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DISCOVERY-ORAL EXAMINATION-RIGHT TO, AND SCOPE OF, CROSS-EXAMINATION UNDER NEW YORK AND FEDERAL PROCEDURE

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DISCOVERY—ORAL EXAMINATION—RIGHT TO, AND SCOPE OF, CROSS-EXAMINATION UNDER NEW YORK AND FEDERAL PROCEDURE—At the close of plaintiff's pre-trial examination of defendant corporation's employee[1] on the question of failure to make delivery of merchandise pursuant to certain contracts, attorney for defendant began to cross-examine. Plaintiff objected to this procedure but permitted the cross-examination to continue, reserving his right to make application to the court to strike out the testimony. *Held,* testimony stricken. There should be no cross-examination in a pre-trial examination except for the limited purpose of clarifying an answer given on direct examination, and cross-examination to elicit additional information to that already adduced by the moving party or to give a version of the whole transaction from the standpoint of the party being examined is improper. *American Worcestershire Sauce Co. v. Armour & Co.,* 194 Misc. 745, 87 N.Y.S. (2d) 738 (1949).

Under the Federal Rules, the right to cross-examination[2] in pre-trial examination is limited to the extent that the questioning must deal only with the subject matter of the examination-in-chief.[3] However, if the notice served by the party desiring to take the deposition does not limit the material proposed to be covered,[4] as is usually the case, there is no reason why the attorney for the adverse party, in view of the broad scope of the proceedings allowed by Rule 26(b),[5] should not be permitted to conduct a direct examination at the same time upon any new matter, without the requirement of filing formal written notice.[6] The New York rules with respect to the right to pre-trial examination have, as their historical basis, the auxiliary jurisdiction of the courts of equity, with the Civil Practice Act merely modernizing the remedy.[7] As such, the nature of the right, and the resultant scope, quite unlike the Federal Rules,[8]

[1] Where a corporation is a party, the testimony of its officers, directors and employees may be taken as such. N.Y. Civ. Prac. Act, §289.

[2] Rule 26(c), 28 U.S.C.A. (Supp. Pamphlet 1949) foll. §723.

[3] Rule 43(b), 28 U.S.C.A. (Supp. Pamphlet 1949) foll. §723.

[4] There is no requirement that the notice of deposition must state the matter on which the examination is sought. Lenerts v. Rapidol Distributing Corp., (D.C. N.Y. 1942) 3 F.R.D. 42; Spaeth v. Warner Bros. Pictures, (D.C. N.Y. 1941) 1 F.R.D. 729.

[5] ". . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party. . . . It is not ground for objection that the testimony will be inadmissible at trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b), 28 U.S.C.A. (Supp. Pamphlet 1949) foll. §723.

[6] 2 MOORE, FEDERAL PRACTICE, 1st ed., p. 2483 (1938).

[7] 4 Carmody's New York Practice, 2d ed., §1229 (1932); Sunderland, "Scope and Method of Discovery Before Trial," 42 YALE L.J. 863 at 870 (1933).

[8] Under the Federal Rules, there is no distinction made between the purposes of perpetuating testimony and of discovery, except as to the use of depositions on trial. The deposition of a witness may not be read unless it is shown, according to standards within the Rule, that the witness is unavailable for trial, while the deposition of a party can be read, even if he is in court. Rule 26(a) and (d), 28 U.S.C.A. (Supp. Pamphlet 1949) foll. §723. There are similar provisions in New York. N.Y. Civ. Prac. Act, §304.

depend on whether the deponent is a witness or a party.[9] Since the examination of a non-party witness can generally be predicated only on the grounds of unavailability of the witness for trial, with the attendant need for perpetuating testimony,[10] it has never admitted of doubt that the right to cross-examination necessarily exists,[11] limited only, as at the trial stage, to those matters on which direct examination is conducted.[12] The reason, however, for allowing the deposition of a party is grounded in the antiquated theory of a bill of discovery, where the sole aim was to aid only the moving party in the prosecution or defense of an action.[13] Considering this narrow purpose, it has been held, by some courts,[14] that the adverse party has no business making a cross-examination,[15] but, rather, his remedy is to make objections at the foot of the transcript.[16] The existence of other considerations casts doubt on the validity of this position. Abundant authority has held that the use of the deposition as evidence is not restricted to either party.[17] Further, it is evident that if the deponent should not be able to appear at trial, the examining party would have the benefit of a statutory right to enter testimony which has never been subjected to cross-examination.[18] Also, as to written interrogatories taken outside the state, express provision is made for the serving of cross-interrogatories, no distinction being made between parties and witnesses.[19] As a consequence, other courts have held that the right to cross-examination at the time of taking the deposition does exist.[20] While the court in the principal case pays lip service to this right, in practical effect, it denies it by limiting its scope to the clarification of an answer already given on direct examination.

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[9] N.Y. Civ. Prac. Act, §288.

[10] Ibid.

[11] Saxe, "Examinations Before Trial in New York," 36 L. LIB. J. 112 at 128 (1943).

[12] N.Y. Rules Civ. Prac. 129.

[13] N.Y. Civ. Prac. Act, §288; Lotz v. Standard Vulcanite Pan Co., 102 Misc. 68, 168 N.Y.S. 446 (1917).

[14] There is no court of appeals decision on this question and therefore no uniformity of decisions. The reason is, undoubtedly, that the scope of the examination has been held to lie within the discretion of the trial court. Public National Bank v. National City Bank, 261 N.Y. 316, 185 N.E. 395 (1933). Also, an order prohibiting cross-examination on a deposition is considered interlocutory and non-appealable. Dworkow v. Bachrack, 274 App. Div. 1057, 85 N.Y.S. (2d) 214 (1949).

[15] Zeldman v. Electrolux, 161 Misc. 849, 292 N.Y.S. 116 (1936); Dworkow v. Bachrack, 193 Misc. 521, 84 N.Y.S. (2d) 492 (1948).

[16] Mansbach v. Klausner, 179 Misc. 952, 40 N.Y.S. (2d) 647 (1943).

[17] N.Y. Civ. Prac. Act, §303, states: "A deposition may be read in evidence by either party. . . ." In support of the proposition that this is not ambiguous, see National Fire Insurance Co. v. Shearman, 223 App. Div. 127, 227 N.Y.S. 522 (1928); In re Green's Estate, 155 Misc. 641, 280 N.Y.S. 692 (1935); Masciarelli v. Delaware & Hudson R. Co., 178 Misc. 458, 34 N.Y.S. (2d) 550 (1942).

[18] Saxe, "Examinations Before Trial in New York," 36 L. LIB. J. 112 at 128 (1943).

[19] N.Y. Civ. Prac. Act, §302, together with N.Y. Rules Civ. Prac. 126.

[20] Freisinger v. Reibach, 254 App. Div. 575, 2 N.Y.S. (2d) 817 (1938); Reliable Textile Co. v. Elk Dye Works, 177 Misc. 926, 32 N.Y.S. (2d) 438 (1941).