Foreign Depositions in Ohio and the Uniform Act

Faced with the difficulty of obtaining essential testimony from a witness outside the state, a party to a suit may, in general, resort to one of two procedures. Adopted through admiralty procedure from the civil law,[1] letters rogatory or letters requisitory may be addressed from the court in which the action is pending to a court of general jurisdiction in the state where the witness may be found. Acceptance is based on comity and such letters are normally approved by the exercise of inherent powers of courts of general jurisdiction.[2] A court, when petitioned by a party, may also execute a commission to a designated person or to authorized persons generally to take such testimony as requested. A fundamental distinction is that when letters rogatory are used the court to which the appeal is made establishes the rules, and where a commission is issued the rules may be established and controlled by the executing court consonant with the grant of power of the acceding state.[3]

By statute Ohio establishes efficacious methods for meeting the problem, whether the deposition is to be taken in other jurisdictions for use within Ohio or to be taken in Ohio for use elsewhere. Enumerated officers of other states and jurisdictions are authorized to take depositions for use in Ohio courts.[4] Any coercive process must be granted by the jurisdiction in which the deposition is taken, but the trial court may review the process when it tests the admissibility of the deposition.[5] This accords with the basic distinction between the right to take and the right to use such testimony.

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[1] Discussed in Kiebling v. Lieberman, 9 Phila. 160, 162 (Dist. Ct. 1873).

[2] De Villeneuve v. Morning Journal Ass'n, 206 Fed. 70 (S.D. N.Y. 1913); Gross v. Palmer, 105 Fed. 833 (N.D. Ill. 1900); *In re* Martinelli, 219 Mass. 58, 106 N.E. 557 (1914) (limited in aid of cause pending in court issuing); Stengel v. Stengel, 85 N.J. Eq. 277, 96 Atl. 358 (Ch. 1915) (if the testimony cannot otherwise be obtained); Vandergrift v. Oler, 19 Pa. D. & C. 360 (C.P. 1933); *Ex parte* Taylor, 110 Tex. 331, 220 S.W. 74 (1920) (discretionary); Hite v. Keene, 137 Wis. 625, 119 N.W. 303 (1909).

[3] People v. Rushworth, 294 Ill. 455, 128 N.E. 555 (1920).

[4] OHIO GEN. CODE § 11531 (1938). (Those listed are judge, justice or chancellor of any court of record, justice of peace, notary public, mayor or chief magistrate of any municipality, commission appointed by the governor of the state or any person authorized by a special commission from Ohio to take depositions either in the United States or in any foreign country, or a consular officer of the United States within his consular district.) See Gibson v. McArthur, 5 Ohio 329 (1832), where mayor of a municipality within the District of Columbia was held not to be an authorized officer of a "state" within the wording of a similar statute.

[5] Devine v. Detroit Trust Co., 52 Ohio App. 446, 3 N.E. 2d 1001 (1935) (Notice and service in Michigan was reviewed).

Authority to take testimony within Ohio is extended to officers or commissioners appointed by courts of other states, territories, or districts.[6] It is not apparent whether such statutes permit a party to a suit to initiate the process or whether he must petition the court in which the action is pending. No case is found in which initiation was by a party without aid of a court, but there is none in which such procedure was attacked. Manifestly, this may be done if testimony is to be taken in Ohio for use in Ohio courts.[7] Although certain officers deriving their powers from other jurisdictions are designated as capable of taking testimony within Ohio,[8] the provisions may not be restrictive and the party who wishes the deposition taken may apply to an officer who derives his authority from the state of Ohio without initial petition to the court.[9]

Neither is it clear whether depositions may be taken within Ohio for a cause pending in courts of a foreign country. The statute authorizing foreign deposition procedure contains the phrase, ". . . in an action, cause, or matter pending before any court or authority without this state." [10] Certainly, the grant of extra-territorial power is limited to an ". . . officer who derives his authority from the state, district or territory in which they are to be used." [11]

Where the procedure is to produce a deposition for use in Ohio courts, initiation does not require the assistance of a court, except where it is taken before a special commission; [12] issuance of subpoenas and notice to the adverse party are within the power of an authorized officer.[13] This power can compel production of books or documents under a subpoena *duces tecum*.[14] By another statute refusal to appear, refusal to be sworn, an unlawful refusal to produce books or documents, or to answer, or to subscribe a deposition

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[6] OHIO GEN. CODE § 11530 (1938); Limited to actions, causes or matters pending, by Section 11528.

[7] OHIO GEN. CODE §§ 11534, 11535 (1938); *In re* Rauh, 65 Ohio St. 128, 61 N.E. 701 (1901).

[8] OHIO GEN. CODE § 11530 (1938).

[9] OHIO GEN. CODE §§ 11529, 11530 (1938).

[10] OHIO GEN. CODE § 11528 (1938).

[11] OHIO GEN. CODE § 11530 (1938).

[12] OHIO GEN. CODE § 11534 (1938).

[13] OHIO GEN. CODE § 11502 (1938); Shaw v. Ohio Edison Installation Co., 9 Ohio Dec. Rep. 809 (Super. Ct. 1882). For criminal cases, application to court is required under Ohio General Code Section 13444-11. State v. Wing, 66 Ohio St. 407, 64 N.E. 514 (1902); Dickey v. Brokaw, 53 Ohio App. 141, 4 N.E. 2d 411 (1936). Such application is also necessary in a proceeding to perpetuate testimony under Ohio General Code Sections 12216 and 12217.

[14] *Ex parte* Bevan, 126 Ohio St. 126, 184 N.E. 393 (1933); *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906); *In re* Rauh, 65 Ohio St. 128, 61 N.E. 701 (1901).

may be punished by any officer who can require attendance.[15] The refusal to appear or the refusal to be sworn is unlawful by statute; [16] the unlawfulness of a refusal to answer, to produce documents, or to subscribe depends upon the basis of the refusal and its accuracy. There is no contempt of the latter category unless an order has been "lawfully" made by the officer and the witness refuses to obey the *order*.[17] It seems that the mere putting of a question with no demand by the officer for an answer will not form the basis of contempt for refusal or neglect to answer.[18] Where the witness refuses to answer on the ground of privilege and a commitment is made, a habeas corpus proceeding may be had to determine the legality of the claimed privilege. If the privilege was present, the commitment order is "unlawful." [19]

Apparently a recent decision [20] changed the attitude toward review of a commitment for a refusal based on materiality, competence, or relevance. The case of In re *Martin, Jr.*[21] categorically states that such issues cannot be raised in a habeas corpus proceeding, but only in the trial court when the deposition is offered in evidence. Inconsistent statements in prior decisions were distinguished by citing them in connection with questions of privilege, though such were not readily apparent in the cases.[22] A prior holding to the contrary was overruled and a different decision in the same case was reversed.[23] This overruling of Ex parte *Schoepf* [24] precludes the possibility of a distinction between depositions taken for use outside the state, as in the *Martin* case, and those for use in Ohio courts, as in the *Schoepf* case. There is no rule permitting a witness to object to questions because they call for immaterial, incompetent, or irrelevant testimony. This decision is compatible with the right of a party to exclude testimony on such grounds at the trial, where a more competent ruling can be made; the opposite

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[15] OHIO GEN. CODE § 11510 (1938).

[16] *Ibid.*

[17] Burnside v. Dewstoe, 9 Ohio Dec. Rep. 589 (C.P. 1886).

[18] *Ibid.*

[19] *Ex parte* Jennings, 60 Ohio St. 319, 54 N.E. 202 (1899); *semble. In re* Martin, Jr., 141 Ohio St. 87, 47 N.E. 2d 388 (1943), was distinguished on the basis of privilege; the privilege apparently being that disclosure would injure the business of the witness. *In re* Rauh, 65 Ohio St. 128, 61 N.E. 701 (1901).

[20] *In re* Martin, Jr., *supra* note 19, *overruling In re* Martin, Jr., 139 Ohio St. 609, 41 N.E. 2d 702 (1942).

[21] 141 Ohio St. 87, 47 N.E. 2d 388 (1943).

[22] *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906); *Ex parte* Jennings, 60 Ohio St. 319, 54 N.E. 262 (1899); See note 20 *supra.*

[23] *In re* Martin, Jr., 139 Ohio St. 609, 41 N.E. 2d 702 (1942); *Ex parte* Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906), syllabus 4.

[24] 74 Ohio St. 1, 77 N.E. 276 (1906).

rule might result in an isolated ruling unduly restricting a trial court, whether in a sister jurisdiction or in this state.

The deposition procedure has been used to obtain discovery [25] and to examine an adverse party "as if under cross-examination." [26] Concerning use of the deposition procedure by foreign parties, Ohio General Code Section 11528 states simply, "Depositions also may be taken when the testimony is required in an action, cause, or matter pending before any court or authority without this state." It might be argued that this would open cross-examination of the adversary or discovery to a party in an out-of-state suit. This contention cannot be made for perpetuation of testimony, because the statute regulating petitions for such process requires an allegation that the applicant is, or expects to be, a party to an action in a court *in this state,*[27] and the deposition statute requires a matter pending.[28]

Section 57 of the Restatement of Conflicts of Laws states the general rule that a state cannot exercise executive jurisdiction without its territorial limits. But Comment (b) under this section recognizes that a commission may operate without state limits and that the officer using such commission may administer oaths and take testimony.

The Uniform Foreign Depositions Act plainly permits officers acting under a commission to compel attendance and extends this grant to commissions or writs issuing out of foreign countries.[29] It is broad enough to authorize recognition of letters rogatory or of powers under a commission issued out of another jurisdiction. By reference to the phrase, ". . . or whenever upon notice or agreement it is required to take testimony of a witness or witnesses in this state . . .," it may be contended that application need not be made to the trial jurisdiction for authorization, but that parties on agreement may initiate by applying to authorized officers granted power under laws of the state where application is made. It is not clear whether the Act requires that an action, as distinguished from a special proceeding, be pending in another jurisdiction before the application may be made. The final phrase of Section 1 of the Act, ". . . [that] witnesses may be compelled to appear and testify in

[25] OHIO GEN. CODE § 11555 (1938).
[26] OHIO GEN. CODE § 11497 (1938).
[27] OHIO GEN. CODE § 12217 (1938).
[28] OHIO GEN. CODE § 11528 (1938).
[29] "Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness or witnesses in this state, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state." UNIFORM FOREIGN DEPOSITIONS ACT § 1; 9 UNIFORM LAWS ANN. 323 (1942).

the same manner and by the same process and proceedings as may be employed for the purpose of taking testimony in proceedings pending in this state," may be restricted to such a situation. It may be possible, however, to assert that other statutory procedures used within the state implement the Act.

In *Christ v. Superior Court*,[30] letters rogatory were issued from a Guatemalan court; the allegation was that the petitioner was *about to commence* an action in that court. The deposition procedure in California, the state of the petitioned court, permitted opening the procedure at any time after service in an action or after an issue of fact was raised in a special proceeding.[31] In addition to the Uniform Foreign Depositions Act,[32] the state had a statute permitting a party to an action or special proceeding in a court of a sister state to obtain testimony within California to be used in the action or proceeding.[33] In ordering recognition and execution of the letters, the court assumed that a special proceeding not unlike their statutory perpetuation process [34] was being had in Guatemala, and that such process, as a special proceeding, would satisfy both statutes.

A liberal and convenient procedure for taking depositions could be provided in Ohio by modification of the perpetuation statute and the enactment of the Uniform Foreign Depositions Act. With or without a presumption, the Uniform Act could embrace cross-examination of adverse parties, discovery, and perpetuation.

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[30] 211 Cal. 593, 296 Pac. 612 (1931).
[31] CAL. CODE CIV. PROC. ANN. § 2021 (1946).
[32] CAL. CODE CIV. PROC. ANN. § 2036a (1946).
[33] CAL. CODE CIV. PROC. ANN. § 2035 (1946).
[34] CAL. CODE CIV. PROC. ANN. § 2083 (1946).