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Depositions and Power of Notary to Punish for Contempt in Ohio

Richard W. Schwartz

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THE DEPOSITION plays an important role in the modern-day practice of law. The enormous backlog of cases in the courts requires preservation of precious testimony during the long wait prior to trial. In addition, the deposition is a valuable tool in evaluating a case, especially during settlement negotiations. Finally, the deposition is a prime means of discovering vital information.

The notary public presides at the deposition, and is invested with quasi-judicial powers, including the power to punish for contempt. This paper will briefly survey both the procedural aspects of the deposition and the quasi-judicial power of the notary public.

The Notary and Mechanics of Taking a Deposition

A *deposition* is a statutorily prescribed method of taking the testimony of witnesses,[1] or, as legislatively defined, it is a ". . . written declaration under oath, made upon notice to the adverse party." [2]

The *notary public* is one of the officers empowered by statute[3] to take depositions. Section 147.07, which enumerates the basic powers of notaries, provides that:

> [A] notary public may, within the county for which he is appointed, or if commissioned for the whole state, throughout the state . . . take and certify depositions. . . .

In addition, Section 2319.10, which is part of the Code Chapter[4] on depositions, specifically provides that:

> [D]epositions may be taken in this state before a . . . notary public. . . .

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1 Ohio Rev Code § 2319.01.

2 *Id.* § 2319.02.

3 *Id.* §§ 147.07 and 2319.10.

4 *Id.* Chapter 2319 entitled "Affidavits, Depositions."

Procedural Requirements Incident to the Taking of Depositions

In brief, three things must be done before a deposition may be taken: filing a lawsuit, notifying the adverse party, and subpoenaing the witness.

When a plaintiff has filed his action in court and made service upon the defendant, each party may commence the taking of testimony by deposition.[5] The party taking the deposition, called the "deponent," must give written notice to the adverse party of his intention to take a deposition,[6] but need not reveal the name of the witness whose deposition is to be taken,[7] unless the witness is the adverse party and the deponent desires to use the deposition of such adverse party in his own behalf.[8] The notice must be served upon the adverse party, his agent, or attorney of record, or left at the usual place of their abode, and the deposition can only be used against parties so served.[9]

After or simultaneous to serving the adverse party with notice of the taking of the deposition, the notary must issue a subpoena directing the witness to attend the deposition and to testify.[10] The subpoena may also direct the witness to bring with him "any book, writing, or other thing under his control, which he may be compelled to produce as evidence." [11]

The Taking of the Deposition

The proceedings are similar to the examination of a witness during the trial of a lawsuit. First, the witness to be deposed is duly sworn to tell the truth.[12] The deponent conducts a direct examination of those witnesses he has called;[13] however, if the

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[5] *Id.* § 2319.06.

[6] *Id.* § 2319.15. This section provides that the notice must set forth the court or tribunal where the deposition is to be used, and the time when and the place where the deposition is to be taken.

[7] Appel v. Appel, 78 Ohio App. 53, 65 N. E. 2d 153 (1946).

[8] Ohio Rev. Code § 2319.15; Appel v. Appel, *supra,* note 7.

[9] Ohio Rev. Code § 2319.16; service on the adverse party can also be made by serving his agent or attorney of record. If the adverse party cannot be personally served within the state, he may be served by publication under § 2319.17.

[10] *Id.* § 2317.12; the subpoena must set forth the time when and the place where the deposition is to be held.

[11] *Id.* § 2317.13.

[12] *Id.* § 2319.24; House v. Elliott, 6 Ohio St. 497 (1856).

[13] In re Rauh, 65 Ohio St. 128, 61 N. E. 701 (1901); Donovan v. Decker, 61 Ohio Law Abs. 67, 105 N. E. 2d 664 (1951), reh. den. 106 N. E. 2d 167 (1951); Forthofer v. Arnold, 60 Ohio App. 436, 21 N. E. 2d 869 (1938).

witness is an adverse party, he may be cross-examined.[14] Of course, the adverse party will have an opportunity to cross-examine the witness at the conclusion of deponent's examination.

Finally, the entire proceeding before the notary must be transcribed by a stenographer and signed by the witness.[15]

The Use of the Deposition

After the deposition is reduced to writing and signed by the witness, there are certain statutory procedural requirements and conditions which must be met before the deposition may be admitted into evidence at trial.

There are two basic statutory procedural requirements. First, the notary must affix his certificate and signature to the deposition, under his official seal.[16] This certificate must state that: (1) the witness was sworn to tell the truth; (2) that the deposition was reduced to writing by the notary or some other proper person; (3) the deposition was written and signed in the presence of the notary; and (4) the deposition was taken at the time and place set forth in the notice.[17]

Second, the deposition must be filed in the court where the case is to be tried at least one day prior to trial.[18]

The statutory conditions precedent to the use of the deposition at trial are, in substance, that a deposition of a witness may only be used in trial where the witness "does not reside in, or is absent from, the county where the action or proceeding is pending, or, by change of venue, is sent for trial," or when the witness is dead or is unable to attend court.[19] Where the testimony of the witness is required upon a motion, or where the oral examination of the witness is not required, the deposition may be used.[20]

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[14] Ohio Rev. Code § 2317.07.

[15] *Id.* § 2319.18; this section provides in substance that the transcribing of the deposition may be done by the notary, the witness or some disinterested person.

[16] *Id.* § 2319.23.

[17] *Id.* § 2319.24.

[18] *Id.* § 2319.26. However, under § 2319.27, the notary may retain custody of the deposition until his statutory fees are paid.

[19] *Id.* § 2319.05.

[20] *Id.* § 2319.21; the deposition may be read at any stage of the action or proceeding.

In spite of the statutory requirements of one day prior filing and the statutory conditions prescribed by Section 2319.05 such depositions may be used, regardless of such requirement and conditions, during cross-examination of a witness for the purpose of impeaching his testimony.[21]

The Power of the Notary to Punish for Contempt in the Deposition

The power of the notary to punish witnesses for contempt is set forth in two sections of the Ohio Revised Code.[22] Section 147.07, which specifies the powers of the notary, provides in part:

> [the notary] in taking depositions, . . . shall have the power which is by law vested in justices of the peace to compel the attendance of witnesses and punish them for refusing to testify.

In addition, Section 2317.20 of the Revised Code provides, in part:

> [D]isobedience of a subpoena, a refusal to be sworn . . . and an unlawful refusal to answer as a witness or to subscribe a deposition, may be punished as a contempt of the . . . officer by whom the attendance or testimony of the witness is required.

Section 2319.10 of the Revised Code, includes "notary" within the purview of officers authorized to take depositions.

These statutory grants of authority present problems in two ways. First, is a notary limited under Section 147.07 to the contempt powers of justices of the peace—*i.e.* "to fine"—or are his contempt powers extended to those of "other officers" under Section 2317.20—"to arrest and imprison"? The supreme court resolved this apparent statutory conflict, holding that the predecessor of Section 147.07 was not a limiting statute, and that it must be read together with sections of the Code dealing with

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[21] McCullough Transfer Co. v. Pizzulo, 53 Ohio App. 470, 5 N. E. 2d 796 (1936). The court in this case stated: "It has become a very general practice for attorneys to take the testimony of known adverse witnesses, using the provisions of law providing for the taking of depositions as a sort of bill of discovery, and likewise, for the purpose of enabling counsel to take advantage of any conflict in the statements of the witnesses, there being no intention of counsel taking the depositions to make any other use thereof." *Id.* at 474, 5 N. E. 2d at 798 (1936).

[22] Ohio Rev. Code §§ 147.07 and 2317.20.

depositions.[23] Thus, the notary is not limited merely to the fining powers of a justice of the peace but can arrest and jail the contemptuous witness.[24]

Second, it was argued that such legislative grants of power to the notary were judicial in nature and therefore antagonistic to the Ohio Constitution which vested all judicial power in the courts of Ohio.[25] The supreme court disposed of these constitutional objections, holding that the power to punish for contempt was not purely judicial in the "constitutional sense"; such power, having been recognized as essential to the deposition,[26] could be granted by statute to the notary. Thus, as subsequently stated, the notary is not an officer of the court; he exercises his power to punish for contempt independently of any court, and the courts have no jurisdiction to restrain the notary from punishing for contempt.[27]

The notary can, therefore, punish as contempts the actions of witnesses in disobeying a subpoena, refusing to be sworn, unlawfully refusing to answer questions, or refusing to subscribe to a deposition.[28]

While the notary's power to punish for contempt has been recognized and accepted by the courts, a more peaceful solution to the disputes giving rise to contempts is the development and use of the non-statutory procedure of seeking instructions from a court.[29] Under this procedure, the notary public, with the consent of the parties to the action, submits questions to the common pleas court for instructions as to how to proceed during the course of the deposition, thus obviating the use of contempt proceedings.[30]

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23 DeCamp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056 (1893).

24 *Ibid.*

25 Article IV, Section I of the Ohio Constitution provides that "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law (Adopted September 3, 1912).

26 DeCamp v. Archibald, *supra,* note 23.

27 State ex rel. Bechtel v. McCabe, 60 Ohio App. 233, 20 N. E. 2d 381 (1938). But, see Shaw v. Ohio Edison Installation Co., 9 Ohio Dec. Rep. 809 (Superior Ct. 1886) which, in approving the practice of notaries to seek instructions from the courts, held that notaries were officers of the court.

28 Ohio Rev. Code § 2317.20.

29 Shaw v. Ohio Edison Installation Co., 9 Dec. Rep. 809 (Super. Ct. 1896); Thomas v. Beebe, 5 Ohio N. P. 32 (C. P. 1932).

30 *Ibid.*

The use of such instructions, while perhaps a practical solution to the difficulties engendered by contempt proceedings, would appear to conflict with the basic theories espoused in the *DeCamp* case[31] that the notary is not an officer of the courts, but acts independently. Further, although the instruction procedure appears to be commonly used in some counties, it is not supported by any statutory authority.[32]

The Procedural Steps

The notary maintains his authority through the use of the writ of attachment for fines, and the order of commitment for imprisonment. Thus, if a witness refuses to obey a subpoena issued by a notary, the notary may issue a writ of attachment to the sheriff commanding the sheriff to arrest and bring the witness before the notary to give his testimony and answer for the contempt.[33] Or he may direct an order of commitment to the sheriff which shall order the sheriff to commit the contemptuous witness to jail.[34] Both the attachment for arrest and order to commit a witness to prison by the notary must be under the notary's seal, and must set forth the cause of the arrest or commitment. If the witness has refused to answer a question which the notary has directed him to answer, the order for commitment must state the question which the witness refused to answer.[35]

Once the contemptuous witness has been arrested or imprisoned, incident to an attachment or commitment, the notary, to force the witness to comply with his orders, may either fine the contemptuous witness[36] or imprison the witness in the county jail until he submits to be sworn, testifies, or gives his deposition.[37]

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[31] 50 Ohio St. 618, 35 N. E. 1056 (1893).

[32] The case of State ex rel Bechtel v. McCabe, 60 O. App. 233, 236, 20 N. E. 2d 381, 383 (1938) in discussing the lack of authority for use of instructions, stated: "It is true our state courts are vested with considerable discretion in matters of procedure not regulated by statute, but where the statute clearly defines the procedure, as it does here, and no alternative procedure is indicated, the statutes must control . . .".

[33] Ohio Rev. Code § 2317.21. This section also sets forth several exceptions if the witness has not been personally served or if the witness is not required to be immediately brought before the notary.

[34] *Id.* § 2317.26.

[35] *Id.* § 2317.25.

[36] *Id.* § 2317.22 sets forth in detail the maximum fines to be imposed upon the witness.

[37] *Id.* § 2317.22.

The rights of the witness are protected in two ways. The imprisoned witness may apply to a judge of the supreme court, court of appeals, court of common pleas, or probate court to discharge him on the ground that he has been illegally imprisoned.[38] In addition, the witness may seek his release by way of habeas corpus.[39]

The Substance of the Contempt

Thus far this article has dealt primarily with the statutory rules and regulations controlling the taking of the deposition and the statutory requirements governing contempt proceedings. The remainder of this paper focuses on the practical application of these statutory rules to five of the most common types of contempts.

The Refusal of the Witness to Appear

Failure of a witness to appear for deposition when properly summoned by subpoena constitutes a contempt.[40] However, the witness cannot be punished for contempt where he refused to attend the deposition because the deponent had prohibited his counsel from accompanying him into the deposition.[41] To require the attendance of the witness under such circumstances, would be to deprive the witness of his constitutional rights.[42]

The Refusal of the Witness to be Sworn

Where a witness is properly summoned to a deposition and appears, he shall be held in contempt if he refuses to be sworn.[43] The notary's order of commitment is sufficient in such a case if it shows that the witness unlawfully refused to be sworn.[44] The

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[38] *Id.* § 2317.24.

[39] DeCamp v. Archibald, *supra*, note 23; Ex Parte Jennings, 60 Ohio St. 319, 54 N. E. 262 (1899).

[40] Ohio Rev. Code § 2317.20.

[41] Peters v. Goodyear Tire and Rubber Co., 50 Ohio L. Abs. 65, 76 N. E. 2d 412 (C. P. 1947).

[42] *Ibid.* The ordinary witness has the right to refuse to answer questions on the grounds of self-incrimination and privileged communications. Without counsel, the witness might waive these valuable rights through ignorance.

[43] In re Sage, 24 Ohio C. C. (N. S.) 7, 34 Ohio C. D. 441 (1915); Schott v. Benckenstein, 6 Ohio App. 63 (1915), aff'd. 92 Ohio St. 29, 110 N. E. 633 (1915).

[44] In re Sage, *supra*, note 43.

statute applies to all witnesses including an adverse party.[45] A witness cannot refuse to be sworn on the ground that the conditions for the use of the deposition in trial are not present,[46] for the right to take a deposition is not controlled by the right to use it.[47] However, a witness can lawfully refuse to be sworn where he had previously given his complete testimony on deposition and was willing to sign it upon the making of certain corrections.[48]

Refusal of the Witness to Answer Questions

Witnesses have refused to answer questions on advice of counsel,[49] on the ground of competency, relevancy, or materiality,[50] and on the ground of privilege.[51] Whether the witness must answer such questions often depends upon whether the witness is an ordinary witness or an adverse party. Also, since the notary is not a judge and therefore cannot rule on the propriety of the evidence,[52] the competency or relevancy of the questions must be determined upon trial or upon a habeas corpus proceeding.

In any case, it is mandatory that the witness be ordered by the notary to answer the question propounded for the contempt to be proper.[53] The refusal of the witness to comply with the notary's order constitutes an "unlawful refusal to answer" under section 2317.20 which defines contempts.[54]

Where the witness refused to answer questions purely upon "advice of counsel," the witness was properly held in contempt, for to hold otherwise would be to permit the counsel and wit-

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45 In re Rauh, 65 Ohio St. 128, 61 N. E. 701 (1901).

46 Shaw v. Ohio Edison Installation Co., 9 Ohio Dec. Rep. 809 (Super. Ct. 1886) provides in its first syllabus: "1. A witness is not excused from giving his deposition under Secs. 5265 and 5266, Rev. Stat., on the ground that he is not interested in the action; that he is within the county in which the action is pending, and that he does not intend to depart; that he is in good health, and will be able to attend court as a witness when the case is reached for trial."

47 In re Rauh, *supra,* note 45.

48 In re Hafer, 65 Ohio St. 170, 61 N. E. 702 (1901).

49 In re Bott, 146 Ohio St. 511, 66 N. E. 2d 918 (1946).

50 In re Martin, Jr., 141 Ohio St. 87, 47 N. E. 2d 388 (1943).

51 *Ibid.*

52 *Ibid.*

53 In re Martin, Jr., 141 Ohio St. 87, 47 N. E. 2d 388 (1943); DeCamp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056 (1893); Burnside v. Dewstoe, 9 Ohio Dec. Rep. 589 (C. P. 1886).

54 In re Martin, Jr., *supra,* note 53.

ness to act as judges in determining the propriety of the questions.[55]

In the oft-cited case of *DeCamp v. Archibald*[56] the witness was committed to jail for refusing to answer certain questions on the grounds that they were incompetent and irrelevant. In a subsequent habeas corpus proceeding, the court held that such a refusal was contemptuous and that the witness must answer the questions; whether such questions were competent or relevant to the case would be determined by the judge upon trial of the action. The court, however, complicated its decision by stating that the questions were, in fact, competent and relevant.[57] This latter statement was subsequently relied upon by the supreme court, in a habeas corpus proceeding,[58] to justify an examination into the merits of a case to determine the competency and relevancy of questions asked upon a deposition.[59]

In re Schoef[60] appeared to hold that a witness could not be jailed for contempt by a notary where he objected to answering the questions propounded upon the grounds of competency, relevancy, and materiality, but the supreme court in its landmark decision of *In re Martin, Jr.*[61] held that these two cases were grounded upon privilege questions. *Martin* specifically overruled the fourth syllabus of the *Schoef* case which had held that a witness could not be lawfully ordered to answer a question where he objected on the grounds of competency, relevancy, or materiality.

The *Martin* case, however, was limited in application to "a witness who is not a party."[62] Thus, the supreme court in the *Martin* case decided that a witness who is not a party, once he

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55 In re Bott, 146 Ohio St. 511, 66 N. E. 2d 918 (1946); Ex parte Oliver, 173 Ohio St. 125, 180 N. E. 2d 599 (1962).

56 50 Ohio St. 618, 35 N. E. 1056 (1893).

57 DeCamp v. Archibald, 50 Ohio St. 618, 35 N. E. 1056 (1893).

58 Ex Parte Jennings, 60 Ohio St. 319, 54 N. E. 262 (1899).

59 *Ibid.*

60 74 Ohio St. 1, 77 N. E. 276 (1906).

61 141 Ohio St. 87, 47 N. E. 2d 388 (1943).

62 The fourth syllabus of In re Martin, Jr., 141 Ohio St. 87, 47 N. E. 2d 388 (1943) provides: "4. A witness who is not a party has no legal right, upon the taking of his deposition, to refuse to answer any question, upon the advice of his attorney, merely because the attorney believes that the testimony sought is irrelevant, incompetent or immaterial. (Paragraph four of the syllabus in Ex parte Schoepf, 74 Ohio St. 1, 77 N. E. 276, 6 L. R. A., N. S., 325; and Ex parte Martin, Jr., 139 Ohio St. 609, 41 N. E. 2d 702, overruled.)"

has been ordered to answer a question, cannot lawfully refuse to answer on the grounds of competency, relevancy, or materiality.[63] The court further held that the determination of whether the questions were in fact competent or relevant to the issues of the action, could not be made in a habeas corpus proceeding, but could only be determined by the judge upon the trial of the case.[64]

Therefore, the *Martin* case, while it put to rest many of the questions regarding the rights of non-party witnesses, left open the problem of witnesses who are parties to the action, leaving them in a position to refuse to answer questions which they believe are not competent or pertinent to the issues, and placing the determination of such questions on the court in a habeas corpus proceeding.[65]

However, though the party witness will receive relief upon a habeas corpus proceeding, the non-party witness is caught in a vicious cycle. If he refuses to answer a question, he will be jailed for contempt. If he files for a release on habeas corpus, how can the court release him if it hasn't the power to determine the competency, relevancy, or materiality of the question propounded? Must the non-party witness rot in jail until the trial of the lawsuit; or, must he answer the question at his peril? A recent case requires the non-party witness to answer the question.[65a]

The one area in which the courts uniformly agree is that the witness, whether a party or not, may lawfully refuse to answer questions which they claim are incriminating or privileged,[66] and that a court on a subsequent habeas corpus proceeding will determine whether or not the questions do involve privilege.[67] The privilege, however, must be one created by constitution or statute.[68] As stated by the supreme court in *In re Martin Jr.*:[69]

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[63] *Id.* at 100, 47 N. E. 2d at 394 (1943).

[64] *Id.* at 101, 47 N. E. 2d at 394 (1943).

[65] In re Berger, 13 Ohio App. 206 (1919); In re Grosswiller, 47 Ohio App. 409, 191 N. E. 910 (1943).

[65a] Ex parte Oliver, 173 Ohio St. 125, 180 N. E. 2d 599 (1962).

[66] In re Martin, Jr., *supra,* note 62; DeCamp v. Archibald, *supra,* note 57.

[67] In re Martin, Jr., *supra,* note 62.

[68] In re Frye, 155 Ohio St. 345, 98 N. E. 2d 798 (1951); In re Martin, Jr., *supra,* note 62.

[69] In re Martin, Jr., 141 Ohio St. 87, 102, 47 N. E. 2d 388, 395 (1943).

> It is well settled in this state that a witness has the lawful right to refuse to answer any question, the answer to which would infringe any personal privilege granted by the Constitution or statutes of Ohio, or any recognized rule of the common law, and a witness committed for contempt for such refusal has the right to have that question of privilege determined in a subsequent *habeas corpus* proceeding.

While the witness has the right to a determination of privilege questions in a subsequent habeas corpus action, the burden rests upon him, where he has grounded his refusal to answer upon privileged communications, to prove both the existence of a confidential relationship, and that the communications were made incident to that relationship and did not deal with extraneous matters.[70]

The courts in Ohio have given broader protection to the witness in the area of self-incrimination and privileged communications due to the fact that such privileges are waived by a failure to object on the part of the witness.[71]

In the case of *In re Berger,*[72] the plaintiff called one of the defendants in for deposition. The defendant refused to answer any question "for the reason that the object of the deposition . . . [was] to discover defendants' testimony." In a later habeas corpus proceeding, the defendant having been committed for contempt, the court held that where the statute[73] provided that a party might, upon deposition, be examined as if under cross-examination, the party could not refuse to testify on the ground that the deposition was to discover his testimony.[74]

Thus, the party witness cannot refuse to testify even where the party taking the deposition has no intention of using the same upon the trial of the action.[75] But, the questions asked must be relevant, and where a deposing party stated that he wished to examine the adverse party to help him develop his case,[76] the court held that the legislative intent of the deposition

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[70] *Id.* at 103, 47 N. E. 2d at 395 (1943).

[71] Peters v. Goodyear Tire & Rubber Co., 50 Ohio L. Abs. 65, 76 N. E. 2d 412 (C. P. 1947).

[72] 13 Ohio App. 206 (1919).

[73] Ohio Gen. Code § 11497, now Ohio Rev. Code § 2317.07.

[74] In re Berger, 13 Ohio App. 206 (1919).

[75] In re Grosswiller, 47 Ohio App. 409, 191 N. E. 910 (1934).

[76] In re Berger, *supra,* note 74.

provisions was not that it would be used purely for discovery purposes.[77]

Refusal to Produce Books and Documents

The notary public has the power to issue a subpoena duces tecum for the witness to produce his books or records and to punish for contempt a witness disobeying the writ.[78]

If the defendant refuses to produce books and documents at his deposition by the plaintiff, for no other reason than upon advice of counsel, he is in contempt.[79]

> By virtue of sections 11550 to 11555, both inclusive, General Code (now sections 2317.31 to 2317.35, and section 2317.48 of the Revised Code), a party to an action is given broad authority to inspect books, papers, and documents under the control of the adverse party to produce them as evidence either in court or before an officer authorized to take testimony in the case; and section 11503, General Code (now section 2317.13 of the Revised Code) provides that by subpoena issued to a witness, a notary public may require the witness to testify and to bring with him any book or writing or other thing under his control, which he may be compelled to produce as evidence.[80]

The refusal to produce the books on advice of counsel was not sufficient, and the witness had no immunity from productions of documents or records "if the testimony or production of documents does not involve self-incrimination or privileged communications and the objection is merely to the competency or relevancy of the evidence sought." [81]

Refusal to Sign the Deposition

The refusal of the witness, upon command of the notary, to sign his deposition constitutes a contempt.[82] However, the refusal of the witness to sign his deposition until certain correc-

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[77] Thomas v. Beebe, 5 Ohio N. P. 32 (C. P. 1898).

[78] In re Rauh, 65 Ohio St. 128, 61 N. E. 701 (1901); In re Bott, 146 Ohio St. 511, 66 N. E. 2d 918 (1946).

[79] In re *Bott, supra,* note 78.

[80] *Id.* at 515, 66 N. E. 2d at 920 (1946).

[81] *Id.* at 517, 66 N. E. 2d at 921 (1946). See also Ex parte Oliver, *supra,* n. 65a.

[82] Ohio Rev. Code § 2317.20.

tions were made in the transcript of the deposition, did not constitute a contempt.[83] The supreme court stated:[84]

> . . . Nothing is more likely to occur than errors in taking down the testimony of a witness, even when done by a stenographer. The witness must be the judge as to whether his testimony had been accurately taken down by whoever it is done. What he signs is his sworn statement, and he should not be required to sign what he under oath says is not accurate. Perjury could not be assigned upon a deposition so taken. . . .

Conclusion

It can be seen that while the deposition is a most important tool for the attorney, in many cases there will be delays and roadblocks.

The notary has vast power to punish witnesses for contempt for refusing to appear in answer to a subpoena, for refusal to be sworn, for refusal to answer questions, for refusal to produce documents, and for refusal to subscribe his deposition. Where the witness has been committed to jail by the notary, the question of contempt will have to be determined in a later habeas corpus or other proceeding under section 2317.24 of the Revised Code, or it will have to wait until trial of the action.

Thus far, it appears that the only questions which the courts will consider on a habeas corpus proceeding are questions involving privileged communications or self-incrimination, except where the witness is the adverse party and then it appears that the court on habeas corpus will determine questions of competency or relevancy of the evidence.

In all other situations of contempt, the witness will have to either answer the order of the notary or remain in jail until the trial of the issue where the judge can make his determination whether the testimony is admissible into evidence.

Therefore, while the notary has the summary power to punish for contempt as a necessary incident to the compelling of testimony, the procedure for determining the substance of the contempt does not rest with him, but with a judge upon habeas corpus or trial of the action.

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[83] In re Hafer, 65 Ohio St. 170, 61 N. E. 702 (1901).

[84] *Id.* at 172, 61 N. E. at 703 (1901).