1953

Current Decision, Right to Inspect Memoranda Used to Revive Recollection

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serving in the United States armed forces were relaxed considerably.[17] Finally, in June, 1952, the former oath requirements[18] were amended and the section setting out the exact form of the oath was repealed.[19] The amended section retains the first four promises required by the former oath,[20] but adds a fifth promise:

> . . . (5) (A) to bear arms on behalf of the United States when required by the law, or (B) to perform noncombatant service in the Armed Forces when required by the law, or (C) to perform work of national importance under civilian direction when required by the law.[21]

This conclusively clarifies the congressional intent that a promise to bear arms is not an absolute requirement, if the petitioner can show by clear and convincing evidence that he is opposed to bearing arms by reason of religious training and belief.[22] The amended section however, still requires an oath in open court as a prerequisite to naturalization.[23] The problem of the instant case, cannot hereafter arise, since no exact form of the oath is prescribed in the amended section. Under the stated facts of the present case and in view of the repeal of the exact form of the oath which contained the phrase objected to, it is submitted that the petitioner here could now be admitted to citizenship.

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RIGHT TO INSPECT MEMORANDA USED TO REVIVE RECOLLECTION

D was indicted for the crime of driving while intoxicated. While testifying at *D's* trial, a witness for the state refreshed his memory by reference to certain notes which he had in his possession. *D's* counsel requested that he be allowed to inspect the notes. The trial court denied the request. *D* appealed from a conviction in the trial court. The Colorado Supreme Court *held*: Reversed.[1] The court stated the

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[17]56 STAT. 182 (1942), 8 U.S.C. §§ 1001-1005 (Supp. 1946). These amendments prompted some lower federal courts to rule that an alien conscientious objector who served with the armed forces as a non-combatant was entitled to naturalization, notwithstanding inability to take the oath without mental reservation if it implied willingness to bear arms. *In re* Sawyer, 59 F.Supp. 428 (D. Del. 1945); *In re* Kinlock, 53 F.Supp. 521 (D. Wash. 1944).

[18]54 STAT. 1157 (1940), 8 U.S.C. § 735 (1946).

[19]66 STAT. 258, 8 U.S.C.A. § 1448 (Supp. 1952).

[20]". . . (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state or sovereignty . . . (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same. . . ." 54 STAT. 1157 (1940), 8 U.S.C. § 735(a) (1946).

[21]66 STAT. 258, 8 U.S.C.A. § 1448(a) (Supp. 1952).

[22]*Ibid.*

[23]*Ibid.*

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[1]Eckhardt v. People, 250 P.2d 1009 (Colo. 1952).

applicable rule in these words: ". . . when, in the trial of a criminal case, a witness for the prosecution, while testifying, refreshes his memory by reference to a memorandum, defendant's counsel is entitled as a matter of right to an opportunity of inspecting and examining such memorandum for the purpose of cross-examination, and denial of this right is prejudicial error."[2]

The court's holding states a virtually universal rule,[3] which applies in civil cases[4] as well as in criminal cases.[5] The court, however, points out that the principal case is a case of first impression in Colorado.[6] For this reason it is perhaps appropriate to consider the rationale of the majority rule and to discuss its applications and its exceptions.

Fundamentally, the rationale of the rule has two interrelated bases. In the first instance, the opposing counsel should have the opportunity to inspect such memorandum in order to determine if, in fact, the witness is using the memorandum to refresh his present recollection, that is, to recall facts of which he has independent knowledge.[7] If, in fact, the witness has no independent knowledge and is simply stating the facts as they appear on the memorandum, the testimony of such witness is inadmissible[8] unless the rules of recorded past recollection are complied with.[9] In the former situation the memorandum is used merely as an aid in recollection and is not itself testimony,[10] while in the latter situation the memorandum itself becomes a part of the witness's testimony.[11] The second basis for the rule is that opposing counsel should have the right to inspect in order to cross-examine the witness and point up any matters which would affect the credibility of the witness and consequently the weight of his testimony.[12]

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[2]*Id.* at 1010.

[3]See State v. Gadwood, 342 Mo. 466, 116 S.W.2d 42 (1937); 3 WIGMORE, EVIDENCE § 762 (3d ed. 1940).

[4]Fifth Avenue-Fourteenth Street Corp. v. Commissioner of Internal Revenue, 147 F.2d 453 (2d Cir. 1945); Schwickert v. Levin, 76 App.Div. 373, 78 N.Y. Supp. 394 (2d Dep't 1902); Duncan v. Seeley, 34 Mich. 369 (1876); *cf.* Traber v. Hicks, 131 Mo. 180, 32 S.W. 1145 (1895).

[5]Little v. United States, 93 F.2d 401 (8th Cir. 1937), *cert. denied,* 303 U.S. 644 (1938); State v. Taylor, 83 Ohio App. 76, 77 N.E.2d 279 (1947); State v. McMahan, 57 Idaho 240, 65 P.2d 156 (1937) (required by statute); People v. Schepps, 217 Mich. 406, 186 N.W. 508, 21 A.L.R. 658 (1922); State v. Nardini, 186 S.W. 557 (Mo. App. 1916).

[6]Eckhardt v. People, 250 P.2d 1009, 1010 (Colo. 1952).

[7]Green v. State, 53 Tex.Cr. 490, 110 S.W. 920, 22 L.R.A. (N.S.) 706 (1908); 3 WIGMORE, EVIDENCE § 762 (3d ed. 1940).

[8]3 WIGMORE, EVIDENCE § 758 (3d ed. 1940). The right to inspect exists in order to prevent the use of false aids which could result in false or manufactured testimony. People v. Schepps, 217 Mich. 406, 186 N.W. 508, 21 A.L.R. 658 (1922); Green v. State, 53 Tex.Cr. 490, 110 S.W. 920, 22 L.R.A. (N.S.) 706 (1908).

[9]The rules governing recorded past recollection are considered in 3 WIGMORE, EVIDENCE §§ 734-755 (3d ed. 1940).

[10]Jurgiewicz v. Adams, 71 R.I. 239, 43 A.2d 310 (1945); 3 WIGMORE, EVIDENCE § 763 (3d ed. 1940).

[11]3 WIGMORE, EVIDENCE § 754 (3d ed. 1940).

[12]See note 5 *supra.* 3 WIGMORE, EVIDENCE § 762 (3d ed. 1940).

Wigmore contends that the rule of inspection should also be applied to the use of memoranda referred to by a witness for the purpose of refreshing his memory before he takes the stand to deliver his testimony.[13] This view has received recognition by at least one state court in a criminal action.[14] However, the United States Supreme Court has held that in criminal actions the rule does not so apply.[15] Of the state courts which have passed on the question, the majority have taken the position of the Supreme Court in criminal cases.[16] In civil actions the federal courts [17] and the state courts[18] are uniform in holding that the rule of inspection does not apply to the situation in which the witness refers to the notes prior to taking the stand. The Colorado rule has not been established, but on the basis of dictum[19] and the precise language of the principal case,[20] it seems fairly certain that the Colorado court would restrict the right of inspection, at least in criminal cases, to memoranda utilized by the witness while testifying.[21]

Before an opposing counsel can contend that the trial court committed reversible error in denying him the right to inspect, counsel must have made a proper demand to the trial court.[22] On appeal,

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[13]3 WIGMORE, EVIDENCE § 762 (3d ed. 1940).

[14]State v. Deslovers, 40 R.I. 89, 100 Atl. 64 (1917). The reasoning of the Rhode Island court is worthy of quotation: ". . . the mere fact that the witness did not have the record [*i.e.*, the memorandum] immediately before him when he gave his testimony upon the stand does not seem to us to be material in view of the further fact that he had a very short time previously refreshed his recollection by its examination; such examination being made in contemplation of the evidence which he was about to give." 100 Atl. 64, 69-70.

[15]Goldman v. United States, 316 U.S. 129 (1942). The Court ruled that when notes are used before testifying the right of inspection is not absolute but rather is within the court's discretion. The Court in the *Goldman* case adopted the rule of the court of appeals as had been established in the criminal case of Lennon v. United States, 20 F.2d 490 (8th Cir. 1927).

Since the holding in the *Goldman* case no federal district court has been reversed on the grounds that its refusal to grant the right of inspection under these circumstances was an abuse of discretion. Echart v. United States, 188 F.2d 336 (8th Cir. 1951); Kaufman v. United States, 163 F.2d 404 (6th Cir. 1947), *cert. denied,* 333 U.S. 857 (1948); United States v. Cohen, 148 F.2d 94 (2d Cir. 1945), *cert. denied,* 325 U.S. 852 (1945); United States v. Toner, 77 F.Supp. 908 (E.D. Pa. 1948), *rev'd on other grounds,* 173 F.2d 140 (3d Cir. 1949).

[16]State v. Strain, 84 Ohio App. 229, 82 N.E.2d 109 (1948); State v. Paschall, 182 Wash. 304, 47 P.2d 15 (1935).

[17]C. W. Hull Co. v. Marquette Cement Mfg. Co., 208 Fed. 260 (8th Cir. 1913). *But cf.* The Alpha. Finley v. Daly Tankship Corp., 44 F.Supp. 809 (E.D. Pa. 1942).

[18]Leonard v. Taylor, 315 Mass. 580, 53 N.E.2d 705 (1944); McCoy v. Courtney, 30 Wash.2d 125, 190 P.2d 732 (1948); *cf.* Williams v. Duluth Street Ry. Co., 169 Wis. 261, 171 N.W. 939 (1919).

[19]*See* Battalino v. People, 118 Colo. 587, 599, 199 P.2d 897, 904 (1948).

[20]Eckhardt v. People, 250 P.2d 1009, 1010 (Colo. 1952).

[21]As to the question of what types of writings may be properly used by a witness to refresh his memory, see Lawson v. Glass, 6 Colo. 134 (1881); Denver & Rio Grande R. Co. v. Wilson, 4 Colo.App. 355, 36 Pac. 76 (1894); 3 WIGMORE, EVIDENCE §§ 758-761 (3d ed. 1940); MODEL CODE OF EVIDENCE, Rule 105 (i) (1942).

[22]Little v. United States, 93 F.2d 401 (8th Cir. 1937), *cert. denied,* 303 U.S. 644 (1938); Parks v. Biebel, 18 Colo.App. 12, 69 Pac. 273 (1902); *cf.* State v. Peacock, 236 N.C. 137, 72 S.E.2d 612 (1952).

In civil actions in Colorado, to make a proper demand, counsel should move the court to instruct the witness that counsel has a right to see the memoranda.

following a refusal, counsel is entitled to a reversal unless it is clear from the record that the trial court's refusal was harmless error.[23] Normally counsel should be allowed to inspect all notes which the witness has taken to the stand and which relate to the subject of testimony, not merely those parts of the notes which the witness has used to refresh his memory.[24] But the extent of inspection is within the sound discretion of the court, and the court may limit counsel's request by allowing him the right to inspect only those notes which the court deems proper under the circumstances of the particular case.[25] Note also that the right is not absolute when the witness used the notes only on cross-examination with the permission of examining counsel.[26] Similarly, it is within the court's discretion to grant or deny the request for inspection where on direct examination the witness is hostile or evasive and the memorandum is read to the witness rather than being referred to directly by the witness.[27]

Upon the granting of a proper request, the opposing counsel may use the memorandum as the basis of cross-examination.[28] He may also read it or show it to the jury.[29] In the majority of jurisdictions, however, counsel may not offer the memorandum into evidence.[30] It is submitted that the use of the memorandum by the opposing counsel as evidence should be left to the discretion of the trial court.[31]

In summary, the principal case firmly establishes the majority rule[32] as the law in Colorado. Nonetheless, of necessity, the instant

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Directing the request to the witness is improper. Likewise making a motion to suppress the witness's testimony is not a proper demand. Parks v. Biebel, *supra.*

[23]Phillips v. United States, 148 F.2d 714 (2d Cir. 1945) *semble;* Miller v. United States, 126 F.2d 771 (5th Cir. 1942), *cert. denied,* 316 U.S. 695 (1942); Taylor v. United States, 19 F.2d 813 (8th Cir. 1927); State v. Gadwood, 342 Mo. 466, 116 S.W.2d 42 (1937).

[24]Brownlow v. United States, 8 F.2d 711 (9th Cir. 1925); State v. Nardini, 186 S.W. 557 (Mo. App. 1916); 3 WIGMORE, EVIDENCE § 762 (3d ed. 1940).

[25]Lee v. Follensby, 86 Vt. 401, 85 Atl. 915 (1913); Morrow v. State, 56 Tex.Cr. 519, 120 S.W. 491 (1909); 3 WIGMORE, EVIDENCE §§ 762, 765 (3d ed. 1940).

[26]State v. Braathen, 77 N.D. 309, 43 N.W.2d 202 (1950).

[27]United States v. Sacony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. M. Kraus & Bros., 149 F.2d 773 (2d Cir. 1945), *rev'd on other grounds,* 327 U.S. 614 (1946). Counsel does have the right to inspect, however, where the witness, although hostile or evasive, refers to the memorandum directly. State v. Miller, 234 Mo. 588, 137 S.W. 887 (1911).

[28]People v. Schepps, 217 Mich. 406, 186 N.W. 508, 21 A.L.R. 658 (1922); Green v. State, 53 Tex.Cr. 490, 110 S.W. 920, 22 L.R.A. (N.S.) 706 (1908); 3 WIGMORE, EVIDENCE § 762 (3d ed. 1940).

[29]Jurgiewicz v. Adams, 71 R.I. 239, 43 A.2d 310 (1945); Green v. State, 53 Tex. Cr. 490, 110 S.W. 920, 22 L.R.A. (N.S.) 706 (1908); 3 WIGMORE, EVIDENCE § 763 (3d ed. 1940).

[30]Jurgiewicz v. Adams, 71 R.I. 239, 43 A.2d 310 (1945). The Massachusetts court has laid down an unusual rule in allowing the counsel for whom the witness is testifying to introduce the memorandum into evidence, though otherwise incompetent, when the opposing counsel has been granted the right to inspect the memorandum and has done so. Leonard v. Taylor, 315 Mass. 580, 53 N.E.2d 705, 151 A.L.R. 1002 (1944).

[31]Jurgiewicz v. Adams, 71 R.I. 239, 43 A.2d 310 (1945) (by implication); 3 WIGMORE, EVIDENCE § 765 (3d ed. 1940).

[32]See notes 3 and 5 *supra.*

case leaves many questions unsettled. As applied to criminal actions, the subsidiary problems involving proper demand, scope of inspection, use of the memorandum after receipt thereof, and the applicability of the rule to notes consulted before testifying are all questions which the Colorado court will have to answer in the future.

HOWARD KLEMME

ANSWERS TO INTERROGATORIES UNDER COLORADO RULE 33

P brought an action for damages for personal injuries received in an automobile accident. Prior to the date of trial, interrogatories were submitted to *D* pursuant to Rule 33 of the Colorado Rules of Civil Procedure.[1] *D* admitted in the answers to the interrogatories that he was driving the car in which *P* was injured and that he knew the car was in an unsafe condition. At the trial *D* failed to appear. The answers to the interrogatories were introduced into evidence by *P*. Counsel for *D* then offered evidence of two eye witnesses to the accident who testified that *P* was driving the car when the accident occurred. *P* contended that the witnesses should not be allowed to contradict the admissions made by *D* in his answers to the interrogatories. The trial court allowed the witnesses to testify over *P's* objections. On appeal, the Colorado court *held*: Affirmed. An admission made by a party in answer to an interrogatory is not conclusive against him and he may offer evidence at the trial to contradict his previous answers.[2]

In Colorado a party has various alternative methods of discovering facts to aid in the preparation for trial; the most widely used method is by oral examination under Rule 30.[3] Under this Rule the testimony of any person may be taken under oath with the right of cross-examination. At the trial the interrogated party may rebutt any evidence contained in the deposition but the deposition, if admissible in evidence, may be used to impeach the witness.[4] Another method available is the use of written interrogatories under Rule 31.[5] This method is available for taking depositions anywhere and is particularly convenient for taking depositions in distant places. This procedure is similar to taking an oral deposition under Rule 30 except it is less suitable for a complicated inquiry or for a searching interrogation of a hostile or reluctant witness.[6]

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[1]COLO. R. CIV. P. 33.
[2]Ridley v. Young, Colo. Bar Ass'n Adv. Sheet, p. 164, February 21, 1953.
[3]COLO. R. CIV. P. 30.
[4]See COLO. R. CIV. P. 26(d) for other uses of the deposition.
[5]COLO. R. CIV. P. 31.
[6]Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 747, 748 (1939).