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ADVERSARY DEPOSITIONS AND ADMISSIONS UNDER TEXAS PRACTICE

by

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SCOPE

This article assumes that a lawsuit is pending by P against D, in connection with which one of the parties, either P or D, desires to force the other party to admit the truth of relevant facts which are against the interest of the admitting party in such a way that the admissions can be used in evidence, or in some related way, in the pending cause.

The possible ways of procuring such admissions include: informal out of court admissions against interest; pleading; pretrial stipulations under Rule 166;[1] discovery under Rule 737; discovery under Rule 167; subpoena duces tecum; witness depositions, including both written and oral ones; ex parte depositions; and admissions under Rule 169.[2] This article deals primarily with ex parte depositions, admissions under Rule 169, and oral depositions of adverse parties.

DEPOSITIONS GENERALLY[3]

The deposition practice is a procedure designed to secure potential testimony from prospective witnesses in such a way that the contents of the deposition can be used as testimony or in some similar way in a lawsuit.

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[1] TEX. RULES CIV. PRO. (1941). References hereinafter made to any numbered rule, not otherwise identified, is to that numbered rule of the Texas Rules of Civil Procedure originally enacted by the Texas Supreme Court as of September 1, 1941, including amendments to those rules.

[2] See, generally, Masterson, *Admissions*, 13 TEX. B. J. 443 (1950); Stayton, *Notes on Summary Judgment*, 13 TEX. B. J. 445; Franki, *Discovery*, 13 TEX. B. J. 447.

[3] A detailed analysis of the mechanics of taking depositions is beyond the scope hereof.

Depositions can be divided into two categories. One is the ex parte deposition, which can be used only by a party to a pending suit against the adversary party therein. The other is the witness deposition, which can be used to secure potential testimony from any and all prospective witnesses, including persons who are parties to a pending suit, as well as third-party witnesses. Witness depositions fall into two classes: written and oral.

A written deposition consists of written interrogatories, filed and later presented to the witness in accordance with the applicable rules. The party desiring to take such a deposition must give his adversary notice and an opportunity to file cross interrogatories, which are also presented to the witness. The interrogatories are presented by a person authorized to take depositions, usually a notary public.

An oral deposition is taken by first complying with the preliminary requirements of the laws authorizing this practice. The witness appears before an officer authorized to take a deposition, usually a notary public, and is questioned in the same manner as is a witness at the trial.

Historically, depositions could be used as evidence only where the deponant was not available as a witness at the trial, and this is still the rule in some jurisdictions but not in Texas.[4]

While the completed deposition is filed in the pending lawsuit, it does not become a part of the record and hence is not entitled to any weight unless and until it is admitted into evidence at the trial on the merits, or is attached to a motion for summary judgment, or a contest thereof. It is permissible for either party to use all or any part of a deposition, regardless of which party caused it to be taken.[5] If only a part of a deposition is used, then only that part becomes a part of the record.

As a deposition is a form of potential testimony, the general rules of evidence are applicable to the matter of whether the deponant is capable of testifying, and to the matters of whether the questions are in correct form and whether the answers are admissible in evidence.

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[4] 2 C. J. S. 930.

[5] Rule 188 expressly so provides as to an ex parte deposition, and Rule 211 does so as to witness depositions.

History of the Ex Parte Deposition

Under common law, neither party to a lawsuit was competent to testify therein. One of the earliest departures from this rule in Texas was the enactment in 1846 of a statute authorizing, to a limited degree, ex parte depositions.[6] Then in 1858, in line with a new statute authorizing parties to testify, a statute was enacted giving either party the unconditional right to take the ex parte deposition of the adversary party.[7] In 1897 this law was amended to prohibit use of an ex parte deposition either for or against a corporation.[8] The reason for the amendment probably was to take away the advantage which otherwise a corporation-litigant would have over an adversary party who was not a corporation. This is because a deposition, being a form of evidence, can be taken only when a deponant can qualify as a witness. Obviously a corporation cannot be a witness; for the same reason it cannot be a deponant. Judge McClendon, speaking for the Texas Commission of Appeals in *Gavermann v. El Paso Electric Railway Co.*[9] put it this way:

> Before the enactment of the amendment the provisions of the chapter were for all practical purposes unilateral in cases in which a corporation was a party. From the very nature of the thing a corporation can act only through its officers and agents, and its deposition cannot be taken. The clear purpose of the amendment was, we believe, to place the parties to the suit upon an absolutely equal footing. . . .

The present law providing for ex parte depositions is embodied in Rule 188.

History of the Admission Practice Under Rule 169

Rule 169 provides a procedure for requesting admissions of relevant facts against the interest of the admitting party. It is based upon Federal Rule 36. Rule 169 was amended, effective March 1, 1950, to provide for the filing of the requests and the answers thereto, as well as proof of delivery, as provided for in Rule 21a, in the pending lawsuit. Further, if the party from whom

[6] Gammel's Laws of Texas, Vol. II, p. 1690.
[7] *Id.*, p. 982.
[8] *Id.*, Vol. X, p. 1171.
[9] 235 S.W. 548 (1921). In Niemann v. Zarsky, 233 S.W.2d 930 (Tex. Civ. App. 1950), it is pointed out that while a witness deposition is available as to an officer of a corporation, it cannot be used to take the deposition of a corporation.

admissions are requested is represented by an attorney of record, delivery of the requests must be to the attorney, unless the court orders delivery to be to the party. An even broader discovery practice than that provided for in Rule 169 had become law in 1922 and is now embodied in Rule 737. However in some instances, Rule 169 is preferable, as it expressly covers the effect of no answers or evasive answers, a matter discussed later, and in other respects is usually more wieldy.[10]

USE OF AND COMPARISON BETWEEN EX PARTE DEPOSITIONS AND ADMISSIONS

Where a Corporation Is a Party

As before stated, ex parte depositions cannot be used for or against corporations. On the other hand, admissions can be so used. Depositions, as before pointed out, can be classified as potential testimony, and hence are controlled by the general rules of evidence. Admissions, on the other hand, are more like pleadings than evidence. By the same reasoning which allows a corporation to be a party to a lawsuit, a corporation can request admissions, or be forced by an adversary party to admit.

Right to Notice before Answering

Rule 169 provides that requests for admissions must be delivered to the attorney of record for the party from whom the admissions are requested unless the court orders that delivery be made to the party. Said party must be given at least ten days in which to answer and the court has discretion to grant a longer time. Under Rule 5, the court may grant an extension even though the answers were not filed within the originally designated time.

Rule 188 requires that a party desiring to take an ex parte deposition must file interrogatories in the cause, whereupon he is entitled to a commission authorizing any officer qualified to take depositions, usually a notary public, to require the party to appear

[10] Where the purpose of a proceeding is to discover facts, as distinguished from procuring admissions of fact, Rule 737 affords a very valuable procedure. See Hastings Oil Co. v. Texas Co., 149 Tex. 416, 234 S.W.2d 389 (1950); Dallas Joint Stock Land Bank of Dallas v. State, *ex rel.* Cobb, 135 Tex. 25, 137 S.W.2d 993 (1940).

and answer. Subdivision (c) of the rule provides that the commission shall be issued, executed and returned "by any authorized officer as in other cases."[11] This reference renders Rule 194 applicable to ex parte depositions. This rule requires the deposition to be taken in any county in which the witness can be found. This provision, when considered with Article 3746, referred to in the rule, authorizes the taking of an ex parte deposition of a party found in another state, as well as in Texas, subject, of course, to the limitation that the law of the other state might make it impossible to force the party to attend and answer.[12] However, a failure of said party to appear and answer would constitute an admission of the facts inquired about under the express provisions of subdivision (g) of Rule 188.

Subdivision (b) of Rule 188 provides that "no notice of the filing of the interrogatories is necessary." At first blush, this might give the impression that one party might put the commission in the hands of a friendly notary public, who, in turn, might pay a surprise visit on the party whose deposition is desired, and procure unpremeditated admissions against interest. Several early cases indicated that this procedure was allowed by the law. However, it is now well established that the party whose deposition is desired has the right to a reasonable time both to consult counsel and to examine the questions. This is well illustrated by *Mulligan v. Omar Gasoline Co.*[13] There the plaintiff filed the interrogatories as required by what is now Rule 188 but then withdrew them, and attached them to the commission. Defendant refused to answer unless and until given an opportunity to examine the interrogatories a reasonable time before answering. The notary certified the refusal, and the unanswered interrogatories with said certifications were filed in the pending cause. Defendant filed a motion to quash (or suppress) the deposition on the ground that he was entitled to a reasonable time to examine the interrogatories before answering. The trial court granted the motion on this ground. A

[11] TEX. REV. CIV. STAT. (1925), as amended.

[12] In Ex parte Taylor, 110 Tex. 331, 220 S.W. 74, 9 A.L.R. 963 (1920) suit was filed in another state and an attempt was made to take the deposition of a witness in Texas. It was held that the Texas district court had power to force the witness to testify under the equity proceeding known as letters rogatory.

[13] 49 S.W. 2d 706 (Tex. Comm. App. 1932). See also Tillison v. Griffin, 148 S.W.2d 873 (Tex. Civ. App. 1941).

court of civil appeals reversed the trial court, but the Commission reversed that court and approved the trial court, thus establishing this right, and, in effect, overruling several prior inconsistent cases.

Thus it is seen that under both the admission practice and the ex parte deposition practice the party from whom admissions are sought has a right both to confer with counsel and to examine the questions a reasonable time before answering. There is this difference, however: this right exists as a matter of course under the admission practice; it exists only under case law under the ex parte deposition practice. This points to the advisability of an early warning by counsel to client to refuse to answer any questions whatever about a pending lawsuit without first consulting counsel.

How Interrogatories and Requests for Admission Should Be Worded

The two practices have this in common: the so-called interrogatory and the request should each state that a specified fact is true; it should be so phrased that it can be answered "yes" or "no"; it should not be in the form of a question.

Examples of deficient interrogatories or requests are the following:

> What is your name?
> Do you deny all liability to the plaintiff on account of his failure to deliver the three cars of grain?

The latter question was included in an ex parte deposition which P took of D in the case of *C. E. Parks Grain Co. v. Townsend.*[14] The answer was, in effect, "Yes, on advice of my lawyer." At the trial P moved for an order that this answer was evasive and hence was a confession. The trial court overruled the motion, and on appeal this action was sustained. The court made this significant statement:

> Before the interrogatories can be taken as confessed . . . the questions must be so framed 'as to distinctly embody the fact to be proved . . .' none of the above questions embody any fact.

[14] 267 S.W. 1011 (Tex. Civ. App. 1924).

Examples of sufficiently leading interrogatories or requests are the following:

> Your name is John Jones and you are the defendant in this case. At the time of the collision between defendant's truck and the car driven by Vernice Gibbons on September 30, 1950, Wayne Lawler was the agent or employee of Montgomery Trucking Company.[15]

The two practices both pose another problem, and that is, how ultimate can a request or interrogatory be.

In analyzing this problem, the analogy between pleadings and admissions under Rule 169 on the one hand, and that between interrogatories and evidence from a witness at the trial on the other, should, and, it is submitted, does lead the way to the solution.

The problem is also similar to that presented in preparing special issues to be included in the court's charge to the jury.[16]

Generally, issues pleaded and issues submitted to the jury can be more ultimate than can testimony. Unfortunately no clear cut line can be drawn between an issue too ultimate even for a pleading, where exceptions are levelled at it on this ground, an issue sufficiently ultimate, and an evidentiary issue. However, a helpful guide is that even issues pleaded should not include in one issue the entire question of liability; on the other hand, each pleaded issue should be sufficiently ultimate that if proved it will constitute one of the ultimate facts which is an essential part of the cause of action, or of an affirmative defense. Questions asked a witness cannot be even this ultimate.[17]

Suppose D is asked: "You admit that you were negligent on the time and occasion in question."

Clearly a general allegation of negligence would yield to a special exception. It follows that this question is too ultimate to be correct even under an analogy to pleading. It also follows that it is too ultimate under an analogy to evidence.

In a 1948 case the court said of the admission practice: "The purpose is to obviate in advance of the trial proof of obviously

[15] This was a request for an admission in Montgomery v. Gibbons, 245 S.W.2d 311 (Tex. Civ. App. 1951).

[16] For a discussion of this problem, see Masterson, *Preparation and Submission of Special Issues in Texas.* 6 Sw. L. J. 163, 165 (1952).

[17] For a more detailed discussion of this matter, see Masterson, *supra,* note 16.

undisputed facts, and holds out no hope for the admission of the very heart of the case."[18]

Several fairly recent cases may prove helpful on this problem of how ultimate requests or interrogatories can be.

Let us first reconsider the request for an admission in the *Montgomery* case,[19] adding additional matter.

> Q. That at the time of the collision between defendant's truck and the car driven by Vernice Gibbons on September 13, 1950, Wayne Lawler was an agent or employee of Montgomery Trucking Company.
>
> A. This defendant cannot truthfully admit or deny the matters contained in paragraph 4 of said request for the reason that he does not know of his own knowledge anything about a collision between any of his trucks and a car driven by Vernice Gibbons on September 30, 1950, and therefore he cannot swear to the statements and admissions shown in paragraph 4.

At the trial P moved for an order that the answer was evasive and that therefore D had admitted the facts embodied in the request, which order the trial court granted. In sustaining this ruling the appellate court said that D "certainly had knowledge or the ability to acquire knowledge" of the facts set forth in the question. This reasoning cannot be justified if there is a direct analogy between evidence and requests for admissions. It can be justified if there is a direct analogy between admissions and pleading.

For example, if D in a pleading had admitted the facts set forth in this request, with no general denial or other matter making the admission alternative, the admission would be binding upon him as a judicial admission.

Similarly sometimes a failure to specifically deny under oath in a pleading operates as a judicial admission. Thus, under Rule 93, a failure to so deny partnership is a judicial admission of partnership.

The connecting phrase in the *Montgomery* case, the one which shows that the purpose of the admission practice is the same as that which forces a party to ascertain certain facts and then plead them under oath, if admission is to be avoided, is that the party

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[18] Schmieding v. Thompson, 210 S.W. 2d 271. (Tex. Civ. App. 1948).

[19] *Supra*, note 15. See also Sanchez v. Caroland, 274 S.W. 2d 114 (1954).

"certainly had knowledge *or the ability to acquire* knowledge." (Emphasis added.)

Suppose the request in the *Montgomery* case had been in an interrogatory in an ex parte deposition. As before noted, a deposition is a form of potential evidence. Thus, whether an answer like that given would amount to an admission would depend upon whether the party interrogated would have had to so answer if called as a witness. Obviously he would not, except as to such matters as were within his personal knowledge. In other words, in the deposition practice, the above quoted phrase "or the ability to acquire knowledge" has no application.

Another interesting case involving admissions is *Caddo Grocery and Ice v. Carpenter*.[20] P's request for admissions included:

> In requests herein set out any request concerning "you" includes you, your servants, agents and employees.
>
> Q. You sold Lindley's sandwiches to Caddo Grocery and Ice at 622 Caddo Street in San Angelo, Texas, for resale.

D refused to answer on the ground that this involved a conclusion of law. On motion of P, the trial court ruled the fact admitted, and a court of civil appeals approved this ruling.

To summarize: when an ex parte deposition is used, the usual rules of evidence apply; however, under the admission practice, the party to whom the requests are addressed must admit or deny not only facts known to him but also facts with which reasonably he can and should acquaint himself. In measuring how ultimate these facts can be, the test is the same as that applied to facts pleaded, and to facts to be submitted to the jury.[21]

Effect of Specific Admissions, Failure to Answer Requests or Interrogatories, and Evasive Answers

A fact admitted in response to a request for admission under Rule 169 if and when it becomes a part of the record, is a judicial admission.[22] Also, a failure to answer a request, if it is one the requesting party has a right to have answered, or an evasive answer, constitutes a judicial admission of the matter inquired

[20] 285 S.W. 2d 470 (Tex. Civ. App. 1955).

[21] *Supra*, notes 16 and 17.

[22] Masten v. Masten, 165 S.W. 2d 225 (1942) *error ref.; Report of the Advisory Committee on Rules of Civil Procedure*, 5 TEX. B. J. 124 (1942).

about. A judicial admission is one which as long as it remains in the case is a conclusive admission. The usual example of a judicial admission is one which is included in a pleading upon which a party goes to trial. This admission may be affirmative or it may result from a failure to plead—as where P alleges partnership and D fails to deny partnership by sworn denial. Under the waiver rules[23] it is possible for the party who would benefit by the admission to waive the admission by allowing testimony contrary to it to come in and stay in without complaint; however, as long as waiver is avoided, the admission is conclusive unless removed from the case.

If a party has made a judicial admission which he desires removed from the record, the possible ways of removing it become important. In the case of an affirmative admission in a pleading, the way to remove it is by filing an amended pleading. Where the admission results from failure to plead, it is removed by an amended pleading or a trial amendment. Under Rules 63 and 66, the trial court has discretion, subject to appellate review for abuse, either to grant or deny the right to amend a pleading, or to file a trial amendment, where the request for leave to amend is made "within seven days of the date of trial or thereafter." However, both Rules 63 and 66 provide for liberality in allowing amendments. After a pleading including an affirmative admission has been abandoned, no longer is the admission a judicial one. The admission in the abandoned pleading may be admissible as evidence under the general rule that any voluntary admission against interest is admissible, but it would then come in as an evidentiary admission, which, while damaging, is not conclusive—that is, the admitting party is entitled to attempt to explain away an evidentiary admission with other evidence, a right which does not exist as to a judicial admission. Of course, if the admission resulted from failure to plead, there cannot be an evidentiary admission based upon such failure.

We shall consider later herein the possible right of the admitting party to withdraw an admission made under Rule 169 from the record. The point we wish to stress at this time is that as long as the admission procured under Rule 169, whether it be an

[23] Rules 66, 67, 90 and 274.

affirmative admission, or one resulting from silence, evasiveness or lack of a sufficient oath, remains in the record it is a judicial admission and is absolutely binding on the admitting party, unless the admission is waived under the waiver rules.

Let us compare the effect of an affirmative admission, or an admission by silence or evasiveness, in an ex parte deposition.

It is again important to remember that a deposition is a form of potential evidence, and hence any affirmative admission is an evidentiary admission. An evidentiary admission, while harmful to the admitting party, is not conclusive. The admitting party is entitled to an opportunity to introduce other evidence explaining away or modifying the evidentiary admission.[24] It is well established that this rule applies to an admission against interest in an ex parte deposition. The reason for this rule was well stated by Justice Gaines in *Smith v. Olson*,[25] as follows:

> Cases which have come to this court show that the procedure in question [ex parte deposition] is frequently resorted to for the purpose of entrapping the opposite party into an unguarded admission; and it doubtless occurs in many instances that a party, in answering interrogatories, uses language against his own interest, which is capable of explanation and which he ought to have the right to explain. Therefore, to make his answers conclusive would be to make the procedure a means of injustice, which would probably, in the long run, counteract the benefits to follow from it.

The above rule applies where there is an express admission. The rule is different where there is no answer, or the answer is evasive. The effect of no answer or an evasive answer is that the matter inquired about is judicially admitted, unless the refusal was justified by the surrounding facts—as where deponant is not given a reasonable opportunity to examine the questions, the matter inquired about is privileged, or an answer would be self-incriminating.[26] Thus as to an interrogatory not answered, or answered

[24] McCormick and Ray, Texas Law of Evidence (1937), Sec. 495.

[25] 92 Tex. 181, 46 S.W. 631 (1898).

[26] Smith v. Olsen, *supra*, note 25; Frerson v. Modern Mutual Health and Accident Insurance Co., 172 S.W.2d 389 (Tex. Civ. App. 1943) *error ref., w.o.m.* In Tillison v. Griffin, 148 S.W.2d 873 (Tex. Civ. App. 1941), the court held that failure to give a reasonable opportunity to examine the questions was a sufficient reason for refusing to answer, and that this reason could be asserted for the first time at the trial. Other good excuses would include a refusal to answer because the matter is privileged, and a refusal because an answer might be incriminating. In this connection see Jordan, *Assertion of Privilege in Deposition Proceedings*, 6 Sw. L. J. 228 (1952).

evasively, with no good excuse for not answering, there is a direct analogy between the admission practice and the ex parte deposition practice.

In this situation the statement that a deposition is a form of evidence would be inaccurate. This is so because the provision that such conduct amounts to an admission is not consistent with general rules of evidence. For example, if at the trial, a party to the suit is a witness, and he refuses to answer questions, this refusal, while it might constitute contempt, would not operate as an admission or admissions. Neither does such refusal constitute an admission when a witness deposition is taken of a party to the suit,[27] unless this has been changed by a 1950 amendment of Rule 202, a matter discussed later herein.

In this connection, if in response to a question in a witness deposition, a party makes an affirmative admission, the rule is the same as that applicable to an affirmative admission in an ex parte deposition,[28] and that is, that the admission is not a judicial admission and hence is not conclusively binding on the admitting party. This rule is well illustrated in *St. John v. Fitzgerald*.[29] In that case, P in an oral deposition admitted that he did not rely upon D's representations. D filed a motion for summary judgment supported by that part of P's deposition which included the admission. P filed a contest, supported by his affidavit that he did rely on D's representation. The trial court granted D's motion and rendered a summary judgment in D's favor. On appeal, the judgment was reversed and the cause remanded, the court holding that the affidavit of P established that there was a disputed fact question. This holding is clearly correct because an evidentiary admission was involved. It would not have been correct if the admission had been a judicial one—as it would have been if secured under Rule 169, or as it would have been had an ex parte deposition been used, and had the fact been that P without good cause had failed to answer or had answered evasively.

It is pointed out that an evasive answer has the same effect as no answer. An evasive answer is one which does not admit and

[27] Farmers and Merchants National Bank v. Ivay, 182 S.W. 706 (Tex. Civ. App. 1916) *error refused*. Reilly v. Buster, 125 Tex. 323, 82 S.W. 2d 931 (1935).
[28] *Supra*, note 25.
[29] 281 S.W. 2d 201 (Tex. Civ. App. 1951).

fails to give a reasonable excuse for not admitting the facts included in the requests or interrogatories, a matter discussed earlier herein.[30]

To summarize: Where a request is made for admissions under Rule 169, an express admission, a failure to answer which failure is without good cause, or an evasive answer would each result in a judicial admission of the matter inquired about. If such an admission becomes a part of the record in the case, and as long as it stays a part of the record, it cannot be contradicted by the admitting party, unless the other party waives the admission under the waiver rules.

Where interrogatories are included in an ex parte deposition and express admissions are made, these admissions are evidentiary only, and even after they are made a part of the record and while they continue as a part of the record, such admissions can be contradicted at the trial. If interrogatories are not answered, or are answered evasively, the effect is the same as it is as to a failure to answer, or an evasive answer to requests under Rule 169.

Effect of Unresponsive Answers

First, if the entire answer is both unresponsive and irrevelent, there is no problem because the answer would have no probative force. Suppose an entire answer, under either the deposition practice, or the admissions practice, is unresponsive but relevant.

Under the deposition practice, it is settled that if timely and proper objection is made by either party to an unresponsive answer, it cannot be used by either party. However, if the objection is not made prior to trial, in the time and manner required by Rule 212, then either party can introduce the answer into evidence, if its contents are admissible under the general rules of evidence.[31]

Under the admissions practice, it seems clear that neither party can use an unresponsive though relevant answer to a request.[32]

Where an answer to an interrogatory in an ex parte deposition

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[30] *Supra,* notes 18 to 21, inclusive.

[31] See 15a TEX. JUR. 124, and numerous cases there cited.

[32] Mosby v. Texas and Pacific Railway Co., 191 S.W.2d 55 (Tex. Civ. App. 1945); York, *Procedure—Rule 169—Effect of Self Serving Statements in Answer to Requests for Admissions,* 27 TEX. L. REV. 562.

includes an admission and also an unresponsive self-serving statement, an objection to the self-serving part is governed by the same rule which applies to a totally unresponsive answer.[33]

A more difficult problem is presented by such an answer made in response to requests under Rule 169. It is believed that the following is a correct statement of the rules applicable in such a situation: In no event can the one who made the unresponsive statement introduce it in evidence, or use it at pretrial; if the party who made the request asks either at pretrial or at trial on the merits that the unresponsive part be stricken from the answer, he is entitled to have this request granted; if, however, the requesting party tenders the undiluted answer in evidence, or uses it at pretrial, then as long as it remains in the record, he is bound by it.[34]

All of the above statements are subject to a possible qualification. This is that if the unresponsive statement includes an admission against the interest of the answering party it may be admissible, not as a deposition or under Rule 169, but as an informal admission against interest. Whether it is so admissible will depend upon whether under the surrounding facts it can be considered voluntary. In *Reilly v. Buster*,[35] P took D's oral deposition erroneously asserting that this was an ex parte deposition. D's answer included admissions. At the trial, P over D's objections was allowed to introduce the admissions in evidence. On appeal, such action was held erroneous. The contention that the admissions were admissible as informal admissions was overruled on the ground that the admissions were not voluntary. If, however, the admissions are voluntary, they are admissible as informal admissions, even though the deposition has been suppressed, or was taken in another case.[36]

No cases have been found on whether unresponsive but relevant admissions under Rule 169, when not admissible as such—as where the court has allowed them to be withdrawn—are admissible as voluntary, informal admissions. Under the analogy be-

[33] *Supra*, note 31.

[34] *Supra*, note 32; Womble v. Wiley, 209 S.W. 2d 201 (Tex. Civ. App. 1938); Wilkinson v. Paschall, 210 S.W. 2d 215 (Tex. Civ. App. 1948).

[35] 125 Tex. 323, 82 S.W.2d 931 (1935).

[36] McLean v. Hargrove, 139 Tex. 236, 162 S.W.2d 954 (1942).

tween admissions and pleadings, it may be held that the rules as to abandoned pleadings are applicable. It is thought, however, that admissibility or not should turn on whether, under the relevant facts, the admission can be considered a voluntary one.

Effect of Relevant, Self-Serving Answers

It was stated earlier herein that both interrogatories and requests should include a statement of the fact as to which admission is requested, and should be so worded that it can be answered "yes" or "no". However, it is elementary that it is not always fair or logical to require that concise an answer. Therefore, under either the deposition or admissions practice there is an area where the answer correctly includes explanatory or qualifying language.

For example, suppose the interrogatory or request, and the answer thereto are as the following:

> Q. John Doe at the time of the collision was in your employ as a truck driver.
>
> A. John Doe was in my employ at that time, but was not acting as my agent or employee when the collision occurred, because at that time he was using the car solely in his own behalf and not in any way connected with his employment.

First let us consider the effect of such a statement in an ex parte deposition. Rule 188, subdivision (f) expressly provides that "The party interrogated may, in answer to questions propounded, state any matter connected with the cause and pertinent to the issue to be tried. . . ." Subdivision (i) of Rule 188 includes this provision: "It is further hereby expressly provided that when any ex parte deposition is taken in any suit whatever, either the party taking the same or the party giving the same shall have the right to introduce the deposition in evidence, subject to the general rules of evidence."

Thus it is clear that if the heretofore quoted answer would be admissible from the witness stand, either side could use this part of the deposition as evidence, or at pretrial, subject to exclusion should it be developed that the self-serving statement was hearsay.

If the answer being considered was in response to a request under Rule 169, it seems clear that if the party who requests the admissions chooses to bring the self-serving statement into the

record, he will be bound by it as long as it remains in the record. The hearsay rule would have no application, because as heretofore stated, the admission practice requires the requestee to use reasonable efforts to acquaint himself with relevant facts. Further, if the explanatory matter is a reasonably necesary part of the answer, the requesting party should not be permitted to use only that part of the answer which is favorable to him. If, however, the request can be answered fairly without self-serving declarations, then the requestor is clearly entitled to have such declarations stricken.

There is no provision in Rule 169 authorizing the use of self-serving statements by the requestee, even though such statements would be admissible if given as testimony. Arguably, he should not be entitled to use such statements under the same reasoning which precludes him from introducing self-serving declarations in his own pleadings. It might be argued that the same policy which allows either party to use an ex parte deposition should apply to such statements. Against this is the fact that there is an express provision in Rule 188 authorizing such use of an ex parte deposition by either party, whereas there is no such provision in Rule 169. Perhaps the preferable view is that the question of whether the requestee can use such self-serving statements should rest in the trial court's discretion, subject to appellate review. Under this view, the trial court should consider such factors as the availability of the requestee to testify, and the extent to which such practice would expedite the trial.

Documentary Evidence

The deposition practice is designed primarily to procure for use in the case what would otherwise come into the record as oral testimony.

However, this practice has at least some value in procuring potential documentary evidence.[37] The historical way of procuring such evidence is by use of a subpoena duces tecum; but, like any other subpoena, it cannot be used outside of the county in which it is served. Thus, if the deponent is outside the county of suit, the right will depend upon whether a notary public, or any other

[37] Franki, *Discovery*, 13 TEX. B. J. 447, 448.

person authorized to take a deposition, has power to issue a subpoena duces tecum. The law is that he does not have, and that he cannot compel a deponent to append documents to the deposition.[38] However, if a party to a suit is a deponant, the judge of the court in which the suit is pending has discretion to order the deponant to produce documents in connection with the taking of his deposition (either ex parte or witness), as long as the order is reasonable.[39] Often the procedures authorized by Rule 737 and Rule 167 would be preferable to a deposition in this respect in that thereunder the judge can supervise and control both the inspection and questions relevant to the documents in question.

[38] Sayles v. Bradley and Metcalf Co., 92 Tex. 406, 49 S.W. 209 (1899).

Rule 169 provides a procedure for procuring admission of the genuineness of any revelant documents described in and exhibited with the request. However, the requirement that the original documents be exhibited renders this procedure unworkable—or at least, not so efficient as the methods discussed in the preceding paragraph.

Methods of Complaining of Matters Included in Answers

1. Depositions: Under the deposition practice, Rule 212 requires that any objection as to the form of the deposition, or the manner of its taking, must be made at least one entire day before the day on which the case is called for trial, must be made not later than the first term of court after the deposition has been filed, and notice thereof must be given the opposite party before the trial commences. An objection that an answer is not responsive is considered one as to form and hence is waived unless made in the time and manner required by Rule 212.[40] Even if this objection is made at the time the deposition is taken, this rule seems to contemplate that it will be timely renewed by motion.

Rule 207 allows objections as to substance to be made either at the time the deposition is taken, or at the time it is tendered in evidence, or at both times.

[39] Southern Bag and Burlap Co. v. Boyd, 120 Tex. 418, 38 S.W.2d 565 (1931).

[40] 15a TEX. JUR. 124, and cases there cited. An objection that a question is leading also goes to form; however, as it is permissible to ask leading questions to an adverse party, this rule has no application to the deposition, either ex parte or witness, of a party-deponant.

2. Admissions: Rule 169 does not provide a method for objecting to answers to requests, although Federal Rule 36, upon which Rule 169 is based does include such a provision.

It is clear that under Rule 169 the trial court has broad discretion as to time for hearing and ruling upon such objections, as well as related matters.[41] Preferably such matters should be considered at pretrial; however, in practice they are usually presented and considered at the trial when an attempt is made to introduce them in evidence.

Methods of Making Answers a Part of the Record in the Pending Suit

1. Trial on the Merits: While the rules require that depositions, both ex parte and witness, must be filed in the pending lawsuit, they have no probative value at the trial on the merits unless and until they are offered and admitted in evidence. Either party is entitled to have admitted into evidence all or any part of a deposition which was taken in the pending suit, and which has not been suppressed, subject to the general rules of evidence, regardless of which party had the deposition taken.[42] The last sentence is subject to the qualification that complaint of unresponsive answers, and in the case of a third party witness, of leading questions, are controlled by Rule 212.[43]

It seems clear that admissions do not become a part of the record at the trial of the merits unless and until they are admitted into evidence. It was so held in *Hyde v. Apple*.[44] This decision was before an amendment to Rule 169, effective in 1950, which requires copies of requests and answers to be filed in the case. It is stated in a case decided after said amendment, that the effect thereof is to render it unnecessary to have the requests and answers admitted in evidence.[45] However, it is submitted that the real basis for that decision was that the parties by their conduct did bring

[41] Sanders v. Harder, 148 Tex. 593, 227 S.W. 2d 206 (1950); Mosby v. T. and P. Ry. Co. 191 S.W.2d 55 (Tex. Civ. App. 1945).

[42] Rules 188, 211 and 213.

[43] *Supra*, note 40 and see Rule 214.

[44] 209 S.W.2d 804 (Tex. Civ. App. 1948).

[45] Fuller Nursery & Tree Co. v. Jones, 253 S.W.2d 946 (Tex. Civ. App. 1952).

the requests and answers into the case as evidence. Certainly, it should not be the law that all answers, no matter how unresponsive or self-serving, become a part of the record and hence binding on the requestor against his will. It is submitted that the 1950 amendment did not alter the rule that requests and answers must be admitted into evidence, when used at the trial on the merits, before they become a part of the record. There is no conflict between this rule and the salutary rule that matters can become a part of the record as evidence, where both parties by their conduct assume that said matters are in as evidence, even though not formally tendered and admitted as such.

There is no difficulty in offering interrogatories or requests where answers have been made to all or a part of them. As to depositions, there is no difficulty in proving that the party whose ex parte deposition was sought, refused to answer any of the interrogatories, as the certificate of the officer who was commissioned to take the deposition reciting such failure, indorsed on the deposition, is available.[46]

If the requestee fails to answer requests under Rule 169, one way to prove this is by evidence adduced under the general rules of evidence. It seems clear that since the 1950 amendment to Rule 169, requiring that copies of the requests and answers be filed in the pending cause, the requestor can make out a prima facie case of requests and failure by proving delivery of the requests in the manner provided for in Rule 21a and proving failure to answer by establishing that copies of answers have not been filed in the cause.[47] Perhaps it would be advisable, although probably not necessary, to supplement the proof of no filing with testimony of the requesting party and his attorney, that no answers were delivered to either of them. Alternatively, the requestee's attorney might be willing to stipulate, or, if not, could be called as a witness on this matter.

2. Plea of Privilege: It is well settled that both depositions

[46] Subdivision (g) of Rule 188 provides for this procedure.

[47] See 5 TEX. B. J. 124 (1942), question numbered 23, and Southland Life Ins. Co. v. Greenivade, 138 Tex. 450, 159 S.W. 854 (1942). It is important to bear in mind that at the time of the referred to Bar Journal, neither Rule 21a nor the part of Rule 169 which refers to Rule 21a, and which requires filing of requests and answers in the pending cause, had been enacted.

and admissions under Rule 169 are admissible at a venue hearing.[48]

Requests or depositions used at the venue hearing can be again used at the trial on the merits in the same cause, unless the requests, under Rule 169, or the interrogatees in a deposition, on matters incident thereto, expressly limit their use to the venue hearing. It is important to bear in mind that matters introduced in evidence at the venue hearing have not, as such, any probative force at the trial on the merits. Depositions, admissions, and evidence generally must be reintroduced and admitted in evidence at the trial on the merits, if they are to have any probative value at said trial.

3. Pretrial, Including Summary Judgments: Rules 166 and 166a are clearly broad enough to authorize the use of depositions, both ex parte and witness, and admissions under Rule 169 at pretrial, including summary judgments.[49] The summary judgment proceeding does not contemplate the admission of anything in evidence. Rather, the party moving for the summary judgment seeks thereby to show what the evidence would be at the time of the trial and that, were a trial on the merits had, movant would be entitled to judgment under the undisputed evidence. The supporting matter should be attached to the motion. Thus, requests for admissions, and answers thereto, depositions, each in whole or in part, and as supplementary affidavits should be so attached. If the opposite party desires to contest the motion by showing that there are disputed fact issues, or if he desires not only to contest the motion but also to move for a summary judgment in his favor, the same procedure is open to him.

In connection with summary judgment proceedings, there is an important difference between relying upon depositions, other than ex parte depositions which have not been answered, or which have been answered evasively, on the one hand, and admissions

[48] Davis. v. Battles, 143 Tex. 378, 186 S.W.2d 60 (1945), as to admissions under Rule 169; as to depositions, the deposition rules themselves are broad enough to authorize such use. Rule 88 provides that taking depositions does not waive a plea of privilege. For an example of how an ex parte deposition can be used effectively at a venue hearing, see Brown v. Gray and Wilmerding, 256 S.W. 977 (Tex. Civ. App. 1923).

[49] Provident Life and Accident Co. v. Haglett, 147 Tex. 426, 216 S.W.2d 805 (1949) which upheld use of admissions at pretrial even before enactment of the summary judgment rule.

under Rule 169 or ex parte depositions which have not been answered or have been answered evasively on the other. This is because, as heretofore pointed out, express answers to an ex parte deposition, or to a witness deposition are evidentiary only, whereas admissions under Rule 169, and no answers or evasive answers under Rule 188 constitute judicial admissions and hence cannot be contradicted, unless and until they are withdrawn from the case.[50]

If the motion for summary judgment is overruled, or is granted as to only a part of the subject matter, and if at the trial, or partial trial, on the merits, it is desired to use depositions or answers under Rule 169, they must be admitted into evidence, to the same extent as if they had not been used in connection with a motion for summary judgment.

Possible Ways of Amending, Changing, and Withdrawing Answers, and of Making Late Answers Where There Were No Timely Answers, or Where Timely Answers Were Defective or Evasive

First let us consider the effect of affirmative admissions against interest. As heretofore discussed, if such admissions are in a deposition, either ex parte or witness, they are evidentiary only, and hence the admitting party can introduce evidence contrary to such admissions. Applying well established rules of evidence, while the admitting party can introduce such contrary evidence, he is not entitled to have the admissions in a deposition withdrawn. Thus, a party litigant who at the time of the trial has a deposition of his adversary which includes admissions, he is assured of the right to use them, even though they are not necessarily conclusive as to the matters admitted.

On the other hand, in the absence of a good excuse, a failure to answer, or evasive answers in an ex parte deposition, and also such a failure in answer to requests under Rule 169, as well as affirmative admissions under said rule, are judicial admissions,

[50] *Supra*, note 22; and see: St. John v. Fitzgerald, 281 S.W.2d 201 (Tex. Civ. App. 1951); Day v. Stuckey, 142 S.W. 2d 734 (Tex. Civ. App. 1940); Brown v. Gray and Wilmerding, 256 S.W. 977 (Tex. Civ. App. 1923); Mitchell v. Napier, 22 Tex. 120 (1858); Maze v. Ruscher, 269 S.W.2d 860 (Tex. Civ. App. 1954); Hester v. Theaner, 252 S.W.2d 214 (Tex. Civ. App. 1952) *error refused.*

and hence are conclusively binding, once they become a part of the record, and for as long as they so remain.

It is now well settled that the trial court has broad discretion in allowing late answers, and amended answers, which amendments take the place of the original answers.[51] Here there is an analogy to pleading. An amended answer under Rule 169, or a late answer under either Rule 169 or 188 is analogous to an amended pleading or trial amendment, in that when it is filed,

[51] Rule 5; Sanders v. Harder, 148 Tex. 593, 227 S.W.2d 206 (1950). P filed answers under Rule 169 in the cause, but failed to deliver them to the adverse party within the time required. *Held:* The trial court correctly exercised its discretion in allowing late delivery; Woods v. Stewart, 171 F.2d 544 (5th Cir. 1948). *Held:* Unsworn answers are admissions, but the trial court has discretion to allow late swearing; Durrett v. Borger, 234 S.W.2d 898 (Tex. Civ. App. 1955). D's attorney answered requests on information and belief. Later, D requested but the trial court refused to allow an amended oath. *Held:* Swearing an information and belief is not sufficient; however trial court had discretion to allow a late amended oath, and abused its discretion by not doing so; Texas Indemnity Insurance Co. v. Halliburton, 209 S.W.2d 775 (Tex. Civ. App. 1948) *rev. on other grounds,* 147 Tex. 133, 213 S.W.2d 677 (1948). The trial court had discretion to allow a late oath to answers made under Rule 169; Gordon v. Williams, 164 S.W.2d 867 (Tex. Civ. App. 1942). D refused to answer requests. The trial court ruled that such failure operated as admissions and rendered judgment for P. D promptly filed a motion for new trial and in connection therewith tendered written answers under oath. The trial court overruled the motion. *Held:* Reversed and remanded. The trial court had discretion to allow late filing and its refusal under the circumstances was an abuse of discretion; Frozen Food Express v. Odom, 229 S.W.2d 92 (Tex. Civ. App. 1950) *error refused, n.r.e.* P introduced in evidence an admission made by D under Rule 169. D moved for leave to withdraw the admission on the ground it was mistakenly made. The trial court refused to allow withdrawal. *Held:* Affirmed. The trial court had discretion either to grant or refuse the motion, and no abuse was shown; Schmieding v. Thompson, 210 S.W.2d 272 (Tex. Civ. App. 1948). *Held:* The trial court did not abuse its discretion in allowing a late filing of answers to requests; Billinglea v. Greaves, 196 S.W.2d 945 (Tex. Civ. App. 1946). The majority held that the trial court did not abuse its discretion in refusing to allow a late verification. Justice Boyce dissented, saying: "This case illustrates how brittle our rules of procedure, designed for flexibility, can become unless wide discretion is used in their application"; Snyder v. St. Paul Mercury Indemnity Co. of St. Paul, 191 S.W.2d 107 (1945). *Held:* The trial court did not abuse its discretion in allowing a late filing of answers to requests made under Rule 169; English Freight Co. v. Preston, 203 S.W.2d 657 (Tex. Civ. App. 1947). D made an admission in response to requests made under Rule 169. At the trial, he asked permission to withdraw the admission on the ground he had learned that the fact he had admitted did not exist. The trial court permitted withdrawal. *Held:* This was in the trial court's discretion, and no abuse was shown; Stoppelberg v. Stoppelberg, 222 S.W. 587 (Tex. Civ. App. 1920). *Held:* The trial court did not abuse its discretion in refusing to allow late answers to an ex parte deposition; Teas v. McDonald, 13 Tex. 349 (1855). A party sought leave to amend one of his answers in an ex parte deposition. The trial court refused the request. *Held:* The trial court did not abuse its discretion. Justice Whedersand: "It would be a dangerous consequence to honest litigants to permit amended afterthougth—swearing under such circumstances. (The original answer, which had been stricken in the local court, was "manifestly evasive and impertinent"); Bounds v. Little, 75 Tex. 316, 12 S.W. 1109 (1890) per Justice Gaines. Where party's refusal to answer an ex parte deposition was under the good faith but mistaken belief that he did not have to answer, the trial court abused its discretion in refusing to allow sad party to make late answer to the interrogatories. (Here the request was made during the trial when the requesting party sought an order that the failure to answer constituted an admission.)

no longer does the failure to answer or evasive answer, or, under Rule 169, the original affirmative admission, have any probative force, except to the extent, if any, that it can come back into the case as an informal voluntary admission against interest, a matter discussed earlier herein.

While there is no dogmatic time limitation upon when a trial court can allow late answers or amended answers, except, of course, that such action must be taken before the court loses power to act by virtue of a final judgment being taken, and the time for complaining thereof expiring, the request should be made as early as possible. This is particularly true where a ruling is desired on whether an answer actually is evasive, and on whether a failure to answer is justified on the ground of privilege, or some other ground.[52] This is the very sort of thing the pretrial procedure defined in Rule 166 is designed to cover, and hence pretrial should be used liberally in this area, although often the court has and should allow such action where the motion to amend or to file late answers is made during the trial on the merits.

It is important to note that a party may have available for use at the trial on the merits, judicial admissions in ex parte depositions or under Rule 169, which, if he can use them, will be decisive in his favor, but still he cannot safely assume that he will have an opportunity to use them. He must realize that the court may allow his opponent to extricate himself by late or amended answers. If this happens, he is left with nothing—except possibly informal, voluntary admissions against interest. This points to an advantage which an affirmative admission against interest in a deposition, either ex parte, or witness, has over judicial admissions. While such affirmative admissions are evidentiary, and hence not conclusive, the admitting party cannot complain when such admissions become a part of the record, and is not entitled to have them withdrawn from the record.

The above differences between judicial admissions and evidentiary admissions point to the advisability of attempting to secure both types of admissions in the same cause, a matter discussed later herein.

[52] The question of what action to take if the trial court rules that an answer is evasive, or that a failure to answer is not justified and hence results in an admission, will not be discussed herein.

Relation Between Judicial Admissions in Pleadings and Attempted Judicial Admissions Under Rules 169 and 188

In the absence of waiver, judicial admissions in pleadings cannot be avoided by sworn denials to requests on interrogatories under the above rules.

In *Home Insurance Co. of New York v. Dacus*,[53] P sued D asserting liability under a fire insurance policy. One defense pleaded was that P had failed to file a proof of loss. As this defense was not sworn to it failed to avoid the judicial admission that such proof was filed, which admission is provided for in subdivision (m) of Rule 93. D, on appeal, sought to supply the defect by pointing out that it had denied proof of loss under oath in response to a request made under Rule 169. The court drew an analogy between Rule 169 and evidence, and held that as evidence could not have avoided the judicial admission created by the pleading, neither could a denial under Rule 169. It was stated earlier herein that the procedure provided for by Rule 169 is more analogous to pleading than to evidence. A possible justification for the result reached under that analogy can be found in the fact that the requestee was seeking to use a self-serving statement, a matter dicussed earlier herein.

ORAL DEPOSITIONS OF ADVERSE PARTIES

Prior to a 1950 amendment of Rule 202, it was settled law that the failure of a party to answer question asked, in the taking of an oral deposition did not constitute an admission of the matter enquired about.[55]

In 1955, Rule 202 was amended by including therein the following provision:

> provided that where the witness is a party to the suit with an attorney of record, service of the subpoena in such case may be made upon the attorney representing the witness, and if the witness fails to appear in answer to the subpoena, except for good cause shown, such party shall not be permitted to present his grounds for relief or his defenses.

First let us consider a situation where after due service upon

[53] 239 S.W.2d 182 (Tex. Civ. App. 1951). See also, Snyder National Bank v. Pinkston, 219 S.W.2d 606 (Tex. Civ. App. 1949).

[55] Reilly v. Buster, 125 Tex. 323, 82 S.W.2d 931 (1935).

the attorney of record for a party, said party fails to appear—that is he fails to be present—at the time and place designated for the hearing. A possible construction of the effect of the amendment would have been that such failure resulted in judicial admissions, as is the rule where a party without good cause fails to answer interrogatories in an ex parte deposition. However the effect of such failure has been construed in two cases as not amounting to an admission, but rather as precluding the party who fails to appear, except for good cause shown from proving his case.[56] Thus, if D seeks to take the oral deposition of P and P fails to be present, then on motion D is entitled to have the case dismissed, unless P in contesting the motion establishes good cause, or unless the trial court gives P an additional time in which to have his oral deposition taken. Such a dismissal it seems, would be without prejudice to the right of P to file a new suit asserting the same claim.

If P seeks to take D's oral deposition and D fails to be present at the time and place designated, such failure does not entitle P to a default judgment. If D has so pleaded as to force P to make out a prima facie case, then P must do so in spite of D's failure. The effect of such failure is to deprive D of the right to assert affirmative defenses, as distinguished from rebuttal defenses.

Suppose the party whose deposition is sought resides more than 100 miles from the court where the case is pending, including a situation where said party resides in another state, or even in another country? Rule 201 provides in effect that when a deponant resides more than one hundred miles distant from the court where the suit is pending, the party adverse to the party desiring the oral deposition may upon notice require a written deposition, unless the court directs otherwise.

Several possibilities exist as to the effect of this rule where the desired deponant is a party to the suit: the courts may hold that the amendment to Rule 202 rendered the distance provision inapplicable to a party-deponant; the courts may hold, on the other hand, that this matter is in the discretion of the trial court. It is

[56] Know v. Long, 152 Tex. 291, 257 S.W.2d 289 (1953); Snowden v. Republic Supply Co., 239 S.W.2d 231 (Tex. Civ. App. 1951) *error refused, n.r.e.;* and see Saenz v. Sanders, 241 S.W.2d 316 (Tex. Civ. App. 1951) *reversed on other grounds,* 151 Tex. 10, 245 S.W.2d 483 (1952).

thought that if the latter rule is adopted, usually it would be an abuse of discretion to force a party who desires to take the oral deposition of the adverse party to use a written deposition.[57]

Subject to the possible limitation above mentioned, the oral deposition rules are broad enough to authorize an oral deposition of an adverse party, wherever he may reside.[58]

Suppose a party-deponant is present at the time and place designated, but without good cause refuses to answer some or all of the questions asked? While no cases have been found on this point, it would seem both logical and just to hold that as to any such question, he has not appeared, and hence that as to the subject matter thereof he is precluded from asserting his prima facie case, or affirmative defenses, as the case may be.

MULTIPLE PARTY LITIGATION

Suppose there is one P and and two D's, or, two P's and one D? Clearly judicial admissions made by one party are not binding on any of the other parties, and this includes a situation where one sues or is sued in several capacities and admits in only one of them.[59]

As to evidentiary admissions in a deposition, the question whether the evidentiary admissions of one party are binding upon another depends upon whether the other party was given an opportunity to participate in the taking of the deposition. This points to the importance of giving all parties notice where it is intended to take the deposition of any of them.[60]

The above rules are subject to the usual qualifications that if admissions either evidentiary or judicial are made a part of the record without objection, either at the time of admission or later in the trial, by the party not correctly bound thereby, that party might be held to have waived the objection.

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[57] In Know v. Long, *supra*, note 56, the trial court's action in ordering an oral deposition of a party who resided more than one hundred miles from the court in which the suit was pending was upheld on appeal.

[58] In 20 TEX. L. REV. 18 (1941) Judge Stayton points out that the court has discretion to allow the taking of oral depositions even of third-party witnesses, anywhere in the world. As to a third-party witness, however, as heretofore pointed out, whether he could be forced to appear would depend on the law of the state or country where he is found. Further, a failure to answer would not penalize or aid either party.

[59] Krasa v. Derrico, 193 S.W.2d 891 (Tex. Civ. App. 1946); Sanchez v. Caroland, 274 S.W.2d 114 (Tex. Civ. App. 1954).

[60] See Veck v. Culbertson, 57 S.W. 1114 (Tex. Civ. App. 1900); 15a TEX. JUR. 161.

USING A COMBINATION OF THE ABOVE METHODS

When the different purposes served by witness depositions, particularly an oral deposition of an adverse party, ex parte depositions, and admissions under Rule 169, are considered in a given case, it may be found advisable to use all of the above procedures, or at least more than one of them, in the same case.

RESTRICTION OF USE TO THE CAUSE IN WHICH THE ANSWERS ARE PROCURED

Rule 169 expressly restricts use of admissions thereunder to the suit in which they were procured. While the terms of the deposition rules, as they now read, are not entirely clear on this point, it seems well established that depositions taken in a pending suit can be used only on that suit.[61]

Both of the above statements are subject to the possibility heretofore discussed that admissions in a prior suit may be admissible as voluntary, informal admissions. Further, as above discussed, admissions may be used in various parts of the same lawsuit.

DEPOSITIONS OR ADMISSIONS AS A WAIVER OF THE BAR OF ARTICLE 3716, KNOWN AS "THE DEAD MAN'S STATUTE"

If in an ex parte deposition, questions are asked which if asked at the trial would waive the bar of Article 3716, the inclusion of them in the ex parte deposition waives said bar, whether or not the deposition is introduced in evidence, and the same rule applies to a witness deposition of a party.[62] It seems safe to predict that the same rule will apply to requests made pursuant to Rule 169.[63]

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[61] Peoples National Bank v. Mulkey, 94 Tex. 395, 60 S.W. 753 (1901); McMurry Corporation v. Yawn, 143 S.W.2d 664 (Tex. Civ. App. 1940) *error refused;* 15a TEX. JUR. p. 147, n.6, and numerous cases there cited. The language of Rule 188 is broad enough, if isolated, to authorize use in other suits. However, as this rule is a part of the rules governing venue, and in the light of the numerous cases limiting use to the pending suit, it seems clear that Rule 188 must be considered with the deposition rules and the cases construing them, and when so considered does not authorize use of depositions in suits other than that in which it was taken. This rule has no reference to a deposition taken solely to perpetuate testimony, a matter beyond the scope of this article.

[62] Allen v. Pollard, 109 Tex. 536, 212 S.W. 468 (1919); White v. Modesto, 276 S.W.2d 359 (Tex. Civ. App. 1955) *error dismissed.*

[63] 1 FRANKI, TEX. RULES CIV. PROC., 521 (1955).