THE POWER TO COMPEL PHYSICAL EXAMINATION IN CASES OF INJURY TO PERSON.

The modern trial is the outgrowth of years of development of the law of procedure. Formerly it seemed as if a court was an arena wherein a combatant was allowed to use almost any artifice to deceive his opponent and the judge. Indeed, so evil were the effects of this policy, that aid was sought from equity to correct them. Hence arose "bills of discovery," issued for the purpose of obtaining from an antagonist, testimony, the production of which, courts of law could not compel. More recently, however, it has become recognized that the object of a trial is to enforce exact justice between man and man, and to the establishing of this justice all minor considerations must yield. The equitable bill of discovery has been superseded in most of our States by statutes compelling a party to a suit to produce for his opponent whatever documents or like evidence he possesses which may be essential to the prosecution or defense of his opponent's case.

In the constantly increasing number of accident cases against railroads and like corporations it is frequently of importance and always of value to obtain if possible medical examination of the plaintiff previous to trial. This procedure is instituted by a motion resembling the motions for disclosure of evidence above mentioned.

It is to be observed at the outset that such motions should be granted only when the information sought is necessary for the support of the defendant's case, never where the object is solely to obtain evidence adverse to the plaintiff. The former is a legitimate exercise of a right calculated to promote exact justice, the latter is but an attempt to compel the adverse party to "give away" his case and should be open to the suspicion that the party making it intends to manufacture evidence sufficient to meet all exigencies. In equity bills of discovery of this nature are termed "fishing bills."

Such motions should always be made in writing previous to trial, and after demand upon the plaintiff and refusal by him to submit to the examination. This will avoid any interruption during the trial and will also prevent the plaintiff pleading surprise when the motion is made to the court. The motion should allege (1) that such examination is necessary in order to aid defendant in making its defense; (2) that plaintiff has been requested to submit to an examination by some reputable physician or surgeon and has refused; (3) that plaintiff has not been theretofore examined or if he has been, defendant is wholly ignorant of the results of the same (S. C. & P. R. Co. *v.* Finlayson, 16 Neb. 578; *a* I. & G. N. R. Co. *v.* Underwood, 64 Tex. 463). *b* This is the usual form of motion before courts which are willing to order such examinations, but upon the abstract power of a trial court to grant such motions and make an order for an examination the decisions of our States are at variance and are not altogether reconcilable. Indeed this form of procedure is peculiar to the United States and dates back no further than 1868. In that year at Special Term in New York (Walsh *v.* Sayres, 52 How. Pr. 334), the judge asserted his power to compel the plaintiff in an action for malpractice to submit to an examination before trial and granted a motion to that effect. In Harrold *v.* N. Y. & C. R. Co., 21 Hun. 268, decided in May term, 1880, it was held that under the Code the Court could not refuse to grant an order for an examination upon proper application before trial, and in Shaw *v.* Van Rensselaer, 60 How. Pr. 143, decided in the following December term, the same result was reached in an opinion affirming the two preceding cases; see also Osborn *v.* M. R. Co., 5 N. Y. Law Bulletin 8. On the other hand in 1883, the General Term in the case of Roberts *v.* O. & L. C. R. Co., 29 Hun. 154, overruled all the preceding decisions, and denied that courts had any power to make such an order. The Superior Court in the case of Neuman *v.* Third Ave. R. Co., 50 N. Y. Sup. J. & S. 412, decided in June, 1884, followed the General Term in denying such a motion. The issue has never come squarely before the Court of Appeals, though in a dissenting opinion in Elfers *v.* Wooley, 116 N. Y. 294, decided in October, 1889, Judge Potter cites the Roberts and Neuman cases with approval and impliedly denies the power.

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a S. C., 49 Am. Rep. 724; 18 Am. & Eng. R. R. Cas. 68.

b S. C., 27 Am. & Eng. R. R. Cas. 240.

Missouri was the next State to decide this question. In Lloyd *v.* H. & St. J. R. Co., 53 Mo. 509, *c* decided in 1873, the court declared such a motion to be "unknown to our practice and to the law," and that it would have no power to enforce such an order. But in 1885 the Schroeder case, cited below, had been decided and a different conclusion was reached in Shepard *v.* M. P. R. Co., 85 Mo. 629, *d* decided in that year. Referring to the Lloyd case, the court said:

> "We are not prepared to say, that in no case can such an order be made. Certainly if the court can make the order it will have no difficulty in enforcing it, not that it can compel the party to submit to a personal examination, but it may dismiss a plaintiff's suit for a persistent refusal to do so."

The court proceeds to hold that a judge may in his discretion order an examination, though a defendant has no absolute right to such order, and that the discretion of the judge will not be interfered with unless manifestly abused. The same court two years afterward approved of the decision in the Shepard case in Sidekum *v.* W. St. L. & P. Ry. Co., 93 Mo. 400, *e* and finally in 1888 came out squarely in asserting such power in Owens *v.* K. C. St. J. & C. B. Ry Co., 95 Mo. 169, *f* saying:

> "The power of the court to make and enforce an order for the personal examination of the injured party must be taken as established in this State as it is in many others."

It is true that in none of the Missouri cases was the motion actually granted, but the failures were merely because of faults in procedure,—the power to grant was distinctly asserted. Missouri, however, was by no means the originator of this doctrine; that distinction belongs to Iowa. In 1877, two years after the Lloyd case, the Supreme Court of Iowa took opposite grounds in Schroeder v. C. R. I. & P. R. Co., 47 Iowa 375, *g* a case considered with such profundity and breadth that it has remained the leader of its doctrine ever since, and, it may well be imagined, has been instrumental in shaping the subsequent decisions of other courts. It is interesting to see how the opinion in this case illustrates the adaptability of the common law. It would be difficult to find a more typical instance of the "judicial legislation," which Judge

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c S. C., 12 Am. Ry. Rep. 474.
d S. C., 55 Am. Rep. 390.
e S. C., 3 Am. St. Rep. 549; 30 Am. & Eng. R. R. Cas. 640.
f S. C., 6 Am. St. Rep. 139; 33 Am. & Eng. R. R. Cas. 524.
g S. C., 14 Am. Ry. Rep. 359.

Cooley so highly commends. In the course of his opinion, Beck, J., said:

"To our minds the proposition is plain that a proper examination by learned and skillful physicians and surgeons would have opened a road by which the cause could have been conducted nearer to exact justice than in any other way. The plaintiff, as it were, had under his control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it."

In reply to the argument that the court was clothed with no power to enforce obedience to such an order in case of the plaintiff's refusal to obey, the opinion proceeds very tersely.

"His refusal would have been an impediment to the administration of justice and a contempt of the court's authority. He would have been subject to punishment as a recusant witness who refused to answer proper questions propounded to him. Should such recusancy too long delay the court, or prove an effective obstruction to the progress of the case, the court could have stricken from the pleadings all the allegations as to permanent injury, and withdrawn from the jury that part of the case. * * * When it is remembered that plaintiff was a witness before the court, that the examination of his person would have had the effect to elicit testimony from him as upon a cross examination, the power of the court over him will be readily understood."

The precedent once having been established by this case, it was not long before other States followed.

In Miami, etc., Turnpike Co. *v.* Bailey, 37 Ohio St. 104, decided in 1881, the court approved the Schroeder case so far as to say that on the refusal of the plaintiff to comply with such order *when properly made*, the court may dismiss the action or refuse to allow the plaintiff to give evidence to establish the injury and that this authority of the court was based upon its inherent power over the subject under investigation. But the Ohio court gives more discretion to the trial judge, holding that in the absence of any showing to the contrary, upon the refusal of a judge to grant such application, it will be presumed that the order ought not to have been granted. In A. T. & S. F. R. R. Co. *v.* Thul, 29 Kan. 466, *h* decided in January, 1883, the court held to the opinion in the Schroeder case and rejected the Missouri doctrine laid down in the Lloyd case, saying:

"It would seem that in a case like the present the evidence of some such expert who had made such an examination would be an almost indispensable necessity; but such evidence in many cases could not be obtained unless the plaintiff were first compelled by an order of the court to submit himself to a

h S. C., 44 Am. Rep. 659; 10 Am. & Eng. R. R. Cas. 783.

personal examination by some such expert. Now is such evidence to be lost and justice possibly defeated, or may the court order that such an examination may be had? We favor the proposition contained in the latter portion of this alternative. We should think that the defendant in a case like the present would be entitled as a matter of right, upon a proper application and a proper showing to have an order made by the court compelling the plaintiff to submit himself to a personal examination, for the purpose of ascertaining the nature, character, extent and permanency of his injuries; but of course the court should exercise a sound judicial discretion in making such an order."

This "sound judicial discretion," means that the trial judge may limit the introduction of such testimony to the necessities of the case. For instance, if such an examination had already been made by experts of reputation and character, further evidence on this point might be only cumulative and tend to delay the case. In such event the judge would be justified in refusing to grant such an order. But the Kansas doctrines gives to the defendant as a matter of right the privilege of having an examination made at some stage of the proceedings.

In S. C. & P. R. Co. *v.* Finlayson, 16 Neb. 578, decided in July, 1884, the court inclined to the belief that the trial court had the power to make and enforce an order for examination, but held that he did right in refusing to make such an order because,

"There was no showing made to the court that permission to make the examination had been refused by defendant in error, nor that any such permission had been requested. There is no showing of any kind that such examination was necessary in order to aid plaintiff in error in making its defense, indeed there was no intimation that any good could possibly result or benefit be derived from such an examination."

In Stuart *v.* Havens, 17 Neb. 211, decided six months after the Finlayson case, the court approved the doctrine there laid down, commenting at length upon what was only mentioned in the former decision, namely, that the examination was sought to be made by experts called by the adverse party, and saying,

"Where in a case like this experts are called by a party and permitted to make a personal examination of the person injured and to testify therefrom there is danger that they will feel under obligations to the party calling them, and, however honest they may be, color their testimony somewhat in his interest, while in many if not most cases their general views will be known to the party producing them before they are called. In any event the evidence partakes somewhat of a partisan character. To avoid this they should be agreed upon by the parties or appointed by the court, and an examination if desired, should be made before the trial begins, although the court may permit it to be made during the progress of the trial."

In White *v.* M. R. Co., 61 Wis. 536,*i* decided in 1884, the court cited the Schroeder case with approval and while expressing no opinion as to whether it was discretionary with the trial court to grant or deny the motion, reversed the ruling of said court because he had denied the application on the sole ground that he had no authority to compel the plaintiff to submit to an examination against her will.

Hatfield *v.* St. P. & D. R. Co., 33 Minn. 130,*j* decided in January, 1885, is the only Minnesota case touching on this point. There the court, citing the Schroeder and Thul cases, said:

"From analogy to such cases, we conclude that a court has the power, in a proper case and under proper circumstances, to direct the plaintiff to do a physical act in the presence of the jury that will illustrate or show the character of his injuries. And we are by no means prepared to say that there may not be circumstances where the defendant would have a right to such an order. But it is evident from the very nature of things that the propriety of such an order must usually rest largely in the discretion of the trial court, and it would only be in a case of a plain abuse of such discretion that we would interfere."

In I. G. & N. Ry. Co. *v.* Underwood, 64 Tex. 463, decided in 1885, the motion contained a request that the court appoint three disinterested surgeons and physicians to examine the person of the plaintiff. The motion was denied because it did not allege that such an examination was necessary to the full presentation of all the facts, nor that the plaintiff was unwilling to be examined by any reputable physician or surgeon. And it further appeared that the plaintiff had submitted to such an examination by experts whom the defendant had called as witnesses. Nevertheless the court seems to uphold the power of the trial court as laid down in the Schroeder case.

M. P. R. R. Co. *v.* Johnson, 72 Tex. 95,*k* decided in 1888, affirms I. G. & N. Ry. Co. *v.* Underwood *sup.*, but held it no error that the court refused to "compel plaintiff to be examined by the one physician to whom he expressed an objection, although this objection did not go to the competency or integrity of the physician proposed. If this power should be exercised at all, it should be by the appointment by the court of one or more disinterested experts, either of its own selection or such as may be agreed upon by both parties."

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i S. C., 50 Am. Rep. 154; 18 Am. & Eng. R. R. Cas. 213.
j S. C., 53 Am. Rep. 14; 18 Am. & Eng. R. R. Cas. 292.
k S. C., 37 Am. & Eng. R. R. Cas. 127.

In G. C. & S. F. R. Co. *v.* Norfleet, 78 Tex. 321,*l* 1890, the court refused to make the order because the plaintiff submitted the injured member for examination. "In no case should such an order be made, when the party is willing to be examined by competent and disinterested men without such an order."

From the Texas decisions it may reasonably be inferred that upon a proper motion the court would order such an examination by physicians which it should appoint. They certainly impliedly hold that it has the power to make such order.

Sibley, Receiver, *v.* Smith, 46 Ark. 275,*m* decided in November, 1885, lays down the following rule:

> "Where the plaintiff in an action for personal injuries alleges that they are of a permanent nature, the defendant is entitled, as a matter of right, to have the opinion of a surgeon upon his condition — an opinion based upon personal examination. In refusing to order the examination as it may do when the evidence of experts is already abundant, the circuit court must exercise a sound discretion; and its action is subject to review in case of abuse."

R. & D. R. Co. *v.* Childress, 82 Ga. 719,*n* decided in March, 1889, asserts that the court in its discretion has power to order a compulsory personal examination by physicians appointed by it and paid by the party making the motion.

A. G. S. R. Co. *v.* Hill (Ala.) 44 A. & E. R. R. Cas., 443,*o* decided June, 1890, is in line with the other decisions in favor of granting the motion. And here the court goes further than in most of the other cases, holding not only a manifest abuse of discretion in denying a motion to be error, but "if a proper case for granting the motion is clearly made, and is refused, the appellate court, having before it all the facts involved in the determination of the matter in the lower court, will reverse the judgment thus infected with error." This case again came up on the point as to the appointment of experts in 9 South. Rep. 722.

Indiana asserts the power to compel an examination in the two cases of Hess *v.* Lowrey, 122 Ind. 225,*p* decided in November, 1890, and T. H. & I. R. Co. *v.* Brunker, 26 N. E. Rep. 178, decided in December, 1890.

Illinois in 1882, in the case of Parker *v.* Enslow, 102 Ill. 272,*q* decided in a short, and ill-considered opinion that "The court had

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l S. C., 45 Am. & Eng. R. R. Cas. 207.
m S. C., 55 Am. Rep. 584.
n S. C., 14 Am. St. Rep. 189; 51 Am. & Eng. R. R. Cas. 216.
o S. C., 44 Am. & Eng. R. R. Cas. 441.
p S. C., 17 Am. St. Rep. 355; 23 N. E. Rep. 156.
q S. C., 40 Am. Rep. 588.

no power to make or enforce such an order." But in C. & E. I. R. Co. *v.* Holland, 122 Ill. 461,[r] decided in 1887, the court makes no mention of Parker *v.* Enslow, and expressly refuses to pass upon the question there decided, holding that the defendant was not injured by the refusal of the trial court to grant the motion, inasmuch as it was allowed by the plaintiff to make an examination which was all that was asked for by the motion.

It is thus seen that the courts of last resort in all of the States before mentioned but Illinois have expressly or impliedly held that a trial judge has the power to compel a plaintiff to submit to a physical examination. It is therefore a matter of some surprise to find that the Federal Supreme Court directly opposes this doctrine. In the case of U. P. R. Co. *v.* Botsford, 11 Sup. Ct. Rep. 1000,[s] decided last May, Mr. Justice Gray delivers the opinion which holds that the courts of the United States have no legal right to make or enforce such an order. The decision is based upon the inviolability of the person which the court says is as much invaded by a compulsory stripping and exposure as by a blow. The cases in the inferior courts of New York, and the cases of Lloyd *v.* R. R. and Parker *v.* Enslow, all mentioned above, are cited in support of the decision. But it has been seen that the New York cases are conflicting and indecisive, the Lloyd case was overruled by the Owens case, and Parker *v.* Enslow was at least doubted in the Holland case. It is significant therefore that there should be a dissenting opinion. Mr. Justice Brewer delivers it and it is concurred in by Mr. Justice Brown. While not presuming to criticise the opinion of this greatest of tribunals, yet a comparison with the dissenting opinion must leave in the mind at least a doubt as to soundness of the decision reached. The former proceeds upon the ground of common law traditions and the lack of precedent; four cases are cited, two of inferior courts, one overruled and one weakened by a subsequent decision. The latter ignores the lack of precedent, and supported by the decisions of every State but one which has decided the question, says:

"The silence of the common law authorities proves little or nothing. The number of actions to recover damages in early days was, compared with the later times limited; and very few of those difficult questions, as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. * * * The end of litigation is justice. Knowledge of the truth is essential thereto. * * * It seems strange that a plaintiff may, in the presence of a jury, be permitted to

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r S. C., 13 N. E. Rep. 145; 30 Am. & Eng. R. R. Cas. 590.

s S. C., 44 Alb. L. J. 325; 33 Cent. L. J. 363; 16 R. R. & C. L. J. 306.

roll up his sleeves and disclose on his arm a wound of which he testifies; but, when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases, in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?"

With the exception of this decision the following may be taken to be the present doctrine of this country. Trial courts have the power to compel the examination of the person of a plaintiff suing for a physical injury. The exercise of this power is in the sound discretion of such courts, open, however, to review and correction on appeal. The wrongful exercise of this power, or the wrongful refusal to exercise it, is error, and may be ground for reversal.

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