

DISCOVERY

FLEMING JAMES, JR.

Parties litigant desire to obtain before trial all possible information relevant to the matter in issue. Obviously their opponents possess much of this information but are usually reluctant to divulge it. If the production of such information is compelled, however, this will frequently result in promptly clearing up those issues in the case concerning which there can be no bona fide controversy, thus saving time and cost both to the parties and to the state. Moreover such compulsion may tend to prevent substantial injustice to the party seeking information in the exclusive possession of his opponent. Both these results are desirable. But other considerations of equal social import render it undesirable to enable a party to find out before trial all that his adversary knows about the case. One problem is therefore to ascertain the extent to which discovery should be allowed, in order best to promote its usefulness without violating the latter considerations. The other problem is to find the machinery best adapted to obtain production of information, or documents, to the extent found desirable. This article aims to deal with these two problems and with a view to their solution attempts a survey and examination of the existing statutes and decisions on the subject.

Historically, courts of common law had no machinery to enforce a general discovery of testimony or production and inspection of documents before trial. Equity would, however, entertain jurisdiction over a bill of discovery in aid of an intended action at law or defense therein, or a defense in an equity suit. And the courts of chancery would also compel discovery as ancillary to a demand for relief which they had jurisdiction to grant.¹ The answer to such a bill was made under oath. In the courts of many of the United States as well as in the federal courts a bill for discovery may still be brought;² in some it is

¹ BRAY, DISCOVERY (1885) 4; Langdell, *Discovery Under the Judicature Act* (1897) 11 HARV. L. REV. 137, 205; Langdell, *Discovery Under the Judicature Act* (1898) 12 HARV. L. REV. 151; Abbott, *Co-operation of "Law" and "Equity"* (1893) 7 HARV. L. REV. 76; *Isham v. Gilbert*, 3 Conn. 166, 171 (1819); 1 POMEROY, EQUITY JURISPRUDENCE (1881) §§ 190-209.

² GA. ANN. CODE (Michie, 1926) § 4543; MD. ANN. CODE (Bagby, 1924) art. 16, §§ 164-167; MASS. GEN. LAWS (1921) c. 214, §§ 12, 13; N. H. PUB. LAWS (1926) c. 317, § 1; TEX. ANN. STAT. (Vernon, 1925) art. 2002; VA. CODE ANN. (1919) § 6238; *Preston v. Equity Sav. Bank*, 287 Fed. 1003 (Ct. of App. D. C. 1923) (bill for discovery and an accounting); Campbell

still apparently the only way of procuring any discovery before trial.³ The federal courts will not entertain an equitable bill for discovery in aid of an action⁴ or defense⁵ at law on the grounds that the statute enabling the law courts to compel discovery "in the trial of actions at law" (as in equity)⁶ affords an adequate remedy. But since this statute has been construed not to embrace any discovery before the trial,⁷ this holding seems undesirable. A similar statute⁸ in Maryland was held to be no bar to a bill of discovery in aid of a law action.⁹

Originally the bill for discovery consisted in charges of evidence on which were based interrogatories or a prayer that documents in the possession and control of the defendant be produced for the plaintiff's inspection. Only a plaintiff in equity could obtain discovery, so that a defendant in any suit or a plaintiff at law would be compelled to bring a separate suit to do so.¹⁰ The defendant in an equitable action is sometimes empowered by statute to attach interrogatories to his pleading which the plaintiff must answer.¹¹ In order that a bill for discovery as ancillary to equitable relief be maintainable, a *prima facie* case for such relief must appear in the complaint or it will be demurrable as a whole, and discovery will not be decreed.¹² Nor will discovery

v. Knight, 92 Fla. 246, 109 So. 577 (1926); *Boriss Constr. Co. v. Deasey*, 212 Ala. 528, 103 So. 470 (1925); *Erswell v. Ford*, 208 Ala. 101, 94 So. 67 (1922); *Lopez v. Lopez*, 27 N. M. 621, 204 Pac. 75 (1922). A few states allow an action for discovery only against irresponsible persons jointly or severally liable on a contract with others whose names the plaintiff has failed to ascertain by exercise of due diligence, for the purpose of getting a disclosure of the names of such other joint or several obligors. ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 1037-9; IOWA CODE (1927) §§ 10953, 10954; KY. CODES (Carroll, 1927) § 685.

³ ILL. REV. STAT. (1925) §§ 20-27; ME. REV. STAT. (1916) c. 82, §§ 6, 15; PA. STAT. (West, 1920) § 4563.

⁴ *Durant v. Goss*, 12 F. (2d) 682 (C. C. A. 6th, 1926); *Bradford v. Ind. Harbor Belt R. R.*, 300 Fed. 78 (C. C. A. 7th, 1924).

⁵ *Texas Co. v. Cohen*, 15 F. (2d) 358 (C. C. A. 2d, 1926); *Welles v. Rhodes*, 59 Conn. 498, 22 Atl. 286 (1890).

⁶ 1 STAT. 82 (1861), 28 U. S. C. § 636 (1926).

⁷ *Carpenter v. Winn*, 221 U. S. 533, 31 Sup. Ct. 683 (1910), criticized in Note (1911) 60 U. OF PA. L. REV. 202.

⁸ MD. ANN. CODE (Bagby, 1924) art. 75, § 106.

⁹ *Hill v. Pinder*, 150 Md. 397, 133 Atl. 134 (1926).

¹⁰ Langdell, *Discovery under the Judicature Act* (1897) 11 HARV. L. REV. 205, 216, *et seq.*; Langdell, *Discovery under the Judicature Act* (1898) 12 HARV. L. REV. 151, 160 *et seq.*

¹¹ ALA. CIV. CODE (1923) § 6569; ARK. DIG. STAT. (Crawford & Moses, 1921) § 1248; KY. CODES (Carroll, 1927) § 140.

¹² *Altman v. McClintock*, 20 F. (2d) 226 (D. Wyo. 1927); *Erswell v. Ford*, 205 Ala. 494, 88 So. 429 (1921); *Middletown Bank v. Russ*, 3 Conn. 135 (1819). Where the plaintiff is entitled to a money decree but not to an equitable accounting, discovery will not be granted to ascertain the

be granted in an action to enforce a penalty or including a charge of a criminal offense.¹³ And it seems that where the bill discloses on its face that the plaintiff is already in possession of the information sought, there will be no discovery.¹⁴ Where the adverse party from whom discovery is sought is a private corporation, the proper officer, member, or agent must under some statutes give the discovery demanded on his own oath.¹⁵ Originally the answer was given under the common seal of a corporation, and the officer or member was required to answer on his oath only when made a party. And such an officer seems still to be a necessary party defendant to a bill of discovery in the absence of any statute dealing with the matter.¹⁶ The corporation is under a duty to ascertain only what its present officers or agents have come to know while in the scope of their employment.¹⁷ But where the officer is made a party he must disclose all his material knowledge.¹⁸

The answer to a bill of discovery must always be under oath and this cannot be waived by the plaintiff.¹⁹ The defendant need not make an answer which tends to incriminate him, which is protected by professional privilege, which relates solely to his own case, or which it is against public interest for him to disclose.²⁰ The question as to what pertains solely to a party's case will be taken up later. Objections to giving discovery on any

amount due him. *Dorough v. Fertilizer Co.*, 210 Ala. 530, 98 So. 735 (1924); *Loose v. Plaster Co.*, 266 Fed. 81 (C. C. A. 2d, 1920).

¹³ *Ohlendorf v. Bennett*, 241 Ill. App. 537 (1926); 3 STORY, EQUITY JURISPRUDENCE (1886) § 1942. *Contra*: *Board of Commissioners v. Maretta*, 93 N. J. Eq. 513, 117 Atl. 483 (1922) (the bill in effect charged embezzlement; the remedy under this decision is to object to making incriminating answers, but the bill is not demurrable).

¹⁴ *Crowson v. Cody*, 207 Ala. 476, 93 So. 420 (1921); *cf.* *Henry v. Donovan*, 148 Miss. 278, 114 So. 482 (1927) (bill for discovery of amount of taxes from certain source in hands of commissioner must contain allegation of due diligence to ascertain that amount).

¹⁵ ILL. REV. STAT. (1925) c. 22, § 22; MISS. ANN. CODE (Hemingway, 1927) § 360 (answer in chancery of corporation to be on oath of officer rather than under seal); *Southern Ry. v. Cotton Oil Co.*, 126 Miss. 562, 89 So. 228 (1921) (construing statute as dispensing with necessity of making the officer a party).

¹⁶ *Boriss Construction Co. v. Deasey*, *supra* note 2, at 529, 103 So. at 471; POMEROY, *op. cit.* *supra* note 1, § 199.

¹⁷ ILL. REV. STAT. (1925) c. 22, § 22.

¹⁸ *Wright v. Dame*, 42 Mass. 237 (1840).

¹⁹ ILL. REV. STAT. (1925) c. 22, §§ 20, 21; MASS. GEN. LAWS (1921) c. 214, § 13; GA. ANN. CODE (Michie, 1926) § 4546; *Palmetto Fire Ins. Co. v. Allen*, 141 Miss. 681, 105 So. 482 (1925) (where bill for discovery, not being under oath, waives sworn answer, it is demurrable).

²⁰ GA. ANN. CODE (Michie, 1926) § 4544 provides specifically that such answers are not required to be given. These grounds for resisting discovery obtain under the present English practice and did obtain in the old Chancery practice. POMEROY, *op. cit.* *supra* note 16, §§ 201-203.

of these grounds are stated in the sworn answer and, so far as well stated, conclude the plaintiff.²¹ The defendant in his answer may explain any of his admissions.²² If the answer is insufficient, a further and better answer may be required by the court on motion.²³ If the defendant refuses to give discovery within the time specified by the court, or if his answer is insufficient and evasive and he fails to give further satisfactory answer, the defendant is liable to attachment for contempt and may have the bill taken against him as confessed.²⁴ The costs of a bill seeking discovery alone are taxable against the plaintiff.²⁵ The answer to a bill of discovery may be used on the trial as evidence by either party.²⁶ And such evidence can be contradicted only on the testimony of two credible witnesses, or the testimony of one with corroborating circumstances,²⁷ unless there has been a statutory change of the rule.²⁸ Some jurisdictions have abolished equitable bills for discovery,²⁹ in others they are rarely used.³⁰

DISCOVERY UNDER STATUTE

The equitable bill of discovery and its history are of interest in code jurisdictions today chiefly because of their influence on dis-

²¹ Langdell, *op. cit. supra* note 1, at 210.

²² GA. ANN. CODE (Michie, 1926) § 4548.

²³ Langdell, *Discovery under the Judicature Act* (1897) 11 HARV. L. REV. 205, 208 *et seq.*; ILL. REV. STAT. (1925) c. 22, § 24.

²⁴ Langdell, *Discovery under the Judicature Act* (1898) 12 HARV. L. REV. 151, 157; ILL. REV. STAT. (1925) c. 22, § 24 (contempt); ALA. CIV. CODE (1923) §§ 6569, 6570. In Maryland, if the defendant fails to appear and has an interlocutory decree entered against him on this account, the plaintiff, after satisfying the court by affidavit that the matter or thing sought is in the defendant's private knowledge, and that there is reasonable ground to believe that it exists, is entitled to have the bill taken as confessed so far as it deals with such matter or thing. MD. ANN. CODE (Bagby, 1924) art. 16, §§ 164, 165. . But the defendant may file answer before final decree on terms imposed by the court. *Ibid.* art. 16, § 167.

²⁵ GA. ANN. CODE (Michie, 1926) § 4547; MASS. GEN. LAWS (1921) c. 261, § 12.

²⁶ STORY, EQUITY JURISPRUDENCE (1886) § 1523; see *Fant v. Miller*, 17 Gatt. 187, 205 (Va. 1867). Only the responsive portions of the answer are evidence. GA. ANN. CODE (Michie, 1926) § 4548; *Marion v. Faxon*, 20 Conn. 486 (1850). In Alabama only the party taking the discovery may use it in evidence. ALA. CIV. CODE (1923) § 6573.

²⁷ GA. ANN. CODE (Michie, 1926) § 4547; *Lopez v. Lopez, supra* note 2; STORY *loc. cit. supra* note 26. Langdell says that the rule is borrowed from the ecclesiastical courts. Langdell, *op. cit. supra* note 24, at 153.

²⁸ ILL. REV. STAT. (1925) c. 22, § 25 (answer may be contradicted as any other testimony).

²⁹ For example, North Carolina has abolished the equitable bill of discovery. N. C. CODE (1927) § 899.

³⁰ ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 1037-1039; IOWA CODE (1927) §§ 10953, 10954, etc. have limited greatly the scope of such bill. See *supra* note 2.

covery under the statutory provisions. Testimony and admissions of the opposite party are obtained under these statutes either by propounding written interrogatories to be answered in writing, or by an oral examination of the party before trial. There are also various provisions the ultimate purpose of which is to allow a party to inspect and copy documents in the possession or power of the adverse party. There are, however, many features which are common to discovery in general. These will be treated first and an analysis and criticism of the various methods and their effectiveness will be taken up later.

Actions in which discovery may be had. Virtually none of the statutes specify the type of action in which the machinery of discovery provided shall be available, except that the provisions are applicable to civil actions only.³¹ There are, however, some restrictions that have been read into the statutes by judicial construction. Some courts, at any rate, follow the traditions of equity and refuse to compel discovery in actions to enforce penalties and forfeitures.³² In probate actions discovery seems to be fairly generally allowed.³³ But there is more question as to actions for divorce.³⁴ In England the machinery for obtaining discovery is available in arbitration proceedings, while in New York it is deemed to be unsuitable and unavailable in such a field.³⁵ In New York, in the first department, there is a decided reluctance to grant discovery in actions for libel or for personal injuries.³⁶ Other jurisdictions probably do not share this reluc-

³¹ Kentucky; Georgia, Texas and some other states have different provisions applicable to suits in equity and at law. KY. CODES (Carroll, 1927) §§ 140, 143; TEX. ANN. STAT. (Vernon, 1925) arts. 2002, 3769.

³² *Seddon v. Comm. Salt Co., Ltd.*, [1925] Ch. 187 (where a plaintiff seeks to enforce a "re-entry clause" in a lease, he will not be granted an order that the defendant file an affidavit of documents); *Blackmore v. Collins*, 286 Fed. 629 (E. D. Mich. 1923) (interrogatories disallowed in suit seeking statutory treble damages in patent infringement suit). *Contra*: *Standard Oil Co. v. Universal Co.*, 21 F. (2d) 159 (N. D. Ill. 1927); *Taylor v. Ford Motor Co.*, 2 F. (2d) 473 (N. D. Ill. 1924) (these cases do not repudiate the equitable tradition but hold it inapplicable to patent cases).

³³ *Lee v. Blumer*, 189 Iowa 1145, 179 N. W. 625 (1920) (action against representative on decedent's note); *Matter of Dooper's Will*, 124 Misc. 411, 208 N. Y. Supp. 820 (Surr. Ct. 1925) (probate of will); *Matter of Butsch's Estate*, 128 Misc. 29, 219 N. Y. Supp. 124 (Surr. Ct. 1926) (proceedings to remove executor).

³⁴ England does not allow it. *E. v. E.*, 24 T. L. R. 78 (1907) (divorce for cruelty in communicating venereal disease to wife); *Thomas v. Thomas*, 34 T. L. R. 434 (1918) (divorce for adultery).

³⁵ *Kursell v. Timber Operators, Ltd.*, [1923] 2 K. B. 202. *Contra*: *Matter of Schwartz*, 127 Misc. 452, 217 N. Y. Supp. 233 (Sup. Ct. 1925).

³⁶ *Herrmann v. Osborne Co.*, 128 Misc. 859, 220 N. Y. Supp. 306 (Sup. Ct. 1927) (libel); *cf.* *Palmer v. Hampton*, 220 N. Y. Supp. 768 (City Ct.

tance.³⁷ If the statute provides for discovery in "special proceedings" this will probably not include a hearing on a motion.³⁸

By and against whom discovery may be had. The usual language in these statutes is to the effect that a party to a civil action may be compelled to give discovery to the "adverse" or "opposite" party.³⁹ Obviously this includes the usual case of the plaintiff examining the defendant, and *vice versa*, where their interest in the controversy is adverse. Where one is, however, a merely nominal party, it is questionable whether he can be compelled to give discovery at least unless the nominal party will be liable to have a judgment for costs entered against him.⁴⁰ Where there is in fact an issue between two parties, but they are either co-plaintiffs or co-defendants on the record, they are probably "adverse" within the meaning of this requirement.⁴¹ But several states have thought it necessary to provide expressly

N. Y. 1927); *Krumeich v. Sundelson*, 131 Misc. 9, 225 N. Y. Supp. 667 (City Ct. N. Y. 1927) (examination allowed in action for malpractice). But *cf.* *Albanos v. News Syndicate Co., Inc.*, 130 Misc. 566, 224 N. Y. Supp. 331 (Sup. Ct. 1927); *Shaw v. Samley Realty Co.*, 201 App. Div. 433, 194 N. Y. Supp. 531 (1st Dep't 1922).

³⁷ *Parnell v. Walter*, 24 Q. B. D. 441 (1890) (discovery allowed in libel action); *Griebart v. Morris*, [1920] 1 K. B. 659; *Robbins v. Brockton St. Ry.*, 180 Mass. 51, 61 N. E. 265 (1901); *B. & O. S. W. R. R. v. Berdon*, 195 Ind. 265, 145 N. E. 2 (1924); *Warner v. Rochester & Co.*, 216 App. Div. 115, 214 N. Y. Supp. 579 (4th Dep't 1926) (discovery in personal injury cases). The Court of Appeals has refused to disturb this inter-departmental conflict. *Middleton v. Boardman*, 240 N. Y. 552, 148 N. E. 701 (1925).

³⁸ *Bresadola v. Ry. & Light Co.*, 165 Wis. 109, 161 N. W. 362 (1917) (motion to set aside summons for lack of jurisdiction).

³⁹ ALA. CIV. CODE (1923) § 7764; MASS. GEN. LAWS (1921) c. 231, § 61; TEX. ANN. STAT. (Vernon, 1925) art. 3769; Order XXXI, Rule 1, ANNUAL PRACTICE (1928) 489; 1 YEARLY PRACTICE (1928) 440. Some statutes provide that the deposition of a witness may be taken when he is a party. N. Y. C. P. A. § 288; MONT. REV. CODES (1923) § 10645; *cf.* AM. JUD. SOC., RULES CIV. PROC. (1919) art. 22, § 1.

⁴⁰ *Codd v. Delap*, [1906] W. N. 57 (no discovery against party disclaiming all interest in the shares which were the subject of the suit). The words "any other party" in Order XXXI, Rule 12 [ANNUAL PRACTICE (1928) 519; 1 YEARLY PRACTICE (1928) 462] include such a nominal party. *Cory v. Cory*, [1923] 1 Ch. 90.

Where a nominal defendant will be liable for costs, however, the plaintiff can compel him to give discovery. *Wells v. Green Bay Co.*, 90 Wis. 442, 64 N. W. 69 (1895); *Aiken v. Baumann*, 17 Abb. Prac. 28, note (N. Y. 1863).

⁴¹ Thus rival claimants to funds paid into court by a shipowner may examine each other, though both are defendants. *The Nedenes*, 41 T. L. R. 243 (1926). And legatees and devisees are examinable by contestants of a will. *Matter of Dooper's Will*, *supra* note 33. But there must be an issue between such co-parties. *Shaw v. Smith*, 13 Q. B. D. 193 (1886); *Mackay, Lowell & Co. v. Dillon*, 215 App. Div. 842, 213 N. Y. Supp. 681 (2d Dep't 1926).

for the examination of such co-parties.⁴² The Massachusetts act provides that interveners and persons otherwise admitted after the beginning of the suit are included by the word "parties."⁴³

By the terms of the Massachusetts statute minors or persons under guardianship may be examined if they are competent; otherwise their guardians *ad litem* are examinable.⁴⁴ And Order XXXI of the English Supreme Court Rules applies to infant parties and their guardians *ad litem*,⁴⁵ but not to a lunatic party or his guardian⁴⁶ except in a matrimonial suit.⁴⁷

Practically all of the statutes provide that if a private corporation is party to a suit it must give discovery,⁴⁸ and this includes non-resident corporations who have appeared or have otherwise become subject to the jurisdiction of the court.⁴⁹ The New York statute expressly includes "joint stock associations or other unincorporated associations."⁵⁰ Where such associations are permitted to sue or be sued in the association name, it seems sensible to consider them as included in the word "party," but the difficulty arises as to who shall give the discovery, and under whose oath shall it be given.⁵¹ It is usually provided that a cor-

⁴² N. C. CONS. STAT. ANN. (1919) § 907 and S. C. CODE OF LAWS (1922) § 698 provide that a party may be examined by a co-plaintiff or co-defendant as to any matter in which he is not jointly interested or liable with such co-party, and as to which a separate and not joint verdict can be rendered. TENN. ANN. CODE (Shannon, 1925) § 5683 provides that in chancery proceedings the deposition of a party may be taken by an adverse or co-party. N. Y. C. P. A. § 288 and WIS. STAT. (1925) § 326.12 provide that a party or his assignor may be examined. Query as to whether a party's assignor must give discovery in the absence of such a provision. See Grinnell, *Discovery in Massachusetts* (1902) 16 HARV. L. REV. 110, 123.

⁴³ MASS. GEN. LAWS (1921) c. 231, § 61. This provision was retained in the draft act proposed by the Massachusetts Judicial Council in 1925. FIRST REPORT OF MASSACHUSETTS JUDICIAL COUNCIL (1925) 144. The same result is reached in England without such a provision. *Eden v. Weardale Iron & Coal Co.*, 35 Ch. D. 287 (1884).

⁴⁴ MASS. GEN. LAWS (1921) c. 231, § 65.

⁴⁵ Order XXXI, Rule 29, ANNUAL PRACTICE (1928) 537; 1 YEARLY PRACTICE (1928) 503.

⁴⁶ *Pink v. Sharwood & Co., Ltd.*, [1913] 2 Ch. 286.

⁴⁷ *Paspati v. Paspati*, [1914] P. 110.

⁴⁸ In Texas a corporation can not take and need not give depositions under the deposition discovery statute. TEX. ANN. STAT. (Vernon, 1925) art. 3769, par. 10; *Sauermann v. El Paso Ry.*, 235 S. W. 548 (Tex. Comm. App. 1921). It was for this reason that the statute reviving the old equitable bill of discovery was enacted in this state in 1923.

⁴⁹ *Island Supply Co. v. Steitz*, 127 Misc. 598, 217 N. Y. Supp. 154 (1st Dep't 1926); *Ky. Finance Corp. v. Allen*, 171 Wis. 586, 178 N. W. 9 (1920).

⁵⁰ N. Y. C. P. A. § 289.

⁵¹ In New York, for example, a partnership is not an unincorporated association under this act unless it has a secretary or treasurer, so that the managing employee of such a firm cannot be examined as such employee. *Roberts v. Hayden*, 213 App. Div. 1, 209 N. Y. Supp. 598 (2d Dep't 1925)

poration must give discovery through the proper officer or agent and on his oath.⁵² Where, as in many of these jurisdictions, interrogatories are delivered to the corporation, the wording of the statute is relatively unimportant since there are fairly well settled rules as to the duty of a party to ascertain knowledge and information within his control, and these would govern the amount and sources of the disclosure required in the answer of a corporation, through whatever officer or agent it might be made. But where discovery is obtained by an examination before trial of an individual, it might make a real practical difference who the individual was. Under these statutes only those in the employ of the corporation at the time of the examination are subject thereto unless former employees are specifically mentioned.⁵³ And if the statute includes former employees, it must embrace the employees of all parties in order to avoid an unconstitutional discrimination against corporations.⁵⁴ The New York provision requiring an individual to be a managing employee is liberally construed,⁵⁵ but seems to serve no useful purpose.

In England the crown and its agencies cannot be compelled to make discovery.⁵⁶ There seems to be no American case deal-

(in this case the firm members were sued as individuals and were examined as parties, but what would have been the situation had the suit been against the firm in the firm name?).

In England the provision is that any body of persons empowered to sue or be sued in its own name or in the name of any officer or other person must give discovery. Order XXXI, Rule 5, ANNUAL PRACTICE (1928) 509; 1 YEARLY PRACTICE (1928) 456. This seems to avoid any possible difficulty.

⁵² Order XXXI, Rule 5, ANNUAL PRACTICE (1928) 509; 1 YEARLY PRACTICE (1928) 456 ("member or officer"); ALA. CIV. CODE (1923) ("such officer agent or servant as may be cognizant of the facts"); FLA. REV. STAT. (1920) § 2734 (officer); N. J. COMP. STAT. (1910) § 140 ("such officers, agents or employees as have personal knowledge of the facts or custody of books, etc."); N. Y. C. P. A. § 289 ("officers, directors, managing agents or employees"); WASH. COMP. STAT. (Remington, 1922) (any one in corporation's "employ, or connected with it, or interested in it").

⁵³ *Cokeley v. Bronx Nat. Bank*, 127 Misc. 175, 215 N. Y. Supp. 311 (Sup. Ct. 1926).

⁵⁴ *Phipps v. Wis. Cent. R. R.*, 133 Wis. 153, 113 N. W. 456 (1907). The Wisconsin statute now includes all former employees. WIS. STAT. (1925) § 326.12, par. 1.

⁵⁵ *Enequist v. Brooklyn City R. R.*, 216 App. Div. 730, 214 N. Y. Supp. 450 (2d Dep't 1926); *West v. C. I. & B. R. R.*, 126 Misc. 674, 214 N. Y. Supp. 475 (Sup. Ct. 1926) (conductor and motorman). And even where the employee cannot be held to be "managing" the court may find that "special circumstances" exist so as to render him examinable under the act. *Swift v. Gen. Baking Co.*, 129 Misc. 135, 220 N. Y. Supp. 554 (Sup. Ct. 1927).

⁵⁶ *In re La Société Affréteurs Réunis*, [1921] 3 K. B. 1. This does not prevent the Crown's obtaining discovery from another party. *Atty. Gen. v. Newcastle*, [1899] 2 Q. B. 478. And foreign sovereigns suing in English

ing with this question, *i.e.*, where discovery is sought of a state or of the United States. Counties and municipal corporations are deemed by some courts to fall within the category of "corporations" provided for in the discovery statutes.⁵⁷ But other courts do not take this view.⁵⁸ The statutes in Massachusetts and Wisconsin specifically provide that an officer of a municipal corporation shall give discovery.⁵⁹

Under the statutes in several states, the person for "whose immediate benefit" the suit is brought may be required to give discovery, even though he is not a party.⁶⁰

In the opinion of the writer no provision could be more simple yet comprehensive than that of New Hampshire, as far as the question of parties and persons who may be compelled to give discovery is concerned.⁶¹

Extent of discovery and grounds for resisting it. That the answer to a question on oral examination or a written interroga-

courts must give discovery. *South Afr. Rep. v. La Comp. Franco Belge*, [1898] 1 Ch. 190.

⁵⁷ *Ex parte Elmore County*, 207 Ala. 68, 91 So. 876 (1921) A municipal corporation must give discovery under the English rules. *Prestney v. Corp. of Colchester*, 24 Ch. D. 376 (1883).

⁵⁸ *New York v. Velmachos*, 129 Misc. 177, 221 N. Y. Supp. 40 (Sup. Ct. 1927).

⁵⁹ MASS. GEN. LAWS (1921) c. 231, § 65 (mayor or chairman of board of selectmen); WIS. STAT. (1925) § 326.12, par. 1 (this includes "counties, towns, villages, and cities"). Federal Equity Rule 58 provides that "public corporations" must give discovery.

⁶⁰ CAL. CIV. CODE (Deering, 1923) § 2021; MONT. REV. CODES (1923) § 10645; N. C. CONS. STAT. ANN. (1919) § 906; N. D. COMP. LAWS ANN. (1913) § 7869; S. D. REV. CODE (1919) § 2714; S. C. CODE OF LAWS (1922) § 697.

⁶¹ N. H. PUB. LAWS (1926) c. 337, § 1: "The deposition of any witness in a civil cause may be taken and used at the trial unless the adverse party procures him to attend so that he may be called to testify when the deposition is offered." *Ibid.* § 11: "If the deposition of a party is taken it shall be filed. . . . Either party may use it unless the deponent is in attendance."

AM. JUD. SOC., RULES CIV. PROC. (1919) art. 22 provides as to parties: "Sec. 1. Any party to an action shall attend, . . . upon demand of any other party."

"Sec. 4. The examination of any party who cannot be compelled to attend within the State, shall be taken in the same manner as evidence may be taken outside the State for use at the trial."

"Sec. 5. The following persons may also be compelled to attend for such examination: (1) any officer, agent, partner, stockholder or employee of a party; (2) the next friend, guardian or guardian ad litem of an infant party; (3) the committee or conservator of a party of unsound mind; (4) the person for whose benefit an action is prosecuted or defended."

With the exception of former employees, agents, and officers of a party, this statute seems adequate. It does, no doubt, provide for discovery by unincorporated associations, municipal corporations, etc., when they could be parties. Query as to a party's assignor. See *supra* note 42.

tory, or the production of a document will incriminate the party from whom discovery is sought, is a sufficient excuse for refusal to give discovery.⁶² The statutes in many of the states provide specifically that no party has a right to discovery of incriminating facts or documents,⁶³ but this seems scarcely necessary for the courts seem never to compel discovery of anything which will be inadmissible at the trial. Further, the facts or documents which would be privileged at the trial because they were confidential communications between a party and his solicitor,⁶⁴ or between a party and a physician,⁶⁵ or which fall within the privilege of either spouse not to testify against the other,⁶⁶ or which it is against public policy to have produced,⁶⁷ need not be disclosed in proceedings before trial, even though no provision in the discovery statute protects them. The fact that the answer to an interrogatory or to questions on an oral examination may be privileged does not, however, render the interrogatory or the examination objectionable. The objection must be made in the answer thereto.⁶⁸

Discovery statutes pretty generally require that the matter or thing sought be "pertinent," "material," or "relevant" to the matter in issue.⁶⁹ This again rules out what is inadmissible in evidence on this score. It is usually, in fact, a much narrower requirement, for it by no means follows that discovery will be compelled of anything that can be admitted in evidence on the

⁶² *Waterhouse v. Barker*, [1924] 2 K. B. 759 (inspection of documents); *Lancashire v. Moynihan*, 218 Mich. 16, 187 N. W. 319 (1922).

⁶³ ALA. CIV. CODE (1923) § 7772; CONN. GEN. STAT. (1918) § 5767; LA. REV. CODE OF PRAC. (Marr, 1927) art. 349; MASS. GEN. LAWS (1921) c. 231, § 63; WASH. COMP. STAT. (Remington, 1922) § 1230. The Georgia statute also renders privileged any answer which tends to disgrace or degrade the party. GA. ANN. CODE (Michie, 1926) § 4554.

⁶⁴ *O'Rourke v. Darbishire*, [1920] A. C. 581; *Woodhouse & Co., Ltd., v. Woodhouse*, 30 T. L. R. 559 (1914); *Southwork Water Co. v. Quirk*, 3 Q. B. D. 315 (1878); *State v. Wood*, 316 Mo. 1032, 292 S. W. 1033 (1927). It does not seem profitable here to discuss the extent of this or any other privilege in detail.

⁶⁵ *Travelers Ins. Co. v. Jackson*, 201 Iowa 43, 206 N. W. 98 (1925).

⁶⁶ *McGrew v. McGrew*, 298 Fed. 204 (D. C. 1924).

⁶⁷ *Asiatic Petroleum Co., Ltd. v. Anglo-Persian Oil Co., Ltd.*, [1916] 1 K. B. 822 (communications as to the state of the British campaign in the Levant); *Chatterton v. Sec'y of State for India*, [1895] 2 Q. B. 189 (official communications between officers of state).

⁶⁸ *Heit & Weisenthal v. Licht*, 218 App. Div. 753, 218 N. Y. Supp. 102 (1st Dep't 1926); *Allhusen v. Labouchère*, 3 Q. B. D. 654 (1878). Objection on ground of privilege must be taken in answer. This is in accord with the theory that such privilege is personal to the witness. WIGMORE, EVIDENCE (2d ed. 1923) § 2196.

⁶⁹ ALA. CIV. CODE (1923) § 7772; IND. ANN. STAT. (Burns, 1926) § 333; IOWA CODE (1927) § 11316. The provision is very general. It is conceivable although improbable that its omission might render the statute in conflict with the "unreasonable searches and seizures" clause of the Constitution.

trial.⁷⁰ Some jurisdictions do, in effect, take this view, but the more general rule limits the scope of discovery further to facts and documents which are a part of the interrogating party's case, and we shall proceed to a discussion of the extent and application of this limitation.

A few statutes provide that a party need not give discovery of a fact or document relating solely to his own case or title.⁷¹ It is much more usual to find a provision that discovery may be had of what relates to the merits of the action or defense therein.⁷² Under most statutes, however, it is recognized as a sufficient ground for resisting discovery that the facts sought are evidence tending only to support the case of the party from whom they are sought. Thus very few jurisdictions compel a party to disclose the names of his witnesses.⁷⁴ But where the information tends to support the case of the party seeking it, it may not be withheld merely because it is also part of the case of the party from whom disclosure is sought.⁷⁵

Whatever must come from one party's side at the trial, any fact which he must set up and prove under the issues as they are formed by the pleadings, seems to be part of his case within the meaning of this rule.⁷⁶ Thus where the defense to an action

⁷⁰ For example, Order XXXI, Rule 1 provides that interrogatories not relating to the matter in issue are irrelevant although they would be admissible on cross-examination at the trial. ANNUAL PRACTICE (1928) 489; 1 YEARLY PRACTICE (1928) 440.

⁷¹ England provides that a party need not produce a document if he satisfies the court that it relates only to his own title, he being defendant. Order XXXI, Rule 15, ANNUAL PRACTICE (1928) 528; 1 YEARLY PRACTICE (1928) 487.

⁷² The Arizona statute as to documents is typical, being like so many others copied from the original New York statute. ARIZ. REV. STAT. (1913) § 1759. For others see *infra* note 119.

⁷³ *Kimball v. Budd Co.*, 215 App. Div. 724, 212 N. Y. Supp. 404 (2d Dep't 1925); *Tichnor Bros. v. Bickle*, 216 App. Div. 110, 214 N. Y. Supp. 547 (4th Dep't 1926); *Hill v. Hill*, 126 Wash. 560, 219 Pac. 18 (1923); *Downie v. Nettleton*, 61 Conn. 593, 24 Atl. 977 (1892); *Niven v. Nat. Bank*, 136 Atl. 334 (N. J. L. 1927); *Ridgway v. Smith & Son*, 6 T. L. R. 275 (1890); *McGarry & Co. v. S. P. Ry.*, 4 F. (2d) 421 (N. D. Cal. 1925).

⁷⁴ *Knapp v. Harvey*, [1911] 2 K. B. 725; *Oil Co. v. Dry Dock Co.*, 129 Misc. 289, 221 N. Y. Supp. 289 (Sup. Ct. 1927); *McNamara v. N. Y. State Rys.*, 129 Misc. 130, 220 N. Y. Supp. 522 (Sup. Ct. 1927); MASS. GEN. LAWS (1921) c. 231, § 63 (except that court may order names to be disclosed if it thinks necessary).

⁷⁵ *People's Bank v. Helms*, 140 S. C. 107, 138 S. E. 622 (1927).

⁷⁶ *Trust Co. v. Prescott & Son, Inc.*, 221 App. Div. 420, 223 N. Y. Supp. 184 (4th Dep't 1927); *Zeltner v. Fidelity Deposit Co.*, 220 App. Div. 21, 220 N. Y. Supp. 356 (1st Dep't 1927) (where defense is the non-performance of a condition subsequent, namely, failure to keep proper books and maintain business specified in policy, defendant can examine plaintiff as to these issues); *Succession of McGuire*, 151 La. 514, 92 So. 40 (1922) (party claiming conveyance was void gift held entitled to interrogate adver-

of libel or slander is privilege, and the plaintiff seeks to destroy the effect of privilege, he must show malice and will be allowed to have discovery of facts tending to show it.⁷⁷ And in an action for injuries negligently caused, the facts of the defendant's conduct at the time of the accident may be discovered.⁷⁸ So where there is a defense of payment,⁷⁹ or lack of consideration,⁸⁰ these may properly be the subject of examination or interrogatories by the defendant. There is some question as to the extent to which a defendant may obtain discovery under a general denial.⁸¹ There seems to be little if any reason why he should not be able to compel disclosure of information upon those matters which he may introduce affirmatively under such a plea, and on which he would have the burden of introducing evidence.⁸² Further where the defendant will attempt to put a different complexion on the situation which forms the plaintiff's case; where, that is, he will try to set up a different version of the facts, he should be allowed to obtain by discovery information tending to impeach the plaintiff's version, or to support his own.⁸³ It is

sary as to whether it was gift); *Sherwood Bros. v. Yellow Cab Co.*, 283 Pa. 488, 129 Atl. 563 (1925) (in action on contract to purchase all the gas and oil consumed for the plaintiff, he is entitled to discovery of the amount consumed by the defendant).

⁷⁷ *Chapman v. Leach*, [1920] 1 K. B. 336; *Plymouth Mut. & C. Soc. Ltd. v. Trader's Pub. Co., Ltd.*, [1906] 1 K. B. 403.

⁷⁸ *Robbins v. Brockton St. Ry.*, *supra* note 37; *Bolckow v. Fisher*, 10 Q. B. D. 161 (1882); *Griebart v. Morris*, *supra* note 37; *B. & O. Ry. v. Berdon*, *supra* note 37; *cf. Palmer v. Hampton*, *supra* note 36 (plaintiff in "dog-bite" case allowed discovery as to scienter).

⁷⁹ *Elterman v. Friedman*, 126 Misc. 34, 212 N. Y. Supp. 392 (Sup. Ct. 1925). Where because of the structure of the pleading or the nature of the case the plaintiff must prove payment, he is entitled to discovery thereon. *N. Y. Car Adv. Co. v. Regensburg & Sons*, 205 App. Div. 705, 200 N. Y. Supp. 152 (1st Dep't 1923).

⁸⁰ *Lee v. Blumer*, *supra* note 33; *Calhoun v. Russ*, 81 Fla. 773, 89 So. 134 (1921).

⁸¹ See *Grinnell*, *op. cit. supra* note 42, for a very good discussion of discovery under a general denial.

⁸² *Handel v. Co-Ed Dressmakers, Inc.*, 216 App. Div. 838, 215 N. Y. Supp. 857 (1st Dep't 1926) (in an action by an employee for wrongful discharge, the defendant can show under a denial that plaintiff could have gotten another job, and hence may have discovery as to this point); *Cutter v. Cooper*, 234 Mass. 307, 125 N. E. 634 (1920) (a general denial interposed to a complaint alleging alienation of affections puts in issue the previous bearing and state of mind of the spouses towards each other so that the defendant may interrogate as to facts tending to show that the conjugal affection had been at a minimum).

⁸³ Thus in a suit on an alleged debt of the defendant's deceased partner, on which the plaintiff claimed the firm was liable, where such liability was denied the defendant could interrogate the plaintiff as to how the alleged liability came into existence. *John v. James*, 13 Ch. D. 370 (1879). And in an action for selling "spurious" products from plaintiff's containers, the defendant could examine its officer as to the reports on which the

true that the defendant would be able to bring out such information at the trial by cross-examining the plaintiff, but this should be no objection to allowing as full a discovery before trial as is necessary to serve the ends for which this machinery is valuable. Before parties to actions were competent witnesses, the chief purpose of discovery was perhaps to obtain information which was necessary for a party to bring his case or make his defense, but which would otherwise be unavailable to him. Today that information may be obtained at the trial. The device may now have a usefulness, aside from preventing substantial injustice, in facilitating procedure by lessening the burden on the courts, and saving costs to the parties. On this function it seems indeed that the emphasis should be placed. It can do this by indicating to the parties before trial what issues it will be worth while to controvert, and by settling those issues which it will not. This would tend to discourage proceeding further with an action for which there was clearly no support, or interposing a hopeless defense. Even more frequently it would save time and costs of proving at the trial matters over which there could be little bona fide controversy. Thus it seems desirable to allow a party to obtain his adversary's admissions concerning facts which are within his own knowledge, or which he could prove independently. Some courts allow this,⁸⁴ but many require that a party disclose only what is otherwise inaccessible to the adverse party.⁸⁵ The Wisconsin and Massachusetts statutes are

complaint was based, the ingredients of the plaintiff's product (to show that defendant's was not "spurious") etc. *Malted Milk Co. v. Spiegel & Co.*, 155 Wis. 201, 144 N. W. 272 (1913). In a suit by an assignee, where the validity of the assignment is denied, an examination as to the facts of it was allowed where they were peculiarly within the plaintiff's knowledge, although the plaintiff had the burden of proving the assignment. *Securities Corp. v. Assur. Co., Ltd.*, 124 Misc. 188, 207 N. Y. Supp. 282 (Sup. Ct. 1924) (the case was treated as showing "special circumstances"). Cf. Holmes, J.: "The facts are part of the plaintiff's case none the less that the defendant's case may consist in pressing a different view as to what the facts were." *Robbins v. Brockton St. Ry.* *supra* note 37, at 54, 61 N. E. at 266.

Similarly in England at any rate when the defendant is entitled to particulars, interrogatories which demand no more than these would contain must be answered. *Saunders v. Jones*, 7 Ch. D. 435 (1877); cf. also *Ashley v. Taylor*, 38 L. T. R. 44 (1878); *Lyon v. Twedell*, 13 Ch. D. 375 (1879). But cf. *Sands v. Comerford*, 211 App. Div. 406, 207 N. Y. Supp. 398 (4th Dep't 1925); *Texas Co. v. Cohen*, 15 F. (2d) 358 (C. C. A. 2d, 1926); *N. C. & St. Ry. v. Jenkins & Sons*, 155 Tenn. 605, 296 S. W. 1 (1927).

⁸⁴ *Lyell v. Kennedy*, 8 App. Cas. 217 (1883); *Texas Co. v. Gulf Ref. Co.*, 12 F. (2d) 317 (S. D. Tex., 1926); *Green v. Selznick*, 220 App. Div. 12, 221 N. Y. Supp. 63 (4th Dep't 1927); *Albanos v. News Synd. Co., Inc.*, *supra* note 36 (even where matter sought was on public record).

⁸⁵ *Hubert v. N. Y. N. H. & H. R. R.*, 90 Conn. 261, 96 Atl. 967 (1916); *Will v. Domer*, 134 Wash. 576, 236 Pac. 104 (1925); cf. *Lancashire v.*

very broad in their terms and are not open to the objection that they limit the usefulness of discovery by limiting its scope.⁸⁰ Under them "the scope of the subjects concerning which interrogatories may be asked is as broad as the field of inquiry when the person interrogated is called as a witness to testify orally in the actual trial."⁸⁷ The Wisconsin rule is ever broader than that in Massachusetts, in that it compels disclosure of facts inadmissible as evidence which form the basis of pleadings, and of the names of the adversary's witnesses.⁸⁸ The American Judicature Society favors a statute as broad in scope as that in Massachusetts.⁸⁹ Irrespective of the scope of the provision, the courts, with the exception of Wisconsin,⁹⁰ seem to protect against "fishing expeditions" which pry into an adversary's case. But there are other ways in which the machinery of discovery may be abused, other types of "fishing expeditions." The scope of an examination, an interrogation, or an order for inspection of documents may be so broad as to amount to what some courts call a "roving commission." For example it may be part of a party's case to prove that his adversary's title is defective, so that an interrogatory such as "Is there not an outstanding mortgage to A on this land?" would be proper. Yet to allow a party to require his adversary simply to set out his title might be undesirable. At any rate, the courts evince a strong tendency to discountenance such broad interrogation. No statutory provision is usual or necessary on this point as long as it is the courts which ultimately pass on the propriety of questions propounded.⁹¹ The English provisions discussed below

Moynihan, *supra* note 62 (matter sought was on public record). There seems to be more justification for such a holding although the party should be required to admit the execution of such a document if requested. Also discovery to enable a party to draw up pleadings would seem to serve a different function.

⁸⁰ MASS. GEN. LAWS (1921) c. 231, § 61 provides that a party may be interrogated as to facts and documents admissible in evidence at the trial of the case. The proposed acts of the Judicature Commission in 1921 and of the Judicial Council in 1925 retain this provision. WIS. STAT. (1925) § 326.12, par. 5 provides that after the service of the complaint an examination may be had as if the complaint were in issue.

⁸⁷ Rugg, C. J., in *Cutter v. Cooper*, *supra* note 82, at 314, 125 N. E. at 636. In *Kelly v. C. & N. W. Ry.*, 60 Wis. 480 (1884), it was held error to limit the defendant's examination to the issue of contributory negligence, on which he had the affirmative.

⁸⁸ *Malted Milk Co. v. Spiegel Co.*, *supra* note 83.

⁸⁹ AM. JUD. SOC., RULES CIV. PROC. (1919) art. 22, § 8 provides: "Upon examination the witness may be examined by the party seeking discovery, upon the whole case and as if an adverse witness at trial."

⁹⁰ Nohl, *Discovery Proceedings in Wisconsin* (1918) 2 MARQ. L. REV. 137.

⁹¹ *Jones v. Watts*, 43 Ch. D. 574 (1889) (application for deeds relating to a title in issue is too broad); *Hall v. Truman, Hanbury & Co.*, 29 Ch. D. 307 (1885) (application for documents within a general class is too

seem to take care of the case of production of documents.

Unless it is within his power to obtain such control or knowledge,⁹² discovery may be successfully resisted by a party on the ground that the document or information is not within his control or knowledge. It is where he has this power that the question arises as to the extent of his duty to exercise it. If he has possession of a document merely as agent for another who is not a party, he cannot be compelled to produce it without that other's consent.⁹³ Otherwise it is generally required that a party must obtain knowledge and documents which are in the possession or control of his agents and servants, at least where such servant or agent is still in the party's employ.⁹⁴ Only information obtained by the servant or agent in the course of his employment is thus obtainable.⁹⁵

broad); *Miller & Pardee, Inc. v. Sweet Mfg. Co.*, 3 F. (2d) 198 (S. D. Cal. 1925) (interrogatory as to general stage of the art at the time of a patent allegedly infringed is too broad); *Bank & Trust Co. v. Nat. Bank*, 40 Idaho 712, 237 Pac. 284 (1925).

Some courts require that the question be clear and narrow, embodying a definite set of facts so that they can be taken *pro confesso* on failure to answer. *Grain Co. v. Townsend*, 267 S. W. 1011 (Tex. Civ. App. 1924). But such questions have been disallowed where the court feels that they are hypothetical merely, and calculated to feel out the situation. *Grumbrecht v. Parry*, 49 L. T. R. 570 (1883), *aff'd*, 32 W. N. 558 (1884).

Under some circumstances the courts seem to allow such "roving" orders for discovery. *Waynes, Merthyr & Co. v. Radford & Co.*, [1896] 1 Ch. 29 (when a particular instance of fraud is alleged and admitted a general discovery to documents to show other probable frauds was allowed).

⁹² *Wilson v. Raffalovitch*, 7 Q. B. D. 553 (1881); *Lancashire v. Moynihan*, *supra* note 62; *Cohen v. Int'l Brokerage Co.*, 124 Misc. 860, 208 N. Y. Supp. 715 (Sup. Ct. 1925).

⁹³ *William v. Ingram*, 16 T. L. R. 434 (1900). But otherwise where the books also contain the personal accounts of the party. *State v. McElhinney*, 300 Mo. 564, 253 S. W. 1063 (1923). The American Judicature Society would abrogate the rule. AM. JUD. SOC., RULES CIV. PROC. (1919) art. 21, § 12 provides: "By order of court any party shall be entitled to inspect any document which is . . . in the possession of the party giving discovery only as agent or on behalf of another."

⁹⁴ *Bolckow v. Fisher*, 10 Q. B. D. 161 (1882); *Robbins v. Brockton St. Ry.*, *supra* note 78. And a solicitor or banker is an agent within this rule. *Foakes v. Webb*, 28 Ch. D. 287 (1884); *cf. Alliot v. Smith*, [1895] 2 Ch. 111, 114. A partner must exercise his legal right to have access to partnership books. *Taylor v. Rundell*, 1 Phill. 222 (1842). But *cf. Davis v. District Court*, 195 Iowa 688, 192 N. W. 852 (1923) (court may not compel Director General of Railroads to produce documents not in his custody although act of Congress gives him power to require them).

WASH. COMP. STAT. (Remington, 1922) § 1227 provides that a corporation shall be excused from answering only where it shows that no one in its employ or connected with it, or interested in it, can give the desired information. The necessity of this provision seems questionable.

⁹⁵ *Wellsbach Lighting Co. v. New Sunlight Co.*, [1900] 2 Ch. 1; *Hancock v. Franklin Ins. Co.*, 107 Mass. 113 (1871). This was not so in

THE MACHINERY

In eleven states, the federal courts, and in England the propounding of written interrogatories to be answered by the adverse party comprises a more or less important element in the machinery of discovery. In most of these jurisdictions it is of paramount importance.

Before a recalcitrant or dilatory party can be punished either by process of contempt, or otherwise, for failure or delay in answering interrogatories there must be a court order that he make answer.⁹⁶ There are two methods, with variations, of providing for such a court order. The English Rules provide that interrogatories shall be delivered "by leave of court."⁹⁷ The party seeking discovery must serve a copy of the interrogatories and a summons "two clear days" before the hearing on the application. In passing upon the application, the court or judge shall grant leave to deliver only such interrogatories as shall be considered necessary either for disposing fairly of the cause, or for saving costs.⁹⁸ Interrogatories must be answered by affidavit within ten days, or such time as the court shall allow.⁹⁹ On failure to answer, or on insufficient answer, the court may on motion order the party to answer, or answer further, by affidavit or on *viva voce* examination.¹⁰⁰ Thus there is a hearing on the interrogatories before their delivery, and a weeding out at the threshold of those that are objectionable for any reason.¹⁰¹ The system has received high praise.¹⁰² But it has been pointed out that it is adapted to the practice of sending each case to a master or registrar to decide matters preliminary to trial. And

equity. *Supra* note 18. It would probably not be so under statutes providing that interrogation is only limited to the scope of an examination on trial.

⁹⁶ *Epstein v. American Co.*, 95 N. J. L. 391, 113 Atl. 319 (1921). This is a case of oral examination. There seems to be no case directly supporting the statement made but on the other hand there is not a single case the writer has discovered where an attempt was even made to punish the party without obtaining a court order.

⁹⁷ Order XXXI, Rule 1, ANNUAL PRACTICE (1928) 489; 1 YEARLY PRACTICE (1928) 440.

⁹⁸ Order XXXI, Rule 2, ANNUAL PRACTICE (1928) 508; 1 YEARLY PRACTICE (1928) 453. The Rule also provides that the court in passing on such application shall consider any offers of the answering party to make admissions or produce documents.

⁹⁹ Order XXXI, Rule 9, ANNUAL PRACTICE (1928) 517; 1 YEARLY PRACTICE (1928) 460.

¹⁰⁰ Order XXXI, Rule 11, ANNUAL PRACTICE (1928) 517; 1 YEARLY PRACTICE (1928) 461.

¹⁰¹ The party answering may make further objection in his affidavit in answer. Order XXXI, Rule 6, ANNUAL PRACTICE (1928) 510; 1 YEARLY PRACTICE (1928) 457.

¹⁰² Sunderland, *An Appraisal of English Procedure* (1925) 24 MICH. L. REV. 109.

the Massachusetts Judicial Council is of the opinion that a modification of the present Massachusetts practice will be less of a burden on the courts in the absence of such masters or registrars.¹⁰³

In Massachusetts, interrogatories are filed with the clerk of the court, and a copy of them delivered to the person to be interrogated or his attorney. On failure to answer within ten days, the party interrogating may move the court to order answers to such interrogatories as are proper.¹⁰⁴ Thus there is no hearing by the court on the propriety of the interrogatories propounded until it is asked to compel answers. The limitations and difficulties of this system spring from the fact that some attorneys deliver an excessive number of interrogatories, which the adverse party refuses to answer, and that a court order is thereby frequently made necessary.¹⁰⁵ Yet it is the system in general use in America with minor variations. In some states interrogatories are filed with pleadings.¹⁰⁶ In others a court hearing may be obtained by the interrogated party on objection to the interrogatories.¹⁰⁷ In the absence of any such objection, the pressure on the court would, of course, be slight. In some cases a court order is entered by consent.¹⁰⁸

In most jurisdictions no affidavit is required to be filed with the interrogatories or application for court order. Alabama¹⁰⁹ and Louisiana¹¹⁰ require an affidavit of materiality to be filed with the interrogatories. In Connecticut, if the movant for discovery makes an affidavit of his belief in the matters set out in the motion, the adverse party must plead, answer or demur thereto within the time specified by the court.¹¹¹ Under the Iowa statute, if a party filing interrogatories fails to file an affidavit stating what facts he expects to prove thereby, no facts can be treated as admitted by a failure to answer.¹¹² And four states provide that failure to answer shall not work a continuance of the trial, even where the party sought to be interrogated

¹⁰³ FIRST REPORT OF MASSACHUSETTS JUDICIAL COUNCIL (1925) 42.

¹⁰⁴ MASS. GEN. LAWS (1921) c. 231, § 63, as amended by Mass. Acts. 1922, c. 314.

¹⁰⁵ FIRST REPORT OF MASSACHUSETTS JUDICIAL COUNCIL (1925) 42.

¹⁰⁶ ARK. DIG. STAT. (Crawford & Moses, 1921) §§ 1248, 1252; IND. ANN. STAT. (Burns, 1926) § 383 (to be answered within time limited by court); IOWA CODE (1927) § 11185 (to be answered when that pleading must be answered); KY. CODES (Carroll, 1927) §§ 140, 143; LA. REV. CODE OF PRAC. (Marr, 1927) art. 347.

¹⁰⁷ N. J. COMP. STAT. (1910) 4097, § 140; IOWA CODE (1927) § 11187.

¹⁰⁸ Free v. Telegraph Co., 135 Iowa 69, 110 N. W. 143 (1907).

¹⁰⁹ ALA. CIV. CODE (1923) § 7764.

¹¹⁰ LA. REV. CODE OF PRAC. (Marr, 1927) art. 350 (where defendant interrogates plaintiff).

¹¹¹ CONN. GEN. STAT. (1918) § 5765.

¹¹² IOWA CODE (1927) § 11191; Hogaboom v. Price, 53 Iowa 703, 6 N. W. 43 (1880); ARK. DIG. STAT. (Crawford & Moses, 1921) § 1259, *semble*.

is absent, unless such an affidavit has been filed.¹¹³ It is submitted that such provisions are unnecessary. Unless discovery is given without objection a court must, under any system, pass on the interrogatories before anything can be done about failure to answer fully. And the helpfulness of affidavits in such a case is not apparent.

Some statutes provide that interrogatories may be filed as soon as a party has filed his pleading,¹¹⁴ but others require that the issues be closed before questions can be propounded.¹¹⁵ Those states providing machinery for the discovery of facts before pleadings avail themselves of deposition and examination statutes. The English rule makes it discretionary with the court whether answers to interrogatories or a bill of particulars shall be ordered first, when they are sought by adverse parties.¹¹⁶ It is usually discretionary with the court, also, whether the party who has filed interrogatories shall be allowed to file further questions.¹¹⁷

The English rules provide that in considering whether leave should be given to deliver interrogatories, the judge or master shall consider any offers to make admissions, deliver particulars or produce documents by the person sought to be interrogated.¹¹⁸ The Judicial Council of Massachusetts commends the insertion of such a clause.¹¹⁹

The usual provision as to failure to answer interrogatories properly is that the court may attach the recalcitrant party for contempt, or strike out his pleadings and enter a judgment or decree against him, or both.¹²⁰ A few provide that the answers

¹¹³ IND. ANN. STAT. (Burns, 1926) § 383; IOWA CODE (1927) § 11138; KY. CODES (Carroll, 1927) § 145; ARK. DIG. STAT. (Crawford & Moses, 1921) § 1254.

¹¹⁴ See *supra* note 104; also: Order XXXI, Rule 1, ANNUAL PRACTICE (1928) 489; 1 YEARLY PRACTICE (1928) 440; MASS. GEN. LAWS (1921) c. 231, § 61; WASH. COMP. STAT. (Remington, 1922) § 1226.

¹¹⁵ N. J. COMP. STAT. (1910) 4097, § 140.

¹¹⁶ Order XXXI, Rule 20, ANNUAL PRACTICE (1928) 532; 1 YEARLY PRACTICE (1928) 498; Whyte & Co. v. Ahrens & Co., 50 L. T. R. 344 (1884); Waynes, Merthyr & Co. v. Radford & Co., *supra* note 91; British T-H Co., Ltd. v. Duram, Ltd., [1915] 1 Ch. 823. In these cases discovery was allowed first since it was necessary as a basis for the required particulars.

¹¹⁷ MASS. GEN. LAWS (1921) c. 231, § 63; Lyell v. Kennedy, *supra* note 84; Boake v. Stevenson, [1895] 1 Ch. 358, 360; cf. Phipps v. Wis. Cent. Ry., *supra* note 54; Norman Oil Corp. v. Bensabat, 118 Misc. 398, 194 N. Y. Supp. 356 (Sup. Ct. 1922) (second examination allowed in court's discretion).

¹¹⁸ Order XXXI, Rule 2, ANNUAL PRACTICE (1928) 508; 1 YEARLY PRACTICE (1928) 453.

¹¹⁹ FIRST REPORT OF MASSACHUSETTS JUDICIAL COUNCIL (1925) 43, 144.

¹²⁰ Order XXXI, Rule 21, ANNUAL PRACTICE (1928) 533; 1 YEARLY PRACTICE (1928) 499; ALA. CIV. CODE (1923) § 7770; FLA. REV. STAT. (1920) § 2734; GA. ANN. CODE (Michie, 1926) § 4553; IND. ANN. STAT.

to the interrogatories be taken *pro confesso*, following the old equity tradition.¹²¹

Discovery may also be had by examination and deposition. Where the testimony of a party is taken after the examining party has filed his first pleading, or after the issues have become formed, the usual machinery for procuring the attendance of the party to be examined is the same as that for any other witness who may be examined on deposition. Thus California simply provides that the testimony of a witness within the state may be taken where "the witness is a party to an action . . . etc."¹²² North Carolina, North and South Dakota have, and formerly South Carolina had, similar provisions.¹²³ The American Judicature Society in its draft act would require any party to an action to attend and testify upon demand by any other party.¹²⁴ Under such provisions no court order or affidavit by the examining party is a condition precedent to the taking of the testimony on deposition.¹²⁵ Consequently the party seeking discovery need

(Burns, 1926) § 383; IOWA CODE (1927) § 11192; KY. CODES (Carroll, 1927) § 151; N. J. COMP. STAT. (1910) 4097, § 140; WASH. COMP. STAT. (Remington, 1922) § 1230.

¹²¹ LA. REV. CODE OF PRAC. (Marr, 1927) § 349; TENN. ANN. CODE (Shannon, 1925) § 5692.

¹²² CAL. CIV. CODE (Deering, 1923) § 2021. The Montana provision is copied from this. MONT. REV. CODE (1923) § 10645.

¹²³ N. C. CONS. STAT. ANN. (1919) c. 12, § 90 provides: "The examination, instead of being had at the trial, as provided in the proceeding, may be had at any time before the trial at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge or court orders otherwise."

And § 903 provides: "If a party refuses to attend and testify, as provided in the preceding sections, he may be punished as for a contempt, and his pleadings may be stricken out." Almost identical statutes are N. D. COMP. LAWS ANN. (1913) §§ 7864, 7867; S. C. CODE OF LAWS (1922) §§ 692, 695; S. D. REV. CODE (1919) § 2714 (party compellable as witness). The New Hampshire statute referred to above is similar. N. H. PUB. LAWS (1926) c. 337, §§ 1, 11. The Indiana depositions statute is similar. IND. ANN. STAT. (Burns, 1926) §§ 564, 565. See also WIS. STAT. (1925) § 326.12. But these rules require a court order to fix the time and place.

¹²⁴ AM. JUD. SOC., RULES CIV. PROC. (1919) art. 22, § 1. The Massachusetts Judicature Commission in its final report recommended the following: "In order to make such examination any party may apply to a justice of the peace, notary public, or special commissioner, who shall issue notice to the party to be examined to appear before said justice, etc. . . . at the time time and place, etc. . . . Notice shall be given to all parties to the proceedings or to their attorneys of record. . . ." FINAL REPORT OF MASSACHUSETTS JUDICATURE COMMISSION (1921) 151.

¹²⁵ Vann v. Lawrence, 111 N. C. 32, 15 S. E. 1031 (1892); Fox v. Clifton Mfg. Co., 122 S. C. 86, 114 S. E. 700 (1922); Niblo v. Ede, 39 S. D. 338, 164 N. W. 109 (1917).

make no showing of good cause or excuse therefor, or indicate the scope of his examination.¹²⁶ The fact that the issues are formed would, of course, be some protection to the examined party, as the scope of the examination is always limited to matters relevant to those issues,¹²⁷ or to the matter in the pleadings filed by the examining party, where issues are not yet formed. But the legislature in South Carolina, at any rate, found this latitude so undesirable that it amended the act, thereby making it necessary to obtain a court order on good cause shown before a party was entitled to have an examination.¹²⁸ In New Jersey, a statute providing that a party could be compelled to attend an examination on a subpoena was held constitutional.¹²⁹ But for another reason the present act in New Jersey provides for examination only on court order.¹³⁰ The system in New York is more complicated. The examining party may procure a court order in the first instance on motion and filing an affidavit.¹³¹ But the more usual procedure today is to give reasonable notice of the intention to take a deposition to the adverse party or his attorney, stating (1) the person before whom it is to be taken; (2) the time and place; (3) the persons to be examined; and (4) the matters on which the examination is to be.¹³² The person sought to be examined may then raise questions as to the right to take, time or place of taking, the subject matter of the examination, and the persons before whom it is to be taken, on a motion to the court to vacate or modify the notice.¹³³

Where the statutes do not expressly provide otherwise the penalty for failure to attend and testify is the same as for any other witness. And in addition most of the statutes provide that the pleadings of a recalcitrant party may be stricken out.¹³⁴ As has

¹²⁶ There is no such requirement in any of these statutes. See also cases *supra* note 125.

¹²⁷ N. J. COMP. STAT. (1910) 4097, § 140.

¹²⁸ S. C. Acts 1923, 170; *White v. Life Ins. Co.*, 134 S. C. 183, 132 S. E. 171 (1926).

¹²⁹ *Epstein v. American Co.*, *supra* note 96. The act under consideration was N. J. Laws 1914, c. 96, 151. The Indiana act has been held constitutional. *Keviatkowski v. Putzhaven*, 189 Ind. 119, 126 N. E. 3 (1919).

¹³⁰ N. J. Laws 1924, c. 93, p. 183.

¹³¹ N. Y. C. P. A. § 292, Rule 122.

¹³² *Ibid.* § 290. Rule 121 requires notice to be served at least five days before the examination.

¹³³ *Ibid.* § 291. The grounds for the motion to vacate must be stated therein, and the motion may be supported by affidavit. Service of notice of the motion operates to stay the taking of testimony until the determination of the motion. The motion is determined on (1) the notice of intention to take testimony, (2) the pleadings, if any, (3) such affidavits as the parties may submit.

¹³⁴ See statutes *supra* note 123 and IND. ANN. STAT. (Burns, 1926) § 563. New York does not allow such striking out. *Roseberg Holding Co. v. Ber- man*, 214 App. Div. 146, 211 N. Y. Supp. 900 (2d Dep't 1925).

been seen, a court order is generally not a condition precedent to a party's right to examine his adversary. But it is questionable whether a person can be committed for contempt, or have his pleadings stricken out, before such an order has been obtained.¹³⁵ So if the deposition is not taken before a judge, it is usually provided that any refusal to attend and testify is to be reported to a judge. And he shall order the recalcitrant party to attend, testify, or answer specific questions which are proper.¹³⁶ Where a party is entitled to the examination as of right, it is often held that the judge has no discretion in issuing such an order.¹³⁷

An opportunity is usually given to the party examined to answer fully and introduce into his answer whatever is necessary to qualify or explain admissions made in them. And the statutes allow a re-examination of such party by his own counsel upon the matters brought out on the first examination.¹³⁸ For

¹³⁵ *Epstein v. American Co.*, *supra* note 96; *Keviatkowski v. Putzhaven*, *supra* note 129.

Some statutes provide that a notary, justice of the peace, or commissioner who may take a deposition, may commit for contempt a person disobeying a subpoena issued by such officer on refusing to testify before him. MO. REV. STAT. (1919) § 5640; N. C. CODE (1927) § 1816; WIS. STAT. (1925) § 326.12 (8). Such statutes have been upheld. *Ex parte Alexander*, 163 Mo. App. 615, 147 S. W. 521 (1912); *State v. Taylor*, 268 Mo. 312, 187 S. W. 1181 (1916); *Benckenstein v. Schott*, 92 Ohio St. 29, 110 N. E. 633 (1915). But other courts regard such a delegation of the contempt power as unconstitutional and require a court to make an order and then proceed to attach the recalcitrant party. *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597 (1903); *Fertilizer Co. v. Taylor*, 112 N. C. 141, 15 S. E. 69 (1893); *cf. Langenberg v. Decker*, 131 Ind. 471, 31 N. C. 190 (1891).

¹³⁶ IND. ANN. STAT. (Burns, 1926) § 468; N. Y. C. P. A. Rule 129; FINAL REPORT OF MASSACHUSETTS JUDICATURE COMMISSIONS (1921) 151; *Burns v. Superior Court*, *supra* note 136. Even in the absence of any provision the court may order a party to answer proper questions. *Finn v. District Court*, 145 Iowa 157, 123 N. W. 1066 (1909).

¹³⁷ This seems to be the effect of the cases cited *supra* note 125. Under them the applicant need not show good cause for taking the deposition. The wording of the act proposed by the American Judicature Society would seem to allow a discretion as to what constitutes good cause for failure. AM. JUD. SOC., RULES CIV. PROC. (1919) art. 22, § 7: "If any person fails to attend or testify as provided in this article, the court shall, upon motion, issue a rule directed to him to show cause why an attachment for contempt should not issue, or why his complaint, answer or other pleading should not be struck out; and such order shall be made if good cause is not shown."

Query whether a showing that the examination is unnecessary to save costs or prevent substantial injustice will suffice under this rule. Query also as to whether the judge may consider offers to make admissions, etc. under it.

¹³⁸ CAL. CIV. CODE (Deering, 1923) § 2055; S. C. CODE OF LAWS (1922) § 696; S. D. REV. CODE (1919) § 2714. The absence of such provision seems to make no difference. *Wabash R. R. v. Morgan*, 132 Ind. 430, 31 N. E. 661 (1892); *Mosier v. Stoll*, 119 Ind. 244, 20 N. E. 752 (1889).

the rest the conduct of the examination is like that on trial, the person holding it passing on objections to questions and answers.¹³⁹

Many of the statutes set out requirements as to the time and place for holding the examination. If a court order is made necessary for the examination, such questions could well be left in the discretion of the judge granting it.¹⁴⁰ Otherwise the statute might make some reasonable requirement.¹⁴¹ Very frequently it is provided that no party¹⁴² is compellable to be examined in a county other than that of his residence if he lives within the state, or in the county where served.¹⁴² There are various provisions as to non-residents.¹⁴³

The machinery is similar when the examination takes place before the filing of pleadings, in those states where this is provided.¹⁴⁴ There is one important difference: a court order supported by an affidavit is always a condition precedent to such an examination.¹⁴⁵ The affidavit then must contain a statement of the nature of the expected action and the subjects on which examination is sought, as well as the necessity therefor.¹⁴⁶

It is also frequently provided that where the answer of the party examined introduces new matter which is not strictly responsive, the examining party may contradict or testify as to it. S. C. CODE OF LAWS (1922) § 696; TEX. ANN. STAT. (Vernon, 1925) art. 3769, § 6; ARK. DIG. STAT. (Crawford & Moses, 1921) § 1250 (interrogating party may file sworn statement as to such matter to be used as deposition.)

¹³⁹ CAL. CIV. CODE (Deering, 1923) § 2055; N. Y. C. P. A. Rule 129.

¹⁴⁰ AM. JUD. SOC., RULES CIV. PROC. (1919) art. 22, § 2.

¹⁴¹ A common provision is for five days notice unless the court orders otherwise on good cause shown. See statutes *supra* note 123.

¹⁴² N. J. COMP. STAT. (1910) 4099, § 145; WIS. STAT. (1925) § 326.12 (6) (residence only); N. C. CONS. STAT. ANN. (1919) § 902; N. D. COMP. LAWS ANN. (1913) § 7864; AM. JUD. SOC., RULES CIV. PROC. (1919) art. 22, § 3 provides: "The time and place for such examination shall be reasonably convenient to the party to be examined, and no party shall be compelled to attend for such examination in any county other than one in which the action is prosecuted or in which he resides, maintains an office or place of business, or is regularly employed."

¹⁴³ N. J. COMP. STAT. (1910) 4099, § 145 (non-resident compellable in any county in New Jersey or where he resides; and he may be served without the state by personal service); WIS. STAT. (1925) § 326.12 (6) (non-resident compellable in any county where served). The deposition of a non-resident party may be taken in the same manner as that of any other non-resident witness.

¹⁴⁴ Very few jurisdictions provide for discovery before the delivery of the plaintiff's complaint, at least. See a plea for such procedure. Bax, *The Right of Discovery* (1920) 55 LAW J. 415. The American Judicature Society does not favor discovery at this time. AM. JUD. SOC., RULES CIV. PROC. (1919) art. 22, § 2 and note.

¹⁴⁵ N. Y. C. P. A. § 295 and Rule 123; WIS. STAT. (1927) § 326.12 (5); *Chesson v. County Bank*, 190 N. C. 137, 129 S. E. 403 (1925). In Ohio an action for discovery may be brought in such a case. OHIO GEN. CODE (1925) § 11555.

¹⁴⁶ N. Y. C. P. A. Rule 123; *Chesson v. County Bank*, *supra* note 145.

The majority of states which use the written interrogatory to obtain discovery, allow the answers to be introduced at the trial only by the party propounding the questions.¹⁴⁷ States having deposition statutes generally allow the deposition to be read in evidence by either party¹⁴⁸ and even under the usual interrogatory statute where the evidence has been introduced by the party interrogated without objection, the interrogating party cannot subsequently have it stricken out.¹⁴⁹ The general rule seems to be that the answers or deposition are evidence, but may be rebutted by any other evidence which the jury finds sufficient for this purpose.¹⁵⁰

Where both parties may introduce such matter at the trial, it makes little difference that neither is obliged to read the whole of the deposition, but may use extracts only. The situation is different, however, in the case of answers to interrogatories which the interrogating party alone may introduce. Some states, in consequence, require such party to put all the answers in evidence if he puts in any.¹⁵¹ Others allow him to put in any, but provide that the judge may order him to put in also any other closely connected answers.¹⁵²

For a sufficient affidavit, see *Whitehurst v. Hinton*, 184 N. C. 11, 113 S. E. 500 (1922). The affidavit need not set out a cause of action. *Sewing Machine Co. v. Lang*, 186 Wis. 530, 203 N. W. 399 (1925). But it is insufficient if it shows that no cause of action exists. *State v. Milwaukee E. R. & L. Co.*, 136 Wis. 179, 116 N. W. 900 (1908); *Grossmann v. Equit. Trust Co.*, 216 App. Div. 765, 214 N. Y. Supp. 674 (2d Dep't 1926). The trial court has discretion to deny an order for such an examination where it appears that the party seeking it has sufficient facts to enable him to plead. *Ellinger v. Equit. Life Assur. Soc.*, 138 Wis. 390, 120 N. W. 235 (1909).

¹⁴⁷ Order XXXI, Rule 24, ANNUAL PRACTICE (1928) 534; 1 YEARLY PRACTICE (1928) 501; ALA. CIV. CODE (1923) § 7768; FLA. REV. STAT. (1920) § 2734; IND. ANN. STAT. (Burns, 1926) § 383; N. J. COMP. STAT. (1910) 4097, § 140; VA. CODE ANN. (1919) § 6236. *Contra*: IOWA CODE (1927) § 11185.

¹⁴⁸ N. C. CONS. STAT. ANN. (1919) § 902; N. J. COMP. STAT. (1910) 4099, § 146; N. Y. C. P. A. § 303; S. C. CODE OF LAWS (1922) § 693. The New Hampshire act allows either party to introduce such deposition in evidence unless the party-deponent is in attendance. N. H. PUB. LAWS (1926) c. 337, § 11. And even where the deponent is in attendance, his answers on the examination are admissible as admissions, or can be used as prior inconsistent statements.

¹⁴⁹ *Grannan v. Fox*, 100 N. J. L. 283, 126 Atl. 398 (1924).

¹⁵⁰ ALA. CIV. CODE (1923) § 7771; CAL. CIV. CODE (Deering, 1923) § 2055; N. C. CONS. STAT. ANN. (1919) § 904; N. D. COMP. LAWS ANN. (1913) § 7866; S. D. REV. CODE (1919) § 2714; N. Y. C. P. A. § 305; *Woodman v. Powers*, 242 Mass. 219, 136 N. E. 352 (1922).

Query whether in the absence of any such provision, some courts might not apply the old equity rule.

¹⁵¹ *Southern Ry. v. Hubbard*, 116 Ala. 387, 22 So. 541 (1896); *cf.* LA. REV. CODE OF PRAC. (Marr, 1927) art. 356.

¹⁵² Order XXXI, Rule 24, ANNUAL PRACTICE (1928) 534; 1 YEARLY PRACTICE (1928) 501; *Bradley Lumber Co. v. Cutler*, 253 Mass. 37, 148 N. E.

The Alabama statute provides that the court may require an interrogated party to attach copies of relevant letters or documents to his answers.¹⁵³ And in New York and Wisconsin, the party whose deposition is to be taken may be compelled by subpoena *duces tecum* to bring such documents to the examination and produce them.¹⁵⁴ In New York their use, when so produced, is limited to refreshing the witnesses' memory, unless the subpoena issued under a court order.¹⁵⁵

The most generally used method in the United States for procuring a discovery of documents is, however, to apply for a court order for their production, inspection, and copy.¹⁵⁶ The application must be supported by an affidavit setting forth the grounds on which the discovery is sought and describing the document accurately.¹⁵⁷ The denying of the order is to some extent dis-

101 (1925). New Jersey will not exclude an offered answer on the ground that other answers were not also offered unless they are shown to be (1) material, and (2) tending to explain, qualify or limit the offered answer. *Cetofonte v. Camden Coke Co.*, 78 N. J. L. 662, 75 Atl. 913 (1910).

¹⁵³ ALA. CIV. CODE (1923) § 7772. WASH. COMP. STAT. (Remington, 1922) § 1226 provides that after filing his pleadings a party may file interrogations for the discovery of facts and documents.

¹⁵⁴ WIS. STAT. (1925) § 326.12 (3); *Roberts v. Hayden*, *supra* note 51; *N. Y. Car Adv. Co. v. Regensburg & Sons*, *supra* note 79. But *cf.* *Trust Co. v. Prestcott & Son, Inc.*, 221 App. Div. 420, 223 N. Y. Supp. 184 (4th Dep't 1927) (holding that N. Y. C. P. A. §§ 288, 289 did not provide for subpoena *duces tecum*); *cf.* FLA. REV. STAT. (1920) § 2735.

¹⁵⁵ The only statutory provision as to production of books, documents, etc. at an examination is limited to the case where such an examination is had under a court order requiring such production. N. Y. C. P. A. § 296. This section provides that documents so procured may come in evidence. The cases cited *supra* note 154 were not under this section. But there the use of such documents was limited to refreshing the witness's recollection. *N. Y. Car Adv. Co. v. Regensburg & Sons*, *supra* note 79. And in any event only such documents as could be used to refresh the witness' memory can be procured. *Singer v. Nat. Gum & Mica Co.*, 211 App. Div. 758, 208 N. Y. Supp. 1 (1st Dep't 1925).

¹⁵⁶ The California statute is typical: "Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book or of any document or paper in his possession or under his control, containing evidence relating to the merits of the action, or defense therein. . . ." CAL. CIV. CODE (Deering 1923) § 1000. Similar provisions are: ARIZ. REV. STAT. (1913) § 1759; CONN. GEN. STAT. (1918) § 5164; FLA. REV. STAT. (1920) § 2733; IND. ANN. STAT. (Burns, 1925) § 536; IOWA CODE (1927) § 11316; MINN. STAT. (Mason, 1927) § 9886; MO. REV. STAT. (1919) § 1370; MONT. REV. CODES (1923) § 9771; N. J. COMP. STAT. (1910) 4098, § 142; N. Y. C. P. A. § 324, Rules 140-142; N. C. CONS. STAT. ANN. (1919) § 1823; OHIO GEN. CODE (Page, 1926) § 11551; S. C. CODE OF LAWS (1922) § 689; S. D. REV. CODE (1919) § 2712; WIS. STAT. (1925) § 327.21. Some of these states seem to provide for a double machinery, the usefulness of which is hard to see. IND. ANN. STAT. (Burns, 1925) § 535; MO. REV. STAT. (1919) §§ 1375, 1376.

¹⁵⁷ Some statutes specifically require an affidavit. IOWA CODE (1927) §

cretionary with the court.¹⁵⁸ And the order, if granted, must contain a full and accurate description of the documents sought, and cannot be too broad.¹⁵⁹

England also provides for production of documents under a court order.¹⁶⁰ But this is not the procedure in general use there.¹⁶¹ Rule 12 of Order XXXI allows a party to apply without affidavit for a court order that the adverse party discover on oath all documents in his possession or power (or that have been so) relating to any matter in question. And the judge may make this order in his discretion if in his opinion it is necessary "either for disposing fairly of the cause or matter or for saving costs." If the order is granted, the adverse party must draw up and deliver an affidavit describing the documents and stating which of them he objects to producing and the grounds of such objection.¹⁶² And Rule 15 of Order XXXI provides that a party may give written notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document so that the party giving notice may inspect and copy it. The word "affidavits" is construed to include answers to interrogatories,¹⁶³ and affidavits of documents.¹⁶⁴ The party receiving notice must, within a few days of its service, allow such inspection, except of documents which he is not bound to produce.¹⁶⁵ If he fails to set a time or place

11317; N. J. COMP. STAT. (1910) 4098, § 143; VA. CODE ANN. (1919) § 6237. The statutes of Indiana and Missouri seem to require an affidavit under only one of the methods provided in those states. See *supra* note 156. In the absence of statute the rule seems to be the same. *State v. District Court*, 27 Mont. 441, 71 Pac. 602 (1903); *Funkenstein v. Superior Court*, 23 Cal. App. 663, 139 Pac. 101 (1914); *Evans v. S. A. L. Ry.*, 167 N. C. 415, 83 S. E. 617 (1914). In England an affidavit is not necessary. Order XXXI, Rule 14, ANNUAL PRACTICE (1928) 525; 1 YEARLY PRACTICE (1928) 477.

¹⁵⁸ Order XXXI, Rule 14, ANNUAL PRACTICE (1928) 525; 1 YEARLY PRACTICE (1928) 477; *MacCay Realty Co. v. Superior Court*, 254 Pac. 287 (Cal. App. 1927); *Hope v. Brash*, [1897] 2 Q. B. 188. But see *Calhoun v. Russ*, *supra* note 80.

¹⁵⁹ *Bank v. Superior Court*, 192 Cal. 395, 220 Pac. 422 (1923); *Broadway Furniture Co. v. Superior Court*, 123 Atl. 566 (R. I. 1924); *Co-op. Tobacco Pool v. Oleson*, 191 Wis. 586, 211 N. W. 923 (1927). Reasonable latitude in the description will be allowed. *Davis v. District Court*, *supra* note 94. It is immaterial that the documents are out of the state. *Ross v. Robinson*, 185 N. C. 548, 118 S. E. 4 (1923).

¹⁶⁰ Order XXXI, Rule 14, ANNUAL PRACTICE (1928) 525; 1 YEARLY PRACTICE (1928) 477.

¹⁶¹ 11 HALSBURY, LAWS OF ENGLAND (1910) 68.

¹⁶² Order XXXI, Rule 13, ANNUAL PRACTICE (1928) 523; 1 YEARLY PRACTICE (1928) 471. Order XXXI, Rule 13A provides that the judge may in his discretion order a list of the documents instead of an affidavit. ANNUAL PRACTICE (1928) 524; 1 Yearly Practice (1928) 476.

¹⁶³ *Moore v. Peachey*, [1891] 2 Q. B. 707.

¹⁶⁴ *Hunter v. D. W. & W. Ry.*, L. R. 28 Ir. 489 (1891).

¹⁶⁵ Order XXXI, Rule 17, ANNUAL PRACTICE (1928) 530; 1 YEARLY PRACTICE (1928) 489.

for the production, the court will do so.¹⁶⁶ The court may also, within its discretion, order the production of specific documents not referred to in the pleadings or affidavits, on the application of a party, supported by an affidavit describing the documents, showing that the applicant is entitled to inspect them, and that they are in the power or possession of an adverse party.¹⁶⁷ Similarly the court may, on a proper affidavit, order a party to state by affidavit whether he has or at any time has had a particular document, or class of documents, in his power or possession, and what has become of them.¹⁶⁸

The party giving discovery may seal up irrelevant or privileged portions of the document to be inspected.¹⁶⁹ England and Ohio allow the court to inspect documents to determine the merit of the claim of privilege made for them.¹⁷⁰

No American state has adopted the machinery of the English courts as provided in Order XXXI to any great extent. New York has enacted Rules 15 and 19A (3).¹⁷¹ And Massachusetts provides for the inspection of documents referred to in the pleadings or bill of particulars unless the court is satisfied that there is a reasonable excuse for their non-production.¹⁷² Both the Massachusetts Judicature Commission¹⁷³ and the American Judicature Society,¹⁷⁴ however, favor the adoption of the English method of obtaining discovery of documents, with minor variations.

The statutes provide various penalties for failure to give proper discovery of documents. It is not unusual to empower the court to exclude the document sought from evidence or punish the recalcitrant party for contempt, or both.¹⁷⁵ And if the party

¹⁶⁶ Order XXXI, Rule 18 (1), ANNUAL PRACTICE (1928) 530; 1 YEARLY PRACTICE (1928) 490.

¹⁶⁷ Order XXXI, Rule 18 (2), ANNUAL PRACTICE (1928) 530; 1 YEARLY PRACTICE (1928) 491.

¹⁶⁸ Order XXXI, Rule 19A (3), ANNUAL PRACTICE (1928) 532; 1 YEARLY PRACTICE (1928) 495.

¹⁶⁹ ANNUAL PRACTICE (1928) 528; MASS. GEN. LAWS (1921) c. 231, § 67.

¹⁷⁰ Order XXXI, Rule 19A (2); ANNUAL PRACTICE (1928) 531; 1 YEARLY PRACTICE (1928) 494; OHIO GEN. CODE (Page, 1926) § 11553. Such a provision is recommended by the American Judicature Society. AM. JUD. SOC., RULES CIV. PROC. (1919) art. 21, § 14.

¹⁷¹ N. Y. C. P. A. §§ 326, 328.

¹⁷² MASS. GEN. LAWS (1921) c. 231, § 68.

¹⁷³ FINAL REPORT OF MASSACHUSETTS JUDICATURE COMMISSION (1921) 910, 153.

¹⁷⁴ AM. JUD. SOC., RULES CIV. PROC. (1919) art. 21.

¹⁷⁵ ARIZ. REV. STAT. (1913) § 1759; CAL. CIV. CODE (Deering, 1923) § 1000; IND. ANN. STAT. (Burns, 1925) § 536; MINN. STAT. (Mason, 1927) § 9886; MO. REV. STAT. (1919) § 1378; MONT. REV. CODES (1923) § 9771; N. J. COMP. STAT. (1910) 4098, § 142; OHIO GEN. CODE (Page, 1926) § 11552; S. C. CODE OF LAWS (1922) § 689; S. D. REV. CODE (1919) § 2712; WIS. STAT. (1925) § 327.22. In England it is provided that where a document

seeking discovery wants the document in evidence, he may introduce on his behalf parol evidence of its contents.¹⁷⁶ Other states provide that judgment or decree be entered against the recalcitrant party, or that his pleading be stricken out.¹⁷⁷ Nor are these provisions unconstitutional.¹⁷⁸

Several of the states have statutes providing that if a party exhibits a document to his adversary and requests an admission of its genuineness, the party requested must bear the costs of proving such genuineness at the trial, if he fails to make the admission and genuineness is actually proved.¹⁷⁹ The statutes in Connecticut and Wisconsin also include admission of a document's existence.¹⁸⁰ Some of these states also have a similar provision as to the admission of the existence or correctness of

is properly sought it shall be excluded from evidence if not produced, there being no excuse for non-production. Order XXXI, Rule 15, ANNUAL PRACTICE (1928) 528; 1 YEARLY PRACTICE (1928) 487.

Where a recusant party recants and offers to produce the document before trial, it may not be excluded on trial. *Sallander v. Prairie Life Ins. Co.*, 112 Neb. 629, 280 N. W. 344 (1924).

¹⁷⁶ Most of the statutes cited *supra* note 171 expressly so provide. But the rule is the same in the absence of such provision. *Silvers v. Junction Ry.*, 17 Ind. 142 (1861); *cf. Sallander v. Prairie Life Ins. Co.*, 110 Neb. 332, 193 N. W. 737 (1923).

¹⁷⁷ CONN. GEN. STAT. (1918) § 5768 (non-suit or default); FLA. REV. STAT. (1920) § 2733; MICH. COMP. LAWS (Cahill, 1915) c. 234 §§ 21, 22; MO. REV. STAT. (1919) § 1377; VA. CODE ANN. (1919) § 6237. England provides for this penalty where a court order has been disobeyed. Order XXXI, Rule 21, ANNUAL PRACTICE (1928) 533; 1 YEARLY PRACTICE (1928) 499. In New York the court may (1) enter the appropriate judgment; (2) strike out a pleading of the recalcitrant party; or (3) debar him from maintaining the defense or claim in connection with which discovery was sought, or the party may be committed for contempt. N. Y. C. P. A. § 325. But where the facts in connection with which discovery was sought can be admitted without impairing a claim or defense, the court may not strike out that claim or defense. *Feingold v. Walworth Bros. Inc.*, 238 N. Y. 446, 144 N. E. 675 (1924); Comment (1925) 10 CORN. L. Q. 234.

¹⁷⁸ *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 29 Sup. Ct. 370 (1908) (defense stricken); *Miles v. Armon*, 239 Mo. 438, 144 S. W. 424 (1911) (non-resident defendant's answer stricken); *Ky. Finance Corp. v. Allen*, *supra* note 49. But a court probably has no constitutional power to strike out a defendant's pleading for disobedience to a court order in absence of such a statutory grant of the power. *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841 (1897).

¹⁷⁹ Order XXXI, Rule 2, ANNUAL PRACTICE (1928) 508; 1 YEARLY PRACTICE (1928) 453; N. C. CONS. STAT. ANN. (1919) § 1825; N. Y. C. P. A. § 322; OHIO GEN. CODE (Page, 1926) § 11550; S. C. CODE OF LAWS (1922) § 689; S. D. REV. CODE (1919) § 2711. New Jersey had such a statute. N. J. COMP. STAT. (1910) 4097, § 141. But it was repealed by N. J. Laws 1912, c. 231.

¹⁸⁰ CONN. GEN. STAT. (1918) § 5776; WIS. STAT. (1927) § 327.22. The latter statute includes "the existence, due execution, correctness, validity, signing, sending or receiving of any document."

facts before trial.¹⁸¹ All of these admission statutes give to the court discretion as to taxing costs if the request was unreasonable or the refusal reasonable.

Such statutes seem to be peculiarly adapted to aiding in the attainment of the aims of discovery, *viz.*, saving costs and clearing up before trial matters over which there is no real dispute. The Massachusetts Judicial Council¹⁸² and the American Judicature Society¹⁸³ recommend their adoption as to both facts and documents.

In England the court has discretion to tax the costs of discovery on the basis of the reasonableness and propriety with which it is sought. And the court must investigate this on the request of either party.¹⁸⁴ The party seeking discovery may be required to deposit £5 to secure costs, which will be returned unless costs are eventually taxed against the depositor.¹⁸⁵ There are very few American statutes that deal with the point specifically.¹⁸⁶

CONCLUSION

On the whole the usefulness of discovery seems to be limited by technical limitations as to its scope and as to parties examinable. It is submitted that the statutory provisions dealing with the extent of discovery be made as broad as possible. Protection against "fishing" can best be afforded by allowing the trial court to exercise its sound discretion on this point. This would lend elasticity to the system and the very apparent conservatism of the courts in this regard precludes the possibility of grave danger resulting from broad provisions.

Machinery is provided to allow the court to exercise this discretion if every application for discovery must be passed on. Or if this imposes too great a burden on the courts, the statute may require that only those applications which are objected to be passed on by the court.

¹⁸¹ Order XXXI, Rule 4, ANNUAL PRACTICE (1928) 509; 1 YEARLY PRACTICE (1928) 456; N. Y. C. P. A. § 323; WIS. STAT. (1927) § 327.22.

¹⁸² FIRST REPORT OF MASSACHUSETTS JUDICIAL COUNCIL (1925) 144.

¹⁸³ AM. JUD. SOC., RULES CIV. PROC. (1919) art. 32.

¹⁸⁴ Order XXXI, Rule 3, ANNUAL PRACTICE (1928) 509; 1 YEARLY PRACTICE (1928) 455.

¹⁸⁵ Order XXXI, Rules 26, 27, ANNUAL PRACTICE (1928) 534, 536; 1 YEARLY PRACTICE (1928) 501, 523.

¹⁸⁶ In Massachusetts the costs are in the discretion of the court. MASS. GEN. LAWS (1921) c. 231, § 66. New Jersey provides that the party examined shall receive witness fees, to be paid in the first instance by the party examining, as well as other costs of discovery, unless the court or judge orders otherwise. If the party examined loses the case, only such sums as the court deems reasonable are taxed against him. N. J. COMP. STAT. (1910) 4099, §§ 147, 148.

Discovery of information from an adversary seems to be most effectively obtained by oral examination before trial. This has the advantage over written interrogatories that any "confrontatory" method of procedure has over one that is "epistolary." And it is not apparent how it would put any greater burden on the court by requiring a larger number of rulings.

Some provision for examination before pleadings are filed seems useful. Theoretically at least, the earlier in the case discovery is had, the greater the resulting saving of time and costs.

The English procedure for obtaining discovery of documents seems satisfactory. The affidavit is made pursuant to a court order, but subsequent demands to inspect documents named therein do not require action by the court. Perhaps it would be feasible to require the affidavit to be delivered merely on notice and provide that the party giving discovery could raise any question by a motion to vacate.