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Depositions: Two Suggested Procedural Reforms

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DEPOSITIONS: TWO SUGGESTED PROCEDURAL REFORMS

THE Texas statutes concerning depositions, which were carried over into the present Rules of Civil Procedure without material change,[1] have long given a convenient and effective means of perpetuating testimony for possible introduction into evidence at a later trial.[2] Because the right to take a deposition in Texas is a broad one, the courts have had few occasions to inquire into the reasons for taking a deposition. Thus, they have allowed its use for purposes of discovering information,[3] even though the wording of the statutes and rules indicate that they were originally enacted to facilitate the preservation of testimony.[4] In Texas the discovery and preservation functions of depositions have been combined under one procedure, which is relatively simple when compared with the detailed and complicated procedures of some states such as New York. Apparently, the Texas statutes and rules provide a flexible and workable system, if the lack of complaints in law reviews and in the state bar journal as to fundamental defects and resultant abuse can be taken as an indication. This is further borne out by the comparatively few cases reaching our appellate courts in proportion to the numberless depositions taken over the years.

With respect to the scope of examination permitted in taking a deposition in Texas, a deponent in effect is placed in the same situation he would occupy on the witness stand at an actual trial. In other words, the examination may extend to any matter relevant to the case at hand which is admissible under the general rules of evidence.[5] As a practical matter, the difficulty in determining

[1] TEXAS RULES OF CIVIL PROCEDURE (VERNON, 1942) Rules 176-215.

[2] RAGLAND, DISCOVERY BEFORE TRIAL (1932) 24.

[3] *Id.* at 20.

[4] Franki, *Discovery*, 13 Tex. B. J. 447, 479 (1950).

[5] Texas Rule 213.

relevancy of testimony prior to the trial[6] and when the pleadings may or may not have been filed (if filed, they may be only rudimentary) has tended to broaden even further the scope of examination. Nevertheless, the opportunity and right of the opposing attorney to advise or instruct the deponent not to answer has probably served to confine the scope of examination within reasonable and sensible limits.

The scope of examination allowed under the Texas Rules of Civil Procedure is not as liberal as that permitted under the Federal Rules, which in effect employ a double standard.[7] Where the deposition is taken primarily for the purpose of perpetuating testimony, the admissibility test is applied.[8] But where the reasons for taking a deposition relate to its use as a discovery device, the examination is authorized to extend to matters which would not ordinarily be admissible in evidence so long as the questioning is reasonably calculated to lead to admissible testimony.[9] The virtually unlimited discovery allowed under the Federal Rules and the more confined discovery permitted under the Texas Rules each has its advantages, but, generally speaking, the abuses which have arisen under the Federal Rules of Civil Procedure or which may possibly arise thereunder[10] have not been observed under the Texas Rules. It is submitted that the more limited scope of examination adequately provides for the use of the deposition for discovery and at the same time makes sensible restriction.

But this Comment is not intended as a mere tribute to the Texas deposition practice. Despite the fact that the procedure is a workable and effective system which provides for both discovery and preservation functions, it is certainly not a perfect system. There

[6] Pike and Willis, *The New Federal Deposition—Discovery Procedure: II*, 38 Col. L. Rev. 1436, 1442 (1938).

[7] Pike and Willis, *The New Federal Deposition—Discovery Procedure: I*, 38 Col. L. Rev. 1179, 1187 (1938).

[8] Federal Rule 26(e).

[9] Federal Rule 26(b).

[10] See Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 Yale L. J. 117 (1950).

are defects, and it is the purpose of this Comment to point out two which could be corrected by changes in the Texas Rules of Civil Procedure.

I

It is suggested that Federal Rule 32(c) should be incorporated into the Texas Rules. It provides for a distinction between objections that are substantial in nature and those which are merely formal. Under the Rule, objections as to substance, such as the competency of the deponent or the relevancy and materiality of the testimony, are not waived by failure to make them before or during the taking of the testimony, unless the ground for objection is one which, if called to the attention of the examining party, could have been obviated at the time. Objections as to form, such as errors and irregularities in the manner of the taking of the deposition, if not made at the examination, immediately are waived, unless the basis for the objection could not have been removed by the examining counsel after it was called to his attention. Provision as to waiver of objections as to the form is made with respect to written interrogatories by the same Rule.[11]

Texas Rule 212 provides that when a deposition has been filed at least one entire day before the day on which the case is called for trial, no objection as to the manner and form of taking the deposition will be heard unless the objection is in writing and notice thereof is given to the opposing counsel before the trial commences. Failure to comply with this Rule will result in waiver of objections as to form.[12] When the objection is as to a matter of substance, it is made at the time the deposition is offered into evidence.[13]

It is thought that the adoption of the Federal Rule will eliminate most of the objections as to form which Texas courts in the past

[11] Pike, *The New Federal Deposition—Discovery Procedure and the Rules of Evidence*, 34 Ill. L. Rev. 1, 7 (1939).

[12] Texas & Pac. Ry. Co. v. Mix, 193 S. W. 2d 542 (Tex. Civ. App. 1946).

[13] City of Magnolia Park v. Crooker, 252 S. W. 341 (Tex. Civ. App. 1923).

have had to rule upon. Certainly, it will effect a saving of the court's time. It is admitted that the number of objections as to form which reach the court is limited to some extent by the requirement that the hearing on such objections be had at the first term after the deposition is taken and filed.[14] But it is urged that most of such hearings will not be necessary if the Federal Rule is adopted.

The present Texas Rule may be used to prevent testimony from ever being introduced into evidence via the deposition route. For instance, during the course of examination an opposing counsel may note that the examining counsel has asked the deponent a leading question. Under the Federal Rule, the opposing counsel must immediately make his objection known, as he would have to do if the witness were on the stand, and thus examining counsel is given an opportunity to reword his question. Under the Texas Rule, if the opposing counsel knows that the question can be reworded, the wisest thing for him to do is to remain silent and save his objection. Then shortly before trial he can make his objection known and have the question ruled out. At such late date the examining counsel may have to ask for a continuance or postponement in order to get the evidence into admissible form. There is always the possibility that the deponent may not be available for another examination or that the attorney will lack the time to take another deposition if he is unable to get a continuance or postponement.

Why should the examining party be so penalized for his error in asking leading questions when he would probably suffer no such penalty if the witness were actually on the stand? After all, most questions objectionable as to form can be reworded or altered so as to avoid objection and yet to elicit the same information. Surely the present practice adds nothing to the reaching of a just decision on the merits of a particular case.

[14] Texas Rule 212.

II

It is also suggested that the Texas Rules be amended to curtail the practice of allowing the introduction of a deposition as original evidence on the trial of a suit when the deponent is actually available or may readily be made available to testify in person at the trial. In order to introduce a deposition as evidence, some burden should be placed on the party seeking to introduce it to show that the deponent is for some justifiable reason unable to testify at the trial. Federal Rule 26 (d), for instance, expressly provides for the use of a deposition at the trial when the deponent is sick, aged, infirm, or resides some distance away from the scene of the trial. If the judge is not satisfied as to the reason for the absence of the witness, he should be required to refuse its admission into evidence.

Under the Texas practice, a deposition may be introduced into evidence even though the witness may actually be sitting in the courtroom a few steps away from the witness stand. It is conceded that whether it may be introduced or not rests in the discretion of the trial judge,[15] but as a practical matter few depositions are denied admission because the deponent is available as a witness. Texas is in the minority among the states in following this particular practice,[16] which has been subject to criticism elsewhere.[17]

What is wrong with allowing the introduction of depositions under such circumstances? For one thing, the jury is deprived of any opportunity to see and hear the witness and to judge his credibility. The same may be said where the trial is before a judge only. When an attorney feels that a witness will not make a good appearance on the stand or may antagonize the jury in some manner, it is advantageous to take the deposition of such witness and to read it into evidence rather than to call the witness at all. The practiced courtroom orator in reading the deposition at the

[15] Cook v. Denike, 216 S. W. 437 (Tex. Civ. App. 1919) *er. dism.*

[16] RAGLAND, *op. cit. supra* note 2 at 163.

[17] Ragland, *Discovery by Deposition*, 1950 Ill. L. Forum 161, 171.

trial will be able to put all the force of his own personality behind such a reading, leading the jury to judge the credibility of the deponent by that of the attorney who puts it into evidence.[18]

Also, this practice has given rise to a great deal of confusion, which the suggested change in the Rules would minimize. The confusion arises particularly in the case of a witness who is not hostile or unwilling and yet who is in possession of information definitely favorable to one of the parties. Texas cases have held that deposition procedure is a procedure in itself, which in no way affects or changes the rules with regard to the examination of a witness on the stand.[19] Following this theory, the courts have applied to the deposition the same rules of evidence used in the examination of a witness on the stand. The party introducing the deposition at the trial makes the deponent his witness, vouching for his credibility.[20] Where both parties introduce portions of a deposition, the witness is for the purpose of impeachment the witness of each party to the extent of the new matter introduced by that party.[21] Of course, it is a general rule of evidence that a party cannot impeach or attack the credibility of his own witness except under circumstances unimportant here.

Since the rules of evidence applied to the examination of an individual at the trial and by deposition are separate and distinct in application, a conflict may arise between the two. *Industrial Fabricating Co. v. Christopher*[22] may be taken as a specific example. Plaintiff took the deposition of a witness and introduced it in evidence in its entirety, including cross-examination and redirect examination. On introduction of the deposition, the deponent became the witness of the plaintiff so far as the deposition was concerned. Apparently the witness was a resident of the county where

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[18] RAGLAND, *op. cit. supra* note 2 at 163.

[19] Cook v. Denike, cited *supra* note 15.

[20] Parr v. Parr, 207 S. W. 2d 187 (Tex. Civ. App. 1947) *er. ref. n.r.e.*

[21] Fenner v. American Surety Co. of N. Y., 156 S. W. 2d 279 (Tex. Civ. App. 1941) *er. ref. w.o.m.*

[22] 220 S. W. 2d 281 (Tex. Civ. App. 1949) *er. ref. n.r.e.*

the suit was held, since she had been subpoenaed by the defendant. The latter felt it necessary to rebut the information brought in by deposition by cross-examination of the witness. He called the witness to the stand and attempted to cross-examine and impeach but was refused this right on the ground that in calling her, he made her his witness so far as the oral examination was concerned. The witness therefore belonged to both parties with respect to the same matter. Of course, the defendant had had the right to cross-examine in the taking of the deposition, but possibly he had felt it advisable to make only a brief examination and to wait until he had the witness on the stand to make a full cross-examination. Certainly the right to cross-examine a witness on the stand is the more valuable, since the witness is under the pressure of testifying before the judge and jury. If the theory that a deposition examination in no way alters or affects an examination before the court were followed to its logical end, the plaintiff in the *Christopher* case could have taken the witness over and subjected her to cross-examination after the defendant had made her his witness by putting her on the stand.

Suppose in the *Christopher* case that the defendant had not seen fit, possibly because of the time and expense involved, to cross-examine the witness when the deposition was taken. In such a case, he would be deprived of his right ever to cross-examine the witness. It would be an unfair result indeed if the defendant had wished to impeach the deposition; presumably he would have been refused the right, as he would vouch for the credibility of the witness in putting her on the stand.

The recommended amendment would bring about a more just result and eliminate some of the "game" in litigation. In the case above, under the suggested change, the plaintiff would have been forced to put the witness on the stand if he expected to use her. The witness would then belong to the plaintiff, and the defendant could then exercise his right to cross-examine and impeach. There would be none of the confusion or question which arose in