion for an extension of time and on notice of such motion to the requesting party.

g. *The Answer*

The answer may consist of an admission or of a sworn statement containing a specific denial of the matters of which an admission is requested, or detailed reasons why the one answering cannot either admit or deny those matters. It should be direct and unequivocal.²⁸ It has been stated that one may show that he has no information on the subject and cannot

25. *Hanauer v. Siegel*, 29 F. Supp. 329 (N.D. Ill. 1939).

26. *Booth Fisheries Corp. v. General Foods Corp.*, 27 F. Supp. 268 (D. Del. 1939).

27. See note 25, *supra*.

28. *In re Independent Distillers of Kentucky*, 34 F. Supp. 724 (W.D. Ky. 1940).

secure it.²⁹ It has also been held that the answer may be sworn to by any one who can do so on knowledge or information and belief.³⁰

h. *Failure to Answer*

Failure to answer within the time permitted results in an admission of truth or genuineness.³¹

i. *Effect of Admission*

Subdivision *b* of Section 5 provides that an admission is effective only for the purpose of the pending action in which it is made.

9. SANCTIONS

a. *In General*

Section 6, article 8 of our suggested practice code relates to sanctions which may be used to compel one to comply with discovery statutes. It is more complete than our present local statutes, but falls short of the coverage of Federal Rule 37.

b. *Interrogatories*

If a party refuses to answer an interrogatory, the proponent may move the court, on reasonable notice to all persons affected thereby, for an order compelling an answer.

If the motion is granted and the court finds the *refusal* was without substantial justification, the court shall require the refusing party to pay to the *examining party* the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and the court finds the *motion* was without substantial justification, the court shall require the *examining party* to pay to the refusing party the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees. Under the Federal Rule, an attorney advising one to refuse to answer may be liable to the same sanction as the party not answering, if the motion is granted and if the motion is denied, the lawyer advising the motion may be subject to the payment of costs incurred in opposing the motion. Whether or not this omission in the law proposed for Missouri is to be commended involves a question of policy. Its inclusion would certainly make a lawyer hesitate to advise refusals to answer or to suggest filings of motions.

29. See note 25, *supra*.

30. *Van Horne v. Hines*, 31 F. Supp. 346 (D.C. 1940).

31. *Walsh v. Connecticut Mutual Life Ins. Co.*, 26 F. Supp. 566 (E.D. N.Y. 1939).

Refusal of any party, or of any officer, director, or managing agent of a party to obey an order to answer interrogatories may also result in the making of *any* just orders by the court before whom the case is proceeding. Such direction may be that the matters concerning which questions were asked shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. It may also refuse to allow the disobedient party to support or oppose designated claims or defenses. It may likewise order the striking out of pleadings, or parts thereof, or the staying of further proceedings until the order is obeyed, or the dismissing of the action or proceeding, or any part thereof, or the rendering of a judgment by default against the disobedient party.

Though contempt of court proceedings, which are permitted under Federal Rule 37(b, 1), are not provided for under the Proposed Code, Missouri Revised Statutes 1939, Section 1937, does make provision therefor.

A court may give additional opportunity to one to answer an interrogatory before ordering a default.³²

c. *Failure to Produce or Submit to Examination*

If a party or an officer, director, or managing agent of a party refuses to obey an order to produce and permit inspection, copying, or photographing, or to permit entry on land or other property, or to submit to a physical or mental examination, similar sanctions may be invoked as are used when interrogatories are not answered as required.

d. *Refusal to Admit*

If a party, after being served with a request under Section 5 of article 8, serves a sworn denial of the truth of a fact or of the genuineness of a document, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. The order shall be made, unless the court finds there were good reasons for the denial, or that the admissions sought were of not substantial importance.

32. *Dann v. Compagnie Generale Trans-Atlantique, Ltd.*, 29 F. Supp. 330 (E.D. N.Y. 1939).