KANSAS JUDICIAL COUNCIL BULLETIN

JULY, 1955 PARTS 1 AND 2—TWENTY-NINTH ANNUAL REPORT

TABLE OF CONTENTS

FOREWORD

In this BULLETIN we have called upon two of the members of the Judicial Council to present a review, in digest form, of the statutes enacted by the 1955 legislature which pertain to the courts and the practice of law. Senator Wilford Riegle, of Emporia, Chairman of the State Judiciary Committee, and Representative John S. Murray, of Leavenworth, Chairman of the House Judiciary Committee, have submitted summaries of bills enacted by the recent legislature which they consider of particular interest to judges and lawyers. We are also indebted to Mr. Franklin Corrick, Kansas Revisor of Statutes, for his excellent "Summary of 1955 Legislation," which proved helpful in the preparation of this article.

This issue of the BULLETIN contains another joint enterprise. The article, "Adoption of Federal Discovery Procedure for Use in State Courts," was prepared by Marvin E. Thompson and George W. Holland, of Russell, Kansas, and was read by Marvin E. Thompson at the Northwest Bar Association meeting at Hays, Kansas, on March 26, 1955. The authors are partners in the firm of Holland, Thompson and Holland. Mr. Thompson was graduated from the University of Kansas School of Law in 1946, served as law clerk for the Honorable Arthur J. Mellot for one year, then practiced at La Crosse, Kansas, until 1950 when he moved to Russell. Co-author George W. Holland received his LL. B at Washburn University in 1951 and practiced a short time at Wichita before entering into partnership with Mr. Thompson in 1952.

The Judicial Council is always interested in receiving material for publication. If you prepare or hear an article pertaining to the administration of justice please call it to our attention.

REVIEW OF STATUTES ENACTED BY THE 1955 LEGISLATURE

By WILFORD RIEGLE and JOHN S. MURRAY

The 1955 Session Laws will be published and distributed at about the same time as this issue of the JUDICIAL COUNCIL BULLETIN. However, we felt it might be helpful to summarize the new statutes which are of special interest to courts and lawyers. The 1955 Kansas Legislature passed a total of 447 bills. A total of 514 sections of the General Statutes of 1949 and the 1953 Supplement thereto were amended, and 115 sections were repealed. Understandably, this cannot be a complete review so we suggest that our readers check their session laws for any changes we may have overlooked.

CIVIL PROCEDURE

HB 122, chapter 277 amends the code of civil procedure, G. S. 1949, 60-3203, by increasing the amount the court or jury may award for damages in wrongful death actions from $15,000 to $25,000.

CRIMES AND CRIMINAL PROCEDURE

SB 101, chapter 283 amends G. S. 1949, 62-2313 to provide that in bastardy proceedings the court may excuse the defendant from giving bond to secure payment of judgment when the court is satisfied that the defendant is unable to provide such security. The court may parole such defendant from commitment to jail upon such terms as will enable the defendant to comply with the judgment rendered and as the court may find necessary and proper.

HB 208, chapter 281 amends G. S. 1949, 62-1401 to provide that the defendant may waive trial by jury in a felony case as well as in a misdemeanor case.

SB 80, chapter 193 amends G. S. 1949, 21-449 to provide the penalty of death or confinement for life at hard labor for convicted kidnapers when the kidnaped person is not released unharmed, and a penalty of not less than twenty years if the person is liberated unharmed. If there is a plea of guilty, the court shall determine the punishment, but if there is a trial then the jury shall determine the punishment.

HB 201, chapter 196 creates a new offense under the criminal code, making it a misdemeanor to accost, entice, or solicit a child under the age of 18 to commit an immoral act or to submit to an act of sexual intercourse, or an act of gross indecency or suggesting such acts to such child.

HB 160, chapter 197 makes possession or ownership of a firearm with a barrel less than twelve inches long by drug addicts and habitual drunkards a misdemeanor; and provides that persons convicted of certain crimes who later possess or own such weapons will be deemed guilty of a felony punishable by up to five years imprisonment.

COURTS

HB 124, chapter 181 amends G. S. 1953 Supp., 20-601 and increases the divisions of district court for Sedgwick county from five to six.

HB 159, chapter 182 amends G. S. 1953 Supp., 20-904 and establishes a retirement system and retirement fund for official court reporters.

EVIDENCE

SB 71, chapter 61 provides that an officer may require a person taken into custody for any offense involving driving while under the influence of intoxicating liquors to submit to a test to determine alcoholic content of the body. Refusal to submit to the test will bring a 90-day suspension of the license. A person may have an additional test by a physician of his own choosing, and if the officer refuses to allow that the first test cannot be submitted into evidence.

SB 74, chapter 279 provides that if a defendant operator of a motor vehicle has been given a blood test as authorized by Senate bill No. 71 and his blood shall show less than a 0.15 percent content of alcohol it shall be presumed that he was not under the influence of intoxicating liquor, but if more than that he shall be presumed to have been under the influence.

PROBATE CODE

HB 227, chapter 274 amends G. S. 1949, 59-203 and authorizes the probate judge in counties over 24,000 to appoint a clerk of the probate court.

SB 123, chapter 273 provides that the probate judge may authorize a deputy clerk of the probate court to issue marriage licenses.

REAL PROPERTY

SB 60, chapter 241 amends G. S. 1949, 67-216c, to empower commissioned officers of the armed forces to act in the capacity of notary for the spouses of members of such forces.

HB 442, chapter 271 provides for the creation of a joint tenancy without the use of a straw man by: (*a*) Transfer to persons as joint tenants from an owner or a joint owner to himself and one or more persons as joint tenants; (*b*) from tenants in common to themselves as joint tenants; (*c*) by coparceners in voluntary partition to themselves as joint tenants. Where the habendum clause in a deed, transfer or conveyance granting an estate in joint tenancy is inconsistent with the granting clause, the granting clause will control. Upon death of a joint tenant a certified copy of letters testamentary or a certificate or affidavit of death will constitute prima facie evidence of such death.

HB 349, chapter 300 supplements G. S. 1953 Supp., 67-333 and is a curative act which declares void mortgages or deeds of trust recorded on or after January 1, 1919, and before January 1, 1923, unless an affidavit is filed of record prior to July 1, 1956.

HB 96, chapter 276 amends G. S. 1949, 60-2110, 60-2112 and provides that the court may order and the sherif may execute an "assignment or other proper conveyance," in addition to the previously authorized sheriff's deed in order to properly convey title to partitioned property.

SALARIES AND FEES

SB 284, chapter 374 increases the salary of the chief justice of the Supreme Court to $13,000 and that of the associate justices to $12,000, effective January 14, 1957.

SB 283, chapter 375 increases the salaries of district judges to $8,000 effective January 14, 1957.

HB 334, chapter 188 amends G. S. 1949, 20-1418 to provide that in cities of the first and second class under 13,900 population, city courts are to charge 125 percent of fees charged by justices of the peace.

HB 260, chapter 187 amends G. S. 1953 Supp., 20-1408 to provide that in cities of the first and second class over 13,900 population, city court personnel may receive the following maximum salaries: judge, $400; clerk, $275; marshal, $200 per month.

SB 23, chapter 189; SB 117, chapter 190; and **SB 158, chapter 220** increases city court salaries in Wichita, Kansas City and Topeka, respectively.

HB 295, chapter 219 increases probate judges' salaries in certain counties (Probably Riley, Geary, Cowley, Leavenworth, Sumner and Saline).

SB 143, chapter 216 provides that jurors serving in juvenile courts will be paid the same fees and mileage as are jurors in courts of record.

HB 209, chapter 214 amends G. S. 1949, 28-115 to require the register of deeds to collect a $1 fee in addition to the recording fee when the name or names of the signer or signers to any instrument to be recorded are not plainly typed or printed under the signatures or in the jurat or acknowledgment of such instrument.

TAXATION

HB 140, chapter 401 provides for exemption from inheritance tax of bequests, legacies, devises and gifts to organizations operated exclusively for religious, charitable, public, scientific or educational purposes.

HB 365, chapter 400 amends G. S. 1949, 79-1501 to provide that property held in joint tenancy shall be taxed in its entirety except that part proven to have been contributed by the survivor, and that oil and gas leases on land in this state and all interests created thereby are tangible personal property having an actual tax situs in Kansas for the purposes of inheritance.

SB 249, chapter 417 amends six statutes pertaining to income tax and brings the Kansas income tax law into closer conformity with the new federal income tax code with respect to computation of net income and methods of apportionment where direct allocation is impracticable.

SB 272, chapter 425 amends G. S. 1953 Supp., 79-3703 and specifies that property purchased or leased within or without the state shall be subject to the compensating tax.

SB 286, chapter 416 amends G. S. 1949, 79-3108 to exclude oil and gas leases or interests created thereby and royalty interest from the intangible tax law.

WORKMEN'S COMPENSATION

HB 397, chapter 250 makes a number of important changes in the Workmen's Compensation Act, some of which are as follows:

Amount of Compensation. Medical, surgical and hospital treatment was increased from $1,500 to $2,500. The maximum on death benefits for dependents was raised from $9,000 to $12,500, and where death does not result from the injury, the maximum weekly benefits were raised from $28 to $32, with changes in the amount of compensation allowed for temporary or partial disability in certain cases. Board and lodging as part of the employee's wages shall be valued at $25 per week instead of $5 in the absence of an agreement.

Medical Examinations. The employee will be entitled to a copy of the physician's report within 15 days after a medical examination made upon the request of his employer, and the employee will also be guaranteed sufficient funds to pay his transportation and subsistence when notified to report at another city for the examination.

Examiners. The number of examiners the state workmen's compensation commissioner may appoint is increased from four to five, and a requirement that the award, finding or decision must be approved by the commissioner was stricken from G. S. 1949, 44-549. Another amendment makes it unnecessary for an examiner or the commissioner to wait for the stenographer's transcript of the testimony of a hearing before making his ruling or finding.

Time for Filing Claims. The limitation on the time for filing a claim was increased from 120 to 180 days and from eight months to one year in case of death of the injured employee if death results within three years of the accident.

CONSUMER LOAN ACT

SB 79, chapter 135 has been commonly known as the Small Loan Act. Many lawyers will be consulted by both lenders and borrowers and will want to familiarize themselves with the entire act. Briefly, it provides for the licensing and regulation of persons engaged in making consumer loans of $2,100 or less, generally repayable in substantially equal installments, and covering a period not exceeding thirty months from the date of making the loan contract. The licensee will be authorized to make charges at a rate not exceeding 3 percent per month on the unpaid principal balance of the first $300 of a loan, and 10 percent per annum on the balance of the loan up to $2,100. Licensees will not be limited to making loans of $2,100 or less, but when loans of more than $2,-100 are made, the contract rate of 10 percent will be applicable to the entire amount of the loans.

The act also amends the statute governing the maximum contract rate of interest (G. S. 1949, 16-202) by authorizing any lender to make installment loans of $2,000 or less for periods of 30 months or less, and to add to such loans or deduct therefrom, interest or discount at a rate not exceeding 8 percent per annum of the total amount of the loans from the date made until the maturity of the final installment. Where the principal amount of an installment loan is more than $2,000, the maximum contract rate (10 percent per annum) would apply to the entire amount of the loan.

ADOPTION OF FEDERAL DISCOVERY PROCEDURE FOR USE IN STATE COURTS

By MARVIN E. THOMPSON and GEORGE W. HOLLAND

President Wolfe, Members of the Northwest Bar Association and guests: When we noted on the program that we would be privileged to follow Judge Birney's remarks, we reflected that it would be the first—and probably the last—time that we would have the opportunity of offering argument after the court's pronouncements.

I use the term *we* because this paper is a partnership affair. Del Haney called a few weeks ago to invite my partner, George W. Holland or me to present a paper on any subject—presumably about the law—which might strike our fancy. After due deliberation and considering the bribe that Del offered, we advised him that we would prepare something on the subject appearing on the program. George and I flipped a quarter paid to us as a fee, and I lost. If you do not like our subject, blame Del, because he told us to choose our own. If there are portions of the paper with which you disagree, blame George—they are his ideas.

The subject and advocacy of adopting the Federal Rules of Civil Procedure for our State court practice, was ably presented to our association by Mr. O. B. Eidson of the Topeka Bar in our meeting at Colby in 1951. His remarks appear in 21 J. B. K. 130. The subject has been cussed and discussed for several years and numerous attempts have been made in the sessions of the legislature to revise our Code of Civil Procedure along the lines of the Federal Rules.

Although we are personally in favor of adopting, for our State courts, many of the salient features of the Federal Rules, we have confined ourselves to advocating adoption of those rules relating to discovery procedures, in which we include pretrial conferences. We believe these procedures to be the most worthy of the federal rules. We think that the present state court rules relating to pleadings are not so outmoded as to make it necessary to adopt the liberal—some say slipshod—pleading rules of the Federal Courts.

Some scope of the term "Discovery Procedures" is advisable. We include within that term:

(*a*) Depositions of parties and other persons;
(*b*) Written interrogatories and procedures for obtaining copies of documents and photographs, and
(*c*) Pre-Trial.

I.—PRESENT STATUS OF DISCOVERY PROCEDURES IN KANSAS DISTRICT COURTS

A. *Depositions.*

The statutory authority for taking and using depositions of witnesses and parties is contained in Sec. 60-2819 to 60-2822 inclusive.

Under 60-2820 either party may commence *taking testimony by deposition* any time after service of summons or the date of the first publication of notice. Presumably this means notice of suit where the defendant is being served by publication.

Under 60-2819, the deposition of *any witness* may be *used* only in the following cases:

First: When the witness does not reside in the county where the action or proceeding is pending, or is set for trial by change of venue, or when the witness is absent therefrom.

Second: When from age, infirmity or imprisonment the witness is unable to attend court, or when the witness is dead.

Third: When the testimony is required upon a motion, or in any other case where oral testimony of the witness is not required.

It should be noted that the statute specifies when the deposition may be *"used."*

Under G. S. 1949, 60-2843, it is provided that:

"When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that, for any cause specified in [60-2819] the attendance of the witness cannot be procured."

We are here concerned with using depositions for discovery, or as is sometimes said "a fishing expedition." Our question therefore is when, and under what circumstances, depositions may be taken, under Kansas statutes and decisions, which might be used as a means to discover the facts surrounding any issue in an action, before trial.

In fairness to the court, we point out that there is nothing in the statutes indicating a legislative purpose to use depositions for discovery purposes. Therefore the court, with one exception, has been consistent in adhering to the view that the deposition of a witness should not be permitted when the purpose is merely a "fishing expedition." In fact, that term seems to be the worst that can be applied to an attempt to take a deposition.

As to the question of when a party may commence taking depositions, the statute, 60-2820, provides "at any time after the service of summons or the date of first publication of notice." There seems to have been no question raised on this point.

As to the circumstances under which a deposition can be taken, it is a little more difficult to lay down any general rule. From the cases, we conclude that the only safe general rule is this:

That depositions of witnesses, who are not parties, may be taken if the witness resides out of the county where the action is pending, or from age, infirmity or imprisonment will not be able to attend the trial.

This rule is derived primarily from the case of *Sampson v. Post,* 154 Kan. 555, where the court stated that the trial court had not abused its discretion in denying an application to take the deposition of a witness, not a party, who resided in the county where the action was tried. Plaintiff brought the action for damages for alienation of her husband's affection. She sought to take the deposition of the cashier of the bank alleging facts showing his knowledge of defendant's business affairs, claiming materiality because punitive damages were sought. The bank cashier had refused to testify unless ordered by the court to do so. Plaintiff even suggested that the witness might be dead or unable to attend trial because he had once been slugged by robbers in a bank holdup, and drove a car every day on the highways. The holding of the court does not seem strange in view of the statute, until earlier cases are examined.

In the case of *In re Merkle,* 40 Kan. 27, where the witness was a resident of the county where the action was pending and was not a party to the action, the court said:

"But as a rule a party has a right to take the deposition of a witness so as to provide against *all contingencies as a mere matter of precaution;* . . ." (Emphasis supplied.)

In the case of *Bowen v. Bowen,* 120 Kan. 545, a divorce action, defendant husband took the deposition of one Black, who was his wife's lover. The witness' testimony was important to prove adultery. (The lurid facts need not be detailed here, because the court did not set them out in its opinion). Black, at the time of trial, could not be subpoenaed because he had taken off work and caught a train east. The trial court refused to permit the deposition to be used and denied a divorce to either party. On appeal, the supreme court held:

"It was error to refuse to admit in evidence the deposition of Mr. Black. The nature of the case as a whole, the character of the testimony of this witness and its importance as bearing upon the issues framed by the pleadings, rendered this evidence important to defendant; and, if important, he had a right to fortify himself against the possible voluntary absence of the witness to avoid being subpoenaed—a thing which evidently did occur—or other contingencies which might arise and which would render his appearance at the trial impossible."

In view of the results reached in *Sampson v. Post,* we conclude that the rule of *In re Merkle,* "To take the depositions of witnesses so as to provide against all contingencies as a mere matter of precaution," no longer applies, and that something more than a mere possibility of the circumstances enumerated in the statute, must exist, before the taking of the deposition of witnesses, residing in the jurisdiction of the trial court, will be permitted.

We now come to the more fruitful ground of discovery depositions. Though we are young and inexperienced, and our practice may not be as extensive as some, we think, that as a general rule, the parties on the other side of the lawsuit would provide the best place to conduct a "fishing expedition."

The statutory authority relating to the taking of the deposition of an adverse party is G. S. 1949, section 60-2821, which so far as here material, provides:

"In any action now pending or hereafter instituted in any court of competent jurisdiction in this state, *any party shall have the right to take the deposition of the adverse party,* his agent or employee, and in case the adverse party is a joint-stock association, corporation or copartnership, then of any officer, director, agent or employee of any such joint-stock association, corporation or copartnership, when such adverse party, or officer, director, agent or employee of such adverse party is without the jurisdiction of the court or cannot be reached by the process of the trial court." (Emphasis supplied.)

The statute further provides that such party's deposition must be taken "in the city or county of the usual place of residence or place of business" of the party.

Despite the alternative circumstances designated in the statute as to when an adverse party's deposition may be taken; namely, when the party is without the jurisdiction of the court, or, cannot be reached by the process of the court, the statute does not mean what it says.

In the case of *Long v. Prairie Oil and Gas Co.,* 135 Kan. 440, the plaintiff sought to take the depositions of defendants and officers of the defendant corporation, who did not reside where the action was pending and were not within its jurisdiction. On a hearing to restrain plaintiff from taking the deposition, defendants offered evidence that they intended to be present for trial.

The trial court restrained the plaintiff. On appeal the ruling was affirmed, the court saying:

". . . There must be reasonable grounds to believe an actual necessity exists for taking the deposition. The statute (R. S. 60-2819) enumerates some of these reasonable grounds as advanced age, infirmity, etc. . . ."

The rule was not always so limited. The question was before the court prior to the enactment of 60-2821. In the early case of *In re Simon Abeles,* 12 Kan. 451, the petitioner in a *habeas corpus* case had been imprisoned for refusing to testify by deposition. He was the defendant in an action pending in Leavenworth county and he resided therein. His imprisonment was upheld by the supreme court. In the opinion, after citing the forerunner of what is now 60-2819, the court said:

". . . Giving the right to use a deposition under the contingencies named gives the right to prepare for those contingencies. . . . Now the giving of testimony, whether on the trial or by deposition is not a privilege of the witness, but a right of the party. He need not solicit; he can compel. . . . It is also said that this permits one to go on a 'fishing expedition' to ascertain his adversary's testimony. This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary's testimony."

According to Shepard's handy little publication, that case has never been overruled, but in view of the rule announced in *Long v. Prairie Oil & Gas,* supra, we doubt that much reliance can be placed on the *Abeles* case.

The rule of *Long v. Prairie Oil & Gas,* was earlier stated in *In re Merkle,* supra, in these words:

". . .; but before a *party* shall be subjected to such process, there must be some reasonable grounds upon which to predicate a belief that there is an actual necessity for it." (Emphasis supplied.)

We submit that it must be concluded that the court has adhered to the evident legislative intent, that the taking of depositions should be limited to circumstances where their use would be a probability at the time of trial, and that depositions should not be used to discover what the facts of the controversy really are before trial.

WRITTEN INTERROGATORIES

The only mention of written interrogatories in the Code of Civil Procedure appears in 60-2833 where deposition is defined as

"A deposition is a written declaration under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine, or upon written interrogatories."

By this definition a deposition by written interrogatories would seem to be an alternative to a deposition by oral examination, and subject to the same rules as to when and under what circumstances they might be used. The statute outlines no procedure for serving written interrogatories nor does it provide a time for their answer.

II.—DISCOVERY PROCEDURES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

The theory of the Federal Rules, permitting the taking and use of depositions, is not limited to the purpose of using them as evidence at the trial. They go

much further, to permit discovery before trial. This purpose is apparent from the text of Rule 26 which provides:

"(a) *When Deposition May Be Taken.* Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories, *for the purpose of discovery* or for use as evidence in the action or for both purposes. . . ." (Emphasis supplied.)

As to the time for taking such depositions, the rule provides that they may be taken without leave of court after the expiration of 20 days after commencement of the action. Leave of court must be obtained if they are to be taken within 20 days after the action is commenced.

For purposes of discovery an important provision is subsection (b) of Rule 26, it provides:

"(b) *Scope of Examination.* Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Rules 30 (b) and (d) referred to provide for limitations by order of the court on the taking of the deposition. The court may forbid the taking of the deposition, or order it to be taken at a specific time and place. It may restrict the inquiry or make further orders for protection of the parties. During the taking of the deposition, a party or the witness, may move the court to terminate or limit the examination, on a showing that the examination is being conducted in bad faith or in such manner as to unreasonably annoy, embarrass, or oppress the deponent or party.

The broad scope of examination permitted under Rule 26(b) gives real meaning to the discovery purposes of the Federal Rules. You will note that the deponent may be examined on any matter, not privileged, which is relevant to the subject matter of the claim or the defense of any party. Inadmissibility of testimony is not ground for objection if the testimony sought appears to be reasonably calculated to lead to the discovery of admissible evidence.

Under this wide latitude, and within the bounds of good faith, your "fishing expedition" is limited only by your own diligence and imagination. Our own experience, and that of others with a more general federal court practice, indicates by full use of discovery procedures you can learn almost all possible facts about the lawsuit.

Your general mode of procedure would be to take the deposition of your adverse party first. By careful questioning you can learn every fact known by such adverse party and the basis of his knowledge. You may learn of the existence, description or location of any documents, including photographs pertinent to the action. You can learn the names and addresses of others who may be witnesses.

By taking the deposition of these witnesses, who are supposed to know something about the facts of the lawsuit, you should be in a pretty good position to know as much about every issue in the case as is possible to learn from oral testimony, before it goes to trial.

The broad scope of the examination is most necessary and desirable under the liberal federal rules on pleadings. Where a party has in his pleadings alleged, by way of conclusion, that his adversary was guilty of contributory negligence, you can have him testify under oath just what he contends are the facts constituting contributory negligence. We suggest however, that before he answers that question, his attorney will be glad to stipulate what his contentions are in that regard, since his client may not be as well versed in stating the items of negligence as the attorney.

The use of depositions is governed by subsection (d) of Rule 26. Under its provisions they may be used at the trial or hearing of a motion, so far as admissible under the rules of evidence, against any party present or represented at the taking of the deposition, or who had notice thereof for the following purposes:

1. To contradict or impeach the testimony of the deponent as a witness.
2. The deposition of an adverse party can be used for any purpose.
3. The deposition of a witness, whether or not a party, may be used if the court finds: (*a*) witness is dead; (*b*) witness is more than 100 miles from place of trial, unless his absence was procured by party offering deposition; (*c*) witness cannot attend trial by reason of age, sickness, infirmity or imprisonment; (*d*) witness cannot be produced on subpoena; or (*e*) upon application to the court and notice to adverse parties, such exceptional circumstances exist that in the interest of justice the deposition should be used.

The taking of the deposition does not make the person the witness of any party. Errors and irregularities occurring during the taking of the deposition, which could be cured if the objection were seasonably made, are waived unless the objection is made at that time. Objections to the competency of the witness, or the competency, materiality or relevancy of the testimony are not waived, but may be saved for trial.

Notice to take depositions must be served upon the adverse party or his attorney. Proof of service and filing of the notice with the clerk is sufficient authority for the clerk to issue subpoena to the witness. The accepted procedure seems to be that the original notice with proof of service is filed with the clerk and copies are sent to adversary counsel. You should also send along $4 for witness fees plus ten cents per mile for the marshal to give to the witness. If the witness does not reside in the jurisdiction where the action is pending, you file the notice with the clerk in the jurisdiction where the witness resides, or where the deposition is to be taken, and not with the clerk where the action is pending. Where a notice to take a party's deposition is served on his attorney, a subpoena need not be served on such party.

The Federal Rules also provide for the place where the deposition may be taken. Under Rule 45 (d) the deposition of a witness, *not a party*, residing in the jurisdiction where the action is pending, may be taken only in the county where he resides, is employed or transacts his business in person. A witness out of the jurisdiction can be required to attend only in the county where he is served with subpoena, or within 40 miles of the place of service, or at such other place as may be fixed by court order.

These limitations on the place of taking the deposition of a witness, do not apply to the place of taking the deposition of a party. Thus a party must at-

tend at the place designated in the notice unless he obtains an order of the court changing the place. In *Collins v. Wayland,* CCA 9th, 139 F. 2d 677, it was held that a resident of Oregon, who brought suit in Arizona, could not complain of being required to give his deposition in Arizona, when he failed to file a motion seeking relief therefrom. The reason for this rule, as to a plaintiff, is apparently bottomed on the fact that plaintiff chose the forum in which to file his action, and therefore should not complain if he is required to make himself available for examination in that district. However, the rule is not strictly adhered to, if the party can show good cause for not being required to attend in the district where the action is pending. The court, under its broad powers of limiting the taking of depositions, may designate a more convenient time or place, or make provisions for expenses, or that the deposition be taken only upon written interrogatories. Although the federal judges have made liberal use of this broad power, in order to protect against hardship, they have consistently recognized that one purpose of the rules is to permit discovery by taking the deposition of the parties.

The Federal Rules also permit written interrogatories, and the theory seems to be, like in Kansas, that such interrogatories are in essence a deposition. Rule 26 uses the phrase "deposition upon oral examination or written interrogatories." Rule 33 specifically relates to interrogatories, and by reference to Rules 26 (b) and (d) adopt the same broad scope of examination and use of interrogatories as apply to depositions on oral examination. Written interrogatories may be served, without leave of court, after 10 days following the commencement of the action, or within such 10-day period, with leave of the court. They must be answered separately and fully, in writing, within 15 days following their service, or such greater time as the court may order on motion. Written interrogatories may be served more than once and may be served either before or following the deposition of the party, but here again the court is vested with broad powers to prevent abuses.

It should be noted that written interrogatories may be served upon adverse parties only, while depositions upon oral examination may be taken from any person, including parties.

The purpose of written interrogatories is to enable a party to prepare for trial, to obtain facts needed for trial preparation, to narrow the issues in order to determine what evidence will be needed at the trial, and to reduce the possibility of surprise at the trial. A favorite use seems to be to determine the existence or non-existence of jurisdictional facts.

Since the scope of examination and use which can be made of written interrogatories and depositions upon oral examination are the same, the choice of method will largely depend on the practical considerations of time and expense, as well as the ground to be covered by the inquiry. As a practical matter most of us would rather question the party personally, than submit written interrogatories which will be answered in the phraseology of the adverse party's counsel. It also gives us a chance to broaden the scope of inquiry based upon the answers of the party on oral examination.

In the sense of narrowing the issues, written interrogatories may serve the purpose of our motions to make definite and certain. It is submitted that they go much further by permitting an inquiry into evidentiary facts, and by permitting inquiry on matters relevant to either the claim of one party or the de-

fense of another, neither of which could be accomplished by our motion to make definite and certain.

It may be well to note here that as a general proposition a motion to make definite and certain is not sustained in the federal practice for the reason that a party can learn everything he might ask in such a motion, and more, by using the discovery procedures provided.

INSPECTION AND COPYING OF DOCUMENTS

Under our Code of Civil Procedure, G. S. 1949, section 60-2850, a method is provided for the inspection and copying of documents. A somewhat similar provision is contained in Rule 34 of the Federal Rules, but the federal rule, with one important limitation, and when used in conjunction with depositions, appears to be broader. The limitation imposed by Rule 34 is that inspection and copying may be obtained only by order of the court on motion showing good cause. Under 60-2850 no motion is required; merely a demand upon the adverse party to exhibit or permit a copy to be made of the specific documentary evidence. Failure to comply with the demand in state court, may, upon motion, result in an order to produce. Failure to comply with the order subjects the party to the penalty of being denied the privilege of using any such document demanded, or having the jury instructed to presume such document to be as the party seeking it may, by affidavit, allege. Under Rule 37 (b) of the Federal Rules the same consequences are provided, and in addition the court may strike the party's pleadings, or enter default judgment.

Rule 36 of the Federal Rules contains a provision, like our section 60-2849, for requesting the admission of the genuineness of a document. However, Rule 36 goes further to permit a request for admitting the truth of any *relevant matters of fact* set forth in the request. Non-compliance with the request under the state statute renders the party liable for any costs incurred in proving the genuineness of the document. Under the Federal practice, he is deemed to have admitted unless within 10 days he denies under oath, or relates why he cannot admit or deny, or within such time serves written objections on the grounds of privilege or irrelevancy or that the requests are otherwise improper.

PRE-TRIAL CONFERENCES

The final link in the discovery procedures under the Federal Rules is the provision for pre-trial conferences. This procedure is provided in Rule 16. Whether such a conference is had is wholly within the discretion of the court. If the court directs such a conference, counsel must attend. Failure of the plaintiff's counsel to attend may result in dismissal for want of prosecution under Rule 41 (b). Failure of defendant's counsel to attend may result in default judgment under Rule 55 (a) and (b) for failure to defend.

The provisions of our code of civil procedure authorizing pre-trial conferences, section 60-2705 is exactly like Rule 16 of the Federal Rules. Curiously, our procedure has been seldom used, and has been criticized as not containing any penalizing provision for failure of a party to take part in the pre-trial.

Although the statutory authority is the same in both jurisdictions, it seems to work with imminent success in the Federal courts. In the past, some federal judges have declined to schedule pre-trial conferences, because they found that many of the cases were being settled anyway. They later discovered that

the pre-trial conferences seemed to have a salutory effect toward producing settlements. Their greatest advantage, as practiced by the Federal courts, is that controverted issues are limited and sharply defined, and admissions of fact and of documents are obtained which will avoid unnecessary proof and save trial time. These advantages are obtained by *not* limiting the inquiry simply to whether the adverse party admits or denies a certain fact, but by going on to inquire what he contends the facts to be.

We have attempted to relate briefly the respective provisions of our own code of civil procedure and the Federal Rules which might be used for discovery purposes. We submit that the difference lies in the basic purposes of each. Under our state court procedure for depositions, the evident purpose is to permit their taking so that the testimony will be available for trial as evidence. Under the Federal Rules this purpose is likewise accomplished, but they go further to permit depositions to discover what the facts are before trial.

In the present session of the legislature, the House Judiciary Committee, in House bill No. 380, introduced a measure, in all important respects, like the Federal Rules relating to depositions. The bill passed the House, but we are informed by Senator John Woelk that it was killed on March 23, 1955, by the Senate Judiciary Committee.

We think that all would agree that our courts and their officers must have a procedure best adapted to ascertaining truth. If truth be ascertained, justice will surely follow. To accomplish that purpose, the procedure must provide ways of finding out what the facts are, and not provide ways whereby facts might be evaded and the true picture only partly revealed. We see nothing wrong with a procedure which enables each of the parties to discover, before trial, every fact surrounding the controversy. To accomplish this result, we must have corresponding rights to interview the reluctant witness and the adverse party. No prejudice can result when the adverse party has the right and opportunity to have counsel present. Such procedure would encourage settlement; discourage the filing of suits without merit; ferret out truth and discourage any possible perjury.

We fully subscribe to the statement of Justice Brewer in *In re Abeles,* 12 Kan. 451, where in answer to the charge that the deposition sought was a "fishing expedition," he said, page 452:

". . . This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary's statement."

Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey and Chairman to Advisory Comm. of Supreme Court of U. S. on Federal Rules, writing the Foreword to Barron & Holtzoff, Federal Practice and Procedure, Vol. 1, page IV and V, says:

"So successful have the Federal Rules been in operation that they have been accepted as the basis of the pleading, practice and procedure of Arizona, Colorado, Delaware, New Jersey, and New Mexico; and they doubtless would have found their way into many other jurisdictions because of their superior merit but for the understandable, but nevertheless regrettable reluctance of the bench and bar to abandon a system of procedure they know, however inferior it may be, and learn a new one. Inertia it should be added, is not the only force operating to retard the acceptance in the states of the Federal Rules. The Federal Rules have as their fundamental premise the elimination of tactical surprise and technical advantage. *They look on a lawsuit as an orderly search for the*

truth rather than as a sporting event depending on the craft of two legal gladiators. It will be only a matter of time, however, before the younger members of the bar, trained in the law schools in both Federal and state procedure, will come to insist on the adoption in their states of the preferable system." (Emphasis supplied.)

The statement is fully applicable to the Federal Rules permitting discovery. It was made in 1950. The "matter of time" then referred to, has arrived to these "younger members of the bar" whom your committee has invited to present this paper.

Please Help Us Keep Our Mailing List Up to Date

The JUDICIAL COUNCIL BULLETIN is published quarterly and mailed without charge to lawyers, courts, public officials, newspapers and librarians, who are or may be interested in our work. We are glad to add to our mailing list the name of any person who is interested in receiving the BULLETIN regularly. We will also send current numbers to persons making requests for them, and will furnish back numbers so far as available.

In order to save unnecessary printing expenses, we are constantly revising our mailing list, and are attempting to eliminate the names of persons who have died or moved out of the state or who have changed their addresses and are receiving the BULLETIN at the new address.

Please advise promptly if you have changed your address, giving the old address as well as the new. If you do not receive any current BULLETIN and wish to remain on the mailing list, please notify us to that effect. If you are receiving a BULLETIN addressed to some person who has died or movd away, please let us know and we will remove the name from the list.

Address all inquiries to: THE JUDICIAL COUNCIL, STATE HOUSE, TOPEKA, KAN.

25-9564

MEMBERS OF THE JUDICIAL COUNCIL

ROBERT T. PRICE, *Chairman.* (1954-) ..... Topeka
Justice of the Supreme Court.
WILLIAM M. MILLS, JR., *Secretary.* (1953-) ..... Topeka
JAMES E. TAYLOR. (1941-) ..... Sharon Springs
ROBERT H. COBEAN. (1947-) ..... Wellington
A. K. STAVELY. (1951-) ..... Lyndon
Judge Thirty-fifth Judicial District.
J. WILLARD HAYNES. (1951-) ..... Kansas City
JOHN H. MURRAY. (1953-) ..... Leavenworth
Chairman House Judiciary Committee.
JOSEPH J. DAWES. (1953-) ..... Leavenworth
Judge First Judicial District.
WILFORD RIEGLE. (1953-) ..... Emporia
Chairman Senate Judiciary Committee.

FORMER MEMBERS OF THE JUDICIAL COUNCIL

W. W. HARVEY, *Chairman.* (1927-1941) ..... Ashland
Justice of the Supreme Court.
WALTER G. THIELE, *Chairman.* (1941-1953) ..... Lawrence
Justice of the Supreme Court.
J. C. RUPPENTHAL, *Secretary.* (1927-1941) ..... Russell
RANDAL C. HARVEY, *Secretary.* (1941-1953) ..... Topeka
EDWARD L. FISCHER. (1927-1943) ..... Kansas City
ROBERT C. FOULSTON. (1927-1943) ..... Wichita
CHARLES L. HUNT. (1927-1941) ..... Concordia
CHESTER STEVENS. (1927-1941) ..... Independence
JOHN W. DAVIS. (1927-1933) ..... Greensburg
C. W. BURCH. (1927-1931) ..... Salina
ARTHUR C. SCATES. (1927-1929) ..... Dodge City
WALTER PLEASANT. (1929-1931) ..... Ottawa
ROSCOE H. WILSON. (1931-1933) ..... Jetmore
GEORGE AUSTIN BROWN. (1931-1933) ..... Wichita
RAY H. BEALS. (1933-1938) ..... St. John
HAL E. HARLAN. (1933-1935) ..... Manhattan
SCHUYLER C. BLOSS. (1933-1935) ..... Winfield
E. H. REES. (1935-1937) ..... Emporia
O. P. MAY. (1935-1937) ..... Atchison
KIRKE W. DALE. (1937-1941) ..... Arkansas City
HARRY W. FISHER. (1937-1939) ..... Fort Scott
GEORGE TEMPLAR. (1939-1941, 1943-1947, 1953) ..... Arkansas City
EDGAR C. BENNETT. (1938-1951) ..... Marysville
SAMUEL E. BARTLETT. (1941-1951) ..... Wichita
PAUL R. WUNSCH. (1941-1943) ..... Kingman
WALTER F. JONES. (1941-1945) ..... Hutchinson
GROVER PIERPONT. (1943-1944) ..... Wichita
I. M. PLATT. (1943-1945) ..... Junction City
C. A. SPENCER. (1944-1951) ..... Oakley
CHARLES VANCE. (1945-1947) ..... Liberal
RICHARD L. BECKER. (1949-1951) ..... Coffeyville
W. D. VANCE. (1951-1952) ..... Belleville
JOHN A. ETLING. (1945-1953) ..... Kinsley
DALE M. BRYANT. (1947-1949, 1951-1953) ..... Wichita
FRANKLIN B. HETTINGER. (1952-1953) ..... Hutchinson

KANSAS JUDICIAL COUNCIL
STATE HOUSE
TOPEKA, KANSAS

RETURN POSTAGE GUARANTEED

Sec. 34.66, P. L. & R.
U. S. POSTAGE
PAID
Topeka, Kansas
Permit No. 421

PRINTED BY
FERD VOILAND, JR., STATE PRINTER
TOPEKA, KANSAS
1955

25-9564