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Article 6

Examination Before Trial

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of dangerous appliances applies in the case where an automobile is hired to an independent contractor.[29] Nevertheless, as was said in Stapleton *v.* Independent,[30] "If the owner of such agency (referring to an automobile) consents to turn it over to the control of an incompetent or reckless chauffeur he is not deprived of any legal right in holding him liable for its negligent operation when in such control and a greater degree of safety to the general public is likely to follow. * * * The owner of an automobile is supposed to know, and should know, about the qualifications of the persons he allows to use his car, to drive his auto, and if he has doubts of the competency or carefulness of the driver he should refuse to give his consent to the use by him of the machine." It is this reasoning which has prompted the several State Legislatures to enact the statutes which, in effect, create "double-barrelled" liability against the owner besides the driver in favor of an injured plaintiff.

L. L. W.

EXAMINATION BEFORE TRIAL.—Section 288 of the Civil Practice Act provides in part that: "Any party to an action in a court of record may cause to be taken by deposition, before trial, his own testimony or that of another party which is material and necessary in the prosecution or defense of an action." The section also goes on to say: "A party to such an action may cause to be so taken the testimony, which is material and necessary of the original owner of a claim which constitutes, or from which arose, a cause of action acquired by an adverse party by grant, conveyance, transfer, assignment or endorsement and which is set forth in his pleading as a cause of action or counterclaim." * * *

This section substantially differs frrom the code of Civil Procedure in that now all parties are subject to examinations, and makes it incumbent on the objector to apply to the court for an order to vacate the notice of examination inasmuch as the purpose of this section is to remove all procedural trammels and permit examinations with as few restrictions as possible. It was necessary under the code, however, for the moving party to prove circumstances which would authorize such examination, the theory being that ordinarily parties were not subject to examination.[1]

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[29] Burbank *v.* Bethel Steam, 75 Me. 373 (1883); Whitney *v.* Clifford, 46 Wis. 138, 49 N. W. 835 (1879); Powell *v.* Virginia Const. Co., 88 Tenn. 692, 13 S. W. 691 (1890); Cunningham *v.* International, 51 Texas 503 (1879); "The only obligation on the part of an employer in reference to tools or appliances supplied is to exercise due care not to let the contractor have an appliance which is a nuisance or is apparently defective or likely to cause injury to third persons." 14 R. C. L. 84-85.

[30] Supra, note 6.

[1] 200 App. Div. 206, 191 N. Y. Supp. 848 (2nd Dept. 1922).

At common law a party to an action could not call his adversary as a witness at the trial and examine him.[2] This was a privilege for the party opponent in civil actions at common law. The party was disqualified as a witness because of his interest in his own behalf and was, accordingly not obligated to testify at the behest of his opponent. Now, however, both the disqualification and the privilege have been abolished.[3]

But even before this very obvious defect was corrected by statute, equity alive to the weakness of the situation permitted what was known as the "bill of discovery," which in substance was a right given to a litigant in a common law action solely for the purpose of subjecting his adversary to an examination under oath and the action at law might be stayed until such examination could be had.[4] The bill of discovery is now no longer recognized in this state [5] and substituted for it is "the deposition of the first class," more commonly known as "the examination before trial." [6]

It follows therefor that a real test to decide whether a party has a right to an examination before trial is to determine whether under the same circumstances the moving party under common law would be entitled to a "bill of discovery." [7]

The "bill of discovery" could be had only if the moving party was in good faith. Hence good faith is an indispensable requisite for an examination.[8] This good faith is evidenced only if the testimony sought to be elicited upon examination be "material and necessary" [9] to the cause of the party seeking the examination. One requirement obviously includes the other. The court, however, may prevent examination where it shall deem "by any reason that the interests of justice would not be subserved by such an examination." [9a]

In the Appellate Division First Department of this state, it is uniformly settled that an examination before trial may not be had for the purpose of discovering who should be sued.[10] It is incumbent upon the plaintiff to show that he has a cause of action before an examination is granted.[11] Likewise if it be the defendant who wishes to examine he must be able to show that he has a valid defense.[12]

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[2] Carmody's N. Y. Prac. Sec. 345.
[3] C. P. A. Sec. 346.
[4] Carmody's N. Y. Prac. Sec. 345.
[5] C. P. A. Sec. 345.
[6] 64 N. Y. 120.
[7] Carmody's N. Y. Prac. Sec. 348.
[8] 188 App. Div. 714, 177 N. Y. Supp. 225 (1st Dept. 1919).
[9] C. P. A. Sec. 288; 299; Civil Prac. Rule 122.
[9a] Carmody's N. Y. Prac. Sec. 344.
[10] 95 App. Div. 417 (1st Dept. 1904); Schull *v.* Snitzer State Bank, 196 App. Div. 934 (1st Dept. 1921).
[11] 201 App. Div. 512, 194 N. Y. Supp. (1st Dept. 1922); N.B. Rule different in 2nd department, 123 App. Div. 814, 161 N. Y. Supp. 1116 (2nd Dept. 1908).
[12] 208 App. Div. 107, 203 N. Y. Supp. 942 (1st Dept. 1924).

It is the general rule in this state that a party may examine his adversary only in respect of those matters which the moving party has the burden of proof.[13] The converse of this proposition is very clearly pointed out by the court in the case of Sieda *v.* Newkirk[14] thru Clark, J. when he stated: "It is quite apparent that the matters defendant alleges that he expects to disprove by plaintiffs' evidence are the very matters that the plaintiff must prove to make out his *prima facie* case. Plaintiff must prove those matters by his own testimony and if he fails to prove them he has no cause of action. Defendant is not attempting to obtain testimony to establish his defense. What he is endeavoring to accomplish is the cross examination of the plaintiff before trial about his own case. Where it is obvious that every particle of material testimony about which the defendant wishes to interrogate the plaintiff, is that which the plaintiff himself must first establish, he is not entitled to an examination before trial."

To the general rule, however, there are two notable exceptions: 1st where there is a fiduciary or quasi-fiduciary relationship existing, a plaintiff may be examined even as to those matters which plaintiff must prove; *a fortiori* when facts are peculiarly within the knowledge of the adverse party;[15] 2nd in negligence cases where an examination of the defendant on the issue of defendant's negligence, which is part of the plaintiff's affirmative case, would almost certainly result in a very grave abuse and amount in little more than a cross examination of defendant in advance of the trail on his version of the occurrence which gave rise to the injury complained of—then an examination is permitted (in the 1st Dept.), but, limited to questions of ownership of the premises or control of the device which caused the injury.[16]

The purpose of an examination before trial is to obtain evidence to use upon trial.[17] But the taking of examinations to properly prepare for trial or to obtain other evidence to meet the defense, are reasons not sufficient to justify the examination of an adverse party.[18]

Care should be taken lest one confuses the examination before trial with "discovery and inspection." The distinction is well pointed out in Singer *v.* National Gum and Meca Co.[19] where the court thru Fruch, I held that on examination of an adverse party before trial, the books,

[13] 188 App. Div. 23, 176 N. Y. Supp. 406 (2nd Dept. 1919); 200 App. Div. 485, 193 N. Y. Supp 97 (1st Dept. 1922); 215 App. Div. 724; 206 App. Div. 287, 200 N. Y. Supp. 602 (1st Dept. 1923).

[14] 148 App. Div. 864 (1st Dept. 1912).

[15] 188 App. Div. 23 (2nd Dept. 1919).

[16] Carmody's N. Y. Prac. Sec. 350; 126 N. Y. S. 628; 201 App. Div. 433, 194 N. Y. Supp. 531 (1st Dept. 1922).

[17] N. Y. S. 529 (1903).

[18] 114 N. Y. S. 473 (1909); see also 125 App. Div. 651 (2nd Dept. 1908).

[19] 211 App. Div. 758, 207 N. Y. Supp. 921 (1st Dept. 1925).

papers and documents produced are merely an incident to the examination of the adverse party, that their inspection and perusal is not the primary object of the examiner; that the party who produces them retains control over them but can be required to answer questions relating to their contents; that on such examination the examining party may inspect any book and paper which contains entries relative to subject matter of the examination but his inspection is limited to specific entries or accounts to which reference is made by the witness and the examiner is not permitted to roam at will thru the books, papers and documents so produced; whereas in those actions where discovery and inspection is allowed a general perusal of the books, papers and documents is contemplated and that such perusal is not an incident to the examination but an end in itself.[20]

Notice of the proposed examination by the moving party to his adversary should state the person before whom the testimony is to be taken; the time and place of taking; the name or names of the person or persons to be examined, and the matters upon which the person or persons are to be examined.[21] It is now the custom for the moving party to make his office the place where the examination is to be held.

In the event the plaintiff fails to appear for an examination before trial on notice for said examination, it has been held[22] that the proceedings will be stayed until the plaintiff does appear for examination. But on the other hand, if defendant fails to appear for examination before trial, when served with notice to appear the Appellate Division, First Department has held it to be a reversible error to strike out the defendant's answer and give judgment for plaintiff, since the statute imposes no such penalty.[23]

On a motion to vacate the notice for examination before trial,[24] the burden of proof rests on him who seeks to examine. He must show that he is entitled to such examination.[25] The service of notice of motion to vacate will, however, operate as a stay to the taking of the proposed examination.[26]

The examination before trial, in conclusion makes it possible for the admissibility of a vast amount of evidence at the time of trial, which without such procedure would be unavailable because of the manifest

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[20] See also Carmody's N. Y. Prac. Sec. 378; 205 App. Div. 705, 200 N. Y. Supp. 752 (1st Dept. 1923).

[21] C. P. A. Sec. 290 et seq.

[22] 207 App. Div. 225, 201 N. Y. Supp. 757 (1st Dept. 1923).

[23] 206 App. Div. 194, 200 N. Y. Supp. 597 (1st Dept. 1923).

[24] Rule 124 C. P. A.

[25] 209 App. Div. 169, 204 N. Y. Supp. 308 (2nd Dept. 1924).

[26] C. P. A. Sec. 291.

inability of securing it. For example, the subpoena would be inadequate in ascertaining in advance that which an adverse party alone knew and which would be material and necessary in establishing a cause of action or defense. A notice to produce, on the other hand, is of value only when the moving party knows what he wants and can introduce secondary evidence, in case, after a notice to produce, the adverse party fails to produce the primary evidence.[27]

These shortcomings were fortunately averted when statute created the existing procedural form of "the examination before trial," a requisite for astute litigators.

V. J. M.

WHEN AN ASSIGNMENT MAY BE A SUB-LEASE—The familiar proposition that the transfer by lessee of the entire term of his lease, results in a so-called "assignment" rather than a "sub-lease," has been subjected to considerable reservation. There are three ways in which the question ordinarily comes before the court. It is submitted that the aim of the suit and the parties at the Bar create equities,[1] which affect the determination, so that we reach a result in which the terms "assignment" or "sub-lease" are merely convenient instruments, legal fictions perhaps, by which the Courts arrive at equitable results. The most convenient way of treating this subject, will be by discussing seriatim, the three ways in which the question usually arises. First, in an action by the landlord against the tenant in possession, the transferee of the term, the instrument is called an assignment and the tenant in possession held bound by the covenants in the original lease, Stewart *v.* Long Island Railroad Co.[2] emphasizes this proposition. Stewart leased certain property to the Central Railroad Co. for a period of fifty years. Later the lease was assigned to the Flushing, North Shore and Central Railroad Co. Then the latter company leased to the defendant the whole of the property covered by the Stewart lease for a term of ninety-nine years. The plaintiff brings this action for rent, and claims that the defendant is liable as assignee of the lease. The defendant contends it is not liable on the ground that it is a sub-lessee. The court said, "Where a lessee of land leases the same land to a third party, the question has often arisen whether the second lease is in legal effect an assignment of the original lease, or a mere sub-lease. The question has frequently and probably most generally, arisen between the lessee and his transferee, and much confu-

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[27] Carmody's N. Y. Prac. Sec. 342.

[1] Linden *v.* Hepburn, 3 Sandf. (N. Y.) 668; O'Connell *v.* Sugar Products Co., 114 Misc. 540 (1st Dept. 1921).

[2] 102 N. Y. 601, 8 N. E. 200 (1886); Sexton *v.* Chicago Storage Co., 129 Ill. 318, 21 N. E. 920 (1889).