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John Woodcock Jr.

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## LEGISLATION

### A DISCUSSION OF THE NEW PENNSYLVANIA RULES RELATING TO DEPOSITIONS AND DISCOVERY

"The law of discovery has been invested at times with unnecessary mystery."<sup>1</sup> The same may be said concerning the law of depositions. Even orderly discussions of the two topics often leave much to be desired.<sup>2</sup> The basic reason for the confusion rests in the fact that much of the law concerning depositions and discovery is found in statutes passed over the years by the various legislatures. With the emergence of the Federal Rules and the various state promulgations the subject has become clearer. The purpose of this article is to discuss the new rules of civil procedure governing depositions and discovery which become effective in Pennsylvania on June 1, 1951, and to attempt to tie in the more important rules which remain in effect.

#### *General Provisions*

Rule 4001 (a) states: "The rules of this chapter apply to any civil action or proceeding at law or in equity brought in or appealed to any court which is subject to these rules." This is most certainly broad enough to do away with the vast mass of court rules in each county dealing with the matters covered by these rules. The situation which existed prior to these rules was confusing at best. In Philadelphia, for instance, distance from the courthouse was no ground for the allowance of depositions.<sup>3</sup> In Lehigh and some other counties a deposition was permitted where the witness resided more than forty miles from the courthouse.<sup>4</sup> Uniformity throughout the state was not required by the Act of May 23, 1887, P.L. 158, § 8.<sup>5</sup> All that act required was that it be taken "in accordance with the laws of this commonwealth and the rules of the proper court." It is absolutely suspended by these new rules.

In Pennsylvania, during the time that an appeal is pending in the supreme court or the superior court "the record . . . shall be taken and considered to remain in the court from which such case may have been removed . . . so far as to enable the parties to such cases to enter rules and take out commissions for the purpose of taking depositions of witnesses in like manner and with like effect as if such case were still pending and undetermined . . ."<sup>6</sup> These depositions are good and regular for all purposes as if they had been taken at any time while the case was undetermined in the lower court. They may be read in evidence subject to the same restrictions

<sup>1</sup> Cardoza, J. in *Sinclair Refining Co. v. Jenkins Co.*, 289 U.S. 689, 77 Law. Ed. 1449 (1933).

<sup>2</sup> For instance see P. Amram and Flood's revised and enlarged edition of *D. Amram, PENNSYLVANIA COMMON PLEAS PRACTICE*, chapter ix, pp. 142-161, Philadelphia, Pa. (1948). Herein is contained an excellent discussion of the law on these subjects prior to the new rules, but one still is slightly in a haze after reading the chapter. Too many things were too indefinite.

<sup>3</sup> See Philadelphia Rule 4026 (b).

<sup>4</sup> See Lehigh County Rule 102 and also the Tioga County rules where the deposition could be taken of a witness if subpoenaed and more than fifty miles from the courthouse.

<sup>5</sup> 28 P.S. 5.

<sup>6</sup> Act of March 26, 1827, P.L. 131 § 1, 28 P.S. 2.

which would be imposed upon them in the lower court.<sup>7</sup> Since the action is for all purposes in the lower court, the procedure under the new rules will be applicable to such depositions. However, it must be remembered that when the appeal involves only a question of law, a deposition would be of no value. In *Drummond v. Parish et al.*<sup>8</sup> the question involved was the legal sufficiency of the defendant's answer. The plaintiff took a rule as of course to take depositions of witnesses out of the state. The defendant objected and the trial court held that in such a case the matter was entirely within the discretion of the trial court. Since this case was not at issue on the facts, the plaintiff was not entitled to take the depositions.

It should be noted that these rules apply to actions in equity and law. Furthermore, they are restricted to a proceeding "brought" in a court subject to these rules. They do not provide a method whereby testimony may be perpetuated. In order to do this one must still file a bill in equity, and then only where one is threatened with future disturbance of present possession or enjoyment of property or rights which cannot now be litigated will the relief be granted. The new rules do not broaden Pennsylvania practice in this respect.<sup>9</sup>

Rule 4001 (b) states: "As used in this chapter 'court', unless the context clearly indicates otherwise, means the court in which the action is pending." This rule seems clear enough. It does mean, however, that where one wishes to avail himself of the Act of March 26, 1827 the proper court will be the court appealed from, since the action, by the act, is still pending in that court.<sup>10</sup>

#### *Rules Relating to Depositions*

Rule 4002 states: If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions. This is a change in the law of Pennsylvania. Although under local rules depositions could be taken as of course in many instances, the formality of the proper procedure had to be followed. Under this rule, the deposition could now be taken in the office of one of the attorneys and his secretary could be a proper person to transcribe them. What is meant by "in any manner" is not too clear. Most likely the courts will require a legal manner at any rate.

This rule is identical with Rule 29 of the Federal Rules. It has been held that Rule 29 relates only to stipulations affecting the formalities of taking depositions, not to the circumstances under which they may be taken or to their use at trial.<sup>11</sup> Where the parties agreed to depositions before the answer was filed and later

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<sup>7</sup> Supra § 2, 28 P.S. 3.

<sup>8</sup> 23 D. & C. 594 (Pa. 1935).

<sup>9</sup> But see Federal Rule 27.

<sup>10</sup> See note 6.

<sup>11</sup> See generally Barron and Holtzoff, FEDERAL PRACTICE AND PROCEDURE, vol. 2, pp. 364-365 (1950); OHLINGER'S FEDERAL PRACTICE, vol. 3, p. 562 (1948); FEDERAL RULES DIGEST, vol. 2, p. 8 (1949), and MOORE'S FEDERAL PRACTICE, vol. 4 pp. 1971-72 (1950).

needed to subpoena a witness to require him to attend, the court refused the application for the subpoena, stating that under Rule 26 (a) the answer must first be filed so that the issues will be plain.<sup>12</sup> General stipulations as to the taking of depositions do not waive objections to competency or materiality. And where a deposition is taken under stipulation it is not evidence unless offered into evidence by one of the parties. If, without having been offered during the trial, it is erroneously included in the record, it will not be considered by the appellate court.<sup>13</sup> Since the wording of the Pennsylvania rule and the Federal rule is identical, these decisions will have some weight in Pennsylvania.

Rule 4003 deals with the right to take depositions and the notice required. A distinction is made between depositions which are to be used at trial in open court and depositions for use at a hearing. If the deposition is for use at trial and the witness resides within one hundred miles of the courthouse and is aged, infirm or going, his deposition may be taken by written interrogatories or by oral examination upon notice. This includes a witness who resides outside the Commonwealth but within one hundred miles of the courthouse. The deposition of any other witness may be taken providing he is more than one hundred miles from the courthouse or is outside the state by written interrogatories *upon notice* or by oral examination *by leave of court upon petition*. A deposition of *any* witness for use at a hearing upon a petition, motion, or rule may be taken *upon notice* by oral examination or written interrogatories.<sup>14</sup>

The petition required must set forth the grounds for the order prayed for, the name of the person before whom the deposition is to be taken, and the name and address of the person whose deposition is to be taken.<sup>15</sup> The petitioner must serve upon each party or his attorney of record a copy of the petition and of the proposed order and a notice stating that the petitioner will apply to the court, at a time not less than five days thereafter, for the order prayed for, at which time the adverse party may present his objections. No service is required nor need any notice be given to a defendant who was served by publication and has not appeared in the action.<sup>16</sup> The notice required for an oral examination where the witness is aged, infirm, or going, or where the deposition is to be used at a hearing upon a petition, motion, or rule must be in writing and given to each party or his attorney of record at least forty-eight hours before the deposition is to be taken. Once again no notice is required to be given to a defendant who was served by publication. The court may extend the time of notice or shorten it upon motion and cause shown by any party. The court may change the person before whom and the place where the deposition is to be taken.<sup>17</sup>

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<sup>12</sup> Application of Wisconsin Alumni Research Foundation, 4 F. R. D. 263 (1945).

<sup>13</sup> United States v. City of Brookhaven, 134 F.2d 442 (C. C. A. 5th 1943).

<sup>14</sup> Pa. R. C. P. 4003 (b).

<sup>15</sup> Pa. R. C. P. 4012 (a).

<sup>16</sup> Pa. R. C. P. 4012 (c).

<sup>17</sup> Pa. R. C. P. 4003 (c).

Where the deposition is to be taken by means of written interrogatories Rule 4004 sets out the procedure which must be followed. They must be filed with the prothonotary of the court and a copy must be served upon each party or his attorney of record. The party so served has ten days in which to file and serve his cross interrogatories. After this subsequent interrogatories may be filed, but the time is limited to five days. If no objection is taken within the time allowed for filing and serving, then all objections to the form of the interrogatories are waived. Thereafter copies of all the interrogatories are sent to the person designated to take the deposition. He is to take it promptly and "complete, certify and file the deposition with or send it by registered mail to the prothonotary, attaching thereto the interrogatories."<sup>18</sup> The prothonotary will then promptly give notice to all parties.

It is interesting to note in this respect that in the case of *Fisher & Porter Co. v. Porter*,<sup>19</sup> the court held that a witness who was classified as 1-A by his draft board was a "going" witness under the local rules. It is hoped that, under these new rules, the courts will take the latitude given to them and not restrict the new rules unreasonably. It is true that it is better if a witness appears in an action and testifies before the jury, for the jury often gains much from the demeanor of the witness. Still the end of justice is the truth, and where testimony exists it should be allowed if it will aid the jury in ascertaining the truth. It is really a balancing of the pros and cons, and today there is more reason for allowing such testimony than there used to be. The strictly "adversary system" of the old common law is slowly giving way to an approach which seeks the truth and not the ability of the contestants. Valid claims are entitled to the aid of the court.

Where the deposition is to be taken by oral examination more than 100 miles from the courthouse, the court, upon petition, shall grant an order imposing such limitations, including provisions for the payment of expenses and counsel fees, as the court shall deem proper.<sup>20</sup> The order of court shall also define the scope of the deposition.<sup>21</sup> Where a deposition is taken under these rules only certain persons are proper people before whom the deposition may be taken. In the United States it "shall be taken before an officer authorized to administer oaths by the laws of the United States or of this Commonwealth or of the place where the examination is held."<sup>22</sup> In a foreign country depositions may be taken before any United States official who is authorized to administer oaths by the law of the United States, or such person appointed by commission or under letters rogatory. However, a commission or letters rogatory will issue only when necessary and on petition under such terms and directions as are appropriate.<sup>23</sup> "No deposition shall

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<sup>18</sup> Pa. R. C. P. 4004 (c).

<sup>19</sup> 60 Montg. 233 (Pa. 1944).

<sup>20</sup> Pa. R. C. P. 4008.

<sup>21</sup> Pa. R. C. P. 4013.

<sup>22</sup> Pa. R. C. P. 4015 (a).

<sup>23</sup> Pa. R. C. P. 4015 (b).

be taken before a person who is a relative, employee or attorney of any of the parties, or who is a relative or employee of such attorney, or who is financially interested in the action."<sup>24</sup> This rule is the same as the Federal rule.<sup>25</sup> It is possible that the courts will impose these restrictions upon depositions taken under stipulation. It would seem that the former rule would be broader than this rule, but one can never tell. It may be that the court will require all depositions to be taken before a person who qualifies under this rule, regardless of the stipulations made by the parties. This would not be a liberal interpretation of the rules, but it will, most likely, be the one taken. After all, if the parties agree to take the deposition before the secretary of one of the attorneys and there is no one there to administer oaths and this is known and made clear to the parties, what possible harm can come from allowing such a procedure? It is likely, however, that this rule will restrict the agreements made under rule 4002.

However, it must be noted that under Rule 4016 (a) an objection to taking a deposition because of the disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be known with reasonable diligence. Where the parties agree, then, the objection to the person to take the deposition must be made before the deposition is taken. But it would seem better to hold that in such a case, the agreement is binding if the facts are known.

Objections to the competency of a witness, or to the competency, relevancy or materiality of the testimony are not waived by failure to make them before or during the deposition. This is true except in the case where the objection was known to the party and could have been obviated or removed if made then.<sup>26</sup> The same thing is true of errors or irregularities which occur during the oral examination in the nature or the form of questions asked and answers given, the oath or affirmation, the conduct of parties at the questioning. The same is true of any other irregularity. If prompt objection before or during the deposition would have removed or cured the error or would have obviated it, then such objection is waived by a failure to object. If such objection would not have cured the error, it may later by objected to.<sup>27</sup>

"Upon the request of a commissioner or a party, the court in which the action is pending or the court of common pleas of the county within this Commonwealth in which the deposition is to be taken shall issue a subpoena to testify."<sup>28</sup> This rule gives power to the commissioner and gives the parties an assurance that they will be able to compel the witnesses to attend. For the court may, on peti-

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<sup>24</sup> Pa. R. C. P. 4015 (c).

<sup>25</sup> See Rule 28 (c).

<sup>26</sup> Pa. R. C. P. 4016 (b).

<sup>27</sup> Pa. R. C. P. 4017 (c).

<sup>28</sup> Pa. R. C. P. 4018.

tion, make an appropriate order if a party or an officer or director of a party, after being subpoenaed, wilfully fails to appear before the person who is to take his deposition, or *induces any witness not to appear*.<sup>29</sup> And where a deponent refuses to be sworn or to answer any question, the deposition is completed on other matters or adjourned, as the proponent of the question prefers. Then, after giving notice to all parties, the proponent may apply, in the action county if the deposition is in Pennsylvania, or in the county where the deposition is being taken for an order compelling the witness to be sworn and to answer under penalty of contempt. If the court finds that the refusal was without justification the deponent or anyone inducing him not to answer or both of them will be liable for the proponent's reasonable costs in obtaining the order, including attorney's fees. The same applies in reverse where the court refuses the application and finds that it was made without substantial justification.<sup>30</sup> Furthermore, where a party or an officer or director of a party refuses or induces a person to refuse to obey the order of court compelling him to answer the question proposed, the court may make an appropriate order in the same manner as they could where one of the said persons gets a witness to refuse to appear.<sup>31</sup>

An appropriate order may include an order that the matters regarding which the questions were asked shall be taken to be established for the purposes of the action in accord with the claim of the party obtaining the order, an order refusing the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing into evidence such testimony, an order striking out pleadings or parts thereof, or staying the proceedings, or entering a judgment of non pros or by default, or an order imposing punishment for contempt.

These rules are strict and they impose a heavy burden on a party if he attempts to fix things. However, a party can stay out of trouble by merely playing fair, and these rules should produce a healthy atmosphere.

It should be noted at this point that the new rules require the subpoena to issue out of a court. Under the Act of February 26, 1831, a commissioner could issue a subpoena to take a deposition and could issue an attachment where there was a failure to appear or a refusal to testify.<sup>32</sup> The constitutionality of that act, at least so far as it related to the issuance of subpoenas and attachments, was never questioned, but it was of doubtful propriety. It is true that a subpoena *ad testificandum* need only issue out of a legal authority, but still the courts felt that it would be better to have such matters issued by themselves. The fact that the parts of this act giving such powers to commissioners is specifically suspended by these new rules is indicative of that attitude. It must also be

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<sup>29</sup> Pa. R. C. P. 4019 (a,2).

<sup>30</sup> Pa. R. C. P. 4019 (b).

<sup>31</sup> Pa. R. C. P. 4019 (a,3).

<sup>32</sup> P.L. 92, No. 60, 28 P.S. 351-354; note that § § 1 to 4 of the act have been suspended by these rules.

noted that although such a subpoena will issue into any county it must be applied for either in the county in which the action is pending or in the county where the deposition is being taken. These new rules have teeth in them and it is really no burden for the commissioner to apply to the court for the subpoena since that is the court's work.

The person before whom the deposition is taken shall put the witness on oath or affirmation, and shall himself, or under his direction, record the testimony; it shall then be transcribed. Any objection to the manner of preparation or the correctness of the transcript are waived unless filed in writing promptly after the grounds become known or could have become known. The transcription is then to be given to the witness and shall be read to or by him and signed by him. Any changes which the witness wishes to make as to the form or content may be made, and a statement of the reasons for the change should be noted. The witness need not sign if all of the parties present including the witness waive the signing, if the witness is too ill to sign, or cannot be found. The witness may refuse to sign. In all of these cases the deposition may be used as fully as though signed as long as the reasons appear for the lack of signature. Where the witness refuses to sign the reasons for the refusal must be noted and if they are strong enough the court may require the rejection of the deposition in whole or in part.

The person who takes the deposition then has to certify on the deposition that the witness was sworn by him and that it is a true record of his testimony. It is then sealed in an envelope which is endorsed with the caption of the action and the name of the deponent. Then it is to be promptly filed with the court or sent by registered mail to the prothonotary thereof for filing.<sup>33</sup>

The question of whether or not an unsigned deposition can be received into testimony is settled by these rules. Prior to this time the courts wavered back and forth on the problem, setting up different standards. In *Zehner v. Leigh Coal & Nav. Co.*,<sup>34</sup> the supreme court disallowed the using of an unsigned deposition. There were additional circumstances in the case, but the chief point revolved about this issue. In *Lambert v. Security Mutual Fire Ins. Co.*,<sup>35</sup> the superior court allowed an unsigned deposition where the deposition showed on its face that the witness was sworn. The court stated that failure to sign was an irregularity which must be timely objected to or waived. Still one would not feel sure that an unsigned deposition which did not show on its face that the witness was sworn would be of any value. A knowledge of the present rules by the one taking the deposition will obviate any such disputes. It would be a good idea for an attorney to instruct the person selected as to just which he should

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<sup>33</sup> Pa. R. C. P. 4017.

<sup>34</sup> 187 Pa. 487, 41 A. 464 (1898).

<sup>35</sup> 58 Pa. Super. 624 (1915).



do in case the witness did not sign. The rules are now lucid and, if complied with, will be a great aid in clearing up a problem which has been kicked around too long in the lower courts.

A party who has been served with notice of the taking of an oral deposition need not participate. Instead he may transmit written interrogatories to the person taking the deposition and that person shall propound them to the witness and record the answers verbatim.<sup>86</sup> However, where the oral examination is to take place more than one hundred miles from the courthouse he may petition the court and the court shall order such limitations, including provisions for the payment of expenses and counsel fees, as the court shall deem proper.<sup>87</sup> These rules save the party from being put to unreasonable expense in attending the oral examination, for, even though the court may not deem the payment of expenses proper, the remedy of sending the written interrogatories still exists.

If the parties want copies of the deposition, they are to be furnished, upon the payment of reasonable charges, by the person before whom the deposition was taken. The deponent has the same privilege.<sup>88</sup>

At trial any part of the deposition which is admissible under the rules of evidence may be used against a party who was present at, or who had notice of, the taking of the deposition in accordance with any of the provisions which follow. It may be used for the purpose of contradicting or impeaching the testimony of a deponent as a witness. Of course, in this instance the deposition is no longer evidence itself, but merely affects the credibility of the witness. At least this is what the law says, but, of course, its effect on the jury is greater than that. A deposition of a party or any witness who at the time of the taking of the deposition was an officer or director of a party may be used by an adverse party for *any* purpose. Here, then, the statement may be used not only to discredit the witness, but may also be used as conflicting evidence. It undoubtedly would have a dual effect at any rate, but this rule does affect the place and time when such deposition may be used. A deposition of a witness may be used at any time by any party if the witness is dead, or at a greater distance than one hundred miles from the courthouse or outside the Commonwealth unless the absence was procured by the party offering the deposition, or is sick, aged, infirm, or imprisoned, and therefore unable to attend, or is a witness that the party offering deposition has been unable to procure by subpoena. In addition, upon application and notice that such exceptional circumstances exist as to make it desirable in the interests of justice to use the deposition instead of the testimony in open court, the court may allow the deposition to be used.

Where only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all relevant parts of it. Any party may introduce

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<sup>86</sup> Pa. R. C. P. 4017 (e).

<sup>87</sup> Pa. R. C. P. 4008.

<sup>88</sup> Pa. R. C. P. 4017 (f).

the remainder of the deposition.<sup>39</sup> It will be noted that a party who has been joined as an additional defendant should have this right where the defendant introduces a part of a deposition. He is such an adverse party.

These rules relating to the procedure at trial are very liberal. It is not possible to compare them with the old rules, since each county regulated the procedure to be followed. It is hoped that these rules will be given liberal treatment by the courts so that valid claims and valid defenses can be used to the greatest advantage. The courts have been reluctant in the past, but certainly these liberal rules should be evidence of intention of Pennsylvania to keep pace with the trend away from secrecy.

Furthermore, it is provided that substitution of parties does not affect the right to use depositions previously taken. When an action is dismissed, and another involving the same subject, the same parties or their representatives or successors in interest is brought, all depositions lawfully taken and duly filed in the former action may be used.<sup>40</sup> This most certainly includes those taken by stipulation; any other interpretation would be stretching the point a little too far. This rule is meant to replace the Act of March 28, 1814,<sup>41</sup> and that act is suspended by these rules. Under that act any deposition taken which could be read in evidence on the trial of any cause "shall be allowed to be read in evidence in any subsequent cause wherein the same matter shall be in dispute between the same parties or persons, their heirs, executors, administrators or assigns." It is at least worthwhile to point out that the act is broader than the present rule. When one considers the principle of *res judicata* the question may be moot as to how much broader the old act was, but, at least in language, it did encompass a larger scope.

The new rules do not suspend § § 1 to 3 of the Uniform Foreign Depositions Act.<sup>42</sup> That act states that "Whenever any mandate, writ or commission is issued out of any court of record of the United States, . . . or of any state of the United States or of any foreign country or of any jurisdiction outside of Pennsylvania . . . witnesses may be compelled to appear and testify by the *same process and proceedings* . . . employed . . . in proceedings pending in this state." Nor do they suspend the Act of April 8, 1833,<sup>43</sup> § § 18 to 21, which authorize any court of common pleas to afford its aid where it has received letters rogatory from any state or federal court. It may subpoena the witnesses to appear before it or the commission upon the penalty of a fine not to exceed \$100. The act further allows the attachment of a defaulting witness and gives the injured party the same rights against person subpoenaed that he had in this state, and a wit-

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<sup>39</sup> Pa. R. C. P. 4020 (a,3).

<sup>40</sup> Pa. R. C. P. 4020 (b).

<sup>41</sup> 6 Sm. L. 208 1, 28 P.S. 1.

<sup>42</sup> Act of May 5, 1921, P.L. 374, No. 175, 28 P.S. 31, 32, 33.

<sup>43</sup> P.L. 131, 9 Sm. L. 308, Ch. 5936, 28 P.S. 2, 3.

ness who refuses to testify is under the same penalty that he would be under according to the rules of this state.

In *Universal Moulded Products Corp. v. E. I. duPont de Nemours & Co.*<sup>44</sup> it was held that the Uniform Act does not authorize the taking of testimony to be presented in a suit in another state prior to trial and joinder of issue where the witness is not aged, infirm, or going, and there is no present cogent reason why the testimony may not be taken at trial. As a matter of fact the act has been rendered useless by the interpretation given it by our courts.<sup>45</sup> It seems obvious that under the new rules this act will become vital, for these new rules are the processes and proceedings employed in Pennsylvania. The courts should no longer talk about a general inquisition of our citizens but should apply the procedure of the new rules to cases arising under the Uniform Foreign Depositions Act. The Act of 1833 has been held to apply only to civil cases, and, as a general rule a commission is used. The courts will interfere only where the commission proves ineffective.<sup>46</sup> It is to be used where letters rogatory are sent from the other jurisdiction. The commission should then issue out of the Pennsylvania court and should be under the present rules. It is to be hoped that the present rules will help break down the resistance which Pennsylvania courts have shown to foreign commissions and the lack of interest they have displayed in letters rogatory received from other jurisdictions.

The new rules do not suspend, nor do they mention the Act of May 23, 1947.<sup>47</sup> That act provides that whenever the superintendent, or any physician or psychiatrist of any State-owned mental hospital or manager of a veterans administration hospital is requested to appear and testify, his deposition may be used in his stead unless the court by special order directs that he appear. Since this act is not inconsistent with the rules, but merely provides another type of witness whose deposition may be used and allows the court to compel his appearance, no reason is present for its being suspended under the catch-all suspender in rule 4025. Since such people are very hard to get to testify due to the pressure of their business, this act is one which should be kept in mind.

Sections 1 to 3 of the Act of June 25, 1895,<sup>48</sup> are suspended by these new rules. This act provided for the taking of testimony of witnesses who resided outside of Pennsylvania by deposition. Local rules governed except that a notice of twenty days was required, and leave of court had to be had before the rule to take the testimony was entered in the prothonotary's office. The Act of June 8, 1911, § 1<sup>49</sup> is also suspended by these new rules. This act provided for the

<sup>44</sup> 62 D. & C. 543 (Pa. 1949).

<sup>45</sup> See *Weil v. Heinz*, 6 D. & C. 301 (Pa. 1926) and *Knitting Mills, Inc. v. Minowitz*, 53 D. & C. 399 (Pa. 1945) for other cases illustrating the view taken in Pennsylvania.

<sup>46</sup> See *Bible House v. Gray*, 15 W. N. C. 271 (Pa. 1884).

<sup>47</sup> P.L. 293 as amended by the Act of May 17, 1949, P.L. 1409 § 1, 28 P.S. 10.

<sup>48</sup> P.L. 279, 28 P.S. 6, 7, 8.

<sup>49</sup> P.L. 709, 28 P.S. 9.

oral examination of non-resident witnesses. The cases which arose under these two acts, however, may have some bearing upon the interpretation of the new rules. For instance, in *Glaser v. Phila. Trans. Co.*,<sup>50</sup> the plaintiff, a non-resident, wanted to take his own testimony since he was going to California. The court stated that if the issues were properly limited such an application would be allowed, but here, where the issue of negligence as well as the issue of damages was involved, the case was not so limited.

These new rules were sorely needed in Pennsylvania. The taking of depositions is necessary in many actions. The fact that there were sixty-seven different sets of rules in Pennsylvania as to the manner and the propriety of depositions is alone a strong reason for the rules. The rules are not as broad as the federal rules on the same subject, but then Pennsylvania has retained fact pleading under its procedural rules and perhaps, due to this, the parties do not need depositions as much as they would under a notice system of pleading. However, it does seem that something similar to rule 27 of the Federal rules allowing depositions before the action in certain limited instances would have been worthwhile.

#### *Rules Relating to Discovery*

Before beginning a discussion of the new rules relating to discovery, a brief summary of the laws which remain in effect seems essential here. The Act of February 27, 1798 provided that the supreme court, and the courts of the common pleas in this state, shall have the power, in any action pending before them, on motion, and upon good and sufficient cause shown, by affidavit or affirmation, and due notice thereof being given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue. Failure to produce gave the court a right to give judgment for the defendant as in cases of non-suit or for the plaintiff by default insofar as the books or writings were needed for the plaintiff's case.<sup>51</sup> This section of that act is not suspended by these new rules.

In *Wright v. Crane*,<sup>52</sup> the court held that this act gave them power to compel the production of documents prior to trial. And in that case the defendant, having failed to satisfy the court that he could not produce the writings, had a default judgment entered against him. This case was followed by the case of *Arrot v. Pratt*.<sup>53</sup> Once again pre-trial discovery was being sought. Once again it was allowed. The court here stated that the act was broad enough to cover the matters to be discovered. It must be noticed that this latter decision followed the Act of June 16, 1836;<sup>54</sup> however, that act was not mentioned and the

<sup>50</sup> 42 D. & C. 582 (Pa. 1941); see also *Ohlweiler v. Ohweiler* 72 Pa. Super. 518 (1919) for a unique application of this act.

<sup>51</sup> 3 Sm. L. 303; 28 P.S. 61.

<sup>52</sup> 13 S. & R. 447 (Pa. 1825).

<sup>53</sup> 2 Wh. 566 (Pa. 1837).

<sup>54</sup> P.L. 784, 17 P.S. 282, giving equity jurisdiction to the courts of common pleas of Philadelphia County in matters relating to discovery.

former act was relied on. Then came *Schmitt's Appeal*<sup>55</sup> where pre-trial discovery was allowed and no cases or statutes were cited by the court. The winning party, however, relied upon the two cases cited above in addition to some others. During this time the courts were mixing things up even more. As a result this act is no longer available for pre-trial discovery. Its use must be limited to the production of books and writings during trial.<sup>56</sup> You cannot, for instance, require the production of an x-ray at trial under this act.<sup>57</sup> Nor can you compel the production of a book which would subject the party producing it to a penalty.<sup>58</sup> The usual reason given for this strict interpretation is that the act is highly penal in its effect, and therefore must be used only when the proper situation presents itself. This act is not suspended by the new rules and it remains a powerful weapon in the hands of the parties who are able to avail themselves of it. It should also be noted that the common law remedy of notice to produce is still available where a party has secondary evidence, as well as subpoena decus tecum for the production of documents at trial.

Nor is the Act of June 16, 1836 suspended.<sup>59</sup> Taken in conjunction with the Act of February 14, 1857 which is not suspended either, courts of common pleas have besides their regular powers the power of the courts of chancery so far as relates to the discovery of facts material to a just determination of issues, and other questions arising or depending in the said courts.<sup>60</sup> It would seem to to any casual observer that this act is clear and simple; that no longer would one be required to file a bill in equity in order to have discovery. So far as the inspection of property was concerned, it was usually allowed by the law courts.<sup>61</sup> Of course one can find cases to the contrary, but Pennsylvania was one state where the law courts exercising the powers of a court of equity did grant an inspection of the property of the defendant in a negligence case.<sup>62</sup> The cases, however, mixed in the Act of 1798. Many courts finally reached the place where there could be no discovery on the law side and the only proper procedure was to file a bill in equity. Since these two remedies still exist, it is worthwhile to look at some of the decisions which were based either on the act or on a bill of discovery and to see the confusion which existed. It has been stated that a rule to produce may be obtained:

<sup>55</sup> 231 Pa. 473, 80 A. 980 (1911).

<sup>56</sup> *Whetsel v. Shaw*, 343 Pa. 182, 22 A.2d 751 (1941); *Bivens v. Standard Terry Mills*, 63 Montg. 60, 60 York 204 (Pa. 1947).

<sup>57</sup> See *Whetsel* case note 56.

<sup>58</sup> *Moelling v. Lehigh Coal and Navigation Co.*, 9 Phila. 223 (Pa. 1874).

<sup>59</sup> P.L. 784, 17 P.S. 282.

<sup>60</sup> P.L. 39, 17 P.S. 283.

<sup>61</sup> See *Hawk v. Bickford Fire Co.*, 42 C. C. 635 (Pa. 1914); *Richardson v. Del., Lack., & Western R. R. Co.*, 21 Dist. R. 1122 (Pa. 1912). For a strained application of this idea see *Heath v. Walton & Co.*, 9 Dist. R. 206 (Pa. 1900).

<sup>62</sup> See the notes in 33 A. L. R. 16 and 13 A. L. R. 2d 657 wherein it is stated, "The theory of the inherent power of the court, or at least of a court having equity powers is largely a modern one."

- (1) Where one party relies upon an instrument in the custody of another which is necessary to his case, and in which he has an interest entitling him to inspection;
- (2) to enable a party to declare or defend upon a contract to which he is a party and which is in the possession of the other party thereto;
- (3) where a relation of agency exists between the parties, which gives both an interest in the accounts;
- (4) or where a signature is desired to be proved by a witness whose deposition must be taken before trial.<sup>63</sup>

There are cases supporting these propositions. For instance, in *Pizo v. Equitable Life Assurance Co.*,<sup>64</sup> it was held that in an action ex contractu where there is but one copy of the contract, then the court of common pleas upon rule may allow discovery, and in *Sork et al v. Trevor Dunham, Inc.*,<sup>65</sup> the court stated that where the defendant has in his possession papers or documents, the inspection of which is necessary in order to enable the plaintiff to declare, the court will grant a rule upon the defendant to produce the same in open court for that purpose. However, one must take into account rather recent cases such as *Weil v. Heinz*<sup>66</sup> where a commission had issued out of New York and had requested the defendant to produce certain books. The court held that the right to the production of the books rested upon the availability of that proceeding in Pennsylvania. They denied the procurement, saying that the only remedy available for the production of a writing in advance of trial, in aid either of the pleadings or proofs, is in equity by a bill of discovery. The only possible grounds for such a decision would be the fact that the act only gave common pleas the rights equity had at the time and did not extend it to the power given under equity rule 35. For that rule states that after a case has been duly commenced, the court, on cause shown, may order the defendant to produce and permit plaintiff to make a copy of any books or papers in the defendant's possession or under his control, which are necessary to enable the plaintiff to prepare his bill. The same right is given to the defendant by rule 53. However, the equity courts had this as an inherent power before these rules were promulgated.<sup>67</sup> In spite of this the recent trend in the lower courts is to deny discovery at law and send the plaintiff or defendant into equity to get relief by means of a bill of discovery in aid of an action at law.<sup>68</sup>

<sup>63</sup> 5 STANDARD PA. PRACTICE, 474, § 634.

<sup>64</sup> 12 D. R. 51 (Pa. 1902).

<sup>65</sup> 14 D. & C. 526 (Pa. 1930).

<sup>66</sup> 6 D. & C. 301 (Pa. 1924).

<sup>67</sup> For instance, see *Dock v. Dock*, 180 Pa. 14, 36 A. 411 (1897), where the plaintiff was allowed discovery as to some letters in the possession of the defendant.

<sup>68</sup> *Egan v. Plotnick*, 51 D. & C. 68 (Pa. 1944); *Shoemaker & Busch, Inc. v. George F. Lee, Inc.*, 65 D. & C. 146 (Pa. 1947). In the latter case the court stated, "We are satisfied that in a suit in assumpsit . . . there is no doubt that under the Act of February 27, 1798, or at common law, there is no authority which will support an order permitting the defendant to examine the plaintiff's books and records to enable the defendant to prepare an affidavit of defense." Query: How about the Act of Feb. 14, 1857?

A bill of discovery in aid of an action at law will issue either in assumpsit or in trespass.<sup>69</sup> It may be used to discover at least the things set out above in rule 35, and other matters such as admissions as to certain items. As has been said,

"A bill of discovery in aid of an action at law is an equitable remedy to enable a litigant to obtain, prior to trial, such information as is in the exclusive possession of the adverse party and is necessary to the establishment of the complainant's case. It cannot be sustained to discover matters whereof the complainant has the same means of information as the defendant."<sup>70</sup>

An order dismissing preliminary objections to the bill is interlocutory and may not be appealed.<sup>71</sup> Where a bill is had the defendant may not deny the truth of the principal fact upon which is based the plaintiff's right to recover, and to decline to answer as to matters tending to prove the truth of the fact so denied; he must make discovery as to all matters which tend to prove the plaintiff's case.<sup>72</sup> A long period of delay will be a sufficient reason for the denial of the bill.<sup>73</sup> However, Pa. R. C. P. 212 which provides for pre-trial conference does not supply such a full, complete and adequate remedy as to oust the power of equity to order discovery where there is nothing to indicate that pre-trial conferences are intended to displace the bill of discovery. Rule 212 does not provide for the compulsory disclosure of evidence by the opposing party under oath which is one of the essentials of discovery.<sup>74</sup> It must be noted, however, that since the new rules apply to equity as well as to law, and are of larger scope than the old time discovery, they will control where an action has been started. In one respect the old method of a bill of discovery in the aid of an action at law was cumbersome. The party seeking the aid had to have a case; therefore equity had to inquire into that; of course their finding was not binding on the trial court, but actually it might have had some weight. Then, too, equity allowed all matters to be discovered as long as they were connected, even though by a weak link. The law court had to determine which were relevant.<sup>75</sup> Under the new rules discovery is had in the court in which the action is pending.

The new rules are a vast improvement. Under the old law, as the cases above cited show, there was little uniformity. It is hoped, at any rate, that the reason for not suspending the act giving equity powers in matters relating to discovery to the common pleas was to retain the possibility of common pleas granting dis-

<sup>69</sup> *Lesser v. Henry*, 50 Pa. Super. 404 (1912); *Reed v. The Farmers National Bank of Watontown et al.*, 63 D. & C. 591 (Pa. 1948).

<sup>70</sup> *Meltzer v. Kushin et al.*, 342 Pa. 84, 86, 20 A.2d 189 (1941).

<sup>71</sup> *Boilinger v. West Penn Power Co.*, 97 P. L. J. 42 (Pa. 1949).

<sup>72</sup> *Lesser v. Henry*, 50 Pa. Super. 440 (1912); *Bain v. Galdey*, 35 Pa. 51 (1860).

<sup>73</sup> *Meltzer v. Kushin et al.*, 342 Pa. 84, 20 A.2d 189 (1941).

<sup>74</sup> *People's City Bank v. John Hancock Mutual Life Insurance Co.*, 353 Pa. 123, 44 A.2d 514, 161 A. L. R. 1143 (1945). But see *Abernathy v. Pittsburgh Press Co.*, 47 D. & C. 570 (Pa. 1943) where it was held that a subpoena duces tecum may be properly employed to require the production of documentary evidence before a pre-trial conference under Pa. R. C. P. 212.

<sup>75</sup> *Reed v. The Farmers Nat'l. Bank of Watontown et al.*, 63 D. & C. 591 (Pa. 1948).

covery before any suit is instituted. A bill of discovery may be used for that purpose. All discovery after an action is brought should be restricted to the court in which the action is pending and to the procedure under the new rules. Furthermore, in order to grant the extraordinary relief given by these rules, the common pleas needs equity powers.

Rule 4005 allows any party, on petition, to serve written interrogatories approved by the court on the adverse party. Their purpose is to be the discovery of facts, including the existence and location of tangible things. The party so served is to file answers within twenty days after receiving them and the order of court allowing them.<sup>76</sup> The petition under this rule shall state the grounds for the order prayed for and a copy of the interrogatories shall be attached to the petition. The petition must be served upon the adverse party with a notice stating that the petitioner will apply to the court not less than five days thereafter for the order. At that time the adverse party may appear and present his objections. No notice is needed when the adverse party has been served by publication and has not appeared in the action.<sup>77</sup> If the party wilfully fails to file an answer or a sufficient answer to the interrogatories, the court may make an order that the matters regarding which the questions were asked shall be taken to be established for the purposes of the action, or an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing into evidence designated documents or things; or an order striking out pleadings, or staying further proceedings until the order is obeyed, or entering a judgment of non-pros or by default against the disobedient party; or an order imposing punishment for contempt.<sup>78</sup>

This is a new remedy at common pleas. Before these rules equity courts had this power, but no cases have been found where a court of common pleas was able to issue such an order upon petition.<sup>79</sup> However, it will be highly useful and should be used freely by the parties. It will help to simplify the issues and the courts should be liberal in allowing interrogatories of this type to include reasonable questions. Under such rules a party cannot keep back choice facts, and a party will be able to prepare his case without fear of hidden facts.

Rule 4007 states that the court upon petition may allow any party to discover the identity and whereabouts of witnesses. Furthermore, the court on petition may allow the taking of depositions orally or by written interrogatories which have been approved by the court to enable any party to discover facts, including the existence and location of tangible things.<sup>80</sup> The purpose here is of course discovery and not evidence, but the failure to answer would subject the party so fail-

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<sup>76</sup> Pa. R. C. P. 4006.

<sup>77</sup> Pa. R. C. P. 4012.

<sup>78</sup> Pa. R. C. P. 4019.

<sup>79</sup> *Compton v. International Harvester Co.*, 297 Pa. 462, 147 A. 93 (1929).

<sup>80</sup> Pa. R. C. P. 4007 (b).



ing to the same penalties which would attach if he had failed to answer under a deposition taken for the purpose of evidence. Also the subpoena could be used in such a case. Where this deposition is to take place more than one hundred miles from the courthouse then the court may grant an order imposing such limitations as it deems proper. It should also be remembered that the adverse party could send interrogatories to the person taking the deposition. Once again these rules are liberal and will greatly aid the party taking advantage of them.

There is a right to inspection provided for under the new rules. Rule 4009 states that the court may, on the petition of a party, order a party to produce and permit the inspection, including the copying and photographing, by or on the behalf of the petitioner, of designated tangible things, including documents, papers, books, accounts, letters, photographs and objects, which are in his possession, custody or control; or order any party to permit entry upon designated land or other property in his possession and control for the purpose of inspection, including measuring and photographing the property or any designated object or operation thereon. The petition required must set forth the grounds for the order prayed for, the name of the person to make the inspection and a description and the location of the land or tangible things to be inspected. This petition must be served with notice stating that the petitioner will apply to the court at a time not less than five days thereafter for the order; at this time the party served may present his objections. A party served by publication who has not appeared need not be served.<sup>81</sup> If a party fails, after the order, to produce the object requested or permit the entry on his property, the court may make an order that the character or description of the thing or land, or the contents of the paper shall be taken to be established in accord with the claim of the party obtaining the order; or an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing into evidence designated documents, things or testimony; or an order striking out part of a pleading or all of it or entering a judgment of non pros or by default; or an order imposing punishment for contempt.<sup>82</sup> It is true that all of these things could have been discovered under prior practice, at least in some counties. The uniformity which shall arise as a result of these rules will be valuable, and the remedies afforded against the defaulting party, although severe, are not unreasonable, since he is given a chance to object. Furthermore, a compliance with the order of the court is all that is required.

The court, on petition of a party, may order a party to submit to a physical or mental examination by a physician when his physical or mental condition is in controversy.<sup>83</sup> The petition, in this case, must set forth the grounds for the order prayed for, the name of the physician to make the examination, and the name

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<sup>81</sup> Pa. R. C. P. 4012.

<sup>82</sup> Pa. R. C. P. 4019.

<sup>83</sup> Pa. R. C. P. 4010.

and address of the party who is to submit to the physical or mental examination. The same provisions for notice are required as above.<sup>84</sup> The court may on petition make an order, if a party refuses to obey an order of court requiring him to submit to a physical or mental examination, that the facts be such as the claim of the party obtaining the order; or an order prohibiting the disobedient party from introducing evidence of physical or mental condition, or an order striking out pleadings or entering judgment of non pros or default. There is no contempt where a party refuses an order to submit to a physical examination.<sup>85</sup>

An order requiring the other party to submit to a physical examination was allowed in common pleas before these rules.<sup>86</sup> However, a refusal in such a case usually resulted in a staying of the proceedings before the case could proceed where the plaintiff was the one who refused.<sup>87</sup> Under prior rules a severe limitation was imposed upon this right respecting the scope of the examination. For instance, a blood test was refused, due to the fact that a needle had to be injected into the party.<sup>88</sup> It has also been held that a party should not be subjected to hospitalization for the purpose of examination.<sup>89</sup> These restrictions will, of course, still be imposed, but it is hoped that the courts will try to keep pace with medical science and not drag several centuries behind it.

The order of the court shall define the scope of the discovery, examination of the physical or mental condition of the party, or of the inspection of land or tangible things and impose such limitations as the court deems proper, including the payment of reasonable expenses and counsel fees where the examination or discovery is to take place more than one hundred miles from the courthouse.<sup>90</sup> However, and this is important, no inspection or discovery is permitted if sought in bad faith; or if it causes unreasonable annoyance, expense or oppression to the deponent or any person or party, or if it would disclose facts or the existence or location of tangible things, other than witnesses, which are not relevant and material, are not competent or admissible as evidence, are known to the petitioner, or the means of obtaining knowledge of which he can be reasonably expected to have, or are not necessary to prepare the pleadings or prove a prima facie claim or defense; or if it relates to matters which are privileged or would disclose a secret process, development or research; or if it would disclose the existence or location or reports, etc., made or secured by any person or party in anticipation of litigation or in the preparation for trial or would obtain any such thing from a party or his insurer, or attorney or agent of either, other than

<sup>84</sup> See note 81.

<sup>85</sup> Pa. R. C. P. 4019 (e,4).

<sup>86</sup> *Myers v. Travelers Ins. Co.*, 353 Pa. 523; 46 A.2d 224 (1946); See 84 U. OF PA. L. REV. 1001 (1936) for a discussion of this topic embracing all states. See 44 DICK. L. REV. 168 involving criminal cases in Pa. In this connection also consult 115 A. L. R. 168 and 163 A. L. R. 919.

<sup>87</sup> *Cohen v. Phila. R. T. Co.*, 250 Pa. 15, 95 A. 315 (1915).

<sup>88</sup> *Com. v. English*, 123 Pa. Super. 161, 186 A. 298 (1936).

<sup>89</sup> *Myers v. Travelers Ins. Co.*, 353 Pa. 523, 46 A.2d 224 (1946).

<sup>90</sup> Pa. R. C. P. 4013.

information as to the identity or whereabouts of witnesses; or if it would require the making of an unreasonable investigation by the deponent or any party or witness.<sup>91</sup> These restrictions on discovery are adequate. In Pennsylvania a law suit is still to be a fight, a battle of wits; there will not be full disclosure, but at least, as in boxing, rest will be given between the rounds and low blows are out. These restrictions on the rights of discovery should be strictly interpreted to mean just what the words say and no more. They are plain enough and give sufficient protection. The adversary system is still with us, but a good inroad on its evils has been made.

The new rules also allow a party to serve upon an adverse party a written request for the admission by him, for the purposes of the pending action only, of the genuineness of any writing, document or record, a copy of which is attached to the request or incorporated therein by reference, or the truth of any fact relating to its authenticity, correctness, execution, delivery, mailing or receipt. The matter is admitted unless within ten days after service of the request the adverse party serves upon the requesting party a sworn denial or explanation why he cannot admit or deny, or objections to the relevancy or competence of the matter or scope of the request.<sup>92</sup> If upon trial or hearing the requesting party proves the matter which the adverse party has failed to admit as requested, the court on petition may enter an order taxing as costs against the adverse party the reasonable amount which the other party incurred in making the proof if he had no valid excuse or justification for his failure to admit. However, these expenses and attorney's fees are not to be imposed upon the Commonwealth.<sup>93</sup>

These rules do not suspend any Act of Assembly relating to the examination of persons, assignees for benefit of creditors and fiduciaries, or the examination or production of tangible things in proceedings upon insolvency, election contests, accounting of fiduciaries, appeals from arbitrators, appeals from administrative agencies, mechanics liens, or discovery in aid of execution, domestic attachment, escheat, stockholders' actions or actions to forfeit corporate charters or franchises.<sup>94</sup> Where a problem involves one of the above, the attorney may use these rules, but the special statutes, some of them very broad, are also at his disposal. Pennsylvania R. C. P. 2032 which gives a party to an action a right to file on any other party there-to a rule as of course compelling him to file of record an affidavit setting forth whether he is a minor or adult should be kept in mind, for it is a type of discovery and it may be very useful, since the minor will be subject to contempt for failing to answer or answering falsely.

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<sup>91</sup> Pa. R. C. P. 4011.

<sup>92</sup> Pa. R. C. P. 4014.

<sup>93</sup> Pa. R. C. P. 4019 (d) (e).

<sup>94</sup> Pa. R. C. P. 4023 (6).

*Conclusion*

The new rules provide a party with a liberal and uniform procedure for securing depositions and for obtaining matters essential to his case. It is hoped that the lawyers of the Commonwealth will use these rules to the fullest extent and that the courts will allow great latitude in their interpretations. It may be worthwhile to note that the case of *Levin v. Hanson Garage*<sup>95</sup> held that a party may use these rules before their effective date, the theory of that case being that the party could discontinue and then begin again after the rules were effective. The case did not consider the question of the statute of limitations, or of what right the defendant had in such a situation, but it is an interesting one. And, if followed, it would mean that these new rules are available now. At any rate, they do become effective on June 1, 1951, and they should lead to "better" justice, for that is the aim of any procedural rule.

John Woodcock, Jr.

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<sup>95</sup> 44 D. & C. 21 (Pa. 1942).