Nebraska Law Review

Volume 34 | Issue 4 Article 8

1955

Criminal Procedure—Discovery Practice in Nebraska

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CRIMINAL PROCEDURE—DISCOVERY PRACTICE IN NEBRASKA

Determining the guilt or innocence of the accused is one of the ultimate purposes of any criminal proceeding. To accomplish this purpose it is necessary to attempt a reconstruction of what occurred in the past. Hence, the function of a trial is to bring to light all of the facts which are relevant to the alleged crime or defenses which are the subject of the trial. Formerly the "sporting" theory[1] of justice was widespread, and under it the fact-finding processes of the courts took on some of the aspects of an athletic contest. These were truly adversary proceedings, sometimes to such an extent that the emphasis seemed to bear more upon the tactical skill and finesse of the respective advocates than upon the real purpose of a trial, namely, a correct and complete revelation of all pertinent facts. The adoption in 1946 of the Federal Rules of Criminal Procedure is the most notable attempt in recent years to modify the "sporting" theory.[2] One of the most important innovations wrought by the adoption of these rules is the development of various discovery devices through which various elements of opposing counsel's case may be brought to light. Of course, state as well as federal courts are gradually reforming their judicial processes[3], and improvements in the processes of state courts often embody many of the same principles found in the federal rules. As these devices developed the civil courts accepted and used them long before the criminal courts; even today in most jurisdictions discovery practice in criminal proceedings is far more limited than in civil actions.[4]

The term discovery practice as used in this note includes primarily all of the devices which are available for securing a pre-trial disclosure of the elements of opposing counsel's case; in addition, there will be references to various devices which provide for disclosure at the trial of certain evidence that might otherwise never have come to light.

RATIONALES AND LIMITATIONS

The innovations which have led to more liberal discovery

[1] Coinage of this phrase is usually attributed to Justice Holmes.

[2] They followed the substantial success of the Federal Rules of Civil Procedure which were adopted in 1938.

[3] Orfield, Criminal Procedure from Arrest to Appeal 323 et seq. (1947).

[4] Compare Federal Rules of Criminal Procedure, Rules 15-17 and Federal Rules of Civil Procedure, Rules 26-37.

and inspection prior to trial have been subject to certain criticisms. First, it has been suggested that there is no precedent at common law which provides a basis for the rights of discovery. This objection has always been used to oppose reform in any field; hence, it is not very persuasive. Nor is it entirely correct since there actually is some supporting case-authority, in addition to the traditional supervisory control that courts exercise over public officers.[5] Second, it has been argued that to allow discovery of various elements of proof before trial will induce false testimony. As Wigmore points out this contention has previously been discredited in analogous fields.[6] The knowledge obtained by the defendant will not seriously reduce the probative force of the evidence if the theory of the prosecution is correct.[7] Third, it is said on the one hand that the prosecution is placed at a great disadvantage while others argue just as strenuously that liberal discovery places the defendant at a serious and unfair disadvantage.[8] An adequate exposition of the weakness inherent in these arguments will not be attempted at this time but suffice it to say that they are far from conclusive.[9]

The most powerful affirmative argument for discovery is that the element of surprise and the practice of concealment are to a large extent eliminated from the trial. Both attorneys are provided with a more complete picture of the evidence which will be presented upon trial; thus they will be able to do a better job of representing their client and reveal the case in its fullest and most understandable form. Secondarily, discovery procedures, supplemented by depositions, serve to preserve testimony of witnesses and allow the court to hear the various versions of what happened as they were told when fresh in the mind of the witness. Theoretically at least this will provide more accurate statements of the facts as they existed.[10]

5 Orfield, Criminal Procedure from Arrest to Appeal 329 (1947).

6 VI Wigmore, Evidence §§ 1859. 1863 (3d ed. 1940).

7 Orfield, op. cit. supra note 5, at 330.

8 Comment, 60 Yale L.J. 626, 634 (1951).

9 Ibid. This article lays out the complete counter arguments for these two propositions. *Prosecution at a Disadvantage.* This is offset by the handicaps of the defendant which often include low intelligence, lack of funds, inadequate counsel and no comparable service to match the well equipped modern crime laboratory. Also, defendant must give notice of alibi and certain other defenses as well as revealing names of witnesses. *Defendant at a Disadvantage.* This assertion is answered mainly by the defendant's rights to confrontation of witnesses and privilege against self-incrimination which go a long way in limiting the use of discovery devices.

10 Id. at 637.

Liberal discovery rules find ample support in the Canons of Legal Ethics. This is particularly true in regard to disclosure of materials by the counsel for prosecution since there is a specific admonition that the primary duty of a prosecuting attorney is not to convict but to see that justice is done.[11] The prosecutor should embrace the opportunity to divulge to defense counsel any information which might help to bring all of the evidence before the court and thus provide a clearer picture of what really happened.

Of course, all of the discovery devices are subject to certain limitations and exceptions. For example, one may not discover the "work product of a lawyer."[12] Both prosecution and defense are prevented from discovering any information which might be privileged because of the physician-patient or attorney-client relationship.[13] The government may exercise another privilege in order to prevent disclosure of military secrets.[14] In addition the prosecution is restricted in that there are certain constitutional safeguards which must be observed. The defendant's right to confrontation of witnesses[15] appears at first blush to be a limitation upon the use of depositions, but actually the use of depositions is quite consistent with the Constitution.[16] The privilege against self-incrimination[17] limits the use of written interrogatories and requests for admissions in particular and perhaps impinges to some extent upon all of the other discovery devices.

STATE COURT PRACTICE

Through the discovery of documents counsel is able to inspect and make copies of documents in the hands of opposing counsel. Although it has often been said that there is no right

11 Canons of Professional Ethics of the American Bar Association, Canon 5.

12 Hickman v. Taylor, 329 U.S. 495 (1946).

13 Note, 34 Neb. L. Rev. 508 (1955).

14 United States v. Reynolds, 345 U.S. 1 (1953).

15 Neb. Const. Art. I, § 11. "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ." Also, U. S. Const. Amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

16 V Wigmore § 1397 (3d. ed. 1940).

17 Neb. Const. Art. I, § 12. "No person shall be compelled, in any criminal case, to give evidence against himself . . . ." Also, U.S. Const. Amend. V. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

of discovery at common law in a criminal case,[18] the Nebraska courts have recognized a right to discover certain documents without any particular statutory authority. At the present time it is difficult to ascertain the precise nature of this right since there is a possibility that it exists independently at common law[19] and under the statutes[20] of Nebraska.

The Nebraska court first recognized this right of discovery in *Marshall v. State*,[21] a forgery prosecution. The court said there was no abuse of discretion by the trial court in denying defendant's request to inspect the forged instruments since the defendant was supplied with photostatic copies of the documents he sought to inspect. In a murder prosecution in 1944, *Cramer v. State*,[22] the court ruled there was no abuse of discretion by the trial court in refusing counsel's request to examine the defendant's confession. Medical experts had been permitted to read defendant's confession prior to trial and defense counsel was given a copy of the confession four days before it was offered in evidence. The court dwelt at some length upon the distinction between a forged instrument and a confession, evidently indicating that it felt the defendant had a higher right to inspect the former because the prosecution arose from this specific instrument. In *Hameyer v. State*,[23] a prosecution for obtaining money by false pretenses, the court compared these previous decisions and concluded that there was a common law right of discovery in criminal proceedings which approximated the statutory authority for civil actions.[24] However, the court concluded that under the circumstances the trial judge had not abused his discretion in refusing to allow the defendant to inspect and make a copy of the fake lease which had been used by the defendant in an effort to obtain the money. The most recent case in point is *Linder v. State*,[25] involving a prosecution for rape. The court held that there was no error in the trial court's refusal to compel the county attorney to make available to the defendant before the trial the results of a medical examination when the defen-

18 VI Wigmore § 1859(g) (3d ed. 1940). "Criminal Cases. At common law no right of inspection of documents before trial was conceded to the accused; and, of course, the privilege against self-incrimination prevented any such concession to the prosecution."

19 See notes 21, 22, 23, 25, 26 infra.

20 See note 28 infra.

21 116 Neb. 45, 215 N.W. 564 (1927).

22 145 Neb. 88, 15 N.W.2d 323 (1944).

23 148 Neb. 798, 29 N.W.2d 458 (1947).

24 Neb. Rev. Stat. § 25-1267 (Reissue 1948).

25 156 Neb. 504, 56 N.W.2d 734 (1953).

dant had been advised of the contents of the report which indicated that the defendant was not mentally ill at the time. *Fisher v. State*,[26] although not a case involving pre-trial disclosure, is indicative of the court's disposition regarding discovery practice. The defendent was being prosecuted for forgery and prior to trial the defendant's attorney secured the check, which was the basis of the prosecution, from the Telephone Co. During the course of the trial and over his objection defendant's attorney was required to produce the check. The supreme court reversed on the ground that it was error to compel the defendant or his attorney to hand over such incriminating documents. This protection against self-incrimination should and does extend to pre-trial disclosures as well.

Although these decisions are consistent in that all convictions were affirmed, thereby condoning the trial judge's exercise of discretion, a distinct difference is to be noted in the general tenor of the opinions. An analysis based on this "reading between the lines" might suggest that documents which are the *res* of the crimes, i.e., forged notes, fake leases, etc., are probably subject to inspection by the defendant. On the other hand, certain documents which may or may not be offered in evidence, such as a medical report, confession of the defendant, etc., are less likely to be subject to discovery. If this distinction does exist it seems undesirable and of course is not in accord with the recent trend toward more liberal discovery practice. The general policy considerations in this area indicate that all of the items mentioned above should properly be subject to discovery.[27]

A right to discovery of documents in criminal cases may exist under the statutes of Nebraska independent of the common law. In 1951, the legislature passed L.B. 136 which to a large extent embodied the rules relating to discovery found in the Federal Rules of Civil Procedure.[28] The provisions of L.B. 136 were patterned after federal rule 26 through 37 inclusive[29] and

[26] 140 Neb. 216, 299 N.W. 501 (1941).

[27] These considerations are fully set forth under Rationales and Limitations, supra 645.

[28] Neb. Rev. Stat. § 25-1267.01 et seq. (Supp. 1953).

[29] The legislative history of L.B. 136 demonstrates conclusively that these sections were taken directly from the Federal Rules of Civil Procedure; however, there is no indication as to whether or not they were meant to apply to criminal as well as civil cases.

Statement of the Judiciary Committee on L.B. 136, Neb. Legis. 62d Sess. (1951): "The purpose of this bill is to adopt in Nebraska the provisions of the rules of practice in federal courts with respect to depositions and discovery. In 1938, the Supreme Court of the United States

provide for discovery of documents, depositions, written interrogatories, requests for admissions, and physical examinations. Hence, the following arguments which support the use of the discovery of documents provision of L.B. 136 in criminal cases apply with equal vigor to all five discovery devices.

Although Nebraska's discovery statutes are found under Title 25, "Civil Procedure," that in itself is by no means conclusive of an intent to limit their application to civil proceedings, since other sections found under Title 25 are applicable to criminal as well as civil cases.[30] An examination of the enacting clause[31] of L.B. 136 reveals that the bill is "An act relating to procedure in courts . . . ." During this same session several other bills concerning

and the Congress, by their joint action, adopted rules of procedure for trial of civil cases in United States District Courts. In 1947, amendments thereof were adopted in similar manner. These rules modernize trial practice and expedite the disposition of litigation. In Nebraska, a lawyer is now confronted with the necessity of operating under two different codes of evidence, one in federal courts and a different one in state courts. In the main, the principles underlying the two systems are the same. However, there are some differences, and these differences make it difficult, particularly for a young lawyer, to practice in both federal and state courts when the rules with respect to evidence differ. They should be the same. Since it is not possible for the tail to wag the dog. the Judicial Council has recommended that we adopt the federal practice in Nebraska."

Hearings before the Judiciary Committee on L.B. 136 and L.B. 406 Neb. Legis. 62d Sess. (1951); "Mr. Robert R. Moodie, of West Point, chairman of a sub-committee of the Judicial Council, appeared in support of L.B. 136. He said the bill is practically a verbatim copy of the federal rules excepting that it eliminates some of the things that do not apply to state practice.... Hon. James W. Delehant, United States District Judge, Lincoln Division, speaking in favor of the bills thought they should be treated without separation, because the measures do interchange and constitute part of the entire whole. [He] asked that the Committee consider them carefully in connection with the counterparts in Nebraska practice of Rule 16 of the Federal Rules of Civil Procedure dealing with the subject of pre-trial practice. He dealt with the matters of discovery, sanctions, interrogatories, depositions, documentary evidence. and ended by saying that the function of the Legislature is to provide the best machinery possible for the administration of justice. 'We do not have an incompetent judicial system. The theory and philosophy of our Code was approved pretty largely. It is in the way of improvement that we are before you this afternoon.' "

[30] Neb. Rev. Stat. §§ 25-1931, 25-1223 et seq., 25-1267.01--25-1267.36 (Reissue 1948).

[31] Neb. Laws c. 68, p. 208 (1951).

procedure[32] were passed and each of these was preceded by an enacting clause[33] which read: "An act relating to procedure in civil actions . . . ." The inference from the use of these divergent clauses is that in the first instance the legislators intended that the bill relate to procedure in all courts both civil and criminal and that in the latter instances the operation of the bills was to be limited to civil actions. If the legislature had intended to limit the scope of the discovery rules to civil actions, they could quite easily have done so by using the same unequivocal language used in other procedure bills passed during the 1951 session. The conclusion that these discovery devices should apply to both civil and criminal cases is buttressed by the realization that the bill did not include any separate provisions relating to discovery practice in criminal cases.

On the other hand the fact that these rules were adopted directly from the Federal Rules of Civil Procedure is an indication that they were intended to apply only to civil actions. And, since the predecessor[34] of L.B. 136 had been limited to civil actions[35] perhaps L.B. 136 should likewise be so limited. Legislative history is of little value in solving this problem since it indicates merely that the new provisions are patterned after the Federal Rules of Civil Procedure.[36] There have been no relevant decisions by the Nebraska supreme court concerning the scope of these provisions so their possible application in criminal cases remains an open question with plausible arguments on both sides.

If these provisions are available in criminal proceedings, they constitute a valuable set of tools for the practicing attorney.

Discovery of Documents.[37] It would be possible upon a showing of good cause to obtain an order requiring the opposition "to produce and permit the inspection and copying or photographing . . . of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which

[32] Including, incidentally, L.B. 406 which was considered jointly with L.B. 136 in the committee hearing. See note 29 supra.

[33] Neb. Laws c. 65, p. 199; c. 66, p. 201; c. 67, p. 202; c. 70, p. 225 (1951).

[34] Neb. Rev. Stat. §§ 25-1246 to 1267 (Reissue 1948).

[35] See note 23 supra.

[36] See note 29 supra.

[37] Neb. Rev. Stat. § 25-1267.39 (Supp. 1953). ". . . any of the matters within the scope of the examination permitted by section 25-1267.02 . . . ." The limiting language of Neb. Rev. Stat. § 25-1267.02 (Supp. 1953) is quoted in the text.

constitute or contain evidence . . . ."[38] Thus under this statutory authority the scope of discovery would be much broader than at common law[39] and would allow discovery of such documents as confessions of the defendant and medical reports as well as forged notes, fake leases, etc. However, statutory discovery is limited to specific documents which have been clearly identified by the party seeking to inspect them. Thus counsel is prevented from engaging in a mere "fishing" expedition or blind effort to gain access to everything the opposition might have that would be of value in preparing a case for trial.

Depositions.[40] The scope of depositions would be limited to the inspection and copying of any designated documents, books, photographs, or tangible things, not privileged, which constitute or contain evidence.[41]

Written Interrogatories.[42] A party could serve upon the opposing party written interrogatories to be answered by the party served. When applied to a criminal proceeding, *State v. X, Defendant,* who is to be served with written interrogatories as the opposing party? It seems likely that if this problem should be litigated, the courts would rule service upon the prosecuting attorney was service upon the opposing party within the meaning of the statute.[43] These interrogatories may relate to any matters concerning the subject matter of the action and may be used in the same manner as testimony taken by deposition. Note that there is no provision for court sanctions[44] to compel the opposing party to answer; this provision was omitted by the legislature when they adopted the federal rules.[45]

Requests for Admissions.[46] After the commencement of an

[38] Although there are no Nebraska decisions construing these words, there have been a number of decisions construing their counterpart, Fed. R. Civ. P. 26(b). See 4 Moore's Federal Practice 1063 (2d ed. 1950).

[39] See notes 21. 22, 23, 25, 26 supra.

[40] Neb. Rev. Stat. § 25-1267.02 (Supp. 1953).

[41] See notes 37, 38 supra.

[42] Neb. Rev. Stat. § 25-1267.37 (Supp. 1953).

[43] This would be in line with the provisions of the statutes which proclaim that service of process upon one of its responsible representatives constitute valid service upon a corporation. See Neb. Rev. Stat. § 25-507 (Reissue 1948).

[44] Fed. R. Civ. P. 33.

[45] Although there are no Nebraska decisions concerning this section, there are a large number of federal cases relating to its counterpart, Fed. R. Civ. P. 33. See 4 Moore's Federal Practice 2251 (2d ed. 1950).

[46] Neb. Rev. Stat. § 25-1267.41 (Supp. 1953).

action a party could serve upon the opposing party a request for admissions. Of course, this device is limited by the privilege against self-incrimination. The opposing party by written reply must either deny the admissions requested and set forth his reasons for so doing or submit written objections to the effect that the requested admissions were privileged or irrelevant. Under a recent Nebraska decision[47] the failure to answer a request for admissions, when ordered by a court to do so, was held an admission of the facts sought to be elicited.[48]

Physical Examination.[49] In certain cases counsel could gain a court order compelling a party to submit to a physical examination. This right is limited to actions in which the mental or physical condition of a party is an issue, and of course counsel must show good cause for the issuance of the order.[50]

An additional right to the use of depositions of non-party witnesses may exist.[51] The statute grants to the defendant the right to obtain depositions when any of his material witnesses are about to leave the state, are sick or for some other good reason would be unable to appear in court. Note that this section applies only to any "material witness for the defendant," which at first might seem to preclude its use as a discovery device. However, a right akin to discovery is available in that if the defendant has good reason to believe that some individual will develop into a material witness for him, the court *may* allow the use of a deposition. Depositions are to be taken in the same manner as in civil actions[52] which means that normal direct and cross examination[53] plus written interrogatories[54] are available to both parties as an aid in eliciting information.

Although the statutes relating to criminal procedure do not specifically so provide, the subpoena duces tecum is available in criminal cases. Its use as a discovery device is limited in that, unlike the federal courts, the Nebraska courts are only authorized to order documents produced at trial; they may not order them

[47] Mueller v. Shacklett, 156 Neb. 881, 58 N.W.2d 344 (1953).

[48] For federal cases on this section's counterpart, Fed. R. Civ. P. 36, see 4 Moore's Federal Practice 2701 (2d ed. 1950).

[49] Neb. Rev. Stat. § 25-1267.40 (Supp. 1953).

[50] For federal cases on this section's counterpart, Fed. R. Civ. P. 35, see 4 Moore's Federal Practice 2551 (2d ed. 1950).

[51] Neb. Rev. Stat. § 29-1904, (Reissue 1948). Note that this section appears under Title 29, Criminal Procedure.

[52] Neb. Rev. Stat. § 29-1905. (Reissue 1948).

[53] Neb. Rev. Stat. § 25-1267.28 (Supp. 1953).

[54] Neb. Rev. Stat. § 25-1267.03 (Supp. 1953).

produced for inspection prior to trial. The section[55] which provides for writs of subpoena in criminal cases states that they shall be "served and returned as in other cases . . . ." This reference to "other cases" leads to the section[56] which provides generally for the issuance of subpoenas.[57] Section 25-1224 provides for issuance of a subpoena duces tecum ordering a witness to bring with him "any book, writing or other thing under his control, which he is bound by law to produce as evidence." Through the broad language of section 25-1224 (all references are to "courts" generally not "civil courts") and the necessary implications in section 29-1905, the subpoena duces tecum has become available in criminal as well as civil cases.[58]

Another related right, though not really a matter of discovery since it applies only to determining the nature of the charge, is the bill of particulars. This right is based upon the Constitution of the State of Nebraska which provides: "In all criminal prosecutions the accused shall have the right to . . . demand the nature and the cause of accusation and to have a copy thereof . . . ."[59] Cases construing this provision indicate that its purpose is limited to informing the accused as to the nature of the offense for which he must answer.[60] Note that the defendant gains notice of certain state witnesses when he is served with an information; this information must include the names of the witnesses known to the prosecuting attorney at the time of filing same.[61] However, it is not necessary that all witnesses whose names are endorsed on the information be called;[62] and the trial

55 Neb. Rev. Stat. § 29-1901 (Reissue 1948).

56 Neb. Rev. Stat. § 25-1233 et seq. (Reissue 1948).

57 Although these general provisions are found under Title 25, "Civil Procedure," in no place is there any indication that their application is to be limited to civil actions. The language throughout speaks in terms of "courts" rather than using "civil actions" or some other restrictive phrase.

58 Recently the Supreme Court of Nebraska recognized, but refused to pass upon, the question of whether section 25-1233 applies to criminal cases (the case did not properly raise the issue). Garcia v. State, 159 Neb. 571, 68 N.W.2d 151 (1955).

59 Neb. Const. Art. I, § 11. Also see Amendment VI of the United States Constitution which through Amendment XIV perhaps is applicable to state courts. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."

60 Schluter v. State, 153 Neb. 317, 44 N.W.2d 588 (1950); Kissinger v. State, 123 Neb. 861, 244 N.W. 794 (1932); Davis v. State, 118 Neb. 828, 226 N.W. 449 (1929); Moline v. State, 67 Neb. 164, 93 N.W. 228 (1903).

61 Neb. Rev. Stat. § 29-1602 (Reissue 1948).

62 Bloom v. State, 95 Neb. 710, 146 N.W. 965 (1914).

judge, at his discretion may permit additional witnesses to be endorsed on the information before trial.[63]

FEDERAL COURT PRACTICE

Practice in the federal courts is governed by the Federal Rules of Criminal Procedure. Under rule 16 the defendant may file a motion asking the court to permit him to inspect and copy any book, paper, document or tangible object obtained from the defendant or third persons by seizure or process.[64] The defendant must specify which documents he wishes to inspect, demonstrate that the items may be material to his defense, and show that the request is reasonable. The disposition of such a motion is left entirely within the discretion of the trial judge.

Under rule 17(c) the trial court may issue a subpoena commanding the person to whom it is directed to produce books, papers, documents, or other objects designated therein.[65] Such subpoena may be quashed or modified upon a showing that it is unreasonable or oppressive. The scope of this rule is limited in that it extends only to materials which are to be offered in evidence. This rule is available to both the prosecution and the defense while the use of rule 16 is limited to the defense counsel.

Rule 15 provides for the use of depositions whenever it appears that a witness may not be able to attend a trial and his testimony is material and necessary to prevent a failure of justice.[66] Depositions are to be taken in the same manner as in civil cases[67] and may also be taken upon written interrogatories at the request of the defendant. Depositions are to be used only upon motion of the defendant;[68] this may have been prompted by extreme caution regarding certain constitutional limitations.[69] Perhaps it should be noted that the defendant, when charged with a capital offense, is also entitled to a list of the prosecution's witnesses at least three days before trial.[70]

63 Wilson v. State, 120 Neb. 468, 233 N.W. 461 (1930).

64 Fed. R. Crim. P. 16; see Advisory Committee Notes to rule 16, Bender's Federal Practice Manual 1149 (1952).

65 Id. 30.

66 Id. 26.

67 See Fed. R. Civ. P. 26 et seq.

68 Fed. R. Crim. P. 15(a) " . . . the court at any time after the filing of an indictment or information may upon motion of a defendant . . . ."

69 U.S. Const. Amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

70 18 U.S.C. § 3432 (1946).

In the application of these rules a problem has developed concerning the relative scope of rules 16 and 17(c). *Bowman Dairy v. United States*,[71] which is the landmark case on this question, was a prosecution for violation of the Sherman antitrust law. The defendant filed a motion pursuant to rule 16 to obtain certain documents; government attorneys complied. Defendant also moved under rule 17(c) for an order directing the government to produce certain other documents not obtained by seizure or process.[72] The order was granted, but Government attorneys refused to comply. Upon appeal the Supreme Court held that under rule 17(c) the trial court had the power to order the documents produced (except for those under a catchall provision).[73] Speaking for the Court, Justice Minton said:

> There may be documents and other materials in the possession of the Government not subject to Rule 16. No good reason appears to us why they may not be reached by subpoena under Rule 17(c) as long as they are evidentiary. That is not to say that the materials thus subpoenaed must actually be used in evidence. It is only required that a good-faith effort be made to obtain evidence.[74]

However, Justice Minton continued:

> It was not intended by Rule 16 to give a limited right of discovery, and then by Rule 17 to give a right of discovery in the broadest terms . . . . Rule 17(c) was not intended to provide an additional means of discovery. Its chief innovation was

[71] 341 U.S. 214 (1951).

[72] The documents were described in the following manner: " 'All documents, books, papers and objects (except memoranda prepared by Government counsel, and documents or papers solicited by or volunteered to Government counsel which consist of narrative statements of persons or memoranda of interviews), obtained by Government counsel. in any manner other than by seizure or process, (a) in the course of the investigation by Grand Jury No. 8949 which resulted in the return of the indictment herein, and (b) in the course of the Government's preparation for the trial of this cause, if such books, papers, documents and objects, (a) have been presented to the Grand Jury; or (b) are to be offered as evidence on the trial of the defendants, or any of them, under said indictment; or (c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt, or innocence of any of the defendants. . . .' " Id. at 217.

[73] This portion of the request referred to books papers, etc. which, " '(c) are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. . . .' " Id. at 217.

[74] 341 U.S. 214, 219 (1951).

> to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials.[75]

Justice Minton then concluded:

> However, the plain words of the Rule are not to be ignored. They must be given their ordinary meaning to carry out the purpose of establishing a more liberal policy for the production, inspection and use of materials at the trial.[76]

As Judge Bazelon pointed out in *Fryer v. United States*,[77] the Supreme Court appears to have made somewhat conflicting statements. Since no Supreme Court decision has been handed down which attempts to rationalize the statements in the *Bowman* decision, apparently one of the best ways to analyze the law in this area is to examine the subsequent decisions of the inferior federal courts. *Fryer v. United States*[78] seems to stand alone in seizing upon the liberal language of the *Bowman* decision. A lower court conviction was remanded with instructions to reverse if prejudice was shown, on the ground that discovery should have been permitted under rule 17(c). More typical of recent decisions[79] is *Remmer v. United States*[80] wherein the court affirmed a conviction on the ground that the trial judge had not abused his discretion in denying the defendant discovery under rule 17(c).

Generally, the decisions seem to indicate that rule 17(c) may be used by the defendant to discover (1) statements made by the defendant,[81] (2) statements volunteered to the government by witnesses relating to this cause,[82] and (3) documents obtained by the government other than by seizure or process (a) in the course of the grand jury investigation or (b) in the course of the government's preparation for trial if the documents were presented to the grand jury or are to be offered in evidence at

[75] Id. at 220.

[76] Ibid.

[77] 207 F.2d 134 (D.C. Cir. 1953), cert. denied, 346 U.S. 885 (1954).

[78] Ibid.

[79] United States v. Carter, 15 F.R.D. 367 (D.D.C. 1954); United States v. Scully, 15 F.R.D. 402 (S.D.N.Y. 1954); United States v. Ward, 120 F. Supp. 57 (S.D.N.Y. 1954); United States v. Cohen, 15 F.R.D. 269 (S.D.N.Y. 1953); United States v. Mesarosh, 13 F.R.D. 180 (W.D. Pa. 1952); United States v. Schneiderman, 104 F. Supp. 405 (S.D. Cal. 1952). In the *Schneiderman* case the court seemed to be motivated by a desire to protect informants by denying discovery.

[80] 205 F.2d 277 (9th Cir. 1953).

[81] Fryer v. United States, 207 F.2d 134 (D.C. Cir. 1953), cert. denied, 346 U.S. 885 (1954).

[82] Ibid.

the trial of the defendant.[83] Any request which is broader than the three outlined above will be denied. Some cases have held that it was within the discretion of the trial judge to deny inspection of documents such as those outlined in (2) or (3) above.[84]

United States v. Iozia,[85] though only a district court decision, is valuable in that it delineates a method of determining what constitutes a showing of good cause for inspection by the defendant. The court stated that it was necessary for the defendant to demonstrate:

> (1) That the documents are evidentiary and relevant;
>
> (2) That they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence;
>
> (3) That the defendant cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial;
>
> (4) That the application is made in good faith and is not intended as a general fishing expedition.[86]

These prerequisites seem to be in keeping with the general tenor of the *Bowman* opinion and should provide a sufficient limitation to prevent unreasonably broad attempts at discovery by counsel who do not have the initiative to prepare their own case thoroughly. Nor will such a limitation unduly hamper the defendant in preparing his case since discovery is permitted when he can demonstrate that the prosecution is withholding any specific information or documents which would be of material aid in preparing his defense.

Most of the recent cases have applied about the same sort of test as the court in the *Iozia* decision, two decisions citing it directly.[87] Rule 17(c) seems to have developed into a weapon

[83] Bowman Dairy v. United States, 341 U.S. 214 (1951); United States v. Iozia, 13 F.R.D. 335 (S.D.N.Y. 1952). Of course any documents which are within these broad categories are also subject to discovery when specifically designated, e.g., forged notes, fake oil leases, confessions of the defendant or third persons, reports of medical examinations, etc.

[84] Some lower courts have refused to allow discovery of documents named in practically the same manner used by defendant in the *Bowman* decision. See note 79 supra.

[85] 13 F.R.D. 335 (S.D.N.Y. 1952).

[86] Id. at 338.

[87] In United States v. Cohen, 15 F.R.D. 269 (S.D.N.Y. 1953) and United States v. Scully, 15 F.R.D. 402 (S.D.N.Y. 1954) the court referred expressly to the test set forth in the *Iozia* case. For other cases of similar tenor which do not mention the *Iozia* decision as such, see note 79 supra.

peculiar to the defense (at least insofar as the recent district court and court of appeals decisions are revelant). On the sole occasion that a prosecutor sought to invoke rule 17(c) his motion was promptly dismissed.[88] The net result seems to be that so long as an attorney can demonstrate that the material he seeks is evidentiary and can identify it with sufficient specificity he may invoke rule 17(c) as a supplement to rule 16, thus reaching documents whether or not they were secured by the government through seizure or process.[89]

CONCLUSION

In the state courts of Nebraska a right to discover certain documents is recognized at common law; however, the supreme court has yet to reverse a lower court conviction on the ground that discovery was improperly denied by the trial court. It is possible that L.B. 136 may have conferred certain rights of discovery in criminal as well as civil actions, although the arguments offered in support of such a proposition are by no means conclusive. If L.B. 136 does apply to criminal cases the following devices are available: discovery of documents (more liberal than at common law), depositions, written interrogatories, requests for admissions and physical examinations. The obvious conclusion is that discovery devices in the state courts of Nebraska are quite limited.

In the federal courts a more liberal discovery practice prevails. The defendant has the right to inspect any documents or tangible objects obtained from him or third persons by seizure or process. In addition either party will probably be able to inspect documents, objects, etc. which are in the hands of opposing counsel so long as the objects have been identified sufficiently and they are evidentiary in nature. In certain situations counsel will be able to use depositions and secure lists of the witnesses of the opposition.

Justice is served through the liberalization of discovery practice, and although it is conceivable that there are a number of discovery devices available in a criminal case in Nebraska, their existence and scope is far from certain at the present time. It would be desirable if some comprehensive system similar to that adopted for civil cases[90] could find approval in our legislature.

[88] United States v. O'Conner, 118 F. Supp. 248 (D.Mass. 1953).

[89] See Comment, 67 Harv. L. Rev. 493 (1954). A good discussion of the various discovery devices available in federal courts.

[90] Neb. Rev. Stat. § 25-1267.01 et seq. (Supp. 1953).

When a person's life or liberty is at stake in a criminal case he should certainly be given at least the same measure of protection from surprise that he is afforded when his property is the subject of a civil lawsuit.

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