divorce. Unfortunately, we also agree entirely with the Master that the evidence in the case does not establish the jurisdictional prerequisite to the granting of a divorce.

Counsel for the plaintiff has suggested that the plaintiff's contradictory, confusing and sometimes ambiguous testimony concerning the date when he, in fact, established his residence in Pennsylvania was due to the Master's repeated interruptions and questions addressed to these areas. We feel the conduct of the Master in attempting to clearly establish the jurisdictional condition precedent to the granting of any divorce was entirely appropriate, and for good cause. We will, however, grant counsel's request to refer the matter back to the Master for an additional hearing to permit the plaintiff to introduce evidence as to the date that he, in fact, established his residence with domicilliary intent in Pennsylvania.

ORDER

NOW, this 6th day of October, 1977, the above captioned case is referred back to the Master for an additional hearing to give the Plaintiff the opportunity to introduce additional evidence concerning the date he first established a bona fide residence in the Commonwealth of Pennsylvania, if he desires to do so.

Exceptions are granted the plaintiff.

NOLDER v. CHAMBERSBURG AREA SCHOOL DISTRICT, C. P. Franklin County Branch, No. 74 November Term, 1975, No. 75 November Term, 1975

Mandamus - Civil Practice - Pleading - Defective Verification - Effect of Pa. R.C.P. 209 (b) - Discovery - Limitations upon Discovery

1. A verification to a petition by counsel does not conform to Pa. R.C.P. 206, unless it sets forth why it is not made by the petitioner, but where such defective procedure is not appropriately attacked by the opposing party, the defect will be disregarded, in the interests of the speedy administration of justice.

2. When Pa. R.C.P. 209 (b) applies, and the petitioner places the matter on the argument list without requesting a hearing or the appointment of an examiner to determine factual issues, all averments of fact responsive to the petition and properly pleaded in the answer will be deemed admitted for purposes of the rule.

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3. Under Pa. R.C.P. 4009, a party may obtain an order requiring the production of records and permitting him to inspect, copy and photograph the same, but he cannot compel the opposing party to supply him with copies thereof.

4. A prayer for relief set forth in the answer to a petition, requesting a protective order under Pa. R.C.P. 4012(a) is inappropriate and will not be granted when the party seeking the order has not proceeded by motion, and the answer filed simply contests the petition of the other party.

5. A party cannot, through the device of petition for discovery, obtain an order requiring a witness to review records in order to prepare himself to give testimony about their contents.

6. While the discovery rules provide for an order compelling production of specific documents, a request that all the records of a school district pertaining to hiring, dismissal, termination, transfer and leave off of employees be reviewed by a witness, without specifying what particular documents are pertinent, is too broad and would require the making of an unreasonable investigation, all as proscribed by Pa. R.C.P. 4011(e).

Gerald E. Ruth, Esq., Attorney for Plaintiff

Jan G. Sulcove, Esq., Attorney for Defendant

OPINION AND ORDER

Heard before Eppinger, P.J., Keller, J.
Opinion by Keller, J., October 4, 1977:

Pursuant to an Opinion and Order of this Court of March 16, 1976, the plaintiff filed an amended complaint in mandamus on April 2, 1976. The defendant School District filed an answer with new matter on April 19, 1976. The plaintiff filed an answer to new matter on May 10, 1976. On August 26, 1976, the depositions of the plaintiff, Dr. William A. Robinson and Dr. Robert W. Kochenour were taken. Immediately before taking the depositions, counsel agreed to waive all objections except as to the form of the question until the same were used at trial. The depositions were filed in the Office of the Prothonotary on November 29, 1976. On May 4, 1977, a "petition for direction to answer questions on deposition and produce documents" was presented to this Court and an order entered directing the rule to be issued upon the Chambersburg Area School District to show cause why they should not comply with the petition. A copy of the petition and rule were served on counsel for the plaintiff. The defendant's answer containing new matter was filed and then

served upon counsel for the plaintiff on May 18, 1977. The plaintiff's answer to new matter was filed June 15, 1977. Counsel for the plaintiff ordered the matter placed on the Argument List for argument at the August Argument Court, and the same was heard on August 4, 1977. Subsequent to argument, counsel indicated to the Court the possibility that the issues could be resolved amicably. By letter dated September 15, 1977, counsel for the plaintiff advised the Court that negotiations had not proven fruitful and requested a disposition of the issues.

Preliminarily, it should be noted that the "petition for direction to answer questions on deposition and produce documents" and the plaintiff's "answer to new matter to petition" were signed by counsel for the plaintiff. The petition, which contained allegations of fact not appearing of record, was not verified. The "answer to new matter to petition" also contained allegations of fact not of record and was verified by counsel for the plaintiff. Pa. R.C.P. 206 provides:

> "Every petition and answer containing allegations of fact which do not appear of record shall be verified by affidavit."
>
> "When the verification was made by the attorney for the petitioner it must set forth why it is not made by the petitioner." 1 A. Anderson Pa. Civil Practice Rule 206.8 (p. 458).

Clearly, the procedure followed by the plaintiff is contrary to the Rules of Civil Procedure and the petition and answer to new matter must be deemed procedurally defective. However, the defendant has not by appropriate proceeding attacked the plaintiff's defective procedure, and in the interest of securing a speedy administration of justice of a matter now too long delayed, the Court will consider the legal issues raised.

Pa. R.C.P. 209 provides inter alia:

> "If, after the filing and service of the answer, the moving party does not within fifteen days:
>
> (b) order the cause for argument on petition and answer (in which event all averments of fact responsive to the petition and properly pleaded in the answer shall be deemed admitted for the purpose of the rule) . . ."

In the case at bar, counsel for the plaintiff, i.e., the moving party, did place the matter on the Argument List

without requesting a hearing or the appointment of an examiner to take testimony on questions of fact pursuant to the practice in this Judicial District. *Pulisevich Petition*, 63 D&C 357, 359 (1948). Therefore, we will consider all averments of fact responsive to the petition and properly pleaded in the answer admitted for the purpose of the rule.

If we understand the plaintiff's petition (and we are uncertain of that), he alleges the deposing of Dr. Kochenour and that the witness throughout the deposition testified that he did not recall the information requested and would have to check his records. The petition further alleges an unsuccessful attempt to reschedule depositions of Dr. Kochenour at his office, the rescheduling at defendant's attorney's office, the notifying of defendant's attorney of the "areas of questions and possible letters, notes, documents or records to be inquired into, and the cancellation of the scheduled deposition by plaintiff's counsel upon being advised Dr. Kochenour had not investigated the various matters previously inquired into, and defendant's counsel questioned the necessity to supply such material and its relevancy. Paragraph 6 of the petition and the prayer of the petition allege:

> "6. Petitioner has already made himself available to Respondent-counsel and been deposed and Petitioner's counsel has deposed Dr. Robinson, a principal at Respondent School District, so Respondent's counsel is very well aware and familiar with areas to be inquired into and should have the responsibility of supplying all material, notes, letters, minutes and documents, etc. that may reveal any information in the hiring, firing and transfer of Mr. Nolder and/or specific other teachers who caused the original vacancy Mr. Nolder filled to occur and/or cease to exist.
>
> "WHEREFORE, Petitioner requests this Court to direct Dr. Kochenour, as Superintendent, to review all Respondents records involving transfer or leaves causing the creation of the vacancy filled by Mr. Nolder and involved with the transfer, granting of leave, or hiring ceasing the vacancy filled by Mr. Nolder, more specifically but not limited to those items requested by letter of February 4, 1977, supply copies of said records to Petitioner's counsel and be prepared to answer questions regarding same, to the best of his personal knowledge and information, as required under Pennsylvania Rules of Civil Procedure, Rule 4011 and 4009; and furthermore, to be precluded at trial from introducing testimony of facts or records not so disclosed."

Incorporated in the petition by reference and attachment

is a letter identified as "Exhibit C" from plaintiff's counsel to defendant's counsel, which provides inter alia:

> "... I hereby respectfully request that he bring with him copies of all letters, board minutes, notes, and other records surrounding the hiring, dismissal or other form of termination, transferring and/or leave of Robert R. Nolder, Dorothy Bangs, Lee Powell, John Olson, Jim Monas (Manos), Mr. Kendrick, and Pam Erickson. These documents we are requesting should include, but are not limited to, letters of applications, letters of requests for transfer and/or actual transfer, letters of request for and/or actual assignments, letters of requests for and/or actual granting of leaves, and in addition thereto, all records verifying present positions of all of the above, including the listing of their duties and responsibilities, job descriptions and/or current assignments."

The position of the defendant as set forth in its answer containing new matter is that the prayer of the petition requiring Dr. Kochenour to review all the various records requested for the purpose of answering questions, and supply copies of those records to counsel for the plaintiff is improper and burdensome and violative of Pa. R.C.P. 4011(b), (d), (e). In addition, defendant alleges repeated requests for plaintiff to proceed by way of written interrogatories to ascertain the existence of the records requested, and to assist the plaintiff in the propounding of questions to the witness, and the refusal of counsel for the plaintiff to accede those requests. Defendant's answer concludes with a prayer for the dismissal of plaintiff's petition and the entry of a protective order under Pa. R.C.P. 4012(a) requiring the plaintiff to proceed by way of interrogatories with appropriate limitations as to the scope of discovery and also limited to the production of documents contained in plaintiff's personnel file relating to his hiring.

As above quoted, the plaintiff relies upon Pa. R.C.P. 4011 and 4009 to support his petition. Pa. R.C.P. 4009 authorizes the issuance of an order for the inspection of tangible things on the motion of a party. Pa. R.C.P. 4011 specifies in detail the limitations on the scope of discovery and inspection. The record discloses that the plaintiff has never filed any motion to inspect, copy or photograph any tangible things, including the records of the defendant. Therefore, Rule 4009 has no application to the case at bar. We are even more at loss to comprehend the citation of Rule 4011 since the plaintiff seeks to broaden the scope of his discovery rather than limit it as provided in that rule.

Pa. R.C.P. 4009 provides inter alia:

> "Subject to the limitations provided by Rule 4007(a) and Rule 4011, the Court, on the motion of a party may
>
> (1) order a party to produce and permit the inspection, including the copying and photographing, by or on behalf of the petitioner of designated tangible things, including documents, papers, books, accounts, letters, photographs and objects, which are in his possession, custody or control; ..."

In the case at bar, the plaintiff has limited his petition to the "supplying" of copies of records in broad categories rather than seeking an order requiring the party to produce and permit the inspection, copying and photographing of specific records. We, therefore, conclude that the plaintiff has not complied with the procedure outlined in the applicable Rule, and this Court has no authority to order the defendant to supply the "copies of said records to petitioner's counsel." Therefore, plaintiff's petition is dismissed insofar as it seeks the supplying of copies.

As previously noted, the defendant's answer prays for a protective order pursuant to Rule 4012(a) requiring the plaintiff to proceed by written interrogatories. However, an examination of that Rule discloses that protective orders are made upon motion by the party seeking the order. In the case at bar, it is evident that defendant has made no such motion, but rather has restricted itself to contesting the petition of the plaintiff. Under the circumstances, we conclude the Court is without authority to grant the protective order prayed for.

On the basis of the foregoing, we conclude that the issue in this case is limited to a determination of whether the plaintiff is entitled to an order requiring Dr. Kochenour to review all of the defendant's records as identified in the prayer of the petition and more specifically identified in petition Exhibit C, both above quoted, so that he will be prepared to testify concerning such records when he is next deposed.

Preliminarily, we must observe that this is the first time in our experience that a party has requested an order directing a prospective witness to review records available to that witness so that he may be prepared to testify concerning the contents of the record. Counsel for the plaintiff has supplied us with no citations of authority for the making of such an order, and our independent research has been totally unproductive. In our judgment, counsel has misconceived the remedy available and

should have proceeded under Pa. R.C.P. 4009 for inspection of tangible things, or Pa. R.C.P. 4005(a) by interrogatory, or by the use of a subpoena duces tecum. The lack of authority to enter the order prayed for renders the plaintiff's petition fatally defective and it must be dismissed.

The defendant has objected to the plaintiff's petition on the grounds that it would be burdensome to require the prospective witness to conduct independent research of all the records referred to in the petition for the purpose of answering questions on depositions. Pa. R.C.P. 4011 provides inter alia:

> "No discovery or inspection shall be permitted which would
>
> (e) require the making of an unreasonable investigation by the deponent or any party or witness;"

In *Uniform Land of Oxford Valley, Inc. v. Pennsylvania National Mutual Casualty Insurance Co.*, 72 D&C 2d 718, 721, 722 (1976), the Court of Common Pleas of Philadelphia County held:

> "Plaintiff's final request (e), is for all other memoranda, documents, papers and books in defendant's possession or control relating to the fire. This request is too broad; if granted, it would require defendants to reveal the entire contents of their file. As observed by McDevitt, J., in *Brownstein v. Philadelphia Transportation Co.*, 46 D&C 2d 463, 464 (1969):
>
> 'Legitimate discovery procedures often are, and sometimes must be, fishing expeditions. What we do condemn is the attempt to fish with a net rather than with a hook or a harpoon.' See 5A Anderson Pa. Civ. Prac. Section 4011.92 at p. 83; Section 4011.95 at p. 85 and cases cited." See also *Philco Corp. v. Sunstein (No. 2)*, 27 D&C 2d 24, 30 (1962), *Trvesniowski v. Erie Insurance Exchange*, 59 D&C 2d 44, 49 (1973).

In the case bar, we find the investigation requested by the plaintiff of "all letters, board minutes, notes, and other records surrounding the hiring, dismissal or other form of termination transferring and/or leave of" seven individuals when coupled with the expression "but are not limited to letters of application, letters of requests for transfer and/or actual transfer," etc. is far too broad and would require the making of an unreasonable investigation, all as proscribed by Rule 4011(e).

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In the light of the conclusions above noted, it is unnecessary for us to consider defendant's objection to the petition on the grounds of relevancy. However, for the guidance of counsel, we would note that at the time of the depositions taken on August 26, 1976, counsel for both parties agreed to waive all objections except as to the form of the question. In our judgment the relevancy objection is not available to the defendant so long as that stipulation is in effect.

ORDER

NOW, this 4th day of October, 1977, the Petition of Robert R. Nolder for Direction to Answer Questions on Deposition and Produce Documents is dismissed.

Exceptions are granted the Plaintiff.

DALE v. CRAWFORD, C. P. Fulton County Branch, No. 6 May Term, 1975

Equity - Specific Performance - Defense of Intoxication - Rescission - undue Influence - Failure of or Inadequacy of Consideration - Excuse from Tender of Consideration - Statute of Frauds - Sufficiency of Written Terms - Sufficiency of Description - Parole Evidence on Description - Effect of Uncertainty or Insufficiency in Description of Excepted Lands

1. In order for intoxication to be a defense, the intoxication must have been such that the vendor did not know what he (she) was doing; it must have been such as to suspend the use of reason and understanding.

2. A party seeking to repudiate a contract on the basis of intoxication when the contract was made must establish proof not only of the requisite incapacitation by the intoxication, but also that he placed the other party in status quo by returning the consideration received.

3. Proof of undue influence vitiating a contract requires evidence, direct or circumstantial, of coercion or improper conduct subjecting one's mind to the will of the person operating upon it; weakness of mind or an impaired condition, without more, is not sufficient to establish undue influence.

4. The facts of widowhood, being sixty-nine (69) years of age and occasionally moved to drink by grief, raise neither a presumption nor an inference of undue influence, when the party is generally competent, and initiates negotiations leading to the formation of the contract, which produce the funds the party then and there needs.

5. Adequacy or inadequacy of consideration can only be a factor to consider in determining whether there was undue influence or fraud.

6. The law will not enter into an inquiry as to the adequacy of the consideration in contracts of this type, and although inequity or hardship may be a valid defense in an action for specific performance, they are not a valid defense if the hardship is due to the defendant's own acts or to events clearly foreseeable.

7. A purchaser's non-performance or failure to tender performance is excused by the vendor's acts which prevent performance or tender.

8. To comply with the Statute of Frauds, it is not necessary that a writing be couched in formal legal terminology.

9. A contract for the sale of realty is unenforceable under the Statute of Frauds if the property is not designated with sufficient definiteness to determine what is intended to be conveyed.

10. Oral evidence may not be accepted to supply a description missing from a writing.

11. Parole evidence may be used, however, to explain and define the description contained in the writing.

12. A description is sufficient if it is clear enough to enable a surveyor to locate the land with certainty.

13. It will not be assumed that the parties to a contract for the sale of land intended land excepted therefrom to be landlocked and of no practical use to the vendor.

14. Experience, common sense and reason are attributes highly regarded by the law, but separately or in combination, they are not without tangible evidence or authority controlling; nor will the court take judicial notice that land is most often subdivided into rectangular shapes, without evidence in support of that argument.

15. If the contract contains the means by which the boundary lines can be run and marked out, there is sufficient compliance with the Statute of Frauds.

16. Uncertainty or insufficiency in the description of excepted lands affects only the validity of the exception and not the validity of the instrument as a whole.

17. Uncertainty of description does not render a reservation void where there is a method provided in the instrument whereby it can be made sufficiently certain.