

# Marquette Law Review

---

Volume 2  
Issue 4 *Volume 2, Issue 4 (1918)*

Article 3

---

1918

## Discovery Proceedings

Max W. Nohl

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Max W. Nohl, *Discovery Proceedings*, 2 Marq. L. Rev. 137 (1918).

Available at: <https://scholarship.law.marquette.edu/mulr/vol2/iss4/3>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

## DISCOVERY PROCEEDINGS

Discovery proceedings in Wisconsin have been nick-named "4096" examinations. Such number is the number of the section wherein are found practically all of the statutory provisions for such proceedings. It is intended here to state briefly how such section has grown to its present proportions, what such section now provides and what its advantages are.

### *THE GROWTH OF THE DISCOVERY STATUTE IN WISCONSIN.*

The section has had a remarkable growth. It was originally Sections 54 and 55 of Chapter 137 of the Revised Statutes of 1858. As then constituted, it abolished actions for discovery under oath in aid of actions; only the adverse party could be examined; the examination could be had on five days' notice at or before the trial; the examination could be had only in the county of the party's residence or in the county where the party was served, either in or outside of the state; if the party refused to attend or testify, his pleading could be stricken out and he could be punished for contempt; and either party could use the deposition on the trial. Up to 1882, such in effect was the law on the subject. Beginning in 1882 and continuing up to and including the year 1917, the provisions have been constantly changed. The changes have almost invariably resulted in additions to and broadening the scope of the law.

Chapter 194, Laws of 1882, authorized the examination of the president, secretary, principal officer and other managing agent of a corporation. Chapter 321, Laws of 1885, authorized the court to limit the examination on one day's notice and provided that if the examination was had before issue was joined in the action there must be an affidavit in behalf of the party desiring the examination as to the general nature and object of the action and the points on which discovery was asked, and authorized a further examination after issue was joined. Chapter 348, Laws of 1889, authorized the officer taking the examination to compel the party examined to answer and produce his books and papers, by contempt proceedings. The statutes of 1898 authorized the examination of such corporate officers as to matters within their knowledge during the time of the occurrence of the facts on which the action was based if they were then such officers, even though they were not such officers when so examined. Chapter

244, Laws of 1901, added the party's assignors, agents and employees as persons who could be so examined. Chapter 84, Laws of 1909, added that the officers, agents and employees could be examined as to matters within their knowledge during the time of the occurrence of the facts on which the action was based if they were then so employed, even though not so employed when so examined; that there might be a separate examination of each; that if a non-resident party was to be examined, the court could fix the time and place of the examination, and that after the complaint was served defendant might examine on all points in the complaint as though it were at issue as to all allegations. Chapter 231, Laws of 1911, provided that if a party was a non-resident, he could be examined in any county in the state where he could be served; and that if a foreign corporation was a party its officers, assignors, agents and employees could be examined in any county in the state, the court fixing the time and place in the state of the examination. Chapter 246, Laws of 1913, provided that the deposition could be used on the trial even though the deponent was present on the trial. Chapter 101, Laws of 1917, authorized either side to have such examinations after the service of the complaint and a further examination after the action was at issue.

Such in effect is the present Section 4096 of the 1917 Wisconsin Statutes. It is a sample of the growth of remedial law in a code state. As the section grew, its fairness and its advantage to litigate became more and more apparent. It is surprising how litigants were satisfied for so long a time to do without it in its present form. Nevertheless it is probably safe to say that this discovery statute has not reached its full growth. Experience will show that it can be improved still more to accomplish what is in effect intended, viz.: a complete discovery by a party preliminary to trial of the facts, books and papers in the knowledge, possession or control of the adverse party, his officers, agents and employees as fully as though the examination constitutes the trial *pro tanto* of the action. To the extent that such a deposition is now introduced in evidence at the trial, it constitutes a trial *pro tanto*.

It is hardly probable that any other state in the Union has a discovery statute exactly like ours, unless the provisions of the statutes of other states have been patterned after ours, as ours has had a growth peculiar to itself. Our statute has grown to

meet the demands of litigants to have a complete discovery before trial where discovery is proper. We must then look principally to the Wisconsin decisions for the construction of our discovery statute.

WISCONSIN DECISIONS.

The examination is in the nature of a cross-examination.

*Cleveland vs. Burnham*, 60 Wis. 16.

*Horlick M. M. Co. vs. Spiegel*, 155 Wis. 201.

After issue joined, the court cannot limit the examination on matters that are relevant to the issues.

*Kelly vs. Ry.*, 60 Wis. 480.

Although the plaintiff has sufficient facts to frame a complaint general in its terms, he is not barred from having the examination before serving his complaint.

*Schmidt vs. Menasha W. W. Co.*, 92 Wis. 529.

*Sullivan vs. Ry.*, 152 Wis. 574.

The statute is liberally construed as it is a remedial statute.

*Schmidt vs. Menasha W. W. Co.*, 92 Wis. 529.

An examination of the directors of a corporation who are not necessary though proper parties to the action may be had.

*Wells vs. Green Bay & M. C. Co.*, 90 Wis. 442.

The party offering the testimony may introduce such portions as he wishes and the other party may then offer the other portions that are explanatory.

*Wunderlich vs. Ins. Co.*, 104 Wis. 382.

The production of physical articles may be compelled.

*Horlick M. M. Co. vs. Spiegel*, 155 Wis. 201.

The examination is both a special proceeding and a provisional remedy; an order requiring a witness to produce certain papers is not appealable.

*Phipps vs. Wis. Cent. Ry. Co.*, 130 Wis. 279.

Interlocutory orders regulating the manner of procedure in or as to "4096" examinations are not appealable.

*Id.* .

*Neacy vs. Thomas*, 148 Wis. 91.

An order practically denying the examination is appealable.

*Kuryer Pub. Co. vs. Messmer*, 162 Wis. 565.

An order requiring a witness to answer and submit to the

examination and an order refusing to stay or restrain the examination are appealable.

*Phipps vs. Wis. Cent. Ry. Co.*, 133 Wis. 153.

In this case the constitutionality of the section as to certain provisions affecting corporations was passed on and certain features held unconstitutional.

If the affidavit served shows that no action exists or can exist, no examination can be had.

*State vs. Ry.*, 136 Wis. 179.

If the affidavit shows the party has sufficient facts to draw his pleading, no examination before pleading can be had.

*Ellinger vs. Equitable Life Soc.*, 138 Wis. 390.

A party need not know before pleading that he actually has a cause of action in order to have the examination.

*Am. F. P. Co. vs. Am. M. Co.*, 151 Wis. 385.

*Sullivan vs. Ry.*, 152 Wis. 574.

A party is entitled to an examination to enable him to draw the particular complaint required by the facts and to determine who are and who are not liable and the nature of his case.

*Sullivan vs. Ry.*, 152 Wis. 574.

The examination of persons residing in a foreign country may be had under this statute on letters rogatory.

*Hite vs. Keene*, 137 Wis. 625.

The officer's charges for taking the examination are taxable as disbursements.

*Arpin vs. Bowman*, 83 Wis. 54.

A defendant may examine a co-defendant where the latter is in effect an adverse party to the former. "The true test is, are their interests adverse?"

*O'Day vs. Meyers*, 147 Wis. 549.

Where an adverse party is called for cross-examination, his counsel has no right to examine him at the close of such cross-examination as this would permit such adverse party to prove his case, or a part of it, as a part of the opponent's case.

*O'Day vs. Meyers*, 147 Wis. 549.

"Where plaintiff has called and examined an employee of defendant as an adverse witness under Section 4068, Statutes, defendant has a right to re-examine such witness as to all matters tending to explain or qualify the testi-

mony already given, though not as to new defensive matters, and may also ask the witness questions proper for the purpose of impeachment, upon stating that he does not intend thereafter to make the witness his own."

*Adams vs. Bucyrus Co.*, 155 Wis. 70.

(This case passes on the ruling of a Circuit Court on the examination of an adverse witness under Section 4068, Wis. Stats., on the trial of an action. In the writer's opinion, it has no application to a "4096" examination, as the latter contemplates merely a cross-examination, as stated elsewhere in this article.)

The examinations are permitted in actions or special proceedings but not ordinarily in connection with motions.

*Bresadola vs. Gogebic & Iron Co. R. & L. Co.*, 165 Wis. 109.

Formerly discovery of facts and papers resting in the knowledge, possession or control of the adverse party could be had only by a separate action of discovery, seeking no relief, but merely in aid of some other action at law or in equity.

14 Cyc. 305.

### THE ADVANTAGES OF THE PROCEEDINGS.

Some of the advantages are apparent from the reading of the section. A party, long before his legal battle is staged in the trial court, can go into his adversary's camp and inspect his battle array and prepare for the fray accordingly. Months before the final battle is fought he can learn how strong his adversary is, and can enter into negotiations for peace or prepare for battle intelligently.

Frequently such examinations result in voluntary dismissals of the suits or in settlements, and thereby expensive and annoying litigation is avoided. Again, the adversary is usually not so well prepared at the "4096" examination to cover up things, to object to the testimony, or to realize the importance of the testimony taken, as he is on the trial of the action. He may not prepare for the trial until shortly before the trial. If he is suddenly served with a five days' notice of the "4096" examination, his time for preparation is limited, and frequently he appears on such examination with no real conception of its importance in the case. He probably gives his testimony more truthfully than if he had more opportunity to prepare or reflect. Once examined, he is practically bound to the story he has told on such examination.

If he is examined all over again on the trial and is then confronted with his "4096" deposition, he is bound to be embarrassed unless the two stories told agree in detail. If his testimony is honestly given, the two stories will very likely agree substantially, but otherwise they are very apt to disagree on important points. If the case warrants the expense or the risk of the expense, a "4096" examination will usually prove to be a good investment.

*WAIVING THE READING AND SIGNING OF  
THE DEPOSITION.*

The statute provides for counsel at their option waiving the reading and signing of the deposition by the deponent and that the deposition may in such case be used with the same force and effect as though it were read and signed by the deponent. If the reporter who takes the testimony is competent and reliable, it is an advantage to both sides to agree to the waiver, as it saves the time of the witness and the attorneys in the case, another day's witness fees, and another day's attendance charge by the officers taking the deposition. If there is no waiver, the witness, upon reading the deposition when transcribed, or upon reflection, frequently wants to straighten out his testimony by correcting what he claims are the reporter's mistakes (which they usually are not), or what he claims is his new and correct conception of what he should have testified. This at times leads to much wrangling and many disagreeable disputes. Of course, proper corrections must be made, and they should be made by the officer taking the deposition at the foot of the deposition with proper recitals. In most cases, the reading and signing of the deposition by the deponent are waived by counsel.

*CORRECTIONS AND EXPLANATIONS OF THE  
TESTIMONY TAKEN.*

Frequently after the examination is concluded by the counsel calling for the examination, the counsel for the adverse party attempts to examine the witness to have him make corrections or explanations of the testimony given. This is improper, in the writer's opinion, for the reason that the witness called under such statute is there for cross-examination only. If any proper corrections or explanations are to be made, they can be made at the trial when the adverse party presents his defense. The delay thus caused to the adverse party in having such corrections and

explanations made can be excused accordingly. Nevertheless, though he has no such right, it may often be well to permit the adverse party to make the explanations and corrections at once so that the testimony of the witness is complete, that is, as nearly as it is possible for the witness to make it at the time, before he has had time to find further things to correct or explain. The party so calling the witness under such section then knows the whole story of the witness and can prepare for trial accordingly. The injustice of permitting such explanations and corrections is apparent at times when it results in a great deal of testimony being taken on such points on the application of the adverse party, thus possibly doubling the expense of the "4096" examination to the party calling the witness and putting it beyond his power to limit the expense thereof. All too often the expense of the "4096" is greater than was anticipated, without the counsel for the adverse party increasing the number of the folios of the testimony taken.

*THE EXAMINATION IS SUBSTANTIALLY A  
PARTIAL TRIAL OF THE CASE.*

The cross-examination under such statute is the same as a cross-examination on the trial. The officer taking the same, rules on the admission and exclusion of the evidence submitted as fully as though he were trying the case, so that the deposition when introduced at the trial will answer the same purpose as though the testimony were given on the trial, and so that the attendance of the witness at the trial is entirely unnecessary to get his story into the case.

*IN WHAT CASES THE EXAMINATION IS  
PERMITTED.*

It seems that in any action or proceeding in which any oral testimony is to be introduced, a "4096" examination is proper. However, where the issues are only properly presentable on affidavits, the "4096" examination is not applicable.

*IT IS NOT A FISHING EXPEDITION.*

The Wisconsin Supreme Court has held that the "4096" examination is not to be considered merely a "fishing expedition." Nevertheless, a great many of such examinations are, in effect, in great part "fishing expeditions," and to a large extent properly so. The party calling for the examination should not



be permitted to have such an examination on the mere suspicion that he may discover facts on which to base a case or a defense. He should, before commencing such an examination, have some good grounds to believe that the examination will result in disclosing details of evidence on which he can base a claim or a defense in conjunction with the facts or information theretofore in his possession. With such grounds and purpose, his fishing for such details of evidence is, in the writer's opinion, perfectly proper, and is contemplated by such statute.

MAX W. NOHL,  
Member of Milwaukee Bar.

## SUBSECTION 2 OF SECTION 2307 OF THE WISCONSIN STATUTES

This section of the statute of frauds is as follows:

*Agreements, what must be written.* Section 2307. In the following case every agreement shall be void unless such agreement or some memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith:

- (1) .....
- (2) Every special promise to answer for the debt, default or miscarriage of another person.
- (3) .....

From its very language it will be seen that it involves only a promise to pay the original debt of *not* the promisor, but the debt of an obligor under a then existing obligation, or the prospective debt of an original obligor of a contemplated obligation. This distinction is well illustrated in the oft given example with which the law student is first acquainted when studying this section in contracts: If A enters a store with B and asks the proprietor to sell goods to B, saying that "if B does not pay for them, I will", or "B owes a debt to you and if he does not pay, I will", that is such a special promise to answer for the debt of another as to be within the letter of the statute and in order to be valid must comply with the requirements expressed in the statute. B is the principal debtor and the obligation to pay is his, which obligation, however, also becomes A's if B fails to pay. An illustration of this can be found in *Reynolds vs. Carpenter*, 3 Pinney, 34, where this statute was first construed in this state. The defendant, a contractor, orally promised the plaintiff, a