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In Defense of H.B. 109 - Re Serving Notice before a Witness' Deposition May Be Taken

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In Defense of H. B. 109—Re Serving Notice Before a Witness' Deposition May Be Taken†

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There has been a question raised since H. B. 109 has become law (effective July 4, 1945) that has temporarily thrown into jeopardy the practice of taking depositions on proof of a will without serving notice, as is required in civil actions. H. B. 109, referred to during the Thirty-fifth General Assembly as "The Probate Bill," amended eleven sections of the present chapter 176, on Wills and Estates, and repealed four others. It had probably received, over a period of years, more technical consideration and deliberation than any other bill before the 1945 legislature.

But now, after Hugh Henry's recent article in DICTA on "Some Tips on Practicing Law—as of 1945,"[1] and after Roy Rubright's article on "Some Footnotes to the 1945 Statutes,"[2] some attorneys are wondering if they will be required to serve notice before the testimony of a witness to a will may be taken by deposition in proving the will. Section 12 of the bill in question amends section 253, ch. 176, the applicable part of subsection (c) thereof reading as follows:

> "Except as in this Chapter otherwise provided or permitted, service and proof of service of any process, notice, citation, writ or order of court, the taking of depositions, and all other procedure under this Chapter, shall be governed by the Colorado rules of civil procedure then in effect with regard to actions in rem; * * *"

Because of the phrase, "Except as in this Chapter otherwise provided or permitted, * * * " H. B. 109 did *not* change the old practice unless the pertinent sections elsewhere in chapter 176 were either repealed or amended. The only other sections which might be applicable are sections 252 and 59. Section 252 applies, in general, to the taking of depositions in probate matters, and section 59 applies specifically to the taking of testimony of any non-resident witness by deposition. Neither section 59 nor section 252 was changed by H. B. 109.

The relevant part of section 59 reads as follows:

> "When the testimony of any non-resident witness or witnesses residing out of the county wherein any will is sought to be admitted to probate, may be desired, touching the execution of such will, it shall be lawful for the party seeking to have such will admitted to probate, or resisting the same in the county court, to

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†Editor's Note: Attention is also directed, in connection with this article, to H. B. 759 regarding proof of will where witnesses are unavailable.

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[1]DICTA, April, 1945, p. 88.

[2]DICTA, June, 1945, p. 130.

cause the deposition of such witness to be taken in like manner, as now is or hereafter may be provided in civil cases; * * *"

Because of the last phrase of the above-quoted statute, "* * * as now is or hereafter may be provided in civil cases; * * *" we must look to our Rules of Civil Procedure for direction; rule 30 (a) provides:

"A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action not in default."

Rule 31 C (a) provides:

"A party desiring to take the deposition of any person upon written interrogatories shall serve them in the manner provided by Rule 30 upon every other party not in default with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken."

From these two rules, it appears that, before the testimony of a non-resident witness may be taken by deposition, reasonable notice in writing must be given to "every other party to the action not in default." But if this is the rule of procedure, H. B. 109 is not responsible, it having made no change in the prerequisites of the taking of testimony by deposition.

It remains for our court decisions, then, to determine whether or not there are parties to the action not in default upon whom service may be made. If there are no parties to a proceeding to prove a will, obviously there can be no notice. In Blackman v. Edsall et al. (1902), 17 Colo. A. 429, 432, it was said:

"In fact, there are no parties to the proceeding in a county court to probate a will. When the will is produced the court may proceed of its own motion. The proceeding is in rem. The judgment is in rem, and is not for or against any party."

Logically, the proceeding being *ex parte*, there are no *parties* in an action to probate a will within the meaning of the parties litigant in an ordinary civil suit. Even though every heir, devisee, legatee, ward, and creditor may have an interest in the action, none can qualify as a party as required by the Rules of Civil Procedure.

H. B. 109 does not place, then, an additional burden on attorneys; it does not complicate a formerly simple procedure; it will not even require lawyers to change their habits of practice in this respect; the burden simply never existed.

This article is not an attempt, however, to justify any new procedure which might be traced to the bill. There will probably be as many mistakes made by attorneys practicing under whatever changes were made as there were before—but there the human element is at fault, not the law.