EXAMINATION ON DISCOVERY IN QUEBEC

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Examination on discovery provides the trial lawyer with an effective means of obtaining valuable evidence and of weakening his adversary's case. It also helps to clarify the issues, shortens the length of the trial and frequently leads to a satisfactory settlement. The relevant procedure and jurisprudence, and the manner in which such examinations should be conducted are therefore of considerable importance. The basic procedure is set out in Articles 286 and 286(a) C.C.P. as amended to date[1]. They read as follows: —

> 286. After defence filed, any party may, after one clear day's notice to the attorney of the opposite party, summon any of the following persons to answer as a witness, before the judge or the prothonotary, upon all facts relating to the action or the defence:
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> 1. The opposite party, his bookkeeper, agent or manager;
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> 2. When the opposite party is a corporation, the president, manager, treasurer, secretary or, on the authorization of a judge, any other officer or employee of such corporation;
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> 3. When the opposite party is a foreign firm or corporation doing business in this Province, the agent of such firm or corporation.
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> 4. In actions resulting from an offence or quasi-offence, the person having the charge, direction, custody or operation of the thing which caused the damage, whether the opposite party be a person, corporation, firm or foreign corporation doing business in this Province.
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> 5. The person whose rights are exercised by the opposite party as *prête-nom*, subrogated party, transferee, tutor, curator or in any other similar capacity.
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> If the person to be examined cannot be summoned or cannot appear, the judge may order the summoning or the examination upon such conditions, in such manner and within such delay as he may deem equitable.
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> 286a. Before the filing of the plea and within the delay fixed for such filing, the defendant, after one clear day's notice to the plaintiff's attorney, may summon to appear before the judge or the prothonotary, subject to article 314, to be examined as a witness on the facts relating to the claim, the plaintiff or the party for whom he is claiming, or for whom he is acting as *prête-nom* in the cases where such a proceeding is admissible, as well as the persons mentioned in paragraphs 2, 3 and 4 of article 286.

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[1]The Code of Civil Procedure is referred to throughout in this article by the letters "C.C.P." It should be noted that in 1945 work commenced on revision of the present Code, the object being "to render the procedure less costly, more simple, more expeditious and better adapted to present needs". The first draft prepared by Messrs. August Désilets and Gérard Trudel was completed in 1947, and contained 1,109 articles as compared with 1,450 in the present Code. Later a Committee (of which this writer was a member) was appointed by the General Council of the Provincial Bar to study the draft and make recommendations. This Committee has met on several occasions and its suggestions have been forwarded to the Attorney-General. It is not yet possible to foretell when a new code of procedure will be enacted.

The defendant may also summon and examine in the same manner the victim of an offence or quasi-offence in any action for the recovery of damages, notwithstanding paragraph 4 of article 314.

The examination must be held within the eight days following the delay for[2] the filing of the plea; nevertheless the court or judge may extend the delay for examination when by reason of the illness or absence of the person summoned to appear or for any other cause not imputable to the defendant, the latter is prevented from effecting the examination within the said delay of eight days.

The provisions of the second paragraph of paragraph 4 of article 286[3] shall apply to the summoning and examining of any person who is subject to the examination contemplated by this article.

When a summons for examination is served within the delays and in conformity with this article, the delay for filing the plea is suspended until the day of the examination or, if it is not held, until the expiration of the delay for holding it.

This article shall apply only to causes brought before Superior Court.

Other provisions to be discussed are contained in Articles 287, 288, 289 and 290 C.C.P. Unlike the examination known as Interrogatories upon Articulated Facts which came to us from France, the right to examine on discovery is of English origin.[4] Today, however, the relevant procedure in Quebec differs substantially from that in England and other common law jurisdictions. It is proposed to deal with the subject from a practical point of view, and under three headings: (1) Examination on Discovery before Plea; (2) Examination on Discovery after Plea, and (3) Examination on Discovery in General.

I—Examination on Discovery Before Plea (Article 286(a) C.C.P.)

Right to Examine — Amendment of February 21st 1958. Since examination under Article 286(a) must be held before the filing of a defence, it is obviously open only to the defendant. Provision for discovery at that stage of the proceedings was first introduced in Quebec in 1926,[5] but the article as it now reads dates only from an important amendment passed on February 21st 1958.[6] In its original form, and until that amendment, the defendant's right to examine before plea was not absolute. The article required a motion for per-

[2]The words "the delay for" have been inserted by the writer. Through some clerical or stenographical error they were omitted from the English text although they appear in the French text: "...qui suivent le délai de production de la défense". The error will no doubt be corrected at the next Session.

[3]The second paragraph to paragraph 4 of Article 286 was added in 1939 by 3 Geo. VI c. 96, s.2. To avoid confusion it should be noted that in Weber's Code of Civil Procedure (1956), that paragraph appears after paragraph 5 of Article 286, and not as a second paragraph to paragrph 4 of that article. (Paragraph 5 was added later by (1944) 8 Geo. VI, c. 45, s. 3.).

[4]For interesting discussion by Bruneau J. on the respective origins of the two types of examination see *La Cie Guillemette v. Magnan* (1916) 17 Q.P.R. 461 (S.C.). Interrogatories upon Articulated Facts (Faits et Articles) are dealt with in article 359 C.C.P. *et seq.*

[5](1926) 16 Geo. V, c.65, subsequently amended by 25-26 Geo. V, c.99 s.1; 2 Geo. VI, c.100 s.2; 3 Geo. VI, c.96, s.3 and finally by 6-7 Eliz. II c.43 s.1.

[6](1958) 6-7 Eliz. II, c.43 s.1.

mission to examine, accompanied by an affidavit that the request was made in good faith and not in any way for the purpose of unjustly delaying the case. The granting or otherwise of the motion was in the judge's discretion,[7] and his decision was seldom reversed in appeal (assuming such an interlocutory judgment to have been susceptible of appeal under Article 46 C.C.P.).[8] Although the tendency was to maintain these motions (since they might result in shortening the length of the enquête or lead to a settlement)[9] it was customary to dismiss them when the Court did not consider that any useful object would be served by a discovery,[10] e.g. in most actions on promissory notes and accounts.[11]

As a result of the above mentioned amendment, the procedure has become simplified. No request, motion or affidavit is necessary save in cases contemplated in the second part of paragraph 2 of Article 286 (which applies also to examinations under Article 286(a)). Except in those cases the defendant may now examine the plaintiff or any of the other persons referred to in the article as a matter of right, after complying with the requirements of notice and summons. These must be served before filing a plea, and before the legal delay for doing so has expired. The clerical error in paragraph 3 of the English text (see fn. 2) will no doubt be corrected at the next Session.

Persons Examined. The words in Article 286(a) "the party for whom he is claiming" include parties whose rights of action the plaintiff claims to exercise. Thus, when an insurance company settles an accident victim's claim and after taking subrogation, sues to recover the amount it has paid him, the

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[7]*St. Amour v. Chabot* [1947] K.B. 779; *Metropolitan Loan Corp. v. Prudential Construction Co. Ltd.* [1948] Q.P.R. 254 (S.C.); *Bureau v. Pageau* [1948] Q.P.R. 280 (S.C.); *Péron v. Dufeutrelle* (1941) 45 Q.P.R. 328 (S.C.); *Biltwell Realties v. Lewis* [1949] Q.P.R. 173 (S.C.).

[8]In *Avery v. Schumann* [1956] Q.P.R. 336 (Q.B.) the Court of Appeal held (Bissonnette J. dissenting) that such a judgment was not susceptible of appeal. See on the other hand *Cadillac Hosiery Mills Ltd. v. Caprice Hosiery Mills* [1958] Q.B. 519 which was concerned with an appeal from an interlocutory judgment dismissing a motion under article 286(a), and *Jutras v. Poirier, infra fn.* 9.

[9]*Marcoux v. Fortin* (1929) 32 Q.P.R. 60 (S.C.); *Simard v. Cloutier* [1949] Q.P.R. 395 (S.C.) and general principles laid down at plenary session of Court of King's Bench in *Barry Casuals Inc. v. A.B.C. Corp.* [1949] K.B. 28. In *Jutras v. Poirier* [1954] K.B. 284 it was held that the only cases in which permission should be refused (other than in the case of bad faith or frivolity) were few in number and were those in which the allegations were so clear and simple that an examination would be an obvious waste of time.

[10]*Létourneau v. Banque Canadienne Nationale* [1950] K.B. 711; *Guy v. Gagnon* [1948] Q.P.R. 246 (S.C.); *Gaucher v. Huard* (1935) 39 Q.P.R. 221 (S.C.); *Deslandes v. Irvine* [1951] Q.P.R. 20 (S.C.); *Fournier v. Renaud* [1949] K.B. 363.

[11]*Duci v. Mandanicci* [1950] Q.P.R. 268 (S.C.); *Lavigne v. Lévesque* [1956] Q.P.R. 422 (S.C.); *Roux v. Martel* [1955] Q.P.R. 243 (S.C.); *Pinsky v. David* [1953] Q.P.R. 308 (S.C.); *Roux v. Baril* [1955] Q.P.R. 304 (S.C.). In exceptional circumstances, however, the examination was allowed in such cases, e.g. *Racine v. Langlois* [1955] Q.P.R. 65 (S.C.); *Morgan v. Turner* [1955] Q.P.R. 96 (S.C.).

defendant is entitled to examine the accident victim on discovery although he is not a party to the action.[12]

In an action taken by a tutor on behalf of a minor, the minor may be examined on discovery provided he or she is sufficiently mature to understand the situation and to appreciate the difference between truth and falsehood. The plaintiff's attorney may object to the examinaion on the ground that the minor is too young.[13] In that event the competency or otherwise of the child to testify may be determined by way of *voir dire*.[14]

Under Article 314(4) C.C.P. neither husband nor wife is competent to testify against the other except in the cases mentioned in that article. The second paragraph of Article 286(a) creates a further exception to that rule. For instance, if a husband claims damages for injuries to his wife, the wife, when examined on discovery is the defendant's witness and may therefore testify against her husband. This exception, however, applies only when the action has been taken on the wife's behalf, either by her husband alone or by the husband acting jointly with her. For example, in *McDougall v. Lussier*[15] the father of a child who had been fatally injured in an accident sued the defendant for damages under Article 1056 C.C. He took the action both in his personal capacity and as head of the community existing between him and his wife. The latter was not a party to the action.[16] On a motion by the defendant to examine both husband and wife on discovery before plea, Brossard J. held that the exception was not applicable, and refused permission for examination of the wife.

It is important to note that the first paragraph of Article 286(a) includes the persons mentioned in paragraphs 2, 3 and 4 of Article 286 in the cases contemplated in those paragraphs. As to the interpretation of the words "any other officer or employee of such corporation" in paragraph 2, see *infra* page 63.

Paragraph 4 of Article 286 (also applicable to 286(a)) provides for examination in cases of delict and quasi-delict of "the person having the charge, direction, custody or operation of the thing which caused the damage", e.g. the driver of an automobile or the motorman of a tramcar. The person who may be examined under this provision is the person having the charge, etc. of the thing which is *alleged* to have caused the damage. For instance, in an action by a railway company in which the plaintiff claimed that a collision between its train and the defendant's automobile was due to negligent driving of the automobile,

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[12]*McCasland et al v. Rochette* [1953] Q.P.R. 209 (S.C.); *Canadian Home Ass'ce. Co. v. Metane Planning Mills Ltd.* [1956] Q.P.R. 13 (S.C.). See also *Wawanesa Mutual Ins. Co. v. Montreal Tramways Co.* [1946] Q.P.R. 374 (S.C.); *Canadian General Ins. Co. v. City of Montreal* (unrept'd., but referred to in the *McCasland* case *supra*): *Workmen's Compensation Commission v. Montreal Tramways Co.* [1947] K.B. 218.

[13]And therefore incompetent under Art. 314 (1) C.C.P.

[14]Art. 328 C.C.P. In practice the judge usually asks the child a few preliminary questions in order to determine whether or not the examination should be permitted.

[15][1956] Q.P.R. 424 (S.C.) and see authorities cited in report.

[16]Nor was there any allegation in the declaration to indicate that any part of the claim was made for her personally as distinct from the community.

it was held that the defendant had no right (before plea) to examine the person in charge of the plaintiff's train.[17] The Committee referred to in *fn.* 1 *supra* has recommended that in the revised Code the words "the thing which caused the damage" should be replaced by the words "the thing which is alleged by one of the parties to have caused the damage."[18]

The provisions contained in Article 286(a) are limitative and should not be extended in order to examine persons other than those referred to in the article.[19]

Scope of Examination. Beacause the discovery is held before plea the scope of examination is necessarily narrower than in an examination under Article 286.[20] Its purpose is to enlighten the defendant as to the action as brought, not to permit "an excursion at large". The questions must therefore be relevant and material, and not such as to cause delays by importing foreign matter into the suit.[21] Moreover, the questions must relate to the allegations in the Declaration,[22] and not to things that happened subsequently.[23] But the questions should not be unduly restricted. Thus the Court of Appeal has held that the article "should be construed liberally, otherwise the object of such preliminary examination would be frustrated, this being merely a preliminary stage".[24] It is noteworthy, however, and it may be significant that the amendment of February 21st 1958 has since removed the word "all" from that part of the article which formerly read "to be examined as a witness on all the facts relating to the claim."

It has been held that a plaintiff who has alleged in his Declaration that the defendant made an admission in the presence of witnesses, can not refuse on discovery to disclose the names of those witnesses.[25]

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[17]*C.N.R. v. Noiseux* [1952] Q.P.R. 35 (S.C.).

[18]See "Deuxième Partie du Rapport du Comité constitué par le Conseil Général pour étudier l'avant-projet d'un nouveau Code de Procédure Civile", p. 5.

[19]*National Lumber Exporters Ltd. v. Labonté* [1952] Q.P.R. 368 (S.C.). In *Atty.-Gen. of Can. v. Davis* [1957] Q.P.R. 143 (S.C.) it was held that "le défendeur a droit à l'examen au préalable de la Couronne en l'absence d'allégation d'intérêt public à l'encontre de cette demande".

[20]*Wright v. Barry Casuals Inc.* [1949] Q.P.R. 299 (S.C.); see also *La Caisse Populaire de la Sarre v. Bélanger* [1953] Q.P.R. 446 (S.C.) at p. 448 distinguishing scope of examinations under Arts. 286a and 286.

[21]*Henchey v. Gauthier* [1945] Q.P.R. 106, 110 (K.B.).

[22]E.g. in *Clément v. Dionne* [1958] Q.P.R. 107 (S.C.) it was held in part: "S'il convient de donner à l'art. 286a C.P.C. une interprétation libérale, il ne faut pas permettre les abus qui sèmeraient la confusion dans le champ où doivent se dérouler les procédures conduisant à jugement et les questions permises en tel examen doivent se rattacher par un lien suffisamment visible aux yeux du Tribunal à la déclaration dans laquelle la demande est formulée"; and see other cases cited on page 113 of Report.

[23]*Presto Oil Co. v. Merette* [1953] Q.P.R. 29 (S.C.); *Canadair Ltd. v. Douglas Aircraft Co.* [1951] K.B. 470; see also *Jacques v. Couture* [1957] Q.P.R. 7 (S.C.).

[24]*Charest v. Forget* (1941) 70 K.B. 401, 403; see also *Buisson v. Thibaudeau* (1934) 38 Q.P.R. 112, 113 (S.C.).

[25]*Lepage v. Roy* [1952] Q.P.R. 261 (S.C.). However, the general rule, of course, is that a party is not obliged to disclose the names of his wituesses, e.g. in *Mainville v.*

Proof.—Documents, etc. (see also page 64 *infra*). It is important to bear in mind that the examinee under Article 286(a) is the *defendant's* witness and that the deposition on discovery will form part of the court record.[26] Care must therefore be exercised to avoid helping the plaintiff to make his proof. In *Collette v. Ponton*[27] a husband sued for damages resulting from an accident to his wife, but failed to produce a certificate of marriage. The Court of Appeal held that the defendant had no ground for complaint on that score because the marriage had been proved by the plaintiff's answers to questions put to him on discovery by the defendant's attorney.

Questions on discovery may also open the door to testimony[28] in cases in which such proof would otherwise be inadmissible. In this connection Mr. Justice Surveyer referred in an article[29] to a letter written to him by Mr. Justice Mignault, reading in part:

> Dans la province de Québec, l'interrogatoire préalable fait partie de la preuve et cela gêne la liberté de l'avocat de la partie adverse, car il s'expose à introduire dans la procédure une preuve testimoniale que son adversaire ne pourrait faire qu'avec un commencement de preuve par écrit.

For example, in *Corporation du Collège Ste.-Marie v. Racette*[30] the plaintiff on discovery before plea was questioned as to money she had deposited from time to time with the College. Since the action was concerned with a non-commercial matter involving more than $50, objection could have been made to verbal evidence to prove the deposit,[31] but no objection was made at the time. At a subsequent stage of the proceedings, however, the appellant objected to any verbal evidence on the part of the plaintiff, and later contended unsuccessfully that a deposition on discovery under Article 286(a) should not in any event be held to form part of the record. Barclay J. stated in part (at page 150):

Monfette infra fn. 64, the Court of Appeal held that objections to certain questions on discovery should have been maintained because they were asked with the object of exposing the names of witnesses.

[26]Under Art. 288 C.C.P.

[27](1930) 49 K.B. 566. See also *The King v. Savard* [1944] K.B. 328 at pp. 336, 339: proof of separation as to property made on discovery. This was admittedly secondary evidence, but no objection was made at the time. In *Grimaldi v. Restaldi* [1933] S.C.R. 489 plaintiff had testified on discovery that the defendant admitted to him, in the presence of other witnesses that the accident in question "was the chauffeur's fault" and that he (the defendant) was liable for the accident and its consequences. At the trial the plaintiff merely proved the amount of damages and produced no further evidence as to the chauffeur's fault. Held *inter alia* that the plaintiff's evidence on discovery established sufficiently the existence of facts which explained the acknowledgment by the defendant of his liability, as sworn to by the plaintiff, and that this fully justified the judgment appealed from in favour of the plaintiff.

[28]i.e. verbal evidence.

[29](1924) 2 Revue du Droit 204, at pp. 205, 206.

[30][1944] R.L. 129 (K.B.).

[31]Art. 1233 C.C.

> While a party may prevent the door being opened to verbal evidence, once he himself has opened the door to such evidence, his objection comes too late and he cannot object to his own evidence, more particularly in view of the subsequent plea of payment, which tacitly admits the deposit.

At one time it was not uncommon to serve the plaintiff with a subpoena *duces tecum* ordering him to bring to the examination accounts and other documents in support of his action. The plaintiff was then asked to produce them as exhibits. In the absence of special circumstances, this practice is unwise since it may amount to making proof against one's own client. Nevertheless, there may be a special reason for obliging the plaintiff to produce documents in his possession. It has been held, however, that he is not required to produce those which do not form the basis of the action.[32] But if he has alleged certain documents in support of his declaration, the defendant may enforce their production.[33] In many cases a defendant would be wiser to wait until he has filed a plea and then move for production of such documents as he may require under Article 289 C.C.P.[34] (*infra* page 64).

Assuming the examination has been properly prepared, all documents filed as exhibits with plaintiff's action will have been inspected beforehand, and notes will have been made on points justifying useful interrogation. Accuracy of exhibits such as accounts, e.g. for hospital and medical services, repairs, etc. may usually be checked in advance, and if found in order, there is no object in refering to them on discovery. In most instances, however, it is necessary to ask some questions relating to the nature and quantum of damages claimed, and in that event the writer, for what it is worth, has made it a practice to insert a reserve along the following lines:

> I wish to make it clear that all the questions I shall ask you in connection with your alleged damages and losses will be asked without prejudice and under express reserve of the defendant's right to contend that all such alleged damages and losses are unfounded, indirect and illegal.

From time to time, especially if the deposition be lengthy, it is well to refer back to that reserve, e.g. "Always under the reserve already made by the defendant. . . ." etc. Although this procedure sometimes is met by an objection, the writer is unaware of any judgment holding it to be illegal. It is obvious, however, that the reserve (assuming it to be legal) is useful only within reasonable limits.

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[32] *Banque Can. Nationale v. Pomerleau* [1943] Q.P.R. 385 (S.C.); *La Manufacture de Portes et Chassis du Lac Noir Ltée. v. Grégoire et al.* [1957] Q.P.R. 252 (S.C.); *Rochester v. The E. B. Eddy Co. Ltd.* (1923) 26 Q.P.R. 124 (K.B.).

[33] It has indeed been held that even when the plaintiff alleges no documents in support of his declaration, the defendant may ask him, when summoned for examination before plea, to bring certain specified documents alleged to be in his possession — *Martens v. Langevin* (1935) 39 Q.P.R. 138 (S.C.).

[34] Under the old procedure which required a motion under Art. 286a it was held that such a motion could not legally be coupled with a motion to produce documents undert Art. 289 — *Couillard-Desprès v. Le Séminaire de Québec* (1941) 45 Q.P.R. 358 (S.C.); and see *Zinman v. Bishinsky* [1948] Q.P.R. 98 (K.B.).

Peremption.[35] Prior to the February 1958 amendment it was held that a defendant who obtained judgment authorizing him to examine a plaintiff on discovery could not have the suit perempted if he had not proceeded with the examination or had not renounced the judgment permitting it, except when the plaintiff had taken advantage of the defendant's default to proceed with the examination within the delay fixed by the court.[36] Nor, it was held, could the suit be perempted if the hearing of a motion under Article 286(a) had been postponed by consent *sine die*.[37] It seemed only reasonable that a defendant who delayed the suit by neglecting to proceed with the motion, or with an examination authorized by the motion, should not be allowed to take advantage of his own neglect. It is submitted that the same principle should be applied to the amended article; e.g. a defendant should not be allowed to peremp if, after serving a notice and summons, he did not proceed with the examination as scheduled, or if, after arranging to postpone it *sine die,* both parties allowed the action to lie dormant.

When Examination is Inadvisable. In some cases it may not be advisable to examine on discovery. If, for example, the plaintiff has omitted one or more material allegations from his declaration, a discovery might serve merely to bring the omission to light, and result in amendment. If, on the other hand, the defendant's attorney lets the matter rest until trial, prescription may operate to preclude the plaintiff from amending in cases where the amendment would change the nature of the demand.[38] And in a case in which testimony would ordinarily be inadmissible,[39] the defendant is often better advised to forego the

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[35]Under Art. 279 C.C.P. "suits are perempted when no proceeding has been had therein during two years." Art. 282 provides that "Peremption must be declared by the court upon a motion of which notice is given to the attorney, or, if there is no attorney, to the party himself."

[36]*Boudreault v. Vézina* [1956] Q.P.R. 95 (S.C.). See, however, *Bleau v. Kouri* [1956] Q.P.R. 285 (Q.B.) which applied the principle laid down in *Tétrault Frères Ltée. v. Canadian Wineries* [1953] K.B. 471. That case held that failure by a defendant to furnish particulars within the delay fixed by the court was not an obstacle to a motion for peremption. In *Ciccanti v. Trottier* (1944) 48 Q.P.R. 36 (S.C.) it was held that when a motion for examination has been granted, the date of same to be fixed by consent of the parties, peremption starts to run from the date of he unanswered letter from defendant's attorneys to plaintiff's attorneys asking when their client can be examined.

[37]*Leblanc v. McClintock* [1952] Q.P.R. 267 (S.C.). See also *Kraus v. Jamieson* [1958] Q.P.R. 93 (S.C.) in which both attorneys had tacitly agreed that the examination would be held on a date to be chosen by defendant's attorney. The latter let the matter rest and later moved to perempt the suit. The motion was dismissed. See also cases cited on page 94 of report. It should be noted that Art. 280(3) states that peremption does not take place "when proceedings are compulsorily stayed by an incidental proceeding or by an interlocutory judgment".

[38]E.g. *Lair v. Laporte* [1944] R.L. 286 (S.C.) at pp. 293, 294.

[39]Art. 1233 C.C.

right to discovery, thereby avoiding the risk of giving the plaintiff an opportunity to obtain a commencement of proof in writing.[40]

Bodily Injury Cases. In most cases involving bodily injury it is customary for the defendant to make a motion for a medical examination before plea under Article 286(b) C.C.P. In such cases it is desirable that the discovery should precede the medical examination because the plaintiff's evidence is often useful to the examining doctor.

II—Examination on Discovery After Plea (Article 286 C.C.P.)

Right to Examine. Unlike the situation under Article 286(a) the right to examine under Article 286 is open to both plaintiff and defendant. It is available to either party as soon as a plea to the action has been filed, and at any time afterwards until the trial. The witness is summoned after one clear day's notice to the opposing attorney. No motion is necessary except in cases contemplated in the second part of paragraph 2 of the article.

Nor is the defendant's right to examine under Article 286 affected by the fact that he has already examined the plaintiff under Article 286(a). Indeed, a second examination often serves a useful purpose. For example, in an action for bodily injuries it is usually advisable to examine the plaintiff again shortly before the trial to ascertain what progress he has made since the first examination. This may be of special importance if as a result of information obtained at the first discovery an investigation has been made concerning the plaintiff and his activities.

Scope of Examination. Since the witness may be examined "upon all facts relating to the action or the defence" the scope of examination is obviously wider than under Article 286(a).[41] Plaintiff's attorney examining a defendant on discovery may try to obtain admissions on the facts of the claim; he is not limited to the facts alleged in the plea.[42] The examination may also provide the plaintiff with an opportunity to obtain a commencement of proof in writing.[43] For example, when the defendant, in answering interrogatories on articulated facts (where the same rule applies) stated that he had paid $728 to a party since deceased as the purchase price of an automobile, Walsh J. observed in the Court of Appeal:[44]

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[40]E.g. *Corporation du Collège Ste.-Marie v. Racette, op. cit. fn.* 30.

[41]See cases cited in *fn.* 20 *supra* and *Jacques v. Couture op. cit. fn.* 23.

[42]*Lachance v. Lapointe* [1955] Q.P.R. 299 (S.C.).

[43]Thereby permitting him to make proof by testimony (Art. 1233(7) C.C.). Art. 316 C.C.P. provides that "a party may be examined by the opposite party and his evidence may be used as a commencement of proof in writing." This provision applies on discovery as well as at trial — *Blain v. Chèvrefils* (1919) 55 S.C. 172.

[44]*St.-Georges v. Auger* [1943] K.B. 241 at p. 245.

> Normally parol evidence would not be admissible to prove this sale. In this instance, however, the respondents provoked this mode of proof by questioning the appellant as to all the circumstances of the purchase in question.

It is often desirable to examine the defendant on discovery before filing an answer to plea. An examination at that stage should be helpful both in preparing the answer and, in doubtful cases,[45] in determining whether or not it is advisable to implead a third party, or perhaps to desist as against one of several defendants.

Persons Examined. These are mentioned in the five paragraphs of Article 286. Paragraph 2 concludes with the words, "or, on the authorization of a Judge, any other officer or employee of such corporation". These words should not be interpreted to mean that a litigant may examine numerous officers or employees of the opposite party and oblige them to expose their employer's case before the trial. Thus it has been held that the party examining may never as of right summon more than one witness, and to be authorized to summon more than one "he must at least establish that to complete the examination envisaged by Article 286 he must question more than one of the corporation's officers or employees".[46] Paragraph 4 of the article has already been discussed (*supra* page 57.

It has been held that an employee no longer in the employ of a defendant corporation may still be examined on discovery if he is the person best qualified to testify on the issues involved.[47] Contrary to the rule in interrogatories upon articulated facts,[48] an employee who is examined on discovery is not obliged to produce a resolution of his company authorizing him to give evidence.[49]

All Evidence forms part of Record. As in the case of Article 286(a), all the evidence taken on discovery under Article 286 forms part of the court record.[50] This rule is different elsewhere. In Ontario, for instance, the examining party has the option of reading into the record at the trial those parts most favourable to him. However, if after reading the deposition the Judge considers

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[45]A plaintiff's attorney not in a position to know all the facts at the time of instituting action may well be in doubt as to whom to sue and sometimes sues the wrong party. When for safety's sake he has sued several defendants, he may decide to desist as against one or more of them, depending upon the evidence adduced at the examinations on discovery.

[46]*C.P.R. v. Lachance* [1947] K.B. *403.* A judgment ordering the examination of an officer or employee should state which officer or employee is to be examined. A judgment simply ordering the examination of "an officer of the company" should be reversed on appeal — *London & Scottish Ass'ce. Corp. v. Credit Foncier Franco-Canadien* [1952] Q.P.R. 271 (K.B.). Although this case was concerned with an examination before plea, the same rule should be applied to an examination under Art. 286(2).

[47]*Lunham & Moore Shipping Ltd. v. J. & R. Weir Ltd.* [1954] Q.P.R. 319 (S.C.).

[48]Art. 363 C.C.P.; and see *Dumont v. Le Collège des Médecins et Chirurgiens de la Province de Québec* (1901) 4 Q.P.R. 81 (S.C.).

[49]*Hall Corp. of Canada v. Atlantic Steel Co. Ltd.* [1955] Q.P.R. 9 (S.C.).

[50]Art. 288 C.C.P.

that "any other part is so connected with the part to be so used that the last-mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence."[51] In the case of a corporation, the law in that Province is that any officer or servant of the corporation may be orally examined, but the examination "shall not be used as evidence at the trial".[52]

Jurisdiction. Unlike an examination on discovery before plea, examinations under Article 286 are not restricted to actions in the Superior Court.

Inspection of Documents, etc. The production of documents at an examination on discovery has already been discussed (*supra* page 60). It should be noted however, that Article 289 makes special provision for inspecting documents, objects, etc. in the opposite party's possession or under his control. It reads as follows:

> Upon the application of any party, the judge may, at any time after defence filed and before trial, order the opposite party to exhibit any object, or to give communication or furnish a copy or allow a copy to be made of, any book or document in his control, relating to the action or the defence, at such times and places, under such conditions and in such manner as are deemed proper.

This provision should not be confused (as it sometimes is) with Article 392 under which the Court or Judge may order an expertise. Article 289 is limited in scope. For example (unlike the corresponding provisions in certain other jurisdictions, e.g. Rule 34 of the U.S. Federal Rules of Civil Procedure)[53] it has been held that an application made under that article for permission to enter the opposite party's premises and carry out tests should be dismissed.[54] Nor, generally speaking, is a party permitted to make tests on an object, e.g. a piece of mechanism ordered to be exhibited, especially if such tests might result in altering its characteristics.[55]

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[51]Rule of Practice 330 (made pursuant to the Judicature Act, R.S.O. 1950, c. 190, s.9).

[52]Rule of Practice 327(2).

[53]For interesting discussion on discovery and production of documents under the Federal Rules see (1958) 58 Columbia Law Rev., p. 498 *et seq.*

[54]*Gareau v. Mtl. Street Ry. Co.* (1898) 1 Q.P.R. 566 (Q.B.); *Dubois v. Horsfall et al.* (1900) 18 S.C. 138; *United Shoe Machinery Co. v. Caron* (1903) 6 Q.P.R. 100 (S.C.); *Moore v. Merit Motors* [1943] R.L. 13 (S.C.); *Phoenix Ass'ce. Co. of London v. City of Montreal* [1952] Q.P.R. 313 (S.C.); *Beaudet v. Bédard et al.* [1955] Q.P.R. 87 (S.C.).

[55]*Belair v. C.P. Express Co.* [1947] Q.P.R. 415 (S.C.); *Dion v. Lessard* [1951] Q.P.R. 49 (S.C.). *Dupré v. C.P.R.*, S.C. No. 213, 394, Jan. 20, 1944 (unrept'd.), was concerned with an action for damages resulting from the death of plaintiff's husband following derailment of a train. Defendant pleaded that the accident was due to a latent defect in the rail which could not be foreseen and against which no reasonable care or skill could provide. Plaintiff moved under Art. 289 to have the rail photographed and subjected to certain analyses and tests. The Court ruled that plaintiff's experts could "(a) photograph the rail; (b) examine the rail under a microscope, and (c) take enlarged photographs thereof"; but that "the rail is not be handled save insofar as may

Application for inspection is open to either party and is made by way of motion supported by an affidavit. As appears from the article, the motion cannot be made until a defence has been filed to the action. If, at the hearing of the motion it is shown that the party has neither possession nor control of the document or object required, he cannot, of course, be ordered to produce it.[56] A judgment granting such a motion and ordering a party to give communication of certain books, documents, etc., does not fall within the terms of Article 46 C.C.P., and is therefore not susceptible of appeal.[57]

III—Examination on Discovery in General

Preparation and Conduct. The examination should be preceded by thorough preparation with *concentration on the points upon which the attorney has reason to believe he may obtain admissions and other evidence helpful to his client's case.* A common mistake is to take the examinee over the allegations of his pleadings without having any particular object in mind. In all probability the answers will confirm the allegations, and the examiner will merely have helped to make his opponent's proof. Such an examination is worse than useless.

In conducting the examination, the attorney should constantly bear in mind the impression the evidence is likely to make upon the Court. This is of particular importance in jury cases since it is customary[58] for the depositions on discovery to be read to the jurors.[59] For example, in examining a widow

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be necessary for re-assortment or placement for the above purposes, nor is it to be scraped polished or otherwise tampered with".

[56]Nor, it has been held, may a party be obliged to produce documents which do not constitute the basis of the action or of the defence — *Rochester v. The E. B. Eddy Co. Ltd., op. cit. fn.* 32. See also *Cellulose Assets Ltd. v. Richmond Pulp & Paper Co. of Canada Ltd.* [1958] Q.P.R. 130 (S.C.). In *Selkirk v. Hyde et al.* [1958] Q.P.R. 281 (S.C.) it was held that a plaintiff who claims damages from a hospital and doctor alleging that injuries were sustained through the fault and negligence of both defendants, is entitled to have the defendant hospital ordered to show and allow a copy to be made of its record of treatment of plaintiff. See also *Mellen v. Nelligan et al* [1952] S.C. 446.

[57]*Crown Trust Co. v. Mussen* (1939) 66 K.B. 517.

[58]It has been held that when two defendants to an action each produce a plea raising different issues, admissions or declarations made by one of them on discovery cannot be used as proof against the other if the latter did not receive any notice of the date and place of the discovery, and therefore had no opportunity to cross-examine the witness — *Wise v. Boxenbaum* [1944] R.L. 97, 107 (K.B.). See also *Livernois v. Beaudin* [1951] Q.P.R. 39 (K.B.). See, however, *Bethune v. Bainbridge* [1953] Q.B. 740 in which plaintiff's motion to refer the case to a jury and to fix dates was opposed by one of two defendants on the ground that two separate defences had been filed, and that only the other defendant had examined the plaintiff on discovery. Under the circumstances it was contended that the case could not be heard by one and the same jury. In this case the two defences, although separate, were substantially to the same effect, each placing the entire blame for an accident upon the plaintiff. The Superior Court judgment dismissing plaintiff's motion was unanimously reversed in appeal.

[59]In exceptional cases the parties may agree otherwise, but such cases are rare.

suing for damages resulting from a fatal accident to her husband, a suitable opening would be: "You appreciate, Madam, that it now becomes my duty to ask you some questions in connection with this unfortunate accident". An aggressive attitude, on the other hand, would be likely to antagonize the jury.

The examination should be confined to a reasonable length. Many depositions are too long, with the result that favourable points are likely to become buried in a mass of questions and answers.

Experience has shown that it is a wise precaution when starting the examination to ask a preliminary question along the following lines: "Mr. X, if you do not fully understand each and every question I shall put to you, will you please say so at once so that I may repeat or rephrase my question? Otherwise it will be assumed that you have understood the question. Is that perfectly clear?" The witness's answer is invariably in the affirmative.

It is important in the writer's opinion that if the lawyer in charge of the case does not personally conduct the discovery, he should at least be present at the examination. It happens too often that an attorney, unfamiliar with the facts and law of a case, is handed a file by a senior partner and instructed to conduct single-handed a discovery due to start in a matter of hours. When it is recalled that the outcome of an action may depend upon the evidence adduced at the examination, the risk involved in such practice is obvious.

Generally speaking, it is not advisable to cross-examine on discovery in non-jury cases, although there are exceptions to this rule. For example, one or more of the examinee's answers may have been given without correctly understanding the questions put to him; or a point favourable to his case may have been touched on only in part, or may have become distorted. In jury cases, however, the situation is somewhat different because, as already mentioned, the depositions are usually read to the jurors and they, being laymen, may wonder why the deposition is one-sided and may conceivably conclude that since the other attorney asked no questions, he was not in a position to challenge the evidence in chief. It is therefore good practice in jury cases to cross-examine *briefly,* covering important points only, and bearing in mind how the cross-examination will sound to the jury. The common practice of entering in the record the words: "Cross-examination reserved" is irregular, and when made, an objection should be taken and entered to such a reserve. If there is to be a cross-examination, it should be held at the time of the discovery or not at all. The general rule[60] that cross-examination is restricted to facts raised in examination-in-chief applies also to cross-examination on discovery.[61]

Original depositions on discovery should not be retained, but should be filed in Court as soon as they have been checked for stenographical errors.[62]

[60]Art. 340 C.C.P.

[61]Art. 287 C.C.P.

[62]In the event of any such errors, a letter should be written to the official stenographer requesting that the necessary corrections be made. A copy of that letter should always be sent to the opposing attorney in case there should be any difference of opinion as to how the deposition should read.

Nor should notes or marks of any kind be made upon them. Copies of the depositions (ordered from the official stenographer at the time of the examination) should be kept for office use. At the outset of a trial it is important to see that the depositions are in the record, and to draw the Judge's attention to the fact that examinations on discovery have been held.

Objections to Evidence — Appeals. Many examinations on discovery are held by consent in the office of one or other of the attorneys. But when the issues are such that objections are likely to be raised at the discovery, it is preferable to hold the examination at the Court House where the objections may be submitted for decision in the Practice Division or to a Judge in chambers. This is particularly desirable in jury cases. If, on the other hand, questions or answers are admitted under reserve of objections, it is important that the trial Judge should be asked to rule upon them and to strike any illegal matter from the record before the deposition is read to the jury. In some instances this precaution has been over-looked, with the result that the jurors have heard evidence they had no right to hear.

Appeals from interlocutory judgments on objections are subject to the same general rule as applies at a trial; namely, a judgment maintaining an objection is susceptible of appeal under Article 46 C.C.P.,[63] whereas a judgment dismissing an objection is not.[64]

Costs. The second paragraph of Article 288 provides that costs of depositions form part of the taxable costs of the action. The following paragraph makes an exception to this rule when the party examined before the filing of the defence is what the article describes as a "disqualified person". In such a case the cost of the summons and of the deposition must be paid by the examining party. Thus it has been held that when a minor is examined before plea, such costs must be paid by the defendant.[65] The general rule is that the taxable costs for conducting an examination on discovery form part of the costs of the action, and follow suit.

Actions in Separation from Bed and Board. In actions of this kind Article 1100 C.C.P. declares that "the parties cannot admit the allegations, proof of which must always be made before the court". In view of this provision the courts at one time held that examinations on discovery were not available in actions in separation from bed and board. Motions to examine plaintiffs before

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[63]*Buzzel v. MacPherson* (1934) Q.P.R. 377 (K.B.); *P. Marrazza Inc. v. Masonry Construction Co.* [1953] Q.P.R. 191 (Q.B.): and see article by Solomon Weber in [1951] 11 R. du B. 371 citing *Beaudry v. Fiset* [1949] K.B. 844, in which the author points out that the headnote in that case goes too far (see Galipeault J. at p. 844 of report). Being an interlocutory judgment, however, leave to appeal must first be obtained in accordance with Art. 1211 C.C.P.

[64]*B.V.D. Co. Ltd. v. Canadian Celancse Ltd.* (1935) 59 K.B. 418. See, however, *Mainville v. Monfette* [1957] Q.B. *795.*

[65]See *Bélanger v. Gagnon* [1949] Q.P.R. 129 (S.C.).

plea under the old procedure were therefore dismissed, and evidence taken after plea under Article 286 was not considered.[66] Recent decisions, however, have held otherwise.[67] The object of Article 1100 C.C.P., of course, was to prevent collusion between the parties, but this is no reason for not permitting an examination on discovery. As pointed out in *Cartier v. Boyer*,[68] a discovery provides a party with the opportunity to become prepared to meet the evidence that will be made against him; it does not prevent the court from requiring that the proof must be made before it, nor from disregarding proof made contrary to the terms of Article 1100.

Summons and "Taking of Evidence". The rules governing "the summoning, examination and punishment of witnesses and the taking of evidence apply, insofar as may be, to the cases mentioned in Articles 286 and 286(a)."[69]

When the party to be examined resides outside the jurisdiction, he is entitled to be paid his expenses in coming to the place where the court is located as well as his hotel expenses[70]. In virtue of Article 299 C.C.P., a party may be summoned for examination on discovery in Quebec even though he resides in Ontario. The necessity of such an examination must, however, be established to the satisfaction of the court and adequate travelling expenses must be provided.[71]

Examination in Accounting Matters. It should be added that Article 570(a) C.C.P. provides for a special type of examination on discovery in accounting matters. It gives a party to whom an account has been rendered (in accordance with Article 566 C.C.P. *et seq.*) the right to summon the accounting party, his bookkeeper, authorized representative or manager, to be examined as a witness "on any fact relating to the account filed and to the vouchers connected therewith."

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The writer hopes that the foregoing discussion may be useful to attorneys and law students in Quebec, and that from a comparative point of view, it may be of some interest to practitioners in other jurisdictions.

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[66]E.g. *Emo v. Hughes* (1940) 44 Q.P.R. 347 (S.C.); *Patenaude v. Gingras* (1926) 29 Q.P.R. 219 (S.C.); *Boily v. Pépin* (1940) 44 Q.P.R. 95 (S.C.).

[67]E.g. *Vey v. Dewey* [1944] Q.P.R. 265 (S.C.); *Cartier v. Doyer* [1958] Q.P.R 139 (S.C.). See also article by Rosario Genest in (1942) 2 R. du B. p. 241.

[68]*Op. cit., fn.* 67.

[69]Art. 287 C.C.P.

[70]*McCasland et al. v. Rochette op. cit., fn.* 12.

[71]*McFayden v. Hutton et al.* [1955] Q.P.R. 281 (S.C.).