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Amendment to the Civil Practice Act Relating to Examinations Before Trial

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the executor or administrator seeking a direction to complete the contract, the result of such a decree would be in practical effect specific performance. It does, therefore, seem superfluous to require the legal representative to go to the extent of securing a decree in equity to accomplish the performance of a valid contract for the sale of land made by the decedent, when all that is sought is a conveyance of legal title to the equitable owner.

The enactment of this legislation was therefore advantageous, as it enables purchasers entitled to deeds under contracts with decedents to receive them without delay and difficulty attendant upon compliance with the law as it existed previously. The section as now revised is sufficiently clear, although not as positively worded as the comparable New Jersey statute cited. There is, however, probably much to be said for New York's inclusion of the option given to the legal representative to seek court approval, as this procedure would be desirable in a situation where an issue could be determined with more economy before conveyance.

DENNIS J. CAREY.

AMENDMENT TO THE CIVIL PRACTICE ACT RELATING TO EXAMINATIONS BEFORE TRIAL.—On March 24, 1948, Section 288 of the Civil Practice Act was amended to provide that where a party to an action or an original owner of a claim is a partnership or an individual doing business under his own or under an assumed or trade name, the testimony of an agent or employee may be taken under the same circumstances as would the deposition of an agent or employee of a corporation. The amendment became effective on September 1, 1948.[1]

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[1] Laws of N. Y. 1948, c. 453. The section now reads: "Testimony by deposition during pendency of action and before trial. 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 any other party which is material and necessary in the prosecution or defense of the action. A party to such an action also 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 the adverse party by grant, conveyance, transfer, assignment or endorsement and which is set forth in his pleading as a cause of action or counterclaim. *When an adverse party, or an original owner of a claim whose testimony may be taken by deposition, is a partnership, an individual conducting a business under his own name, or an individual doing business under a trade or assumed name, the testimony of one or more of his or their agents or employees, which is material and necessary, may be so taken.* Any party to such an action also may cause to be so taken the testimony of any other person, which is material and necessary, where such person is about to depart from the state, or is without the state, or resides at a greater distance from the place of trial than one hundred miles, or is so sick or infirm as to afford reasonable grounds of belief that he will not be able to attend the trial, or other special circumstances render it proper that his deposition should be taken." (Amended matter in italics.)

The provisions for examinations before trial as embodied in the Civil Practice Act [2] have been in existence since 1920, but in their original form and interpretation limited the examination of agents and employees to those actions which involved private corporations.[3] The privilege of examining municipal corporations through their employees was extended by the amendment of May 1, 1941,[4] and thus both types of corporation were placed in the same position. Now, with the passage of the most recent amendment to the Act, any business, whether a corporation, partnership, or sole proprietorship can be examined before trial through its agents or employees.

Prior to September 1, 1948, the employees of an individual or of a partnership could only be examined by deposition in those limited circumstances enumerated in Section 288. Consequently, the deposition of such employee was procurable only when his testimony was material and necessary and it appeared that he would be unavailable at the trial. It is now possible to obtain and use the deposition of such a person in the same manner as the deposition of a party to the action. Of course, where it was possible to name an employee as a party defendant along with his employer, the plaintiff could always take his testimony in an examination before trial. But, except in those cases involving automobile accidents where the operator of the defendant's vehicle was someone other than the owner, it was not ordinarily possible for the plaintiff to name as a party defendant the employees whom it would be advantageous for him to examine.

The purpose of an examination before trial is fourfold. It shortens litigation by allowing the parties or party who has the right of examination to determine in general what his opponent's testimony will be upon the trial. It narrows the issues on the trial by allowing the parties or party who has the right of examination to frame his pleadings according to known facts, as revealed by his own knowledge and that of the party opponent. The deposition may also be used as, or in lieu of, testimony at the trial, subject to the rules of evidence governing its admissibility. Lastly, it encourages pretrial settlements and discontinuances of actions which are discovered to be futile. The examination may reveal facts which would make it impossible for the party to recover, and rather than bring the case to trial under such circumstances the party will wisely discontinue.

The amendment which is now effective was brought into existence to further the purposes referred to above. It seeks to make it possible to take the deposition of those persons who are, or should be, in the best position to know what occurred. In the usual case the owner of a business does not know the facts of an accident which

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[2] N. Y. CIV. PRAC. ACT §§ 288, 289 and 292-a.
[3] N. Y. CIV. PRAC. ACT § 289.
[4] N. Y. CIV. PRAC. ACT § 292-a.

may have taken place while his employees and agents were working in the furtherance of his business. An examination of such an employer would reveal none of the facts pertinent to the issues. Upon the trial it is likely that he would not testify as a witness in his own behalf. Rather, he would attempt to refute the other party's case by having those agents or employees who were present at the time of the occurrence testify to the facts as known to them. It is now no longer necessary to wait until the trial of the action to discover the facts which such an employer will put into evidence through his employees. They can be examined before trial just as the employer could always be examined.

The amendment in question is significant in that it not only places partnerships and individuals owning their own businesses on the same footing as corporations, but also because it constitutes another step along the road toward a more liberal trial practice in New York and a slightly closer emulation of the rules of practice in the Federal Jurisdictions.[5] During recent years there has been a noticeable tendency on the part of New York practitioners to be increasingly critical of the limitations and confusion of interpretations among the four departments which comprise the Judicial System in New York of the rules pertaining to examinations before trial. Those persons who advocate the streamlining of our trial practice point to the advantages to be derived from adopting the Federal Rules in New York.[6]

Under the Federal Practice, the testimony of any person, whether a party to the action or not, may be taken at the instance of any party by deposition on oral examination or on written interrogatories for the purpose of discovery, or for use as evidence, or for both purposes.[7] This means that a party plaintiff can examine any and all of the defendant's witnesses as well as the party defendant, and the defendant has the same right as to the plaintiff and his witnesses. The purpose of the rule is to limit the pleadings to the simplest possible form and to permit the adverse party to obtain whatever information he needs by means of discovery rather than through the pleadings.[8]

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[5] FED. R. CIV. P., 26 through 37, effective Sept. 16, 1938.

[6] For a comparison of the New York and Federal Rules with criticisms and suggested changes, see reprint of address by Mr. Leonard Saxe, Executive Secretary, Judicial Council in 36 LAW LIBRARY JOURNAL 112 (1943).

[7] FED. R. CIV. P. 26.

[8] "These Rules . . . clearly show that an attempt has been made to set up a machinery by the operation of which a cause reaches actual trial stripped to its essentials: with issues defined, clarified and narrowed, with both parties (if properly diligent) thoroughly prepared to meet all possible issues and fortified against surprise, and with a record already complete, except as to those matters which by their inherent nature can only be presented before a Trial Judge. The formulation of the Rules and the development of the procedure tend to hasten the day when the outcome of this class of litigation will depend less upon the skill and strategic manoeuvering of respective counsel and more

Under the New York doctrine, the examination must be *material and necessary* to the prosecution or defense of the action. It is limited to his own testimony and that of the other party, and the only provision made for the discovery of testimony of the adverse party's witnesses is in those instances where the witness is about to leave the state, or is absent from the state, or resides more than one hundred miles from the place of trial, or is seriously ill, or other special circumstances require his deposition to be taken.[9] Furthermore, the decisions in each of the four Judicial Departments vary as to whether the *necessity* exists in any given case to allow an examination to the defendant where he does not have the burden of proof, or whether it will be limited to the plaintiff who usually has such burden.[10] For the sake of brevity only the First and Second Departments will be compared in this regard. Under the ruling in the Second Department only the party having the burden of proof in the action can examine the other party before trial.[11]

In the vast majority of cases this limits the privilege to the plaintiff, and forces the defendant to wait until the actual trial to learn the exact issues which will be raised by the plaintiff.

A recent decision in the First Department has held that the right to examine before trial belongs to all of the parties to the action, regardless of who has the burden of proof, and it appears that this more liberal and sensible view will be adopted hereafter as the rule in the First Department.[12]

Rule 26(b) of the Federal Act raises another point for comparison between the doctrines of the two jurisdictions. This rule expressly states that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. It does not restrict the examinations to matters relevant to the precise issue but only to matters relevant to the subject matter involved in the action.[13] The rule further provides that unless otherwise ordered by the court, a party may be examined regarding any relevant matter "including the identity and location of persons having knowledge of relevant facts."

New York's First Department strictly limits the subject matter

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upon the merits of the issues involved." Teller v. Montgomery Ward & Co., 27 F. Supp. 938, 941 (E. D. Pa. 1939).

[9] N. Y. CIV. PRAC. ACT § 288.

[10] *Ibid.*

[11] O'Boyle v. Home Ins. Co., 226 App. Div. 767, 234 N. Y. Supp. 259 (2d Dep't 1929); Weber v. Deutschberger, — Misc. —, 45 N. Y. Supp. 2d 503 (Sup. Ct. 1943). The rule in these cases has been affirmed by implication in the following: Fried v. Acme Backing Corporation, 269 App. Div. 844, 55 N. Y. Supp. 2d 479 (2d Dep't 1945); Bernstein v. Wittner, 266 App. Div. 743, 41 N. Y. Supp. 2d 230 (2d Dep't 1943).

[12] Marie Dorros, Inc. v. Dorros Bros., — App. Div. —, 80 N. Y. Supp. 2d 25 (1st Dep't 1948).

[13] Lewis v. United Air Lines Transport Corporation, 27 F. Supp. 946 (D. Conn. 1939).

of the examination. If the action is one in negligence, the deposition must be restricted to matters dealing with ownership, agency, operation and control; under no circumstances can the examination be extended to touch upon issues of alleged negligence.[14] The Second Department, on the other hand, allows a general examination into the subject matter and substance of the action. The examiner can delve into the negligence aspects of the case as well as those involving ownership, operation and control.[15]

In New York there is no provision for the determination before trial of the identity of the other party's witnesses.

Another section of the Federal Act which is deserving of comment is that which provides that if the party who receives a mental or physical examination before trial at the instance of the other party (the defendant), requests and obtains the physician's report, a mutuality of disclosure becomes mandatory.[16] One of the purposes of the rule is to make available testimony by an impartial witness as to injuries on account of which damages are claimed.[17] Speaking of this rule, one of the members of the United States Supreme Court's Advisory Committee to draft rules of procedure for the lower federal courts has said: "This provision . . . should prove an effective barrier to much malingering and fraudulent testimony (heretofore so difficult to rebut) as to the real physical or mental condition of parties to civil actions. When such a condition is vital in actual litigation, specious considerations of the oft asserted sanctity of the body or mind and outmoded feelings of false modesty must yield to expediency and the practical administration of justice in the courts." [18]

Under the New York law at the present time, such mutuality of disclosure is not expressly required. Although Section 306 of the New York Civil Practice Act authorizes the physical examination of a plaintiff at the instance of the defendant in a personal injuries action, the various Appellate Division departments are here too in conflict as to whether the examining physician is required to deliver a copy of his report to the plaintiff as well as to the defendant or his attorney.[19] The First Department does not require that the physician furnish such report to the plaintiff.[20] In the Second

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[14] Klar v. City of New York, 165 Misc. 875, 300 N. Y. Supp. 1182 (Sup. Ct. 1937). For a discussion of the rules as applied in the First Department, *see* Parsons v. Moss, 171 Misc. 828, 13 N. Y. Supp. 2d 865 (Sup. Ct. 1939).

[15] Storm v. Gair, 212 App. Div. 829, 207 N. Y. Supp. 925 (2d Dep't 1925); Samols v. Mayer, 120 Misc. 516, 199 N. Y. Supp. 754 (Sup. Ct. 1923); Oshinsky v. Gumberg, 188 App. Div. 23, 176 N. Y. Supp. 406 (2d Dep't 1919).

[16] FED. R. CIV. P. 35.

[17] Wadlow v. Humberd, 27 F. Supp. 210 (W. D. Mo. 1939).

[18] Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 280 (1939).

[19] PRASHKER, NEW YORK PRACTICE 440 (1947).

[20] Feinberg v. Fairmont Holding Corporation, 272 App. Div. 101, 69 N. Y. S. 2d 414 (1st Dep't 1947); Kelman v. Union Ry., 202 App. Div. 487, 195 N. Y Supp. 313 (1st Dep't 1922).

Department, on the other hand, the report must be delivered to the plaintiff as well as to the defendant.[21]

Depositions taken pursuant to the amendment which has been under discussion will not be limited in their use upon the trial of the action, to the impeaching of the witness. The legislative intent was to liken the employees and agents of partnerships and individuals to similar persons in the employ of corporations, and if this intent is recognized, the depositions will be admissible as evidence whether the witness is available or not.[22]

The recent amendment to the New York Act which has been under discussion falls far short of a complete adoption by this jurisdiction of the Federal Rules on examinations before trial. But if it is an indication of more changes to come which will tend to simplify, unify and streamline the examination before trial doctrine in New York, it should be considered as a legislative act of considerable importance.

JOHN B. MCGOVERN.

AMENDMENT OF MUNICIPAL COURT CODE PERMITTING PERSONAL SERVICE WITHOUT THE STATE IN LIEU OF PUBLICATION.—That no man may be deprived of life, liberty or property, without due process of law, is a principle firmly rooted in our democratic way of life.[1] But what is due process? Its definitions have been so numerous and varied that it is well nigh impossible of exact and comprehensive definition.[2] However, it has long been settled, that due process requires judicial proceedings conducted before a court of competent jurisdiction,[3] and that the person proceeded against, be entitled, as a matter of right, to notice and an opportunity to be heard.[4] Although notice is required, personal notice is not an in-

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[21] Horowitz v. B. & Q. T. Corporation, 171 Misc. 321, 12 N. Y. S. 2d 41 (N. Y. City Ct. 1939).

[22] Masciarelli v. Delaware & Hudson R. R., 178 Misc. 458, 34 N. Y. S. 2d 550 (Sup. Ct. 1942); General Ceramics Co. v. Schenley Products Co., 262 App. Div. 528, 30 N. Y. S. 2d 540 (1st Dep't 1941). N. Y. CIV. PRAC. ACT § 303.

[1] U. S. CONST. AMENDS. V, XIV; N. Y. CONST. Art. I, § 6; Nebbia v. New York, 291 U. S. 502, 78 L. ed. 940 (1934); Pratt Institute v. City of New York, 99 App. Div. 525, 91 N. Y. Supp. 136 (2d Dep't 1904); Roseman v. Fidelity and Deposit Co. of Maryland, 154 Misc. 320, 277 N. Y. Supp. 471 (N. Y. City Ct. 1935).

[2] "'Due process of law' is process due according to the law of the land." Ives v. South Buffalo Ry., 201 N. Y. 271, 300, 94 N. E. 431, 442 (1911). ". . . law in its regular course of administration through courts of justice . . ." People v. Dunn, 157 N. Y. 528, 537, 52 N. E. 572, 575 (1899). ". . . due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." Westervelt v. Gregg, 12 N. Y. 202, 209, 62 Am. Dec. 160, 163 (1854).

[3] Matter of City of Buffalo, 139 N. Y. 422, 34 N. E. 1103 (1893).

[4] Jenkins v. Young, 35 Hun 565 (N. Y. 1885); People *ex rel.* Scott v.