

## CHAPTER 597

## DEPOSITIONS

**597.01 DEPOSITIONS, ON NOTICE TO ADVERSE PARTY.**

**HISTORY.** R.S. 1851 c. 95 ss. 7, 8; P.S. 1858 c. 84 ss. 7, 8; G.S. 1866 c. 73 ss. 15, 16; 1873 c. 61 s. 1; 1876 c. 68 s. 1; G.S. 1878 c. 73 ss. 15, 16, 36; 1885 c. 53; 1887 c. 185; G.S. 1894 ss. 5667, 5668, 5688; R.L. 1905 s. 4666; G.S. 1913 s. 8381; G.S. 1923 s. 9820; M.S. 1927 s. 9820.

The party offering the deposition must prove the existence of statutory grounds, that is, that a reason existed for taking it and the reason still exists. *Carver v St. Paul, Minneapolis*, 43 M 375, 45 NW 713; *Atkinson v Nash*, 56 M 472, 58 NW 39; *Davison v Sherburne*, 57 M 355, 59 NW 316.

A deposition, while authorized by statute, is secondary evidence, the primary evidence being that given by the witness orally in court; and where the witness whose deposition is thus obtained is within the jurisdiction of the trial court, and able to appear and testify, the reason for taking his deposition no longer exists. *State ex rel v Elliott*, 75 M 395, 77 NW 952.

After the depositions were filed, counsel entered into a stipulation waiving any defect or informality in taking the deposition, hence the lack of a statement in the depositions that witness was sworn is waived. *Reagan v Philadelphia Life*, 165 M 192, 206 NW 162.

**597.02 SERVICE; ORDER; DEFENDANT IN DEFAULT.**

**HISTORY.** 1873 c. 61 s. 1; 1876 c. 68 s. 1; G.S. 1878 c. 73 s. 36; 1885 c. 53; 1887 c. 185; G.S. 1894 s. 5688; R.L. 1905 s. 4667; G.S. 1913 s. 8382; G.S. 1923 s. 9821; M.S. 1927 s. 9821.

**597.03 EXAMINATION OF WITNESS.**

**HISTORY.** 1873 c. 61 s. 2; G.S. 1878 c. 73 s. 37; G.S. 1894 s. 5689; R.L. 1905 s. 4668; G.S. 1913 s. 8383; G.S. 1923 s. 9822; M.S. 1927 s. 9822.

**597.04 UNDER COMMISSION.**

**HISTORY.** R.S. 1851 c. 95 ss. 25, 26; P.S. 1858 c. 84 ss. 25, 26; G.S. 1866 c. 73 ss. 32, 33; G.S. 1878 c. 73 ss. 32, 33; G.S. 1894 ss. 5684, 5685; R.L. 1905 s. 4669; G.S. 1913 s. 8384; G.S. 1923 s. 9823; M.S. 1927 s. 9823.

The testimony of a party to the action may be taken. *Clafin v Lawler*, 1 M 297 (231); *Tyson v Kane*, 3 M 287 (197); *Hart v Eastman*, 7 M 74 (50).

When, in a commission to take testimony, an interrogatory is to be put if a previous question is answered in a particular way, and the question is not answered in that way, the contingent interrogatory ought not to be put, and if put the answer ought not to be admitted. *Seeden v Bank of Commerce*, 3 M 166 (108).

A substantial compliance with rules of court is generally sufficient. *Tyson v Kane*, 3 M 287 (197); *Cooper v Stinson*, 5 M 201 (160).

When a commission names several commissioners the return must show that all were present or notified of the time and place of executing it. *Mair v January*, 4 M 239 (169).

Rules of court respecting the taking and return of depositions must be followed. *Mair v January*, 4 M 239 (169); *Beatty v Ambts*, 11 M 331 (234).

Neither has a right to be present, or to have any one present for him, unless by consent, at the execution of the commission. *Walker v Barron*, 4 M 253 (178).

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Interrogatories and cross-interrogatories cannot be added to or diminished at the time of taking the deposition. *Walker v Barron*, 4 M 253 (178).

The certificate should state directly that the witnesses were sworn before the commissioner; but this may be inferred from the whole certificate. *Cooper v Stinson*, 5 M 201 (160).

Where a commissioner takes several depositions under one commission it is not necessary to attach a certificate to each deposition. *Day v Raguet*, 14 M 273 (203).

Where, upon the request of a party in a trial to the court, a cause is held open to permit application for a commission to obtain the evidence of a witness in a foreign country, the application should be made within a reasonable time; and a court in its discretion properly refused to grant such commission after five months had elapsed. *Coombs v Bodkin*, 81 M 245, 83 NW 986.

## 597.05 INTERROGATORIES.

HISTORY. R.S. 1851 c. 95 s. 27; P.S. 1858 c. 84 s. 27; G.S. 1866 c. 73 s. 34; G.S. 1878 c. 73 s. 34; G.S. 1894 s. 5686; R.L. 1905 s. 4670; G.S. 1913 s. 8385; G.S. 1923 s. 9824; M.S. 1927 s. 9824.

When the parties to a legal proceeding stipulate that deposition "may be taken, to be introduced in evidence on behalf of" one of them, they may be introduced by the other, if the party in whose behalf they were taken fails to use them. The one who uses the deposition makes it his own, and the original petitioner for the deposition may cross-examine. *In re Smith*, 34 M 436, 26 NW 234.

## 597.06 BY STIPULATION.

HISTORY. R.S. 1851 c. 95 s. 27; P.S. 1858-c. 84 s. 27; G.S. 1866 c. 73 s. 34; G.S. 1878 c. 73 s. 34; G.S. 1894 s. 5686; R.L. 1905 s. 4671; G.S. 1913 s. 8386; G.S. 1923 s. 9825; M.S. 1927 s. 9825.

## 597.07 DEPOSITION, HOW WRITTEN.

HISTORY. 1873 c. 61 s. 2; G.S. 1878 c. 73 s. 37; G.S. 1894 s. 5689; R.L. 1905 s. 4672; G.S. 1913 s. 8387; G.S. 1923 s. 9826; M.S. 1927 s. 9826.

## 597.08 SIGNING AND CERTIFYING.

HISTORY. 1873 c. 61 s. 2; G.S. 1878 c. 73 s. 37; G.S. 1894 s. 5689; R.L. 1905 s. 4673; G.S. 1913 s. 8388; G.S. 1923 s. 9827; M.S. 1927 s. 9827.

## 597.09 RETURN OF DEPOSITION.

HISTORY. R.S. 1851 c. 95 s. 18; P.S. 1858 c. 84 s. 18; G.S. 1866 c. 73 s. 26; G.S. 1878 c. 73 s. 26; G.S. 1894 s. 5678; R.L. 1905 s. 4674; G.S. 1913 s. 8389; G.S. 1923 s. 9828; M.S. 1927 s. 9828.

Notary sealed the envelope and mailed same to plaintiff's attorneys who retained same in their possession until day of trial. The court suppressed it because not returned in conformity to law. Whether or not the court erred in this ruling, the plaintiff has shown no prejudice and there is nothing to show it contained material evidence, so the ruling of the court is sustained. *Qualy v Johnson*, 80 M 412, 83 NW 393.

## 597.10 PERSON GIVING DEPOSITION TO BE SWORN.

HISTORY. R.S. 1851 c. 95 ss. 14, 32; P.S. 1858 c. 84, ss. 14, 32; G.S. 1866 c. 73 ss. 22, 38; 1873 c. 61 s. 2; G.S. 1878 c. 73 ss. 22, 37, 43; G.S. 1894 ss. 5674, 5689, 5695; R.L. 1905 s. 4675; G.S. 1913 s. 8390; G.S. 1923 s. 9829; M.S. 1927 s. 9829.

## 597.11 WITNESS COMPELLED TO GIVE DEPOSITION.

HISTORY. R.S. 1851 c. 95 s. 24; P.S. 1858 c. 84 s. 24; G.S. 1866 c. 73 s. 31; G.S. 1878 c. 73 s. 31; G.S. 1894 s. 5683; R.L. 1905 s. 4676; G.S. 1913 s. 8391; G.S. 1923 s. 9830; M.S. 1927 s. 9830.

**597.12 DEPOSITION, HOW USED; OBJECTIONS.**

**HISTORY.** R.S. 1851 c. 95 s. 20; P.S. 1858 c. 84 s. 20; G.S. 1866 c. 73 s. 28; 1873 c. 61 s. 3; G.S. 1878 c. 73 ss. 28, 38; G.S. 1894 ss. 5680, 5690; R.L. 1905 s. 4677; G.S. 1913 s. 8392; G.S. 1923 s. 9831; M.S. 1927 s. 9831.

At common law depositions could not be received in evidence and can only be admitted by virtue of the statute or of a stipulation when all the requirements of the same are complied with. Courts exercise caution in admitting them. *Walker v Barron*, 4 M 253 (178); *Chapman v Dodd*, 10 M 350 (277); *State e rel v Elliott*, 75 M 391, 77 NW 952.

A party is not bound to introduce a deposition. *Chapman v Dodd*, 10 M 350 (277).

A deposition taken at the instance of one party and not used by him may be introduced by the adverse party. *Lowry v Harris*, 12 M 255 (166); *In re Smith*, 34 M 436, 26 NW 234; *Byers v Orensstein*, 42 M 386, 44 NW 129.

Where the party at whose instance the deposition is taken has used the answers to the direct interrogatories, he may, if the opposite party declines to do so, use the answers to the cross-interrogatories. *Lowry v Harris*, 12 M 255 (166).

That an interrogatory and answer are excluded for any sufficient reason is, as a general rule, no ground for excluding the whole deposition. *Lowry v Harris*, 12 M 255 (166); *St. Anthony Falls v Eastman*, 20 M 277 (249).

Answers to interrogatories must be full, frank, explicit, and responsive and if they are not, their admission may be objected to on the trial. *Lowry v Harris*, 12 M 255 (166); *McMahon v Davidson*, 12 M 357 (232); *St. Anthony Falls v Eastman*, 20 M 277 (249); *Stone v Evans*, 32 M 243, 20 NW 149.

Where an answer in a deposition is in part proper and in part improper a party objecting must limit his objection to the part which is improper. *Day v Raguet*, 14 M 273 (203).

A deposition taken at the instance of one of two intervenors is admissible in favor of the other. *Lougee v Bray*, 42 M 323, 44 NW 194.

Depositions were taken on a stipulation which waived all objections except to the competency, relevancy, and materiality of the testimony. The parties appeared, examined and cross-examined the witnesses and took and had noted certain objections to the testimony. On trial a party could not take other objections to other parts of the testimony. *Pioneer Savings v St. Paul Fire & Marine*, 68 M 170, 70 NW 979.

A party offering evidence taken by deposition is not obliged to offer or to read the whole deposition. *Watson v St. Paul City Railway*, 76 M 358, 79 NW 308.

Objection that a deed with reference to which the testimony was given was not exhibited to the witness at the time of giving his testimony, was overruled and the testimony admitted. *Clark v Butts*, 78 M 373, 81 NW 11.

Objection to deposition that necessity for taking it was not shown to exist where offered, if not made before read in evidence, is waived. *Schlag v Gooding*, 98 M 261, 108 NW 11.

Under Section 597.12 a party is entitled to read a deposition taken on behalf of his adversary and thus makes the deponent his own witness. *Porter v Grennan*, 219 M 14, 16 NW(2d) 906.

**597.13 INFORMALITIES AND DEFECTS; MOTION TO SUPPRESS.**

**HISTORY.** 1873 c. 61 s. 4; G.S. 1878 c. 73 s. 39; G.S. 1894 s. 5691; R.L. 1905 s. 4678; G.S. 1913 s. 8393; G.S. 1923 s. 9832; M.S. 1927 s. 9832.

Defects of a purely formal nature which could not have misled or prejudiced the adverse party are not a ground for suppressing a deposition or for excluding it at the trial. *Molm v Barton*, 27 M 530, 8 NW 765; *Osgood v Sutherland*, 36 M 243, 31 NW 211; *Smith v Groneweg*, 40 M 178, 41 NW 939; *Beckett v Gridley*, 67 M 37, 69 NW 622; *Rock Island v Schoening*, 104 M 163, 116 NW 356.

The following objections must be made by a motion to suppress if an opportunity is given; and cannot be raised on the trial:

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That the name of the witness was not properly given in the notice. *Waldron v City of St. Paul*, 33 M 87, 22 NW 4;

That the notice was not signed by the firm name of attorneys appearing for the party taking the deposition. *Osgood v Sutherland*, 36 M 243, 31 NW 211;

That the depositions contain the testimony of witnesses not named in the notice. *Thompson v St. Paul City Railway*, 45 M 13, 47 NW 259;

That the deposition was written out in the third person. *Holm v Bettingen*, 81 M 91, 83 NW 467.

The effect of failure to give notice of the return is not to render the deposition inadmissible but simply to leave the adverse party at liberty to make at the trial any objections that he could have made on a motion to suppress. *Tancre v Reynolds*, 35 M 476, 29 NW 171; *Osgood v Sutherland*, 36 M 243, 31 NW 211; *Smith v Groneweg*, 40 M 178, 41 NW 939.

Where the time elapsing between notice of the filing of a deposition and the trial is less than ten days so that the adverse party has not the statutory time within which to move to suppress before trial, the effect is not to render the deposition inadmissible, but to leave the adverse party in the same position as if no notice had been given; that is to say, he make at the trial all objections that he could have made in a motion to suppress. *Tancre v Reynolds*, 35 M 476, 29 NW 171.

The omission of the official seal to the certificate of the authentication of a deposition taken before a notary in another state is an informality merely and not sufficient ground to warrant the rejection of the deposition on the trial although no notice of the return was served. *Rachas v Spencer*, 49 M 235, 51 NW 920.

Where a party is represented at the taking of a deposition and cross-examines the witness without any objection to the manner of taking the deposition he waives the objection that it was taken in narrative form. *Paterson v Chicago, Milwaukee*, 95 M 57, 103 NW 621.

Conceding that the refusal of a witness to answer material questions asked on cross-examination is ground for suppressing the deposition of such witness, the motion to suppress must be made within ten days after notice of the return of the deposition. *Lamont v Lamont*, 128 M 525, 151 NW 416.

The omission of notice to take deposition to state that witness' residence was outside the state as a reason for taking deposition was a defect of form and cured by General Statutes 1913, Section 8393 (section 197.13), regardless of General Statutes 1913, Section 8395 (section 197.15). *Rawleigh v Hoffman*, 162 M 58, 202 NW 54.

As no prejudice was shown, and no definite record of variance of time of taking, the trial court did not err in refusing to suppress the deposition. *Mollan Estate*, 181 M 217, 232 NW 1.

The expert witness on value sufficiently identified the bond so that his testimony was admissible. *Ebacher v First State Bank*, 188 M 268, 246 NW 903.

The trial court did not err in denying defendant's motion to suppress the deposition of plaintiff's witness on the grounds: (1) that it was not timely filed, and (2) that the witness did not sign each page of the deposition, there being no claim that the deposition was not accurate or that defendant was prejudiced thereby. *Wolfson v Kohn*, 210 M 14, 297 NW 109.

## 597.14 FAILURE OF PARTY GIVING NOTICE TO APPEAR; EXPENSES.

HISTORY. 1876 c. 68 s. 2; G.S. 1878 c. 73 s. 40; G.S. 1894 s. 5692; R.L. 1905 s. 4679; G.S. 1913 s. 8394; G.S. 1923 s. 9833; M.S. 1927 s. 9833.

## 597.15 DEPOSITION, WHEN NOT USED.

HISTORY. R.S. 1851 c. 95 s. 19; P.S. 1858 c. 84 s. 19; G.S. 1866 c. 73 s. 27; G.S. 1878 c. 73 s. 27; G.S. 1894 s. 5679; R.L. 1905 s. 4680; G.S. 1913 s. 8395; G.S. 1923 s. 9834; M.S. 1927 s. 9834.

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The court below did not err in permitting the deposition of a deceased witness to be read in evidence although it appeared that since the taking of such deposition said deceased witness had been sworn and examined as a witness on a former trial of the action. *Lamberton v Windom*, 18 M 506 (455).

A deposition within this state can only be taken when one of the causes or reasons exists. Specified in General Statutes 1878, Chapter 73, Section 16 (section 597.01). If taken in accordance with the provisions of General Statutes 1878, Chapter 73, Section 36, as amended by Laws 1885, Chapter 53 (section 597.02), the certificate must be in the form laid down in General Statutes 1913, Chapter 73, Section 37 (section 597.03); and then it is incumbent upon the party who wishes to use it to show to the court that a cause or reason existed for the taking, and that it still exists. *Atkinson v Nash*, 56 M 472, 58 NW 39.

The necessity for taking the deposition appears from the testimony of the witness himself. He testified he resided in Maryland and he is presumed to reside there until the contrary is shown. *Lieb Packing Co. v Trocke*, 136 M 344, 162 NW 499.

See *Rawleigh v Hoffman*, 162 M 58, 202 NW 54.

### 597.16 DEPOSITION USED IN SECOND ACTION.

**HISTORY.** R.S. 1851 c. 95 s. 21; P.S. 1858 c. 84 s. 21; G.S. 1866 c. 73 s. 29; G.S. 1878 c. 73 s. 29; G.S. 1894 s. 5681; R.L. 1905 s. 4681; G.S. 1913 s. 8396; G.S. 1923 s. 9835; M.S. 1927 s. 9835.

In order to use a deposition at a second trial an order of court is not necessary. *Chouteau v Parker*, 2 M 118 (95).

The depositions of witnesses upon an examination before a justice of the peace, on a criminal charge, are not competent evidence in an action for malicious prosecution. *Chapman v Dodd*, 10 M 350 (277).

See *Lamberton v Windom*, 18 M 506 (455).

Admissibility on second trial depends on identity of matters in issue and opportunity of party against whom offered to cross-examine the witness rather than on mutuality between parties. *Lougee v Bray*, 42 M 323, 44 NW 194; *Watson v St. Paul City Railway*, 76 M 358, 79 NW 308.

Where deposition taken to be used in an action in a state court that has been dismissed would be admissible as evidence under the statute of the state in another suit subsequently brought, and such second suit, after being brought, has been removed from the state court to the federal court, such depositions are admissible in the federal court. *Gravelle v Mpls. & St. L. Ry.* 16 F 435.

### 597.17 DEPOSITION ON APPEAL.

**HISTORY.** R.S. 1851 c. 95 s. 22; P.S. 1858 c. 84 s. 22; G.S. 1866 c. 73 s. 30; G.S. 1878 c. 73 s. 30; G.S. 1894 s. 5682; R.L. 1905 s. 4682; G.S. 1913 s. 8397; G.S. 1923 s. 9836; M.S. 1927 s. 9836.

### 597.18 DEPOSITIONS FOR USE IN OTHER STATES.

**HISTORY.** R.S. 1851 c. 95 s. 49; P.S. 1858 c. 84 s. 49; G.S. 1866 c. 73 s. 48; G.S. 1878 c. 73 s. 33; G.S. 1894 s. 5705; R.L. 1905 s. 4683; G.S. 1913 s. 8398; G.S. 1923 s. 9837; M.S. 1927 s. 9837.