CHAPTER III

PRESERVATION OF TESTIMONY BY MEANS OF DISCOVERY

Preservation as well as discovery of testimony is one of the important functions of pre-trial procedure. It is important that the lawyer have at his disposal adequate means of providing for the contingency of the death or removal of necessary witnesses, since cases are not reached for trial until months and sometimes years after the occurrence of the transactions in question. This is especially true in the large cities where there is a shifting population and where court calendars are so crowded that there are unusual delays in reaching trial. The law has always recognized the need but the machinery which it has provided to supply it too frequently has been cumbersome and inadequate.

Courts of common law for a long period of time furnished no machinery to perform this function. Consequently courts of chancery were called upon to supply the defect. Just as courts of chancery entertained bills of discovery, which preserved as well as discovered the testimony of adverse parties, so, likewise, did they entertain bills to perpetuate testimony and to take testimony de bene esse in aid of actions at law.¹ The purpose of both of the latter remedies was to provide a means of preserving the testimony of witnesses generally. In the early part of the nineteenth century common law courts were empowered by special statutes to give the same remedy which chancery formerly had given by these

¹ Story's Equity Jurisdiction (2nd English ed.) secs. 1505, 1513; Weeks, Law of Depositions (1880) sec. 10 ff.
ancillary bills. The statutory remedy became known as deposition procedure.

There has been an increasing tendency under modern practice to combine the methods of obtaining discovery and preservation of evidence, respectively. As a matter of fact there usually can be no discovery without incidental preservation. Conversely, preservation often affords an incidental discovery. Why not, therefore, combine the two procedures into a single one? This is the trend of the modern practice. Two developments have removed differences in the two types of procedure which formerly made their assimilation less practicable. At one time parties to an action were neither competent nor compellable to testify as witnesses but later this disability was removed. When parties became witnesses in fact it was an easy step to provide that they be examined as witnesses. There has also been a tendency to make liberal allowance for the taking of depositions of all witnesses on the theory that it is impossible to tell when a witness may die or become inaccessible and that therefore a litigant should not be required to show the witness is unavailable before taking his deposition. It has been thought sufficient to make the unavailability of the witness a condition to the use of the deposition at the trial rather than to the taking thereof.

If depositions may be taken from both witnesses and parties and if the right to take is unconditional, a very liberal method of discovering and preserving evidence is afforded. If the right to take is unconditional there is no reason for the court to inquire whether the preservation of testimony or the discovery of testimony is the primary objective of the applicant. The words of the Supreme Court of Kansas in this regard are classic: "Now the giving of testimony, whether on the trial or by deposition, is not a privilege of the witness, but a right

2 Wigmore on Evidence, IV, sec. 2217.
of the party. He need not solicit; he can compel. It seems to us therefore that under our statutes a witness may be compelled to give his deposition, although he reside in the county where the action is pending. It is said that this power is liable to abuse, and that a witness may be compelled to give repeated depositions, and still be present at the trial. Courts will see that this power is not abused, or the time of witnesses unnecessarily taken. It is also said that large amounts of costs will be accumulated. This will not injure the adverse party, for a party taking depositions which he does not use must himself pay their cost. It is also said that this permits one to go on a ‘fishing expedition’ to ascertain his adversary’s testimony. This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary’s testimony.”

When first introduced there was considerable aversion on the part of the bar to the use of deposition procedure for purposes of discovery before trial. Such use of the procedure has been attacked as a “fishing expedition” and as being foreign to the traditional purpose of deposition procedure. Some lawyers have felt that, to employ words used by the Kansas Supreme Court upon another occasion, “the taking of the deposition of a party in a pending case merely to find out in advance what his testimony will be, and to annoy and oppress him, and not for the purpose of using the same as evidence, is an abuse of judicial authority and process.”

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4 In re Davis (1898) 38 Kan. 408, 16 Pac. 790.
This hostility on the part of the bar, however, is short-lived once the use of deposition procedure both to discover and preserve evidence is given a fair trial. Its very reproach becomes its glory—the courts say that the virtue of the device is that it is a means of discovering evidence. The following quotations from various opinions will serve to illustrate the satisfaction which such a use of the procedure gives: (1) "The code confers the right on either party to take the deposition of the adverse party, not merely for use as evidence if the necessary conditions arise, but for the purposes of exploration, or of ascertaining the facts on which the adverse party relies." 6 (2) "This is a very wise provision of the code of procedure, taking the place of the old bill of discovery and affording a much more speedy and efficient remedy than was given in that mode." 6 (3) "Taking the deposition of a party is the only substitute we have for a bill of discovery under our practice." 7 (4) "It was the intention of the legislature * * * to remove every barrier to the discovery of the truth." 8 (5) "The common law originally was very strict in confining each party to his own means of proof, and, as it has been expressed, regarded a trial as a cock-fight, wherein he won whose advocate was the gamest bird with the longest spurs. But we have come to take a more liberal view and have done away with most of those features of trials which gave rise to that reproach." 9

Effective machinery for discovery and preservation of evidence already exists in all of the states which allow

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6 Valliant, J., in Tyson v. Savings & Loan Association (1900) 156 Mo. 588, 57 S. W. 740. Compare the earlier case of Ex parte Krieger (1879) 7 Mo. App. 367.
the taking of depositions to be an unconditional right of the party, and impose limitations, depending upon the availability of the witness, only upon the use of the deposition at the trial. Already approximately half of the states of this country have this type of deposition statute and other states could obtain the same result by a simple statutory amendment to the effect that the conditions which are now imposed for the taking of depositions henceforth shall apply only to the use thereof at the trial and that depositions may always be taken as of right. It would facilitate the practical use of the device and reduce the possibility of illiberal decisions limiting such use if the deposition statutes were so labelled as to indicate that use both for discovery and for preservation of testimony is intended. Indeed, the greatest danger incident to the use of ordinary deposition procedure for purposes of discovery before trial is that since it is not labelled discovery procedure courts and lawyers hesitate to use it as such. The easiest way to remove this danger is to specifically label the statutory provisions *discovery and deposition procedure*.

It is to be regretted that the first tentative draft of the proposed uniform deposition act submitted to the Commissioners on Uniform State Laws in 1929 has not made provision for such a practice. The proposed act provides that, "depositions may be taken of any witnesses who are about to be beyond reach of a subpoena or for some cause are expected to be unable to attend court at the time of trial." In a note to this provision it is said: "Question is raised as to whether under this Act the deposition of a party could be taken and if so under what circumstances. And if his deposition could be taken, could he be compelled to produce books, documents, or things under his control? Some states have

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10 Handboook of the National Conference of Commissioners on Uniform State Laws and Proceedings (1929) 360.
special statutes or rules which permit examination of parties before trial. The entire question could be comprehended in this statute but, as now drafted, Section 1 would have to be modified. If, however, it is desired to exclude examination of parties hereunder, it could be so stated, perhaps in Section 1. To include the whole subject here might introduce a controversy which would be undesirable. However, it should be broad enough to cover parties beyond the reach of a subpoena or who cannot attend trial." 11 Perhaps one explanation of the fact that this type of deposition statute has been proposed is the personnel of the committee which drafted it. Lawyers from the following states were on the committee: Washington, Delaware, Utah, Iowa, Illinois, Mississippi, and Oregon. None of these states exhibits an effective discovery practice based upon a statute which gives an unconditional right to take depositions. It seems rather unfortunate that the committee had no representative from such states as Ohio, New Hampshire, Missouri, Kentucky, Indiana, Nebraska and Texas, where liberal deposition statutes have been the means of developing an effective practice for discovery and preservation of testimony.

11 Id.