

1963

# Marvin L. Bainum v. J. Rex Mackay, Clyde B. Dixon, Dee H. Lowder and J. L. Robinson : Brief of Proposed Deponents-Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF  
THE STATE OF UTAH

UNIVERSITY OF U

MARVIN L. BAINUM,

*Petitioner-Respondent*

JUN 30 1963

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Case No. 9975

J. REX MACKAY, CLYDE B.  
DIXON, DEE H. LOWDER and  
J. L. ROBINSON

*Proposed*

*Deponents-Appellants*

FILED

SEP 17 1963

Clerk, Supreme Court, Utah

BRIEF OF PROPOSED DEPONENTS-  
APPELLANTS.

Appeal from Order of the Third District  
Court for Salt Lake County,  
Hon. Ray Van Cott, Jr., Judge.

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# INDEX

*Page*

## STATEMENT OF POINTS

1. THE PETITION DOES NOT SHOW THAT PETITIONER IS UNABLE TO BRING THE ACTION..... 4
2. THE PETITION SHOWS NO REASON FOR DESIRING TO PERPETUATE TESTIMONY..... 5

## CASES AND AUTHORITIES

- 16 Am. Jur. Depositions, Par. 8..... 4
- 38 Col L. Rev. 1179, 1193-1194. Pike and Willis, The New Federal Deposition-Discovery Procedure (1938)..... 6
- Exstein, Petition of, (SD NY 1942) 7 FR Serv 27a-14, Case 1, 3 FRD 242..... 5
- Egan v. Moran Towing & Transportation Co. (SD NY 1939) 26 F. Supp. 621, 1 FR Serv 27a, 623, Case 1..... 6
- Ferkauf, Petition of, (SD NY 1943) 7 FR Serv 27a-14, Case 2, 3 FRD 89..... 6
- Johnson Glove Co., Petition of, (ED NY 1945) 9 FR Serv 27a-14, Case 1, 7 FRD 156..... 6
- 4 Moore's Federal Practice, 1820 ..... 5
- 4 Moore's Federal Practice, 1825 ..... 6
- Mosseller v. United States (CCA 2d, 1946) 158 F. 2d 380, 10 FR Serv 27 a 11, Case 1..... 5
- Utah Rules of Civil Procedure, Rule 27(a)..... 5

IN THE SUPREME COURT OF  
THE STATE OF UTAH

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MARVIN L. BAINUM,

*Petitioner-Respondent*

J. REX MACKAY, CLYDE B.  
DIXON, DEE H. LOWDER and  
J. L. ROBINSON

*Proposed  
Deponents-Appellants*

} Case No. 9975

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BRIEF OF PROPOSED DEPONENTS-  
APPELLANTS.

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STATEMENT OF THE NATURE OF THE CASE

Petitioner sought an Order under Rule 27(a) authorizing the taking of the depositions of appellants before the filing of an action.

DISPOSITION IN LOWER COURT

The petition was granted and an order entered authorizing the taking of the depositions.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the order.

## STATEMENT OF FACTS

The petition was heard with no evidence having been offered on either side. The order was entered based solely upon the representations contained in the petition. The representations in the petition were as follows :

“That the petitioner expects to be the plaintiff or one of the plaintiffs in an action to be filed in Salt Lake County, State of Utah, arising out of damage to the petitioner’s business caused by a conspiracy of individuals and corporations as yet unknown, the plan and purpose of said conspiracy being to damage the business and reputation of the petitioner in his business by reason of false statements made to the public in derogation of the petitioner’s business. The contemplated action will seek damages against all defendants, individually and jointly, in the amount of \$1,000,000.00 or such other additional sum as may appear by the evidence produced at trial.

The petitioner, Marvin L. Bainum, is the president of Continental Reliance Life Insurance Company, a corporation presently offering stock for sale to residents of the State of Utah, and various individuals and corporations are believed to have entered into a conspiracy to disseminate false information with reference to said offering for the purpose of hurting petitioner in his business.

The petitioner desires to establish by the taking of depositions before action who the individuals are, who has instructed them to disseminate such information and to determine which defendants are to be joined in the action the petitioner contemplates filing. It is believed that the witnesses sought to be deposed herein

have knowledge of facts which will enable the petitioner to determine the identity of all defendants, which facts are necessary to the preparation of a complaint and which testimonies will be perpetuated to be used as provided by the Rules of Procedure in the prosecution of the petitioner's contemplated action.

It is believed by the petitioner that among the defendants to be named in the action will be the following:

Name	Address
J. Rex Mackay,	3935 South Redwood Road Salt Lake City, Utah
Cyde B. Dixon,	1937 South Moor Drive Salt Lake City, Utah
Dee H. Lowder,	2170 Wilson Avenue Salt Lake City, Utah
J. L. Robinson,	6020 South Jamaica Salt Lake City, Utah

The names and addresses of the witnesses sought to be examined under this petition are the same as those set forth in Paragraph No. 4 above. It is expected that the testimony of these individuals will establish the identity of other individuals who are co-conspirators in the effort to defame the petitioner and to establish from the taking of said depositions that the above named individuals participated in the said conspiracy and to establish the exact extent of said participation."

The proposed deponents appeared and objected to the entry of the order on the grounds as stated in the statement of points.

## ARGUMENT

## POINT I.

THE PETITION DOES NOT SHOW THAT PETITIONER IS UNABLE TO BRING AN ACTION.

Rule 27(a) provides in part, as follows :

“(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in the district court of the county in which any expected adverse party may reside.

“The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of this state *but is presently unable to bring it or cause it to be brought*, 2, the subject-matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his *reasons for desiring to perpetuate it*, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.” (Emphasis added)

Petitioner should show that he is “unable by reason of some Legal impediments” to bring an action, 16 *Am. Jur. Depositions*, Par. 8.

“Permission to perpetuate testimony for use in an expected action has always been denied when the subject matter of the expected action could be made the subject of an immediate action.” 4 *Moore’s Federal Practice*, 1820.

The right to take a deposition before suit depends upon petitioner’s “power to bring his rights to an immediate investigation” such as a situation in which an injured seaman could not bring suit until administrative relief had been denied or sixty days had elapsed. *Mos-seller v. United States* (CCA 2d, 1946) 158 F. 2d 380, 10 FR Serv. 27a 11, Case 1.

The petition does not show petitioner has no power to bring an action.

## POINT II.

### THE PETITION SHOWS NO REASONS FOR DESIRING TO PERPETUATE TESTIMONY.

Rule 27(a) requires that petitioner state “his reasons for desiring to perpetuate” the testimony. The petition gives no such reason but shows that discovery is the sole purpose of taking the depositions.

Rule 27(a) does not contemplate such a proceeding before suit.

“Where there is no danger of loss of the testimony, however, a person cannot take advantage of Rule 27 merely for the purpose of obtaining facts on which to base a complaint. Thus in *Petition of Exstein*<sup>19</sup> petitioner alleged that



he had a cause of action but was not certain whether it was against an individual or against one of three corporations through which the individual did business. In *Petition of Ferkauf*<sup>20</sup> the petitioner alleged that he had a claim under the Fair Labor Standards Act but that he did not have sufficient information as to the facts to frame a complaint. In *Petition of Johnson Glove Co.*<sup>21</sup> the petitioner was not sure what kind of a complaint it wished to serve. In each case the court denied the application on the ground that the rule could not be used for the purpose of *ascertaining* facts to be used in drafting a complaint.<sup>22</sup> Since it would seem that petitioner in each case could have drafted at least a skeleton complaint, on the basis of which he could have proceeded to make use of the discovery procedure under Rules 26 and 28 to 37, denial of the use of Rule 27 in this situation, for which it was not intended, causes no injustice." 4 *Moore's Federal Practice* 1825.

- 19 (SD NY 1942) 7 FR Serv 27a.-14, Case 1, 3 FRD 242.
- 20 (SD NY 1943) 7 FR Serv 27a-14, Case 2, 3 FRD 89. See also *Egan v. Moran Towing & Transportation Co.* (SD NY 1939) 26 F Supp 621, 1 FR Serv 27a, 623, Case 1.
- 21 (ED NY 1945) 9 FR Serv 27a.-14, Case 1, 7 FRD 156.
- 22 See also discussion of this question in Pike and Willis, *The New Federal Deposition-Discovery Procedure* (1938) 38 Col L Rev 1179, 1193-1194.

## CONCLUSION

The petitioner has not met the requirements of the rule which allows depositions to be taken before action only if the party is in a position in which he is unable to bring an action and it is therefore necessary to perpetuate the testimony. The proposed deponents should not be subjected to the harassment resulting from unauthorized depositions. The order should therefore be reversed.

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