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FEDERAL COURTS - DEPOSITION-DISCOVERY PRACTICE - RULE 26 AND HEARSAY EVIDENCE

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FEDERAL COURTS — DEPOSITION-DISCOVERY PRACTICE — RULE 26 AND HEARSAY EVIDENCE — In an action for personal injuries suffered in defendant's store, plaintiff moved for an order requiring one Jackson to answer certain questions propounded to him at the taking of his deposition.[1] Jackson, an investigator for defendant's insurer, had ascertained certain facts from witnesses to the accident. The questions, to which Jackson objected on the ground of privilege, sought to elicit the number and names of persons who he learned were present at the accident. *Held,* the motion should be denied on the ground that the evidence sought was hearsay. *Poppino v. Jones Store Co.,* (D. C. Mo. 1940) 1 F. R. D. 215.

It will be noticed that the witness's refusal to answer the questions propounded was based solely on the ground of privilege. Yet the court passes over the question of privilege,[2] and apparently of its own motion decides the case upon the ground of the inadmissibility of hearsay matter. In a case in the district court for Maryland,[3] the court held that an insurance adjuster employed by the defendant bus company's insurer must answer questions asking for the names and addresses of the persons known to him who were present at the scene of the accident, but could not be required to divulge the information derived from such

[1] Rule 26 (a) of the Federal Rules of Civil Procedure establishes when depositions may be taken. Rule 26 (b): "Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

[2] Principal case, 1 F. R. D. 215 at 217: "Without considering whether the matters inquired of in the deposition sought to be taken here were 'privileged,' our view is that the rule is not to be construed as requiring answers to such questions as were asked." Holding that questions as to privileged matters were not to be answered: Grauer v. Schenley Products Co., (D. C. N. Y. 1938) 26 F. Supp. 768 (attorney-client); E. W. Bliss Co. v. Cold Metal Process Co., (D. C. Ohio 1940) 1 F. R. D. 193 (same).

[3] State of Maryland for use of Montvilla v. Pan-American Bus Lines, (D. C. Md. 1940) 1 F. R. D. 213.

persons.[4] Both these cases arise under rule 26 of the federal rules of civil procedure.[5] Differing from many rules of discovery, rule 26 provides for a pre-trial procedure which serves the dual purpose of discovering facts for the preparation of a case and of obtaining testimony for use on trial.[6] The distinction between these two functions of the rule must be observed in order to assure its proper application with reference to hearsay matter. In the instant case and in the Maryland case it is held that hearsay proof is inadmissible upon the deposition examination.[7] But in applying the hearsay rule a distinction should be drawn between proof of the truth of an assertion, in which instance the hearsay rule applies, and proof of the making of an assertion, in which instance it does not.[8] The rule would not apply where the names and addresses of the persons reported to have been present at the scene of the accident are offered merely as proof of their presence, not as proof of their actual presence. The questions in both cases were propounded, not to prove the presence of certain persons at the scene of the accident by what the insurance investigator learned from witnesses (this being hearsay), but to obtain the names and addresses of those persons reported to have been present so that the examining party might seek them out and question them as to the occurrence in issue.[9] By excluding the inquiry in the principal case the court limited the clue-seeking, discovery phase of rule 26. The Maryland case, on the other hand, recognizes the investigatory purpose of the rule as being an important feature of the deposition-discovery procedure. The language of the rule indicates that it was drafted in contemplation of just such

[4] Cf. Barter v. Eastern S. S. Lines, (D. C. N. Y. 1939) 1 F. R. D. 65, where the court said that questions as to names of anyone knowing "anything about the accident" need not be answered because such a general question was not contemplated by the rule.

[5] Quoted supra, note 1.

[6] See Bachrach v. General Investment Corp., (D. C. N. Y. 1940) 31 F. Supp. 84 at 86.

[7] Accord: Kenealy v. Texas Co., (D. C. N. Y. 1939) 29 F. Supp. 502; Rose Silk Mills, Inc., v. Insurance Co. of North America, (D. C. N. Y. 1939) 29 F. Supp. 504.

[8] 6 WIGMORE, EVIDENCE, 3d ed., § 1766 (1940): "The theory of the Hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but *without reference to the truth of the matter asserted*, the Hearsay rule does not apply."

[9] Where the examination is had for the sake of discovering clues for the preparation of the case, and the presence of certain persons is reported through such examination, the report obviously is useful to the examining party only as a guide to further investigation of the case, not as testimony on trial. One should note that there is a distinction between the scope of the examination and the use of the results of the examination on trial. As Professor Sunderland said: "There is no restriction whatever on the right to take, and it may therefore be said that *unlimited discovery* is contemplated. But there are very definite restrictions on the right to use the depositions. *Unlimited proof* by deposition is therefore *not* contemplated." Sunderland, "Discovery before Trial under the New Federal Rules," 15 TENN. L. REV. 737 at 741-742 (1939).

Cf. Lewis v. United Air Lines Transport Corp., (D. C. Conn. 1939) 27 F.

use as that attempted in the principal case,[10] a use which would help to realize the ultimate purpose of the federal rules of civil procedure to effect the determination of actions as justly, speedily and inexpensively as possible.[11]

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Supp. 946 at 947, 948: "That the examination may develop useful information by way of discovery which may not be admissible or material upon the precise issue is aside from the point; to the extent that the examination develops useful information it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. . . . But under Rule 26 (b) a party is entitled by way of discovery to information, such for instance as 'the identity and location of persons having knowledge of relevant facts,' which obviously is not directly admissible in evidence. . . . The examination, under the rule, is not to be restricted to matters which are material or admissible."

[10] The rule is quoted in note 1, supra. Note especially the express reference to "the identity and location of persons having knowledge of relevant facts."

[11] Rule 1. And see Babcock & Wilcox Co. v. North Carolina Pulp Co., (D. C. Del. 1938) 25 F. Supp. 596 at 597.