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Discovery Practice in Ohio--Pathway to Progress

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By Edwin F. Woodle

IN AN earlier article,[103a] we discussed the basic remedies available to Ohio lawyers in obtaining information from the opposing party and third persons, along with the current handicaps stemming from the manner in which Ohio courts have interpreted and restricted these rights. No examination of the law in this field would be complete, however, without careful consideration of matters of privileged communications relating to discovery practice, and discovery under the Federal Rules. Primary attention will be devoted here to these significant aspects of discovery procedure, in an effort to indicate how all parties may be afforded a full opportunity to obtain facts pertinent to the lawsuit.

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PRIVILEGED COMMUNICATIONS

Introduction

This brings us to a consideration of the most troublesome question in the State of Ohio in the entire field of deposition and discovery procedure, namely, the question of privileged communications.

There are no communications or statements and there is no evidence privileged by common law in Ohio. Whatever communications may be privileged in the State of Ohio derive their protection, supposedly at least, solely by reason of the single Ohio statute on the subject, Revised Code section 2317.02.[104] The principal problems which arise involve the in-

[103a] 8 WEST. RES. L. REV. 117 (1957).

[104] "The following persons shall not testify in certain respects:

"a) An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient, but the attorney or physician may testify by express consent of the client or patient, or if the client or patient be deceased, by the express consent of the surviving spouse or executor or administrator of the estate of such deceased client or patient; and if the client or patient voluntarily testifies, the attorney or physician may be compelled to testify on the same subject.

"b) A clergyman or priest, concerning a confession made to him in his profes-

terpretation of Paragraph "A" of the statute with respect to communications between attorney and client and between physician and patient.

Physician-Patient Privilege

Considering first the physician-patient privilege, there are only a few questions which may present themselves in the field of discovery practice and procedure. These will concern chiefly the problems of what testimony, if any, can be obtained from a physician as a result of a physical examination of a patient; to what extent production of records can be required and enforced for inspection if they relate to the physical condition of a party; and to what extent third persons who are associated with physicians in the course of their practice can be required to testify regarding the physical condition of a party, which they have observed as a result of their employment. In 1914 the supreme court, in a leading case, announced the rule that:

> A communication by the patient to the physician may be not only by word of mouth but also by exhibiting the body or any part thereof to the physician for his opinion, examination or diagnosis and that sort of communication is quite as clearly within the statutes as communication by word of mouth.[105]

This rule was adhered to and incorporated in the syllabus of a workmen's compensation case decided by the supreme court twenty-five years later.[106]

The question concerning the extent to which hospital records may be required to be produced and inspected has not been fully settled, notwithstanding a recent decision of the supreme court dealing with many aspects of this problem. In *Weis v. Weis*[107] the court held that:

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sional character in the course of discipline enjoined by the church to which he belongs.

"c) Husband or wife, concerning any communication made by one to the other, or an act done by either in the presence of the other, during coverture unless the communication was made, or act done, in the known presence or hearing of a third person competent to be a witness; and such rule is the same if the marital relation has ceased to exist.

"d) A person who assigns his claim or interest, concerning any matter in respect to which he would not, if a party, be permitted to testify.

"e) A person who, if a party, would be restricted in his evidence under section 2317.03 of the Revised Code, when the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee or legatee, shall be restricted in the same manner in any action or proceeding concerning such property or thing."

[105] Ausdenmore v. Holzback, 89 Ohio St. 381, 382, 106 N.E. 41 (1914).

[106] Baker v. Industrial Comm'n, 135 Ohio St. 491, 21 N.E.2d 593 (1939).

[107] 147 Ohio St. 416, 72 N.E.2d 245 (1947) (syllabus #5).

> Where hospital records include communications between the patient and his physician, such portions of the records are, in the absence of waiver of the privilege, inadmissible in evidence by virtue of the express provisions of [Revised Code 2317.02].

Keeping in mind the fact that communications between physician and patient may be by exhibition of the body as well as by word of mouth, this rule excludes, as it should, any portion of the hospital record containing any statement of any physician having an opportunity to examine the patient in the hospital, because of the privilege accorded to him as such physician, and resulting in an inscription by the physician on the hospital record of his observations, diagnosis, instructions or directions. It is a peculiar fact that, in considering this problem of physician-patient relationship, the Ohio Supreme Court appears to have gone to considerable length to limit and to restrict those communications which the court regards as privileged, and to limit and to restrict the manner in which such privileged communications may come into existence. Whereas, as will be seen hereafter in considering the attorney-client relationship, the court appears to have gone to great lengths to do exactly the opposite—namely, to extend to the utmost privileged communications found by the court to be within the orbit of the attorney-client privilege, and to extend to the utmost the manner in which such privileged communications may come into existence. It is suggested that both reason and logic and public policy as well should produce a reversal of the tendency toward which the recent decisions of the supreme court have been directed.

In the *Weis* case, the most recent decision of the Ohio Supreme Court involving the physician-patient privilege, the court declared:

> Hospital records, *in the absence of privilege,* are admissible in evidence, in so far as their compliance with the requirements and conditions imposed by [Revised Code 2317.40], and in so far as such records contain observable facts, transactions, occurrences or events incident to the treatment of the patient and are helpful to an understanding of the medical or surgical aspects of his hospitalization.
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> [Revised Code 2317.02] making privileged communications between certain persons, being in derogation of the common law, must be strictly construed and consequently such section affords protection only to those relationships which are specifically named therein. The relationship of nurse and patient not being named in the statute, no privilege is extended to communications between a patient and his nurse.[108]

The *Weis* case is an important one and has been, and will continue to be, used in arguments both pro and con with respect to the extent to which various portions of hospital records are protected by the physician-patient privilege. In considering the effect of that case, it is extremely important to keep in mind that the factual question before the court

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[108] *Ibid.* (syllabi #3 and#4).

had nothing to do with the physical condition of the patient, but with the patient's mental capacity. It is a serious question whether the entire problem, involving the classes of persons who may be permitted to give testimony concerning the mental capacity of an individual, as well as the basis for their observations concerning mental capacity, is not a problem distinct and apart from those cases involving only the physical condition of a patient.

It would appear, therefore, that there should be applied to the *Weis* case the rule which has been announced on so very many occasions by the supreme court — namely, that, notwithstanding the pronouncement of a rule of law in the syllabus of a case, the effect of the syllabus must be limited by referring to the facts of the case and the issues before the court. It is, accordingly, suggested that the syllabi of the *Weis* case are considerably broader than the facts of that case either require or warrant, and that at least some of the questions alluded to in the syllabi of that decision have not yet been fully settled in Ohio by a decision of the supreme court, in which those issues are necessarily presented for determination.

In each of the instances in which the statute creates a privilege surrounding communications between two persons, that privilege has been based upon a natural trust and confidence arising out of the relationship. Collaterally, the understanding on the part of the individual extending communications in confidence is that they will be repeated to no one without his consent, except as may be necessary in connection with the purpose for which the communications were made.

Viewed in this light it is apparent that the hospital and all of its agents, as well as its equipment, constitute, so far as the patient is concerned, simply an extension of the physician's arm, and the place is simply one to which the patient must be confined in order that the physician may render services made necessary as the result of the confidential communications between them. Certainly there are few occasions in the course of a lifetime in which an individual is as helpless as he is when confined as a patient in a hospital. The patient's communications with respect to his physical condition would, under normal circumstances, be made only in the sanctity of the physician's office, and only during that brief period in which the physician tends his patient within the confines of that office. But when the physical condition of the patient is such that he must be placed in a position where he can constantly receive medical attention and the physician obviously cannot tend him constantly, it is clear that all those who wait upon him, to assist in his care and treatment as a patient of the physician in whom the

patient has confided, do so only because of the fact that the physician cannot be personally and physically in attendance twenty-four hours a day.

By the same token, communications made by the patient to any physician in the hospital temporarily replacing his own doctor, or to any nurse in the hospital, either by word of mouth or by observation of his condition, transmit knowledge which should be known only to the patient's physician were he personally present at all times. At such a time, the patient has no alternative except to confide in those who are treating and assisting him at the direction and upon the orders of his own physician. When consideration is given to the great latitude to which the supreme court has extended the attorney-client privilege in the cases to which reference is about to be made, it is suggested that this relationship of nurse and patient is so clearly collateral to and so clearly a part of the physician-patient relationship, that all privileges accorded by the statute should be extended to cover it.

One other problem will be touched upon before we turn to the next subject. In order to *waive* the physician-patient privilege, either directly or by virtue of testimony on the part of the patient, the waiver must be *voluntary* and it must relate to the communications which are surrounded by the privilege. Three important rules of law on this subject are to be found in the syllabus of a case decided by the supreme court in 1937:

> Where, in an action for damages for personal injuries, the plaintiff on direct examination testified that his general physical condition was good before an accident, such declaration alone without mention of any treatment by or communication to or from any physician, is not a waiver of the protection of [Revised Code 2317.02], forbidding a physician to testify concerning treatments or communications without express consent of the patient.
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> Where a patient voluntarily testifies as to his general physical condition, such testimony will not enlarge the term "subject" as used in [Revised Code 2317.02], so as to permit a physician to testify without the express consent of the patient concerning treatments for a specific ailment of the patient.
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> Merely answering the questions as to treatments from a physician in response to questions on cross-examination does not waive the privilege under [Revised Code 2317.02]. Such testimony is not voluntary within the purview of the statute.[109]

As indicated above, hospital records containing instructions of a patient's physician, which in effect are communications by the physician to a third person, are nevertheless privileged communications. Thus, their production cannot be enforced without the consent of the patient, because the records containing the physician's instructions are in fact the *end re-*

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[109] Harpman v. Devine, 133 Ohio St. 1, 10 N.E.2d 776 (1937) (syllabus).

sult of the confidential communications previously passing directly between the patient and the physician.

Attorney-Client Privilege

When we approach the subject of attorney-client privilege, we find the same reasoning applied with respect to disclosures which may not be required of an attorney.

In 1924 the Supreme Court of Ohio decided the case of *Collins v. Collins*,[110] involving the extent to which an attorney may be required to testify in a will contest case. The court had previously held that, where an attorney acted as a subscribing witness to a will, the testator thereby expressly consented that the attorney might testify in the same manner as any other subscribing witness concerning the capacity of the testator, or any other fact affecting the validity of the will.[111] In the *Collins* case, however, the court held that the attorney was precluded, even in a will contest case, from "... testifying to matters which he must necessarily have learned by communications from his client, and to matters that relate directly to communications made and advice given while the relation of attorney and client existed."[112] Of major importance, however, is the reasoning of the court in arriving at this conclusion:

> If by the statute and the decisions of this court the attorney could not testify to any communication made by his client, or any advice given in the premises, it would seem to follow that he would likewise be incapacitated from testifying to the *direct results of such communications* between himself and his client, and it cannot be gainsaid that the contents of the codicil were the result of the communication between the testator and the attorney, because the attorney must have obtained the information from the testator, and it must have been what the testator wanted put in the codicil by his attorney; so that reduced to its last analysis, the codicil and copy thereof are the *direct result* of the communications between client and counsel, only the communication in another form, which the statutes say is privilege. (Emphasis added).[113]

It has been held that the attorney-client privilege "... is applicable only where the communication is of such a character that it would not have been made except for that relation."[114]

The real basis for the existence of the various privileges created by the Ohio statute is referred to and applied in the decision of the Court of Appeals for Scioto County in 1926:

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[110] 110 Ohio St. 105, 143 N.E. 561 (1924).

[111] Knepper v. Knepper, 103 Ohio St. 529, 134 N.E. 476 (1921).

[112] *Ibid.* (syllabus #3).

[113] *Id.* at 132, 133, 143 N.E. at 568.

[114] Smart v. Nova Caesarea Lodge, 6 Ohio C.C.R. (n.s.) 15 (1904) (syllabus #1), *aff'd*, 73 Ohio St. 387, 78 N.E. 1137 (1905).

> The attorney was never an incompetent witness. He was only barred from testifying because of the confidential character of the communication made to him, and because public policy required that confidence between attorney and client be encouraged. To be privileged, however, a communication to an attorney has always been required to be of a confidential nature, and if made in the presence of a third person it ceases to be confidential.[115]

In reaching this conclusion, the court relied heavily on Professor Wigmore's statement that "the privilege assumes of course that communications are made with the intention of confidentiality. The reason for prohibiting disclosure ceases when the client does not appear to have been desirous of secrecy."[116]

This basis for the existence and application of the attorney-client privilege was recognized by the Court of Appeals for Medina County in 1945:

> Privileged communications between attorney and client under [Revised Code 2317.02] assume that the communications are made with the intention of confidentiality. When confidence ceases, the privilege ceases.[117]

We have heretofore referred to the case of *Chapman v. Lee,* decided by the Supreme Court of Ohio in 1887, as the grand-daddy of a long line of ill-advised decisions. In the same vein, it is appropriate to view the decision of the supreme court in 1906, in the case of *Ex parte Schoepf,*[118] as the grandmother of a long line of decisions which, at the least, are of doubtful lineage. At least one of her distant offspring has partially renounced the old lady's restraining influence,[119] and it seems to be high time for the remainder of the decision to be reversed or highly limited in its application.

In the *Schoepf* case, the conductor and motorman of an electric car made a report of an accident to the company's claim agent, for the purpose of settlement or for use of counsel in case of suit. The court held that this report was a privileged communication, and refused to compel its production by the company's counsel in the taking of depositions.

In its opinion the court offers several reasons in support of its decision. It is submitted that all of the reasons advanced for the decision in the *Schoepf* case, with a single exception, have long since been altered or abandoned by the courts of this state, and that the sole remaining reason

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[115] Whigham v. Bannon, 21 Ohio App. 496, 505, 153 N.E. 252, 255 (1926).

[116] 5 WIGMORE, EVIDENCE § 2311 (2d ed. 1923).

[117] Emley v. Selepchek, 76 Ohio App. 257, 63 N.E.2d 919 (1945) (syllabus #2).

[118] 74 Ohio St. 77 N.E. 276 (1906).

[119] *In re* Martin, Jr., 141 Ohio St. 87, 47 N.E.2d 388 (1943), which overruled the fourth paragraph of the syllabus in the *Schoepf* case.

advanced for the decision in that case is no more valid than those which have been abandoned or directly reversed by the supreme court itself.

The first reason advanced was that the question relating to the report of the conductor and motorman was not relevant to the issues and therefore, the witness could not be required to produce the report. This basis has since been expressly reversed by the decision in the second *Martin* case.

The second reason advanced by the court for its decision was stated as follows:

> The rule in chancery as to compelling the production of documents for the purposes of evidence and inspection is generally recognized and clearly defined. It is to the effect that a plaintiff is entitled to a discovery of such facts or documents in the defendant's possession or under his control as are material and necessary to the plaintiff's case; but that this right does not extend to a discovery of the manner in which the defendant's case is to be established, nor to evidence which relates exclusively to the defendant's case. . . . The efforts of the plaintiff appear to us to be directed to "fishing" for the nature of the defense and the persons by whom it is to be established, rather than to obtain competent and necessary evidence to sustain the plaintiff's petition.[120]

In this paragraph we find the basis for the union of this astigmatic old lady with her unworthy mate born nineteen years earlier. It has been previously demonstrated that these narrow and illogical limitations upon discovery practice and procedure are no longer the law in this state.

This brings us to the third, and final, basis for the decision in the *Schoepf* case, which the court summarily disposes of in the following language:

> Another question is, was the report privileged? The statement of the witness that the reports were made in anticipation of a possible litigation and that they are in the possession of counsel for use in the suit which did ensue stands uncontradicted and must therefore be taken as true. This clearly brings the documents within the rule as to privilege; and we see no reason to limit or modify the rule because the defendant is a corporation and obtained its information and made its memoranda for the purpose stated, through the usual agencies of a corporation.[121]

Although the court in that case makes the observation that "this clearly brings the documents within the rule as to privilege," not a single Ohio case is cited in support of this ruling, and it appears that there were no such cases during the entire century preceding this decision. What really appeared to be troubling the court is found in the following observation in its opinion:

> . . . it does not appear in the record that the names of the division

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[120] *Ex parte* Schoepf, 74 Ohio St. 1, 14-15, 77 N.E. 276, 279 (1906).

[121] *Id.* at 15, 77 N.E. at 279.

> superintendent, the conductor and motorman would add anything more to the proof of negligence by the company than proof of the names of passengers on the car or of other persons who were witnesses to the accident. So it seems that the only purpose of this inquiry, as of all of the others, was to compel the defendant in the suit to disclose before the trial the sources of its information in regard to the case and the names of its possible witnesses.[122]

It seems never to have occurred to the court that the "possible witnesses" referred to were, so far as the defendant was concerned, only "its witnesses" to the extent that their testimony might be favorable, or might be expected to be favorable, to the defendant. To the extent that the testimony of the witnesses might be favorable to the plaintiff in the case, the same witnesses, in the same loose, inaccurate fashion might be referred to as the plaintiff's witnesses. The fact, of course, is that witnesses do not "belong" to either party to litigation. Furthermore, no party to litigation will call as a witness, or can be expected to call as a witness, any person the bulk of whose testimony will not preponderate in his favor. It is equally clear that each party should have the privilege and the opportunity to produce as a witness on his behalf any person whose testimony he believes will preponderate in his favor. Thus, when either party to litigation has in his possession the names and addresses of persons who are in a position to offer testimony directly bearing upon the issues in the case, and he is sheltered and protected by the court from furnishing to his adversary the names and addresses of such witnesses, the court is thereby aiding in withholding testimony which would assist in determining where the truth lies. Since the proper administration of justice must be based upon a determination of where the truth lies in any case, the decision in the *Schoepf* case, and the long line of cases following and applying the rule there announced, have constituted a grave obstacle to the administration of justice in Ohio.

The validity of the views here expressed may be confirmed by referring to the Federal Rules of Civil Procedure, and the great volume of literature discussing their enlightened purpose. Notwithstanding, we must explore the decisions announcing the existing law in the state of Ohio; and we find next in line the decision of the Supreme Court of Ohio thirty years later in the case of *In re Klemann*.[123]

This case involved a report to an insurance company from its insured concerning a casualty covered by a policy of insurance, which report was transmitted by the insurance company to its counsel at the time of litigation arising out of the casualty. The court held:

> The report thus required, when furnished, becomes the property of

[122] *Id.* at 13, 77 N.E. at 279.

[123] 132 Ohio St. 187, 5 N.E.2d 492 (1936).

> the insurance company, and when the original or copy thereof is transmitted by the insurance company, either directly or through an agent, to its attorney, on the authority of *Ex parte Schoepf*, it constitutes a communication from client to attorney, and as such it is protected as a privileged communication under [Revised Code 2317.02], and its production and disclosure cannot be compelled by subpoena duces tecum.[124]

Thus we find the insidious manner in which a pronouncement of a rule, previously non-existent, has, thirty years later, spawned a distant offspring. In the *Schoepf* case the report which was held to be privileged was made by an employee and agent of a company which subsequently, and *after litigation had been begun,* transmitted that report to the company's counsel. We have previously pointed out the several decisions in this state, which are simply an expression of the universally accepted principle, that the basis for the existence of a privileged communication is the *confidence* on the part of the person making the communication in the person to whom the communication is made. We have pointed out the application of the rule which has been made by the courts of this state that where this confidence has ceased, the reason for the rule no longer exists and the privilege itself ceases.

No matter how confidential a communication may be between an employer and an employee, no matter how confidential a communication may be between a master and a servant, no matter how confidential a communication may be between a principal and an agent, and no matter how far the employee, the servant or the agent may rely upon the discretion of the person to whom the communication is made, such communications are not privileged in the State of Ohio. If pertinent and relevant to the issues in a lawsuit, the production of such communications may be required.

In the course of the business of many large organizations, numerous reports concerning a large variety of subjects are daily required to be submitted and filed. The report of the accident involved in the *Schoepf* case was completed and filed by the employees of the defendant as a routine part of their daily work. Such accident reports are required to be prepared and filed whether or not it is anticipated that any claim will ever be made, and whether or not it is anticipated that litigation will ever be instituted. Throughout the State of Ohio probably hundreds of such reports are prepared and filed daily in instances where it is anticipated that no claim will ever be made and no litigation will ever be filed.

There can, of course, be no privileged communication of any kind unless the communication comes into existence primarily as a communication to the attorney. This rule was recognized and, apparently, approved in the opinion of the supreme court in the *Klemann* case, although cer-

[124] *Id.* at 193, 5 N.E.2d at 495.

tainly not applied by the court in that case. Judge Day, writing the opinion of the court, said:

> In order for a document to constitute a privileged communication it is essential that it be brought into being primarily as a communication to the attorney. . . . A document of the client existing before it was communicated to the attorney is not within the present privilege so as to be exempt from production.[125]

It must be remembered that in the *Klemann* case the casualty report was made by an individual who had utterly no relationship whatsoever to the person to whom the report was made, except that which arose by virtue of a contract of insurance between them. The report was not even made by the insured to a principal, a master or an employer. It was certainly not made by the insured to his own attorney. It was transmitted by the insured to an an insurance agent, which, again, was entirely independent of the insurance company whose counsel eventually received the report. The important circumstance of vital consequence, which the court apparently completely overlooked, is that there was no confidential relationship whatsoever between the insured and the person to whom the report was submitted. The further circumstance appears also to have been overlooked that the report passed through the hands of several "third persons," before it finally came to rest in the hands of counsel for the insurance company. It appears that not a single one of the requirements constituting the basis for privileged communications existed in the *Klemann* case, and that there was nothing to support the decision other than a bare reliance on the decision in the *Schoepf* case. The court did rule in the *Klemann* case that books, records and documents bearing on the question of the agency relationship between the defendant and the individual whose conduct gave rise to the lawsuit would be required to be produced.

Next in line is the decision of the supreme court twelve years later, in 1948, in the case of *In re Hyde*.[126] After reviewing several prior decisions, the court concluded:

> We are of the opinion that when reports concerning an accident on a public transportation system have been made in the course of the business of the company operating the system, and when such reports, including the names and reports of such witnesses, have been turned over to the legal department of the company, they are privileged.[127]

It is important, in reviewing this line of decisions, to note how the privilege, unfortunately born to the light of day in the *Schoepf* case, grows and grows with each additional consideration of it. In the *Schoepf*

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[125] *Id.* at 192, 5 N.E.2d at 494.

[126] 149 Ohio St. 407, 79 N.E.2d 224 (1948).

[127] *Id.* at 413, 79 N.E.2d at 227.

case it was restricted to the report of an agent transmitted through the principal directly to the principal's counsel. In the *Klemann* case the report was that of a third person having only a contractual relationship to the company to whom the report was not even directly made. In the *Hyde* case the attorney-client confidential privilege was extended by the court to statements made by *"witnesses"*—persons who certainly stood in no confidential relationship to anyone in so far as the subject matter of their reports or statements is concerned.

Now it may be that some ephemeral basis for the existence of an attorney-client privilege can be found in the furnishing of a report by an agent to a principal, notwithstanding the fact that the report does not come into existence as a communication to an attorney, which is normally the prerequisite for the application of the attorney-client privilege. But it is certainly extending the attorney-client privilege beyond any bounds contemplated by the statute, when the privilege operates to prevent the examination of a document consisting of a report or statement made by a witness, who had no intention except to communicate information directly to the person to whom the report is transmitted. Clearly there is no attorney-client relationship between the witness and counsel for either a plaintiff or a defendant in a lawsuit. In fact, no confidential relationship of any kind exists. Yet the supreme court in the *Hyde* case has declared that reports "made in the course of the business of the company" and the reports of "witnesses" become privileged when they have been turned over to an attorney, by virtue of that circumstance alone. Thus we see the spreading evil originally propagated by the decision in the *Schoepf* case.

In the following year, 1949, the supreme court followed up its decision in the *Hyde* case with that in the case of *In re Keough*.[128] In the second paragraph of the syllabus the rule is stated:

> Reports and records concerning an accident in which a public transportation vehicle is involved, which reports and records, according to the custom of the company owning such vehicle, are turned over to and remain in the possession of the company's legal department, are privileged communications and their production cannot be enforced in the taking of depositions in an action predicated on such accident.[129]

Thus, only information kept for general purposes could be elicited, such as the car barn in which the car was kept on the day of the accident, names of the operators and their times of operation of the car. Records prepared for use in connection with the lawsuit were held to be privileged, including the names and reports of witnesses to the accident. In this regard, the court observed:

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[128] 151 Ohio St. 307, 85 N.E.2d 550 (1949).

[129] *Ibid.* (syllabus #2).

> The mere fact that such records had been turned over to a legal department would not preclude access to the information contained in them *if it were otherwise not privileged.* It would lead to an absurd result if a report or document, relevant, material, competent and non-privileged in the possession of a client, which had come into existence in the general course of the client's business could be made privileged merely by turning it over to the client's lawyer, even though the client asserted that it was his custom to turn over such records and documents whenever claims were asserted against him. (Emphasis added).[180]

It is submitted that the court in the *Keough* case stated, in the paragraph last quoted, the correct rule with reference to privileged communications. However, the court illogically failed to apply the rule to the circumstances of the case before it. The court has again taken a step beyond its previous decision. In the *Hyde* case the court extended the rule of privilege to a report which was prepared according to a *rule* of the company. In the *Keough* case the privilege was extended to a report which was prepared only according to a *custom* of the company. The next logical step would be to extend the privilege to a report of an accident which was prepared by an employee or agent, who anticipated the possibilities of litigation which his master or principal had failed to anticipate.

It seems that the privilege created by the court in the *Keough* case is elevated to a position of effectiveness through being lifted by its own bootstraps. "It would lead to an absurd result," says the court, if a relevant, material and non-privileged report or document could be made privileged merely by turning it over to the client's attorney, although it was the client's custom to turn over such records whenever claims were asserted against him. A moment's reflection, we believe, will reveal that the result reached in the *Keough* case is equally absurd. Suppose that at the time the subpoena was issued for it, the same report was found not in the custody of counsel for the transportation system, but simply in the custody of one of its administrative officers. Would it then be claimed that the report was still confidential because it was "intended" that eventually, because of the litigation, the report was to be placed in the hands of counsel? The answer would appear to be self-evident, since it is clear that the report in question came into existence not at all as a communication from client to counsel, but simply as a record of an event occurring in the course of the business of a transportation system, which record was made for a number of purposes.

The real basis for the decision in the *Keough* case would seem to be the same reasoning which was employed over forty years earlier in the *Schoepf* case; namely, the view of the court that discovery procedure was intended to be limited, by the old rules of equity jurisprudence, to a dis-

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[180] *Id.* at 314, 85 N.E.2d at 554.

covery of facts or evidence supporting only the case of the interrogator, and that the names of witnesses were neither relevant nor material.

The decisions we have outlined were again followed the next year, 1950, in the case of *In re Shoup.*[131] The opinion in that case consists of a single brief paragraph:

> The records which the plaintiff in the negligence case seeks to have produced consists of slips of paper containing the names of witnesses procured by an employee of the transportation system after an accident which resulted in the negligence action. These reports had been turned over to the system's legal department according to the custom of the system. Such records are privileged and their production cannot be enforced by subpoena duces tecum.[132]

Cited in support of this decision were the *Schoepf, Hyde* and *Keough* cases. Again it is important to note that in the *Shoup* case there has been spawned a new and still more distant offspring of the decision in the *Schoepf* case.

The *Shoup* case did not involve in any way reports made by any employee of the transit system. It did not involve statements with respect to the accident made by any employee. It did not even involve statements of wtinesses over which the supreme court had previously extended the protection of privileged communication. Nothing whatsoever was involved except a subpoena for the production of slips of paper containing only the names and addresses of witnesses to an accident, which had been secured at the time of the accident by an employee of the system. There was no question in the case with reference to the nature of the document sought to be produced. In order to arrive at its decision, the court was required to adopt a flat principle of law that even though no statements, no records and no reports were sought in the course of a deposition, nevertheless information with respect to the names and addresses of witnesses to an event, in this instance an accident, were privileged and for this reason alone the information could not be secured. In order to arrive at this conclusion, the court was compelled to look upon the name and address of a witness to an event as a *confidential* communication, coming into existence primarily as a communication from a client to an attorney *and as an item of information which otherwise would not have come into existence.*

It is submitted that there is no basis in logic, or in any discussions of the elements necessarily involved in the production of a privileged communication, that could justify declaring the name and address of a witness to an event to be in and of itself a communication of that character. The

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[131] *In re* Shoup, 154 Ohio St. 221, 94 N.E.2d 625 (1950).

[132] *Id.* at 222, 94 N.E.2d at 625.

effect of such a ruling on the administration of justice is well illustrated by the result in the action which gave rise to the *Shoup* case.

That was a wrongful death case, in which it was alleged that the death of a decedent resulted from negligence in the operation of a bus by the Cleveland Transit System. The decedent was a woman whose body had been found underneath the rear portion of a bus, after it had proceeded partly into a main intersection and across the crosswalk of that intersection when it was brought to a stop. Circumstantial evidence indicated that the woman had been a passenger on the very bus under which she was subsequently found. In the normal course of events, she would have taken that bus in traversing the distance between her place of employment and her residence and, would have alighted from the bus at that very intersection. The woman was alone and there was no one present to take the names and addresses of witnesses on her behalf. However, it was not only the "custom," but also the rule of the transportation system that the operator of the bus himself procure the names and addresses of as many eye-witnesses as possible. It was these names and addresses which were sought to be produced in the action for wrongful death, in order that the case of the plaintiff might not be required to rest on circumstantial evidence alone. The supreme court, however, determined that the bar of the rule of privileged communication stood in the way of a full and complete inquiry into, and presentation of, the circumstances of the accident.

This line of cases reached its inevitable, and equally illogical, zenith in 1954 in the case of *In re Tichy*.[133] There, a passenger on a transit system bus was injured as a result of a collision with another vehicle, and was in no position to secure the name and address of the driver of the automobile which collided with the bus, or the license number of that vehicle. Nor was he able to secure such information thereafter. Accordingly, an action was instituted by the injured party against "The City of Cleveland and John Doe." The transit system had in its possession the desired information concerning the name and address of the driver of the other vehicle and its license number. Again, in a single paragraph decision, as in the *Shoup* case, the court said:

> Counsel for respondent insists that the identity of the person unknown by plaintiff in the negligence action is subject to pre-trial discovery in order that the plaintiff may join as parties defendant all who may be legally responsible for the accident, and that the information is not privileged. The information sought, having some into being only as a result of the accident and, pursuant to a custom of the transit system, having been turned over to its legal department, is privileged, and the petitioner was justified in refusing to answer.[134]

[133] 161 Ohio St. 104, 118 N.E.2d 128 (1954).
[134] *Id.* at 105, 118 N.E.2d at 128, 129.

Despite a strong and well-reasoned dissenting opinion by Judge Hart, we find the final mis-shapen offspring of the decision in the *Schoepf* case, rendered approximately fifty years earlier.

In all of the other cases with reference to privileged communications, the document held by the court to be a privileged communication was, at the very least, some kind of a *document* even though, as in the *Shoup* case, the document contained nothing more than the name and address of a *witness* whose identity was sought. In the *Tichy* case, however, the court has entirely abandoned even the idea of a *document* as a privileged communication; therein the court has gone beyond all cases which the writer has been able to discover dealing with privileged *communications* generally. In the *Tichy* case an injured party was attempting to procure from a party defendant in a lawsuit the name and the address of another person — not simply a witness to the incident giving rise to the plaintiff's case, but a person who might well be legally responsible for the plaintiff's injuries. In other words, the plaintiff was attempting to procure from a party defendant in a lawsuit *information* within the knowledge of that party defendant, which the plaintiff needed to know in order that he might pursue his claim for damages against any and all persons legally liable therefor. In the *Tichy* decision the supreme court has finally come down to the illogical conclusion of its line of decisions which we have been discussing. In that case, the court held that it is not the communication itself, not the report itself, not the record made presumably for the benefit of counsel which constitutes a privileged communication. Rather, the court says it is the very *information* itself which is privileged!

In no other case that we have been able to find has it been held that direct information, with respect to the occurrence of an event involved in or becoming the subject matter of litigation, can ever become confidential or privileged. That an injured party should be prevented from having an opportunity to recover damages for his injuries, because the name and the address of the person causing his injury is privileged, is a new concept in American jurisprudence. But it is now the law in the state of Ohio, as the result of the decision in the *Tichy* case, that information coming into being "only as a result of" an accident can be withheld and made completely confidential and privileged if only by rule, custom, practice or otherwise it can be gotten into the hands of counsel before the injured party can subpoena it.

It appears that the law which has been established as a result of the line of decisions here discussed cries out urgently for some form of legislative relief. This form of relief will be found in the various provisions

of the Federal Rules of Civil Procedure, reference to which will be made shortly.

Other Privilege Problems — Accountants and Police Officers

In the meantime we shall consider several other recent decisions dealing with the extent of information which may be secured on oral deposition.

Confirming what we have heretofore said with respect to the existence of confidence, and of the confidential relationship specified by the statute as the necessary basis for the existence of a privileged communication, the supreme court in the case of *In re Frye*[135] declared:

> In the absence of a privilege created by constitution or statute not to disclose available information, a witness may not refuse to testify to pertinent facts in a judicial proceeding merely because such testimony comprehends a communication or report from himself as agent to his principal or as independent contractor to his employer, no matter how *confidential* may be the character of the *communication* itself or the *relationship* between the parties thereto. (Emphasis added).

It is difficult to explain the absence from the line of cases just discussed of the principles and the reasoning applied in the *Frye* case. That case involved the production of statements and reports prepared in confidence by a certified public accountant for a corporation on whose behalf he was employed. The distinction seems to be that at the time of the preparation of these reports by the accountant, no litigation was anticipated. If confidence is one of the essential elements of the existence of a privileged communication, it is certainly beyond question that the report of a certified public accountant to the person by whom he is employed is one of the most confidential of all documents. Accountants, however, are not among those individuals named in the statute as the recipients of privileged communications. Interesting in this connection is the claim of the petitioner that information sought to be disclosed by virtue of the subpoena served was protected by provisions of the Federal Internal Revenue Code, forbidding the printing or publishing of income tax returns or the information contained in those returns. In answer to that argument the court observes, with reference to this federal statute:

> This statute does not and could not legally inhibit the disclosure as evidence in a particular judicial inquiry or where required by law, of the operative financial data relating to the business of a tax payer, even though such data comprehends the elemental facts and information from which his income tax return is necessarily made up *The law could never sanction such a sweeping prohibition of the disclosure of essential facts of the business world.* (Emphasis added).[136]

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[135] 155 Ohio St. 345, 354, 98 N.E.2d 798, 803 (1951).

[136] *Id.* at 352, 353, 98 N.E.2d at 802.

One can only conclude from the foregoing observations that a different standard of disclosure has been fixed by the court concerning facts of the business world, as opposed to facts relating to accidents and personal injuries. This difference in the standard of disclosure fixed by the court is again evidenced in the following observation from the opinion in the *Frye* case:

> And where one possesses knowledge of facts which are pertinent to a judicial inquiry he may be required to testify or to produce papers and documents as to such facts. . . .
>
> The duty of witnesses to disclose the details of their private business for the benefit of third persons when required in the administration of justice is one devolving on them as members of a civilzed community.[137]

It seems, however, that this duty as a member of a civilized community does not extend to disclosing to an injured party the known name and address of the party presumably responsible for his injury.

In 1940, in considering the effect of the privileged communication statute, now Revised Code section 2317.02, the supreme court declared that it must be strictly construed, as it is an exception to the statutory section which abrogates the common law rule relating to the competency of witnesses and enables all persons having sufficient mentality and comprehension competent to testify.[138]

In 1953, however, the supreme court decided the case of *In re Story*.[139] From any point of view this case is closely related to the line of decisions which have just been reviewed, particularly those involving records and reports turned over to counsel by the defendant in a personal injury or wrongful death case. In the *Story* case the petitioner was the Chief of the Police Department of the City of Cleveland. There was a wrongful death action pending in the common pleas court in which two police officers of the City of Cleveland were defendants. It was claimed in that action that the police officers were liable for the wrongful death of a decedent who had been shot and killed. A subpoena was issued and served upon the Chief of Police, directing him to produce certain records of the police department:

> The records involved are those made in connection with decedent's death by police officers including the defendants in the wrongful death action. . . . Admittedly those records include written statements by the defendants in the wrongful death action, there are no prosecutions pending in connection with the decedent's death, the city's attorneys are defending the two policemen in the wrongful death action, and all those records have

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[137] *Id.* at 354, 98 N.E.2d at 803.

[138] *In re* Estate of Butler, 137 Ohio St. 96, 28 N.E.2d 186 (1940). The *Butler* case was later approved in *Smith v. Barrick*, 151 Ohio St. 201, 85 N.E.2d 101 (1949).

[139] 159 Ohio St. 144, 111 N.E.2d 385 (1953).

> been turned over to or will be made available to those attorneys for aid in defending that action.[140]

In its opinion in the *Story* case the court stated:

> We do not believe it is necessary to describe in detail the records called for by the subpoena. It is sufficient to state that *some* represent writings which, in the absence of some privilege, either are or reasonably *may be admissible* in evidence at the trial of the wrongful death action, and that the petitioner is not a party to that action. It follows that, in the absence of some privilege, petitioner, having refused to produce *any* of the records when ordered to do so, was in contempt and properly committed to custody.[141]

Now this paragraph would seem to require some analysis and comparison in the light of the line of decisions from the *Schoepf* case to the *Shoup* case which was, at that time, the last one in the line decided by the court. It is emphasized in the paragraph quoted, which in effect constitutes the complete ruling of the court, that the petitioner is not a *party* to the original action giving rise to the habeas corpus proceedings. The reason for this emphasis is certainly obscure, since in none of the other cases which have been reviewed was the petitioner a party to the original action; nor can this circumstance have any bearing whatsoever on the question of whether some privileged communication had been made by some third person, not to the petitioner, but in some form which simply placed the communication in the petitioner's custody. It is emphasized in the paragraph quoted that *some* of the writings "may be admissible in evidence at the trial." This is perhaps an accurate and, no doubt, a justified statement, but in none of the earlier cases did the court or any other person, including the party who had issued the subpoena, have an opportunity to examine the statements and records subpoenaed, so that either the party or the court could possibly have determined whether *some* of the records under subpoena might not have been admissible in evidence at the trial.

There is nothing to be found anywhere in the report of the *Story* case to indicate that the basis for this statement was an examination by the court of the documents subpoenaed. And it would seem to be a thoroughly logical conclusion that at least *some* portion of the records and reports which had been subpoenaed in the several other cases would have been admissible at the time of the trial, both to test the credibility of a witness and for purposes of impeachment. Certainly this would be true in the case of a statement made by the operator of a transit vehicle involved in an accident, or the statement by the insured in the *Klemann*

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[140] *Id.* at 145, 111 N.E.2d at 386.

[141] *Id.* at 145, 146, 111 N.E.2d at 386.

case with reference to conduct on his own part which, subsequently, gave rise to a lawsuit.

It would appear that the important consideration is not the *purpose* for which the writings might be used in evidence at the time of the trial of a lawsuit but the fact, as indicated by the court in the *Story* case, that such writings may be *admissible* at the time of trial that should lead to their production in advance of the trial.

In the *Story* case the court continued:

> The question to be determined is whether one, having custody and control of the records of a city police department made in the detection and prevention of crime, is generally privileged from disclosing those records upon the taking of a deposition in a civil suit.
>
> We have been unable to find and have been referred to no authorities other than the Common Pleas Court case of *Solanics v. The Republic Steel Corporation,* which would support such a broad privilege in a civil action in this state where it has not been provided for by statutory or constitutional provision. . . .
>
> This court has stated and decided that a privilege against testifying or producing evidence must rest upon some *statutory or constitutional provision.* (Emphasis added).[142]

The foregoing statements in the opinion of the court are then followed by observations which appear to confirm the analysis we have previously presented concerning this line of decisions:

> However there are *no statutory provisions* which provide against the production of such reports or records or testimony concerning them by the party, his nonattorney employees, or anyone else. It is apparent therefore that this court has *extended the privilege* against testifying or producing evidence to an instance beyond those supported by statutory or constitutional provisions. . . . It may be observed that this extension of a statutory privilege apparently originated in paragraph 3 of the syllabus in the controversial case of *Ex parte Schoepf.* (Emphasis added).[143]

This observation on the part of the court should be compared with the ruling in the *Klemann* case, where the report of an insured was turned over to an insurance company which also was not a party to the civil action. It is true that the insurance company might eventually become involved in some financial obligation as a result of that action, but in the *Story* case it is equally true that the city, having possession of the reports which were subpoenaed, had already become financially interested in the action brought against its police officers, by virtue of the fact that the

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[142] *Id.* at 146, 111 N.E.2d at 386. See also: *In re* Frye, 155 Ohio St. 345, 98 N.E.2d 798 (1951); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947); Goehring v. Dillard, 145 Ohio St. 41, 60 N.E.2d 704 (1945); Roberts v. Briscoe, 44 Ohio St. 596, 10 N.E. 61 (1887); Hubbell v. Hubbell, 22 Ohio St. 208 (1871); *In re* Raab's Estate, 16 Ohio St. 274 (1865); Bomberger v. Turner, 13 Ohio St. 263 (1862).

[143] *In re* Story, 159 Ohio St. 144, 148, 111 N.E.2d 385, 387 (1953).

action was then being defended by counsel gratuitously supplied by the city. The foregoing observations in the *Story* case are followed by others, which are equally to the point, stating principles which, admittedly, in the State of Ohio have been honored more in their breach than in their observance:

> When we come to examine various claims to exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule. . . . When the course of justice requires the investigation of the truth, no man has any knowledge that is rightfully private. (These privileges) should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.
>
> We believe the policy expressed by the General Assembly of this state with regard to witnesses and depositions indicates a general legislative intention in favor of, rather than against, requiring testimony and the production of evidence on depositions.[144]

The *Story* case is a classic example of why lawyers in practice find it so difficult to determine what the law is, or to advise a client as to what a court will do with any given set of facts. In this decision, the court has pointed out the numerous decisions declaring that a privilege against testifying or producing evidence must rest upon some statutory or constitutional provision. The court has then admitted that in many instances, notwithstanding this rule, the court has extended privileges against tsetifying or producing evidence beyond any basis to be found in any statutory or constitutional provision. Next, the court has pointed out that all privileges against testifying or producing evidence, such as those created by the privileged communication statute, should be maintained "within the narrowest limits required by principle." And, in the next breath, the court turns around and says that there "may be instances" where "the protection of the public or *some other compelling reason* will require the *recognition of other privileges* against testimony or the production of evidence."[145]

The best that can be said for the effect of the decision in the *Story* case is that it constitutes a clear indication that the supreme court recognizes limitations by which the court is or ought to be bound, but that the court does not propose to be bound by those limitations when "the protection of the public or some other compelling reason" influences the court to decide otherwise. Certainly the decision in the *Story* case can be employed with telling effect by counsel on either side of a controversial

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[144] *Id.* at 148, 149, 111 N.E.2d at 387, citing 8 WIGMORE, EVIDENCE § 2192 (3rd ed. 1940).

[145] *Id.* at 150, 111 N.E.2d at 388.

issue, as to whether a particular record or document may or may not be required to be produced in the course of a deposition. All that is necessary is for counsel to select that portion of the decision which applies to his side of the case.

At this point, a lower court decision relating to the same subject matter is worthy of mention. In 1947 the Common Pleas Court of Cuyahoga County decided the case of *Parkhurst v. Cleveland,*[146] holding:

> The record of a motorman's conduct made in the ordinary course of duty and before litigation has commenced is not a privileged communication and must be produced in accordance with a subpoena duces tecum.

The reader will find this a well considered opinion, analyzing and relying upon appropriate portions of earlier supreme court decisions, and helpful in procuring information contained in documents which consist of "entries made long before the present action arose."

The course of future decisions in this field, however, can best be charted when it is remembered that only one year after the decision in the *Story* case, there was decided the case of *In re Tichy,* which rejected the broad and liberal, and generally accepted principles approved in the *Story* case.

STATUTORY AIDS TO DISCOVERY

Before concluding a discussion of the law in Ohio in the field of discovery practice and procedure, it should be pointed out that there are some very important and valuable procedural devices provided by Ohio statutes which may be employed in the preparation of a case for trial.[147]

The first of these sections provides for a demand by either party to a lawsuit upon the other to admit in writing the genuineness of any paper or document. If the demand is not complied with and the party is put to expense to prove the document on the trial of the case, that expense must be borne by the party who has refused to make the admission "unless it appears to the satisfaction of the court that there were good reasons for the refusal."[148] The remaining sections deal with the enforced production or right to inspect books, records and documents. Peculiarly, the lawyers of Ohio appear to have made considerable use of the provisions of Revised Code sections 2317.32 and 2317.33,[149] but comparatively little

[146] 36 Ohio Op. 321, 77 N.E.2d 735 (1947). (syllabus #3).

[147] OHIO REV. CODE §§ 2317.31-2317.35.

[148] OHIO REV. CODE § 2317.31.

[149] OHIO REV. CODE § 2317.32: "Upon motion, and reasonable notice thereof, the court in which an action is pending may order the parties to produce books and writings in their possession or power which contain evidence pertinent to the issue. If the plaintiff fails to comply with such order on motion, the court may give judg-

use of the provisions of section 2317.35.[150] As a result, numerous trial, appellate and supreme court decisions have interpreted the meaning and application of sections 2317.32 and 2317.33, but there is almost a complete dearth of authority interpreting or applying the provisions of section 2317.35. The first two sections require the production of books and writings for purpose of *inspection.*

It will be at once observed that the method of enforcing the rights and privileges extended by these sections of the code are to be found within their provisions, and that they are fairly drastic and summary in nature.

In a recent unreported case tried in the Common Pleas Court of Cuyahoga County, a problem arose concerning the interpretation of section 2317.35. A demand was made by one party to a lawsuit upon the other for a copy of instruments in writing which the other party "intends to offer in evidence at the trial." The case was a fairly complicated one and the party upon whom the demand was made had placed a great variety of documentary evidence in the hands of his counsel which, it was anticipated, might well be required as evidence during the trial of the case. Several of these were lengthy documents; many others consisted of checks and a large number of bills and invoices presented in the course of the construction of a project, which was the subject matter of the lawsuit. Because of the extremely large number of "instruments of writing" which counsel intended "to offer in evidence at the trial," it was regarded as entirely impractical, as well as extremely expensive, to comply literally

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ment for the defendant as in case of nonsuit; if a defendant fails to comply with such order, on motion, the court may give judgment against him by default."

OHIO REV. CODE § 2317.33: "Either party, or his attorney, in writing may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense, specifying the book, paper or document particularly to enable the other party to distinguish it.

"If compliance with the demand within four days is refused, on motion, and notice to the adverse party, the court or judge may order the adverse party to give the other, within the time specified, an inspection and copy, or permission to take a copy of such book, paper or document.

"On failure to comply with such order, the court may exclude the paper or document if offered in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as such party, by affidavit, alleges it to be. This section does not prevent a party from compelling another to produce any book, paper or document when he is examined as a witness."

[150] OHIO REV. CODE § 2317.35: "Either party, or his attorney, if required, shall deliver to the other party, or his attorney, a copy of any instrument of writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant refuses to furnish the copy required, the party so refusing shall not be permitted to give the original in evidence at the trial. This section does not apply to a paper, a copy of which, as required by law, is filed with a pleading."

with the demand made under this section of the code to furnish copies of each one of these instruments. In response to the demand, a tender was offered of full opportunity to inspect all of the documents under the provisions of section 2317.33. This tender was refused and no other action was taken in advance of the trial of the case by the party who had made the demand. At the time of the trial the court excluded from evidence all of the instruments of writing, asserting that this action was not only justified but necessary under the provisions of section 2317.35.

It will be at once observed that this procedural device and the privilege extended under the provisions of section 2317.35 can be both extremely useful and extremely dangerous. If the interpretation made by the court in the case just referred to was a correct interpretation, counsel in every lawsuit need simply sit back and issue a demand upon opposing counsel for copies of every written instrument in the possession of opposing counsel or of his client, which can by any stretch of the imagination be intended to be used in evidence upon the trial of the case. Counsel can, in this manner, by means of a simple one sentence communication fill his own file with copies of all of the documentary evidence in the possession of his opponent. It is suggested that this was not a correct interpretation of the statute in question. The problem turns upon the interpretation of the word "required" in the first sentence of section 2317.35: "Either party, or his attorney, if *required,* shall deliver to the other party. . . . "

Section 2317.35 is the last of a group of five coordinated statutes appearing in the chapter of the Revised Code dealing with the subject of evidence. The subject heading of the code for these five sections is: "Admission and Inspection of Documents." The statutes appear clearly to be in *pari materia* and we believe they should be so interpreted.

It is to be noted that sections 2317.32 and 2317.33 each require the filing of a motion before there can be any enforcement whatever of the privileges extended by those sections. Under section 2317.32 a motion "and reasonable notice thereof" is necessary in order that the *court* "may order the parties to produce books and writings in their possession or power." Under the provisions of section 2317.33, after demand has been made for permission to inspect or take a copy of a book, paper or document, then, if compliance with the demand is refused, "on motion and notice to the adverse party" the *court* may order that party to permit such inspection or right to take a copy of the instrument in question.

Obviously, permission simply to inspect a book or a writing which must be accorded under section 2317.32, or permission to inspect or to "take a copy" of an instrument in writing, under section 2317.33, each constitutes a device and a method of procedure which is far less cumber-

some, far less troublesome and much less expensive to the person who is required to extend these privileges upon demand than the procedure provided under section 2317.35, by virtue of which the party must undertake the expense of reproducing and furnishing copies of all of the documents in his possession. When it is considered that no penalty of any kind may be inflicted under either sections 2317.32 or 2317.33 for failure to comply with the demands made thereunder until the court has issued an order requiring compliance, it would seem to follow that at least the same procedure is necessary before any penalty can be inflicted under the provisions of section 2317.35.

This brings us back to the crux of the problem in the interpretation of this section, namely, the meaning of the word "required." It is suggested that under the proper application of this section, no party can be refused a right to introduce documents in evidence upon the trial of a case unless prior to the trial that party has been "required" by an order of the court to furnish copies of instruments demanded. It is suggested that neither party can be "required" to furnish copies of such instruments by the simple device of a letter or communication addressed by one counsel to another. It would appear that any proper interpretation of this section, which as yet has not been interpreted in any reported decision, must place the final authority to require the expenditure of a large amount of time and, frequently, a considerable sum of money to reproduce papers and documents solely in the hands of the *court.*

If, at this point, we stop to reflect upon the state of the law in Ohio in the field of discovery practice and procedure, we find that the legislature has provided the legal profession with many valuable procedural devices but that the courts, in their interpretation and application of many of these procedural devices, have greatly limited and restricted their usefulness. We find, further, that in some instances, the limitations and restrictions created by the courts have so far exceeded the apparent original intent of the legislature, that undoubtedly nothing short of further legislative action will provide the remedies which are needed and without which Ohio will remain one of the distinctly backward states.

Discovery Under the Federal Rules

The entire field of discovery practice and procedure was presented with a new and fresh approach by the adoption, in 1934, of the Federal Rules of Civil Procedure. We find an appropriate prelude to a discussion of these new rules in an observation by a trial judge almost twenty-five years ago in the case of *Bergelt v. Roberts*:[151]

[151] 144 Misc. 832, 838, 258 N.Y. Supp. 905, 911 (Sup. Ct. 1932).

> Times change, and the law must change with them. Fundamentals remain immutable, but their application must be attuned to the necessities. General progress does not exclude growth of the law; rather it demands it. The absence of a precedent does not negative the existence of a right, and, where the right demands recognition and enforcement, equity should respond.

Unfortunately, courts of equity generally failed to apply these views in the field of discovery practice and procedure, and it was long apparent to lawyers throught the country and to many courts that the gradual growth of the law, paced as it was to a process of infinite attrition, would never succeed in bringing the courts of equity in tune with the requirements of a modern industrial world, accompanied by a tremendous growth in litigation, a growth which was not only huge numerically but attended by complexities of factual issues as well. The new and tremendous mobility of the population frequently led to the birth of litigation far from the homes and the business places of the parties involved. At the same time, the removal of vital evidence was made relatively simple and the necessity for invoking the aid of the courts in discovery practices was far more urgent.

No less an authority than the highest court of the land fully recognized the importance of these problems and understood, moreover, that an entirely new approach was required to the handling of litigation from the very outset to the conclusion of the trial. A most distinguished group of lawyers appointed by the court labored for several years to prepare a draft of rules embodying a complete new concept. These were finally officially adopted by the court in 1934. They created many radical changes in practice which need not here concern us. The changes in the field of discovery practice and procedure were, perhaps, as radical as any. In the period of almost a quarter of a century which has intervened since their adoption, the effectiveness of the new rules and the validity of their underlying concept has been firmly established. For as long a period as ten or twelve years following their adoption we find the adjective "new" generally employed in any discussion of them, but its use has since gradually disappeared and is certainly no longer justified.

Alexander Holtzoff, one of the leading authorities on federal practice, writing for the Michigan Law Review in 1942, declared:

> The elimination of the "sporting theory" of justice, the simplification of procedure, and the prompt disposition of controversies on their merits are the great objectives of the new federal civil practice. One of the principal means for the attainment of these purposes is discovery. . . .[152]

Two outstanding authorities on the subject who, both alone and joint-

[152] Holtzoff, *Instruments of Discovery under Federal Rules of Civil Procedure,* 41 MICH. L. REV. 205 (1942).

ly, have authored many valuable discussions of the federal rules contributed an exceedingly penetrating and valuable analysis of the new concept, which appeared in the Columbia Law Review only four years after the rules first became effective:

> Its trial-by-battle background has left indelible marks upon the common law. *The conception of justice has always been subordinated to the conception of the lawsuit as a game between opposing counsel.* . . . Both sides conduct their operations with as great a measure of secrecy as possible. The attack to be used, the amount and character of ammunition, and the strategy contemplated are regarded as the exclusive possession of the party able to possess and devise such materials. Generally speaking, judge and legislator have hedged fact gathering devices with limitations tending to preserve the sporting approach to the lawsuit. . . .
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> From this there easily developed the rule so heavily relied on in later times, that discovery must relate to the party's own case. An appropriate pendant to it was the shibboleth — repeated to the point of nausea — that the court would not sanction "fishing expeditions." . . . Actually no sound objection to both parties knowing *all* the facts could be made simply on the ground that secrecy as to the plays makes the game better. (Emphasis added).[153]

One of the same authors, writing for the Illinois Law Review in May, 1939, begins a lengthy discussion by stating that:

> The deposition discovery procedure is the keystone of the new federal practice. It bridges the gap between pleading and trial and assumes much of the burden of each.[154]

The deposition discovery procedure has been embodied in Rules 26 to 37, inclusive, of the Federal Rules of Civil Procedure. As under the practice in Ohio, after the commencement of an action, any party may take the deposition of any person, including a party, by oral examination or written interrogatories. However, Federal Rule Number 26 frankly recognizes what is simply tacitly admitted by the courts of Ohio, for the rule expressly provides that such oral depositions or written interrogatories may be employed "for the purpose of discovery or for use as evidence in the action or for both purposes." Under Ohio practice depositions are theoretically taken only for use as evidence. The scope of the examination expressly permitted by Rule 26 goes to the very crux of the completely new concept upon which the federal rules were founded:

> Unless otherwise ordered by the court . . . the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition

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[153] Pike and Willis, *The New Federal Deposition — Discovery Procedure,* 38 COLUM. L. REV. 1179, 1180 (1938).

[154] Pike, *The New Federal Deposition — Discovery Procedure and the Rules of Evidence,* 34 ILL. L. REV. 1 (1939).

> and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.[155]

Many of the remaining provisions of the federal deposition discovery procedure are very similar to those already embodied in the Ohio statutes we have discussed, but the provisions of the rule above quoted constitute the basis for the very different practice in the federal courts, and for the very different and generally far more beneficial results which have ensued. It is this rule which was intended entirely to eliminate surprise from the trial of a lawsuit. And, whenever the rule has been fully taken advantage of, that purpose has been accomplished.

The desirability of the result is still the subject of considerable controversy.[156] It is the view of the writer, however, that in actual practice the results have fully justified and realized the fondest expectations of those who labored so long and hard in the preparation of these rules.

One of the earliest and one of the most famous commentaries on this subject was set forth in an Ohio decision in 1887 by the learned jurist, William Howard Taft, while sitting as a trial judge in the city of Cincinnati. To the objection that a party may not "go fishing" for evidence among witnesses of the opposing party, Judge Taft observed:

> Witnesses do not belong to one party more than to another. What they know relevant to the issue should be *equally* available to *both* sides, and if they claim immunity from examination by deposition on the theory that their testimony is one side's rather than the other's, their claim is utterly indefensible.
>
> What a witness is presumed to know is the truth and that cannot vary between the time of taking the deposition and the trial. If there is likely to be a variance in the testimony, the earlier a witness is committed to a statement the better for the sake of the truth. There is no objection that I know why each party should not know *the other's case.* (Emphasis added).[157]

As we have learned, much of what Judge Taft stated did not become the law in Ohio for many years thereafter, and some of it is not even yet the law in this state. All of it, however, is now the law in the federal courts.

In this light, Professor Edson Sunderland has declared that "courts have found no difficulty in dealing with unrestricted discovery, and have

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[155] FED. R. CIV. P. 26(b).

[156] See, for example, *What's So Wrong About Surprise?,* 39 A.B.A.J. 1075 (1953); *Sweet Are the Uses of Discovery,* 40 A.B.A.J. 303 (1954); *Surprises in Discovery,* 28 CONN. B.J. 13 (1954).

[157] Shaw v. Ohio Edison Installation Co., 9 Ohio Dec. Reprint 809, 812, 17 Week. L. Bull. 274, 276 (1887).

expressed satisfaction with its results."[158] In his characteristic style, this eminent author has written a brilliant and illuminating analysis of the federal procedure, and has disposed of many of the arguments and objections originally made against its adoption, and which still appear from time to time. In an article in the Yale Law Journal, which was written before the federal rules were adopted and made effective, Professor Sunderland pointed out that the pleadings alone do not offer a satisfactory basis for the trial of a lawsuit, since the pleadings deal with ultimate facts and not with evidence. Also, a pleader is free to allege many facts which he knows may not or cannot be proved. As a result, counsel are faced with a genuine dilemma in preparing for trial with only the pleadings as a guide. If an attorney undertakes to meet *all* possible items of proof which opposing counsel may present at the trial, much of his effort will inevitably be futile. If, on the other hand, he restricts his preparation to those matters which his adversary is likely to rely upon, he may well be the "victim of surprise." In truth, Professor Sunderland's words might well be employed as a red flag by every counsel in the preparation of a case for trial.

Consider, also, the following further observations by the same writer:

> Furthermore, from the beginning until the end, the question of settlement is always involved in a litigated case. Indeed one of the greatest uses of judicial procedure is to bring parties to a point where they will seriously discuss settlement. But the pleadings seldom disclose a basis upon which a settlement can be reached. It is not what a party asserts, but what he can establish by proof, that determines the strength of his position, and so long as each party is ignorant of what his opponent may be able to prove, their negotiations have nothing substantial to rest upon. Many a case would be settled, to the advantage of the parties and to the relief of the court, if the true situation could be disclosed before the trial begins.[159]

In these words Professor Sunderland has stated, and in the proper order, the two chief reasons for all of the discovery procedures provided, or which should be provided, by the law. First, discovery seeks to afford an appropriate and sensible basis for negotiation of a settlement; and, second, in the event a settlement cannot be negotiated, to enable each party to meet the proof to be offered by his adversary. For centuries the elimination of surprise upon the trial of a lawsuit was objected to upon the assertion that if each party knew exactly what his opponent's testimony and proof would consist of at the trial of the case, he could thereupon manufacture *perjured* testimony with which to meet that anticipated proof. Professor Sunderland well disposed of that objection in an analysis from which the following observations are quoted:

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[158] Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L. J. 863, 871 (1933).

[159] Sunderland, *supra* note 158, at 864.

> Perjury is one of the great bugaboos of the law. Every change in procedure by which the disclosure of the truth has been made easier has raised the specter of perjury to frighten the profession. . . . It is easy for those who are interested in opposing change to conjure up visions of calamities which the change will precipitate, and to persuade themselves of the reality of the dangers which serves so useful a purpose as a deterrent from the course which they disapprove. It may well be doubted whether the chancery bar really wanted to liberalize the practice. An acquired technique always develops resistence to change. . . .
>
> Unless litigation can be conducted under such reasonably favorable circumstances as to make it a legitimate business risk instead of a lottery, modern business men will decline to use it, and whenever possible will either arbitrate, settle by direct negotiation or simply charge off the loss.[160]

The answer to the problems posed by Professor Sunderland was supplied the following year in the adoption of the Federal Rules of Civil Procedure. However, the observations made were certainly not directed at the federal courts alone, nor at any special type of litigation peculiarly confined to federal jurisdiction. The very same reasons make it both desirable and imperative that the broad scope of federal deposition discovery procedure be embodied at the earliest possible time in Ohio practice.

Within the period of more than two decades since the adoption of the federal rules, literally hundreds of cases have been decided and reported by the federal courts interpreting and applying these rules, a substantial percentage of which have dealt with the various phases of deposition discovery procedure. The leading case, decided by the United States Supreme Court in 1947, is that of *Hickman v. Taylor*.[161]

That case arose out of a wrongful death action seeking the recovery of damages for the death of a seaman resulting from a collision between two vessels. In the course of that case, counsel for the plaintiff filed thirty-nine interrogatories directed to the owners of one of the vessels. All of the interrogatories except one were answered. That one asked: "State whether any statements of the members of the crews of the tugs J. M. Taylor and Philadelphia, or of any other vessel, were taken in connection with the towing of the car float and the sinking of the tug John M. Taylor. Attach thereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."[162] The defendant objected to this interrogatory on the ground that it called for privileged matter obtained in preparation for litigation, and constituted "an attempt to obtain indirectly counsel's private files." It was claimed that answering these requests would involve

[160] Sunderland, *supra* note 158, at 867-869.

[161] 329 U.S. 495 (1947).

[162] *Id.* at 498, 499.

practically turning over not only the complete files, but also the telephone records and almost the "thoughts of counsel." The district court ordered the defendant to answer this interrogatory. On appeal, the Third Circuit Court of Appeals reversed and held that the information sought was part of "the work product of the lawyer" and, therefore, privileged from discovery. In a unanimous opinion delivered by Mr. Justice Murphy, the Supreme Court affirmed the ruling of the circuit court of appeals. In so doing, however, the court announced, for the assistance of the bench and bar generally, its views concerning the interpretation and application of the federal deposition discovery procedure, declaring:

> We fully appreciate the widespread controversy among the members of the legal profession over the problem raised by this case. It is a problem that rests on what has been one of the most hazy frontiers of the discovery process. But until some rule or statute definitely prescribes otherwise we are not justified in permitting discovery in a situation of this nature as a matter of unqualified right. When rule 26 and the other discovery rules were adopted, this court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.[163]

At the same time the court laid down some broad and liberal principles to be employed in the application of the discovery process, stressing that it is available in all types of cases to any party, "individual or corporate, plaintiff or defendant":

> We agree of course that the deposition discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end either party may compel the other to disgorge whatever facts he has in his possession.
>
> The deposition discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. . . . For present purposes it suffices to note that the protective cloak of this "attorney-client" privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation.[164]

In applying these principles to the particular problem before it, the court says:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's files and where production of those facts are essential to the preparation of one's case, discovery may properly be had.

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[163] *Id.* at 513, 514.

[164] *Id.* at 507, 508.

> Such written statements and documents might under certain circumstances be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. A production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.[165]

Significantly, the foregoing observations should be contrasted with the views expressed in the Ohio cases dealing with attorney-client privilege which were reviewed above, and the court's observations covering factual situations involved in each of those cases. The particular application made by the court in the *Hickman* case, denying the right to compel an answer to the interrogatory propounded, is then to be found in the following statement in the opinion of the court:

> Petitioner has made more than an ordinary request for relevant nonprivileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney . . . without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause from any hardship or injustice.[166]

Thus, the *Hickman* case has substantially outlined the boundaries which either party may approach in propounding to the other interrogatories, oral or written, and beyond which they may not go.

It should be noted that Rule 26 contains the phrase, "relevant to the subject matter involved in the pending action," and that in applying this rule in the *Hickman* case, the Supreme Court emphasized the word "relevant." Since the concept of relevancy has troubled numerous other courts faced with similar problems, a word should be added here concerning the interpretation of "relevant" which has given rise to so many reported decisions, including those in Ohio referred to earlier.

In this regard, an excellent standard has been suggested:

> Relevancy presupposes a referent which is considerably less clear before the trial than at the trial. Fairness and expediency demand that the parties and court, in applying the standard of relevancy to pre-trial examination, utilize a measure of imagination as to the possible development of the litigation. Thus, it has been said that the test is not whether the matter inquired of *will* be competent at the trial, but whether it *may* be.[167]

In the light of the decision in the second *Martin* case, the interpretation

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[165] *Id.* at 511, 512.

[166] *Id.* at 508, 509.

[167] Pike and Willis, *supra* note 153, at 1442.

of this word would present no problem to Ohio lawyers, were Rule 26 to be incorporated in the Ohio practice.

The federal concept of the trial of a lawsuit, banishing the sporting theory of litigation and, so far as possible, eliminating surprise upon the trial of the case, is generally representative of modern enlightened thinking on the subject.

In a very recent article discussing the practice in New York State, the author observes, concerning the trial bench of the City of New York, that the judges realize "that the main procedural salvation for a system of civil justice largely devoted to negligence litigation . . . lay in a system of free and mutual examination before trial as of right."[168] He also referred to a statement of the court in the case of *Lowe v. Bacon*[169] to the effect that, in the preparation of a case for trial, it is necessary for each party not only to know his own version of the case to be presented at the time of trial, but it is equally important that he be informed as to how much of the facts are within the knowledge of his opponent, declaring:

> Information can be necessary even though the petitioner already have knowledge of it, or can obtain such information elsewhere. Many states feel otherwise, but both the New York and federal courts recognize that *the purpose of the deposition is not only to learn the facts but also the opponent's version of them.* (Emphasis added).[170]

A similar concept is followed by the courts of the State of Illinois.[171]

Approximately ten years ago a special committee was appointed by the Ohio State Bar Association to inquire into a proposal to incorporate the Federal Rules of Civil Procedure in Ohio practice. Several reports were made by this committee over a period of approximately five years, at the conclusion of which the committee reported that, in its opinion, the rules were not "appropriate" to Ohio practice and their adoption was therefore not recommended. The matter has rested in that state for several years, but the obvious need for improvement in Ohio practice is so compelling that the question cannot remain dormant.

A lengthy discussion of the subject again appeared in the publication of the Ohio State Bar Association early in 1956. In that article the author points out:

> In fact it is the general opinion among federal judges and practitioners that the rules have been an outstanding success — a vast improvement over the old complicated, technical and uncertain legal rules and procedure . . . prior to the adoption of the rules in 1938 (sic).

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[168] Jordan, *Discovery Proceedings As Affected by Expense Involved,* 9 N.Y.U. INTRA. L. REV. 55, 58 (1954).

[169] 112 N.Y.S.2d 533 (1952).

[170] Jordan, *supra* note 168, at 59.

[171] See Shaw v. Weisz, 339 Ill. App. 630, 91 N.E.2d 81 (1950).

> Circuit Judge John J. Parker, one of the great jurists of the country, summed up his opinion of the federal rules as follows: "It is now almost universally conceded that these rules have given to the federal courts in their civil jurisdiction the best code of practice that is to be found anywhere in the country, or for that matter anywhere in the world."[172]

Notwithstanding these unqualified endorsements of the federal rules by persons who are clearly in a position to know whereof they speak, the author of the article appearing in the Ohio Bar takes exception to their incorporation as a whole into Ohio practice, pointing out particular features which he believes to be undesirable. One feature, however, to which the author appears to take no exception is the deposition discovery procedure in the federal rules, which we have been discussing. These rules which, as we have pointed out, constitute the keystone of the entire federal civil practice, are dismissed with the following brief observation:

> Another example is the federal rules for discovery which have been the subject of so much controversy. For all practical purposes these rules covering the taking of depositions, interrogatories, the production of documents, admissions, etc., operate in practice much the same as do our Ohio rules of discovery which have been in effect longer than any lawyer present can remember.[173]

It is somewhat discouraging to find an outstanding trial lawyer, who has obviously devoted a considerable amount of time and thought to the question, having such a clearly erroneous conception of the comparison between the federal deposition discovery rules and what we have found to be the law in this field in Ohio. If this misconception is generally held by experienced trial lawyers throughout the state, we sincerely trust that it will be dissipated by a careful study and comparison of the law as it exists in the two jurisdictions.

We suggest that the eminently practical value of proper deposition discovery procedure, such as that embodied in the Federal Rules of Civil Procedure, simply cannot be over-emphasized. Very recently, and without any knowledge of his correspondent that this article was in the process of preparation, the writer was the recipient of a communication from a personal friend, a trial lawyer who is a member of the bar of Los Angeles, California, who wrote in regard to a recent case:

> In this case the discovery proceedings by both plaintiff and defendants

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[172] Shumaker, *Should Ohio Adopt the Federal Rules of Civil Procedure,* 29 OHIO BAR 43, 51 (Jan. 23, 1956). William W. Barron, co-author of a well-known work on federal procedure, summed up his views of the rules as follows: "The rules have worked well. In civil cases the practice has been simplified. The element of surprise has been eliminated. The trial of cases has been expedited. Substantial savings of time and expenses have been effected."

Judge Alexander Holtzoff has said of the rules: "That the new procedure has been an outstanding success is admitted by all who have practiced under it with the possible exception of a few doubting Thomases and unreconstructed rebels."

[173] Shumaker, *supra* note 172, at 53.

> were so intense, and therefore so thorough and complete, that the defendants became fully aware of everything that we knew about their case and we became fully aware of everything they knew about our case. Consequently, both sides were able to agree upon a fair evaluation. Settlement in the sum of $435,000.00, which I personally negotiated, followed; without our having to set foot in the court room.[174]

We can think of no more telling argument in support of the views which we here advocate.

CONCLUSION

Nothing is clearer, from a review of the Oho law in the field of discovery procedure, than that generally throughout the state, and assuredly as a result of numerous decisions of the supreme court, the Ohio courts are still imbued with the old concept of the sporting theory of justice. In numerous decisions the Ohio courts have placed hampering and apparently unwarranted limitations upon discovery practice in general. Notwithstanding occasional enlightened decisions to be found here and there throughout the state, many of the courts are still reverting to applications and adaptions of the old chancery rules, particularly that discovery practice must be limited to securing information about the interrogator's own "side" of the case. The Supreme Court of Ohio has, admittedly, in several important instances, applied the attorney-client privilege in such a way as to extend it far beyond anything authorized by the language of any statute or constitutional provision, whenever the circumstances of the particular situation appear to have "impelled" the court to do so. Witnesses in Ohio still appear to be regarded as the property of and as "belonging to" one side or the other in litigation, and the cases have even gone so far as to deny to an injured person the right to secure from an opposing party in a lawsuit information, in the possession of the opposing party, concerning the identity and location of one who may be legally liable for his injury.

It is suggested that all of these limitations and restrictions upon discovery practice and procedure could be eliminated by the courts themselves, if they would only approach the problem with a realization of the fact that the pillars upon which these decisions have been erected have long since crumbled in the dust. The reasons for the once narrow concept concerning discovery, which was long ago held by courts of chancery, have been found to be utterly groundless, and that concept has itself been riddled by many decisions in other fields both in Ohio and elsewhere.

In one of his brilliant essays Mr. Justice Cardozo pointed out:

> The pressure of society invests new forms of conduct in the minds of

[174] See Vogue Theater Co. v. Twentieth Century Fox Film Corp., No. 14118-HW D. Cal., C.D., May 5, 1956.

> the multitude with the sanction of moral obligation, and the same pressure working upon the mind of the judge invests them finally through this action with the sanction of the law.[175]

Nevertheless, as was pointed out by Professor Leonard J. Emmerglick:

> The courts have not kept up the level of their contribution to the growth of law by absorbing material from the field of morals. We have come to depend for such advances mainly upon legislative and administrative agencies. . . . In many jurisdictions judges appear to administer equity with only a legal point of view, and the growth of the law is retarded.[176]

We believe there is no basis in morals for decisions which treat witnesses as the chattel property of a party to a lawsuit, and which regard their identity as permissible secrets to be closely guarded, even though, on the trial of the case, the persons whose identity has been so closly guarded may never be called to offer their testimony, because to do so would not serve the interests of the party who happens to know of their identity.

It is suggested that it is the duty of a court to make certain that every witness who can contribute anything to a determination of the issue, as to where the ultimate truth lies in any lawsuit, is encouraged and aided in so doing. It is only necessary to bear in mind an immortal statement by Professor Wigmore, which was quoted in the majority opinion in the *Story* case, that "our duty to bear testimony runs not to the parties in the present cause, but to the community at large and forever."[177]

It appears, as stated by Professor Emmerglick, that we have come to depend heavily for advances in the science of jurisprudence upon the action of legislative bodies. It also appears, from a review of the numerous Ohio decisions in the field of discovery practice, that the badly needed reforms in this field can be accomplished, with any degree of reasonable promptness, only by legislative action. The administration of justice is, and must be, concerned with the discovery of the truth, and with moral values. And with the huge growth in the amount of litigation, it has become increasingly demonstrated that the administration of justice should and must be equally concerned, wherever reasonably possible, with the compromise and settlement of pending litigation. This can only be done effectively and with fairness to all parties concerned if all parties are afforded an equal opportunity to obtain all the facts that are to be known.

Bearing these objectives in mind, we may hope to see the day dawning in the near future when discovery deposition procedure becomes the keystone to the administration of justice in the courts of Ohio, as it has been so aptly described and so effectively demonstrated in federal practice.

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[175] CARDOZO, THE PARADOXES OF LEGAL SCIENCE 18 (1928).

[176] Emmerglick, *Law and Morals*, 43 GEO. L. J. 615, 616 (1955).

[177] 8 WIGMORE, EVIDENCE § 2192 (3rd ed. 1940).