1932

Discovery before Trial

George Ragland Jr.

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DISCOVERY BEFORE TRIAL

BY

GEORGE RAGLAND, JR.
OF THE CHICAGO BAR

Research Associate in the Legal Research Institute of the University of Michigan Law School (1930-1931)

CHICAGO
CALLAGHAN AND COMPANY
1932
FOREWORD

By Edson R. Sunderland

Professor of Legal Research, University of Michigan Law School

It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial. Much of the delay in the preparation of a case, most of the lost effort in the course of the trial, and a large part of the uncertainty in the outcome, result from the want of information on the part of litigants and their counsel as to the real nature of the respective claims and the facts upon which they rest.

False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial. Under such a system the merits of controversies are imperfectly understood by the parties, are inadequately presented to the courts, and too often fail to exert a controlling influence upon the final judgment.

All this is well recognized by the profession, and yet there is a wide-spread fear of liberalizing discovery. Hostility to "fishing expeditions" before trial is a traditional and powerful taboo. To overcome its subtle influence requires more than logic and learning. Experience alone can effectively meet it.

The primary purpose of this study is to present the results of professional experience in administering discovery as a normal function of pre-trial procedure. Mr. Ragland has devoted two years to the work, the first as

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Graduate Fellow, and the second as Research Associate, in the Law School of the University of Michigan. His thesis for the graduate degree in law dealt with the history and theory of discovery, and his researches included practically everything to be found in print upon the subject. With this as a foundation he devoted a second year to a field study of the actual use of discovery in all the jurisdictions of the United States and Canada where it had been effectively developed. The book, therefore, represents an extensive survey of the current practice regarding this important procedural device, in the light of its history and its logical theory. It is being published under the auspices of the Law School of the University of Michigan for the information of the American bench and bar, in order to exhibit the great possibilities of discovery as a means of removing some of the needless hazards of litigation.

Mr. Ragland has made a unique contribution to the literature of the administration of justice. The method employed, which involved interviews with hundreds of lawyers, judges and court officials in many jurisdictions, was difficult and laborious, and produced a vast amount of detailed data which he has analyzed and presented with great skill. He is an accurate observer and reporter, and his conclusions are well founded and conservative. The book is submitted to the judgment of a critical profession with full confidence that it will prove to be of unusual interest and value.

Ann Arbor, Michigan
October 1, 1932
PREFACE

The purpose of this volume is to present in a convenient and usable form a comparative study of the expedients which are being employed in various American and English jurisdictions for the purpose of facilitating pre-trial practice, to describe the practical operation of the different devices, and to show their effect upon the general administration of justice. An analysis of the statutory and case law has been combined with data which shows the practical operation of the procedure in the everyday work of the lawyer and judge. Field studies were made by the author in different cities of the following fourteen jurisdictions for the purpose of ascertaining the experience of the profession with each type of device which is being used: Indiana, Kansas, Kentucky, Massachusetts, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Ontario, Quebec, Texas, and Wisconsin. Interviews were sought with representative judges, lawyers, and where there were such, officials in charge of discovery examinations. Other means employed in obtaining information included the study of trial court records of examinations for discovery, observation of actual examinations and correspondence with lawyers in states other than those in which field investigations were made.

GEORGE RAGLAND, JR.

Chicago, Illinois
October 1, 1932
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CHAPTER I

INADEQUACY OF PLEADING AS BASIS OF PREPARATION FOR TRIAL

Common Law Pleading

Written pleadings formed the traditional basis of preparation for trial in courts of common law. The chief objective of common law pleading was the production of a single issue which might be tried by the jury. The facts of the controversy were supposed to be narrowed down to a single issue from the respective allegations of the parties. The plaintiff was required to plead his case according to its legal effect and, therefore, could not plead evidence but only the ultimate facts upon which his claim rested.¹ When the facts had thus been stated by the pleader, the opposite party was required to deny specifically each allegation which he wished to controvert at the trial. All the well-pleaded facts not denied by the adverse party were deemed to be admitted. This device, applied to the alternate pleadings, was supposed in the end to produce a single controverted point or issue, but a great number of highly technical rules were required to make it effective. As has been said, "refinements of pleading grew up on the court's passive willingness to let issues emerge out of the allegations recited

¹Stephen on Pleading, 341.
to it by contending pleaders in antiphonal rivalry, and the stilted form which written pleading eventually assumed was born of the tradition of care with which every statement in one’s opponent’s pleading had to be met to the court’s satisfaction without disclosing to that opponent too much of one’s own case."

It is doubtful whether common law pleading ever afforded an adequate basis of preparation for trial. In any event there were two factors at work which ultimately destroyed to a large extent whatever degree of efficiency the system formerly had. Clear statements of the facts of the case in the plaintiff’s pleadings gave way to fictitious and vague allegations which were couched in antiquated terminology. The plaintiff was more concerned with invoking the judicial process by incantation of the precise ritual than he was in reciting the facts of the case. The defendant, too, was allowed to conceal his true position under the guise of an easy formula, the general issue. The general issue was used not only for the purpose of denying everything in the opposite pleading, whether really controverted or not, but also for the purpose of enabling the party pleading it to prove matters not suggested on the face of the pleading.

Especially did use of the general issue work havoc with the system of special pleading. This was the oldest form of traverse, which Stephen describes as “an appropriate plea fixed by ancient usage as the proper mode of traversing the declaration, in cases where the defendant means to deny the whole or the principal part of its allegations.” Its effect had always been to put a summary close to the pleadings, thus, as Stephen says, “narrowing very considerably the application of the greater and more

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8 Rosenbaum, Rule-making Authority in the English Supreme Court, 109.
8 Stephen on Pleading, 172.
INADEQUACY OF PLEADING

subtle part of the science of special pleading," and making it impossible for the pleadings to perform their theoretical function of disclosing the real points in dispute between the parties. Both the courts and the legislature encouraged its use. An act passed in 1650 provided that the general issue might be pleaded in any case whatsoever and though, as Holdsworth has pointed out, "this sweeping change did not outlive the period of the commonwealth, a number of statutes were passed in the Seventeenth and Eighteenth Centuries, expressly allowing the general issue to be pleaded in certain actions in which it would not otherwise have been applicable." Blackstone has pointed out exactly why the general issue, after that date, was increasingly used: "formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a special plea; which was originally intended to apprise the court and the adverse party of the nature and circumstances of the defense and to keep the law and fact distinct. And it is an invariable rule, that every defense, which cannot be thus specially pleaded, may be given in evidence, upon the general issue at the trial. But, the science of special pleading, having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves everything open, the fact, the law, and the equity of the case, and have allowed special matter to be given in evidence at the trial." 

4 Acts and Ordinances of the Interregnum (Firth and Bait) II, 443, 444; an Act of Bot. 23, 1650, cited by Holdsworth's History of English Law, IX, 321, note 3.
5 Id.
6 Blackstone's Commentaries, III, 305.
Upon the passage of the Statute of Anne in 1705, it became the fashion for defendants to add the general issue even when they filed special pleas of confession and avoidance. This had the effect of preventing the operation of the rule of implied admission by failure to deny. The practice was justified on the ground that it saved the defendant from the risk of a judgment non obstante where the pleadings raised a technically immaterial issue. Such men as Runnington advocated an even greater use of the general issue. "Nothing," he said, "would more prevent 'the many miscarriages of causes,' or more promote the ends of justice, than to enact that the defendant shall in all actions, on giving previous notice of his intended defense to the plaintiffs, be permitted to plead the general issue, and give the merits of his case in evidence." This was the policy which was adopted, with the exception that the defendant was not required to give "notice of his intended defense." Whereas formerly nothing could be shown under the general issue except that which went to dispute the truth of facts stated in the declaration, it became customary to allow also matters which merely avoided liability. To a declaration of indebitatus assumpsit, for instance, it became possible, as Brougham pointed out in 1821, to set up no less than eight different defenses under a plea of the general issue of non assumpsit. These were a denial of the contract, payment, usury, gaming, infancy, accord and satisfaction, release, and coverture. Use of the general issue prevented the disclosure of the real

7 Anne, ch. 16, sec. 4. This statute also diminished the possibility of reducing the controversy to a single point since it allowed the defendant to plead as many several pleas as should be necessary to his defense.
9 Ex parte Pearce (1885) 80 Ala. 195.
10 Holdsworth's History of English Law, IX, 322.
11 Reppy, "The Hilary Rules and Their Effect," 6 N. Y. Univ. L. Rev. 95, 111.
12 Cited in Holdsworth, op. cit. IX, 323, note 4.
points at issue. Especially was this true of such actions as trespass on the case, trover, and ejectment, for in these actions the declaration itself was already marked by an all too great generality of statement.\textsuperscript{18} The situation became so intolerable in the early part of the Nineteenth Century that reforms in pleading were adopted in the form of the Rules of Hilary Term 1834. The principal effect of these rules was to "restrict drastically the scope of the general issue."\textsuperscript{14} The reform, however, did not prove satisfactory. The effect of the Hilary Rules has been accurately estimated thus, upon the basis of a survey of cases decided in the ensuing twelve years: "Under the common law system the matter was bad enough with a pleading question decided in every sixth case. But under a Hilary rules it was worse. Every fourth case decided a question on the pleadings. Pleadings ran riot."\textsuperscript{15}

The confusion occasioned by the attempt to make written pleadings the chief, if not the only, basis of preparation for trial at common law was tersely stated by Bentham when he said: "General pleading conveys no information, but there is an end to it; if any information is conveyed by pleading, it is by special pleading, but there is no end to it."\textsuperscript{16} The mistake of the common law system of procedure in the final analysis was that written pleadings were supposed to do what they were inherently incapable of doing. Instead of recognizing the limitations of pleadings as a fixed basis for litigation and supplementing them by other devices, pleadings were made increasingly complicated and technical in an attempt to force them to produce impossible results.

\textsuperscript{13} Millar, Ficta Confessio as a Principle of Allegation in Anglo-American Civil Procedure, 23 Illinois L. Rev. 215, 222.
\textsuperscript{14} Holdsworth's History of English Law, IX, 324; Reppy, "The Hilary Rules and Their Effect," 6 N. Y. Univ. L. Rev. 95 ff.
\textsuperscript{15} Whittier, Notice Pleading, 31 Harv. L. Rev. 507. Id.
\textsuperscript{16} Rationale of Judicial Evidence, Works VII, 274.
Pleading in courts of chancery performed a quite different function from pleadings in courts of common law. There was no formal trial with witnesses in equity until a comparatively recent date. Pleadings were supposed to present the facts of the case to the court in so complete a fashion that the court would be able to render its decision thereon. The pleader set forth detailed statements of the evidence in support of his case. A bill in equity consequently was a very lengthy and elaborate affair. Indeed as Story has said: "Equity pleading has now become a science of great complexity, and a refined species of logic, which requires great talents to master in all its various distinctions and subtle contrivances." A bill consisted of nine parts, the most important of which, as far as disclosure of the facts of the case was concerned, were the stating part and the interrogating part. The stating part was supposed to contain a full narrative of the facts and circumstances of the plaintiff's case. The interrogating part of the bill contained questions addressed to the defendant. The defendant's answer was supposed to bring forward such other facts and circumstances as might be considered essential to his defense, as well as to make full response to the interrogatories contained in the bill. A defense by answer in equity always meant an affirmative defense. Defense by denial was not necessary because, unlike the practice of common law, there was no constructive admission by failure to deny.

The later reform of pleading by the codes, it has been said, owed much to equity pleading. Even so, equity

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17 Langdell, Summary of Equity Pleading, sec. 57.
18 Story, Equity Pleading (7th Ed.) sec. 13.
19 Id. sec. 27. Langdell, Summary of Equity Pleading, sec. 56.
20 Story, Equity Pleading (7th ed.) sec. 849; Great Britain Chancery Commission Report (1852) 6.
21 Langdell, Summary of Equity Pleading, sec. 79.
22 Clark on Code Pleading, 13.
pleadings were not intended to prepare a case for a formal trial with witnesses. They were intended to disclose all of the evidence of the case rather than to reduce the controversy to such a form as would make a trial with witnesses practicable.

**Code Pleading**

Reforms in pleading under the codes of practice which have been adopted in many of the United States have not rendered pleadings a sufficient and satisfactory basis of preparation for trial. It is true that some changes have been made in the direction of a more complete disclosure of the facts in dispute. Draftsmen of the first codes recognized that common law pleading too often contained formal and general statements which did not distinctly set forth the pleader's case. Accordingly the codes required that parties *plead the facts*, not the evidential facts but the material operative facts. The codifiers considered the requirement that the actual facts be pleaded in simple and concise language to be "the key of the reform" which they were proposing. While the defendant is not allowed to make a general denial of all of the allegations of the complaint in a few code jurisdictions which require that every allegation of the complaint be specifically denied, the more usual rule under the codes is to allow general denials.

Some of the same factors which made common law pleading ineffective as a means of disclosing the facts in issue are to be seen at work under the code practice. Even though a pleader is faced with the requirement that he plead the facts on which he relies, he often copies his complaint direct from a previously approved form. Simple and concise statements of the actual facts gradually

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23 Id. 150.
24 First Report, New York Commissioners on Practice and Pleading (1848) 137.
25 Clark on Code Pleading, 392.
have given way to statements couched in the language of form books. The complaint used in one negligence action, for example, could, with slight changes of wording, be used with equal propriety in a dozen similar cases. A comparatively small portion of the facts involved are disclosed by the pleadings. The defendant, too, can conceal his real position by use of the general denial. By denying "each and every allegation" of the complaint, he gives no indication as to what statements he will actually contest at the trial. Even in the few code jurisdictions in which it is required that denials be specific rather than general, lawyers often make a literal denial of every allegation, thus effecting what is in reality a general denial. The final result is that code pleadings do not afford a satisfactory solution of the problems of pre-trial practice. There is needed some additional device or devices for the clarification of issues and for the elimination of fake claims.

Reformed English Pleading

Pleadings are no longer regarded as the primary basis of preparation for trial under the reformed English procedure. Rather pleadings are regarded as mere forecasts of the points in dispute and are supplemented by discovery and various pre-trial administrative devices. Reforms under the Judicature Acts of 1873 and 1875 were predicated upon the view that it is impossible to expect written pleadings alone to provide a sufficient means of pre-trial practice. Pleadings may be dispensed with entirely in many types of actions. Every action is commenced by a writ of summons.26 The plaintiff must endorse on the writ the general nature of the claim upon which he sues. It is not necessary that he set forth the precise ground of complaint or the precise remedy or

26 Annual Practice (1932) Order II.
relief to which he considers himself entitled. In actions to recover a debt or liquidated claim and in actions to recover possession of land or possession of specific chattel, the plaintiff may specially endorse the writ with a short and concise statement of his claim, and this is all the pleading there is in the action. Even in cases in which the plaintiff endorses the writ generally rather than specially it is not always necessary for the parties to file pleadings. Since 1897 the question as to whether pleadings are necessary in an action and the time within which such pleadings must be filed is a matter for the master to decide. In each individual case the matter is presented to the master on a preliminary reference known as the hearing on summons for directions.

When pleadings are required they consist of a short and concise statement of the material facts upon which the party relies. The Judicature Acts required that: ‘‘Statements shall be as brief as the nature of the case will admit and every pleading shall contain as concise as may be, a statement of the material facts on which the party pleading relies, but not the evidence upon which they are to be proved.’’ The present rules provide that: ‘‘Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence upon which they are to be proved.’’ General denials are not and never have been allowed under the reformed English practice. The present rules provide that allegations of fact in a pleading if not denied specifically or by necessary implication are taken to be admitted.

27 Id. Order III.
28 Id. Order III, rule 6.
29 Rosenbaum, Rule-making Authority in the English Supreme Court, 54.
30 Annual Practice (1932) Order XIX, rule 4.
31 Hepburn, Development of Code Pleading, sec. 297.
32 Annual Practice (1932) Order XIX, rule 13.
Pleadings have been simplified by these reforms in England and some of the faults which existed under the common law system and under the equity system, respectively, have been corrected. But even so, pleadings are not supposed to perform the full function of disclosing and sifting the facts of the case before trial. They have been supplemented by other procedural devices which make possible a more thorough preparation for trial.
CHAPTER II

DEVELOPMENT OF DISCOVERY PROCEDURE TO SUPPLEMENT PLEADING

Ancillary Pre-Trial Devices in Courts of Common Law

Two ancillary devices were employed to supplement pleadings and to furnish additional means of preparation for trial in courts of common law. These were the bill of particulars and the bill of discovery. The classic description of the bill of particulars is thus given in Tidd’s Practice: "Where the declaration does not disclose the particulars of the plaintiff’s demand • • • the defendant’s attorney or agent may take out a summons before a judge for the plaintiff’s attorney or agent to show cause, why he should not deliver to the defendant’s attorney or agent, the particulars in writing of the plaintiff’s demand, for which the action is brought, and why all proceedings should not in the meantime be stayed. This summons, which cannot, it seems, be had till after the defendant has appeared, is usually taken out before a plea; and unless good cause be shown to the contrary, the judge will make an order, agreeably to the summons, which operates as a stay of proceedings till the particulars are delivered." 1 The real purpose of ordering the bill of particulars was to limit the generality of pleading and to more fully disclose the facts of the case. Their object was to give the parties every reasonable facility for coming to the trial fully prepared for what might be produced by the other side. 2 At common law granting or

1 Tidd’s Practice (3rd ed.) vol. 1, 534.
2 Liscomb v. Agate (1889) 4 N. Y. S. 167.
refusing a demand for particulars was a matter within
the sound discretion of the court under the facts of the
particular case. On an entire failure to furnish a bill
of particulars when ordered, the court could order a stay
until it was furnished or it could strike out the pleadings
respecting which the particulars were required and not
given.8

A second additional means of preparation for trial was
afforded by the equitable bill of discovery. Discovery
of facts and discovery and production of documents
could be had in aid of actions at law by application to
courts of chancery. Spence in his treatise on Equitable
Jurisdiction shows how ancient this practice was:
"Where discovery was wanted in order to sustain an
action at law, without reference to any equitable ques­
tion, the Court of Chancery, certainly as early as the
reign of Henry VI, entertained jurisdiction to compel
it."4 The statute of 36 Henry VI, p. 26, provided in part :
"Where certainty wanteth the common law faileth, but
yet help is to be found in Chancery for it."5

One of the chief objectives of the common law pro­
cedure acts which were passed in the early part of the
Nineteenth Century was that courts of common law be
empowered to grant complete relief without the necessity
of resort to chancery. In line with this policy an attempt
was made to empower the law courts to administer the
remedy which equity formerly had given by bills of dis­
covery. The Commissioners on Courts of Common Law
in 1830 circularized the bar of England with these ques­
tions: "Would it not be desirable, in order to obtain
the benefit of a discovery without having recourse to a
court of equity, that the parties in a cause should be
examined upon oath either personally, or by interro­

3 31 Cyclopedia of Law and Procedure, 571.
4 Spence's Equitable Jurisdiction, vol. 1, 677.
5 Id.
atories? At what stage of the proceedings should this be done, and before whom, and what regulations would you suggest for the purpose of carrying this measure into effect?" 6 The answers which were sent in by the bar did not favor the innovation which was proposed. 7 It was not until the passage of the second common law procedure act in 1854 that law courts were allowed to administer discovery. Section 51 of the act allowed parties to deliver with their pleading interrogatories to their adversary, who was required to answer them under oath. For failure to answer without just cause the punishment was as for contempt. Section 52 of the same act provided the mode by which a party could obtain the appropriate court order allowing interrogatories, namely, upon an application under oath that the party believed the matter sought was material, that he had a good cause of action, and that discovery was not sought for purposes of delay. 8

DEVELOPMENT OF DISCOVERY PROCEDURE IN COURTS OF CHANCERY

The first chancellors were churchmen and accordingly procedure in courts of chancery was modelled in many respects after procedure in the ecclesiastical courts. The canon law practice is especially significant in respect to the development of discovery procedure in equity. Pleadings occupied a relatively unimportant place in pre-trial practice in the ecclesiastical courts. The object of the plaintiff’s pleading was "not to state the facts which plaintiff would prove on the trial, but to identify the claim, to indicate its legal nature, and to specify the relief which the plaintiff sought; and thus to enable the defendant to decide whether he would resist the claim or

7 Id.
submit to it, and to assist the judge in framing his sentence.” 9 As the pleadings were always in the affirmative there was no such thing as a denial corresponding to the common law traverse; all the defendant had to do was to indicate by oral statement in court whether or not he would contest the plaintiff's claim. If he indicated that he would so contest, all of the facts stated by the plaintiff were deemed to be denied.10

Regarding pleadings as a mere preliminary forecast of the issues to be tried, the ecclesiastical courts provided an additional means of reducing the controversy to a justiciable form. The plaintiff was required, in a series of separate allegations which were not a part of the pleading and which were called positions or charges of evidence, to set forth in detail the evidence in support of the facts which he had alleged in his pleading and to demand of the defendant a categorical answer of "yes" or "no" to each proposition. This detailed statement or charge of the party's own evidence was divided into paragraphs which were numbered, and each paragraph was called a position; the whole instrument was called positions; and the procedure was called positional. The defendant had to proceed in the same way as to the evidence supporting his affirmative defense, if he had pleaded such. The adverse party could object to any particular charge and ask that he be relieved from answering, on the ground that the matter was impertinent, or irrelevant, or that the statement was bad for uncertainty, or that it was set forth in negative form. But once the positions were held admissible it was incumbent upon the adverse party to categorically admit or deny them. If he did neither, it was held equivalent to an admission.11

9 Langdell, Summary of Equity Pleading, sec. 5.
10 Id. sec. 6.
11 This admission was not accomplished ipso jure but only upon the intervention on the part of the court to make the admission effective. Millar, ficta confessio as a principle of allegation in Anglo-American Civil Procedure, 23 Ill. L. Rev. 215, 216.
This was exactly the reverse of the rule applied to the pleadings themselves, for there a failure to do anything was equivalent to a denial.

Englemann observes that this procedure in Romano-canonical law "possessed the great advantage of dispensing with proof of all positions either expressly admitted or left undenied, and of lending an extraordinary degree of precision to the propositions remaining to be proved." Among the writings of the canonists we find similar encomiums on the effectiveness of the method, as for instance, the following: "Positions have long been used for the purpose of relieving the litigant of the onerous burden of proof, by means of admissions obtained from his adversary." Pleadings and discovery proper were commingled in equity pleadings. The result was that pleading in equity assumed the form of a detailed statement of the party's evidence. The bill in equity not only showed a right to relief founded upon a statement of facts, but it also demanded the personal answer of the defendant to the plaintiff's evidence stated in the bill. The part of the defendant's answer which set up affirmative allegations by way of defense and the part of the answer responsive to the charges of evidence were even more closely blended than were the two corresponding elements of the bill. In fact the union was so close that for a long period it was not noticed that the answer contained these two distinct elements. About 1700 draftsmen began to insert interrogatories in bills for the purpose of obtaining a more complete answer from the defendant. However, no interrogatory was permissible

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12 Englemann, History of Continental Civil Procedure (Millar's translation) 472.
13 Decretals of Pope Clement V., Lib. 5, tit. 11, c. 2., cited in Langdell, Equity Pleading, sec. 22.
14 Gilbert, Forum Romanum, 90.
15 Langdell, Summary of Equity Pleading, sec. 76.
16 Hare on Discovery, 223.
unless it was founded upon a charge or statement of evidence in the bill. In theory there was no necessity for the use of interrogatories because the defendant was already required to categorically answer each and every charge of evidence. Interrogatories in time assumed an independent status as an important part of equity pleadings. Gradually over a period of more than a century they ceased to be used as mere specifications of the statements of evidence which should be answered. While theoretically they still required a supporting charge, in reality they became independent of the charging portion of the bill. This development facilitated the separation of interrogatories from the bill proper. Interrogatories already had a separate status and use in the chancery bill of discovery which was employed as an ancillary remedy in law actions. Discovery without any other relief was the sole object of bills of discovery and consequently such bills were composed of interrogatories entirely. Apparently David Dudley Field, of New York, first suggested the separation of interrogatories from the pleading in all chancery pleadings. His proposal was "that the practice of obtaining discovery by answer in equity, be discontinued, leaving the bill of complaint and answer to be regarded merely as pleadings," for, said Field, "if the practice of obtaining discovery by answer in equity were discontinued the pleadings would naturally fall into a plain, short statement by each party of his own case. May not a discovery be obtained in some other way?"

A similar recommendation of the English Chancery Commissioners was adopted, that: (1) Every bill should contain a concise narrative of the material facts, matters and circumstances on which the plaintiff relies; (2) a bill should not contain interrogatories for the examination of the defendant; (3) the plaintiff should file separate

17 From an essay of Field's published Jan. 1, 1847, found in Speeches and Papers of David Dudley Field, vol. 1, p. 230.
Development of Discovery

interrogatories for the defendant to answer; and until the plaintiff files such interrogatories the defendant need not answer the bill.18

Discovery Under the Codes

Draftsmen of the New York Code of Procedure of 1848 recognized that discovery procedure should play an important part in the reforms which they proposed. The Commissioners in their note to the sections of the New York Code of Procedure dealing with the subject of discovery, said: "The provisions contained in this chapter, we have considered so important to the success of our system, that from the first we have contemplated their introduction. Meantime the legislature, at their late session, have passed an act upon the subject. That act, however, contemplates the examination at the trial only. We think it important to extend it so as to permit the examination to take place before the trial at the option of the party.

"Before the act of the last session, whenever a party sought a discovery from his adversary, he was obliged to file a bill in equity, called a bill of discovery. The proceeding was dilatory and expensive. If the examination be had at all it may be had in the same action as well as in another. That it should be had in some form our law has always admitted. The difficulty was, that the process to obtain it was oppressive and often ineffectual.

"One of the great benefits to be expected from the examination of the parties is the relief it will afford to the rest of the community, to a considerable degree, from attendance as witnesses, to prove facts, which the parties respectively know, and ought never to dispute, and would not dispute if they were put to their oaths. To effect this object it should seem necessary to permit their examina-

18 15 and 16 Vict. Chap. 86, secs. 10-12. See also Langdell, Discovery Under the Judicature Acts, 12 Harv. L. Rev. 16, 166.
tion beforehand, that the answer of the party may save the necessity of a witness."

Many of the other American jurisdictions which adopted codes of practice modelled after the New York Code of Procedure of 1848, overlooked the importance of discovery as such and its relation to the general scheme of pleading and pre-trial practice under the code. A number of these jurisdictions, however, have remedied the defect by enacting liberal provisions for taking depositions generally. This has made possible a combination of the methods for discovering and preserving the testimony of parties and witnesses alike. It has proved an entirely feasible way of allowing oral examinations for discovery before trial.

Discovery Under Reformed English Procedure

Draftsmen of the English judicature acts devised a combination of the devices for obtaining discovery before trial which had formerly been used in courts of common law and courts of chancery respectively. The purpose of the combination was "to obtain the benefit of the extended principles of the court of chancery and to combine with them the simplicity of the common law method." Briefly the system of discovery set up under the judicature act of 1875 provided that any party might, after the first pleadings had been exchanged, deliver to his opponent without leave, a set of written interrogatories requiring sworn answers. Rules of court provided full details as to the times and methods for requesting discovery and for enforcing the right, by penalties, when refused. Discovery as well as other pre-trial administrative devices has played a prominent part in the reformed English practice.

19 Report of Commissioners on Practice and Pleading (1848) p. 244.
20 Rosenbaum, Rule Making Authority, 58.
CHAPTER III

PRESERVATION OF TESTIMONY BY MEANS OF DISCOVERY

Preservation as well as discovery of testimony is one of the important functions of pre-trial procedure. It is important that the lawyer have at his disposal adequate means of providing for the contingency of the death or removal of necessary witnesses, since cases are not reached for trial until months and sometimes years after the occurrence of the transactions in question. This is especially true in the large cities where there is a shifting population and where court calendars are so crowded that there are unusual delays in reaching trial. The law has always recognized the need but the machinery which it has provided to supply it too frequently has been cumbersome and inadequate.

Courts of common law for a long period of time furnished no machinery to perform this function. Consequently courts of chancery were called upon to supply the defect. Just as courts of chancery entertained bills of discovery, which preserved as well as discovered the testimony of adverse parties, so, likewise, did they entertain bills to perpetuate testimony and to take testimony de bene esse in aid of actions at law.¹ The purpose of both of the latter remedies was to provide a means of preserving the testimony of witnesses generally. In the early part of the nineteenth century common law courts were empowered by special statutes to give the same remedy which chancery formerly had given by these

¹ Story's Equity Jurisdiction (2nd English ed.) secs. 1505, 1513; Weeks, Law of Depositions (1880) sec. 10 ff.
ancillary bills. The statutory remedy became known as deposition procedure.

There has been an increasing tendency under modern practice to combine the methods of obtaining discovery and preservation of evidence, respectively. As a matter of fact there usually can be no discovery without incidental preservation. Conversely, preservation often affords an incidental discovery. Why not, therefore, combine the two procedures into a single one? This is the trend of the modern practice. Two developments have removed differences in the two types of procedure which formerly made their assimilation less practicable. At one time parties to an action were neither competent nor compellable to testify as witnesses but later this disability was removed. When parties became witnesses in fact it was an easy step to provide that they be examined as witnesses. There has also been a tendency to make liberal allowance for the taking of depositions of all witnesses on the theory that it is impossible to tell when a witness may die or become inaccessible and that therefore a litigant should not be required to show the witness is unavailable before taking his deposition. It has been thought sufficient to make the unavailability of the witness a condition to the use of the deposition at the trial rather than to the taking thereof.

If depositions may be taken from both witnesses and parties and if the right to take is unconditional, a very liberal method of discovering and preserving evidence is afforded. If the right to take is unconditional there is no reason for the court to inquire whether the preservation of testimony or the discovery of testimony is the primary objective of the applicant. The words of the Supreme Court of Kansas in this regard are classic: "Now the giving of testimony, whether on the trial or by deposition, is not a privilege of the witness, but a right

2 Wigmore on Evidence, IV, sec. 2217.
of the party. He need not solicit; he can compel. It seems to us therefore that under our statutes a witness may be compelled to give his deposition, although he reside in the county where the action is pending. It is said that this power is liable to abuse, and that a witness may be compelled to give repeated depositions, and still be present at the trial. Courts will see that this power is not abused, or the time of witnesses unnecessarily taken. It is also said that large amounts of costs will be accumulated. This will not injure the adverse party, for a party taking depositions which he does not use must himself pay their cost. It is also said that this permits one to go on a ‘fishing expedition’ to ascertain his adversary’s testimony. This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary’s testimony.”

When first introduced there was considerable aversion on the part of the bar to the use of deposition procedure for purposes of discovery before trial. Such use of the procedure has been attacked as a “fishing expedition” and as being foreign to the traditional purpose of deposition procedure. Some lawyers have felt that, to employ words used by the Kansas Supreme Court upon another occasion, “the taking of the deposition of a party in a pending case merely to find out in advance what his testimony will be, and to annoy and oppress him, and not for the purpose of using the same as evidence, is an abuse of judicial authority and process.”

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4 In re Davis (1898) 38 Kan. 408, 16 Pac. 790.
This hostility on the part of the bar, however, is short-lived once the use of deposition procedure both to discover and preserve evidence is given a fair trial. Its very reproach becomes its glory—the courts say that the virtue of the device is that it is a means of discovering evidence. The following quotations from various opinions will serve to illustrate the satisfaction which such a use of the procedure gives: (1) "The code confers the right on either party to take the deposition of the adverse party, not merely for use as evidence if the necessary conditions arise, but for the purposes of exploration, or of ascertaining the facts on which the adverse party relies." 6 (2) "This is a very wise provision of the code of procedure, taking the place of the old bill of discovery and affording a much more speedy and efficient remedy than was given in that mode." 6 (3) "Taking the deposition of a party is the only substitute we have for a bill of discovery under our practice." 7 (4) "It was the intention of the legislature • • • to remove every barrier to the discovery of the truth." 8 (5) "The common law originally was very strict in confining each party to his own means of proof, and, as it has been expressed, regarded a trial as a cock-fight, wherein he won whose advocate was the gamest bird with the longest spurs. But we have come to take a more liberal view and have done away with most of those features of trials which gave rise to that reproach." 9

Effective machinery for discovery and preservation of evidence already exists in all of the states which allow

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6 Valliant, J., in Tyson v. Savings & Loan Association (1900) 156 Mo. 588, 57 S. W. 740. Compare the earlier case of Ex parte Krieger (1879) 7 Mo. App. 367.
the taking of depositions to be an unconditional right of the party, and impose limitations, depending upon the availability of the witness, only upon the use of the deposition at the trial. Already approximately half of the states of this country have this type of deposition statute and other states could obtain the same result by a simple statutory amendment to the effect that the conditions which are now imposed for the taking of depositions henceforth shall apply only to the use thereof at the trial and that depositions may always be taken as of right. It would facilitate the practical use of the device and reduce the possibility of illiberal decisions limiting such use if the deposition statutes were so labelled as to indicate that use both for discovery and for preservation of testimony is intended. Indeed, the greatest danger incident to the use of ordinary deposition procedure for purposes of discovery before trial is that since it is not labelled discovery procedure courts and lawyers hesitate to use it as such. The easiest way to remove this danger is to specifically label the statutory provisions discovery and deposition procedure.

It is to be regretted that the first tentative draft of the proposed uniform deposition act submitted to the Commissioners on Uniform State Laws in 1929 has not made provision for such a practice. The proposed act provides that, "depositions may be taken of any witnesses who are about to be beyond reach of a subpoena or for some cause are expected to be unable to attend court at the time of trial." In a note to this provision it is said: "Question is raised as to whether under this Act the deposition of a party could be taken and if so under what circumstances. And if his deposition could be taken, could he be compelled to produce books, documents, or things under his control? Some states have

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10 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings (1929) 360.
special statutes or rules which permit examination of parties before trial. The entire question could be comprehended in this statute but, as now drafted, Section 1 would have to be modified. If, however, it is desired to exclude examination of parties hereunder, it could be so stated, perhaps in Section 1. To include the whole subject here might introduce a controversy which would be undesirable. However, it should be broad enough to cover parties beyond the reach of a subpoena or who cannot attend trial."

Perhaps one explanation of the fact that this type of deposition statute has been proposed is the personnel of the committee which drafted it. Lawyers from the following states were on the committee: Washington, Delaware, Utah, Iowa, Illinois, Mississippi, and Oregon. None of these states exhibits an effective discovery practice based upon a statute which gives an unconditional right to take depositions. It seems rather unfortunate that the committee had no representative from such states as Ohio, New Hampshire, Missouri, Kentucky, Indiana, Nebraska and Texas, where liberal deposition statutes have been the means of developing an effective practice for discovery and preservation of testimony.

11 Id.
CHAPTER IV

METHODS OF DISCOVERY IN DIFFERENT JURISDICTIONS

There are two basic methods of discovery of testimony which are being employed in the different jurisdictions. In addition there are several methods for discovery and inspection of documentary evidence. The two methods of discovery of testimony are written interrogatories and oral examination before trial. Under the former the party serves a series of written questions upon his adversary who is required to answer under oath. Under the latter the person from whom discovery is sought is subjected to an examination upon oral questions propounded by the applicant for discovery. The questions and answers are recorded in the form of a deposition.

The written interrogatory practice is modelled after the chancery procedure for discovery. Considerations of procedural policy, however, favor an oral examination. Ever since the time of Jeremy Bentham who pointed out the superiority of what he termed "confrontatory" to "epistolary" examinations\(^1\) lawyers have increasingly recognized that an oral examination is the only efficient means of taking testimony. David Dudley Field, one of the draftsmen of the New York Code of Procedure, consistently urged the general adoption of this mode of taking testimony by all of the courts.\(^2\) Accordingly the commissioners in their note to the sections of the New York Code of Procedure which provided for an oral examination before trial, said: "Two modes of examination have

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been proposed, one oral, the other upon written interrogatories. The latter is the method of the civil law. We think the question is decided by the act of December, and if it were not we should still prefer the oral examination. A written deposition taken in private is not the best means of eliciting the truth; nor do we see why the law should be so tender of the consciences of parties when it is so hard with the consciences of witnesses. These are brought into court, are made to waste their time about a matter not their own, and when called to the stand, are subjected to the most searching and often offensive examination. Why should he who has brought them here be exempted from the same scrutiny?’’

The various jurisdictions have adopted one or the other of these two methods of discovery, either the oral examination or written interrogatories. In many states discovery and preservation of testimony have been combined so that an oral examination may be had under the ordinary deposition procedure.

The statutory provisions on discovery are set forth in the appendix at the back of this volume. The provisions in the United States federal courts are given first and thereafter the other jurisdictions are listed alphabetically. The statutes and rules of court in each state dealing with oral examinations for discovery and preservation of evidence before trial, written interrogatories and inspection of documents are set forth. The number and the elaborateness of the statutory provisions is no index to the effectiveness of the practice. New York has lengthy and detailed statutes and rules of court dealing with discovery, yet the actual practice is notoriously ineffective. Ohio, New Hampshire, Kentucky and other jurisdictions, on the other hand, have developed an extensive and effective discovery practice upon the basis of a short and simple statutory authorization.

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8 First Report of the Commissioners on Practice and Pleading (1848) p. 244.
CHAPTER V

TYPES OF ACTIONS IN WHICH DISCOVERY IS AVAILABLE

Discovery Available in All Types of Actions in Many Jurisdictions

There are no prohibitions or restrictions upon the use of discovery, as far as the type of action is concerned, in most of the jurisdictions which have procedures for discovery before trial. On the contrary the usual provision is that discovery may be had in all civil actions. In some states, such as Missouri for instance, it is also possible to have discovery under the guise of depositions in criminal actions. The latter aspect, however, is without the scope of this treatise. In all of the jurisdictions in which field investigations were conducted, except New York, it was found that discovery is actually used much more extensively in automobile accident litigation than in all other types of action combined. Some lawyers who take discovery examinations as of course in personal injury cases seldom resort to the device in other cases.

The following statistics from Wisconsin and Ontario, respectively, show that while personal injury cases exhibit the most extensive use of discovery, it is actually employed in all kinds of litigation in those jurisdictions. These statistics were obtained by examination of fifty consecutive records of cases in which discovery had been used in each of the following cities: Milwaukee, Wisconsin; Madison, Wisconsin; and Toronto, Ontario.
Chart Showing Types of Actions in Which Discovery Is Used in Wisconsin

<table>
<thead>
<tr>
<th>Type of Action</th>
<th>Milwaukee</th>
<th>Madison</th>
<th>Composite</th>
</tr>
</thead>
<tbody>
<tr>
<td>Automobile Accident</td>
<td>24</td>
<td>21</td>
<td>45</td>
</tr>
<tr>
<td>Contract</td>
<td>6</td>
<td>7</td>
<td>13</td>
</tr>
<tr>
<td>Negligence Other than</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Automobile</td>
<td>5</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Fraud</td>
<td>2</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Divorce</td>
<td>4</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Account</td>
<td>2</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>Promissory Note</td>
<td>1</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td>Malpractice</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Mortgage Foreclosure</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Assault and Battery</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Cancellation of Deed</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Slander</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Conversion</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total 13 Different Types</td>
<td>50</td>
<td>50</td>
<td>100</td>
</tr>
</tbody>
</table>

Types of Actions in Which Discovery Is Prohibited in Some Jurisdictions

Discovery is not allowed in actions to enforce forfeitures or penalties in England and Ontario. Some of the federal courts have held that, under federal equity rule 58, discovery cannot be had in patent litigation, it being the theory that discovery is inappropriate because such proceedings often are in the nature of actions to enforce penalties. There is, however, substantial authority to the effect that discovery is available in such cases, because of the fact that rule 58 itself mentions no such exception.

1 Annual Practice (1930) p. 500 and cases cited thereat; Bray’s Law of Discovery, 345; Ontario Judicature Act (Holmested, 1915) 796.
**Actions in Which Available**

Chart Showing Types of Actions in Which Discovery Is Used in Ontario

<table>
<thead>
<tr>
<th>Type of Action</th>
<th>Number in Which Discovery Was Used</th>
</tr>
</thead>
<tbody>
<tr>
<td>Automobile Accident</td>
<td>11</td>
</tr>
<tr>
<td>Negligence Other than Automobile</td>
<td>7</td>
</tr>
<tr>
<td>Contract</td>
<td>5</td>
</tr>
<tr>
<td>Promissory Notes</td>
<td>4</td>
</tr>
<tr>
<td>Specific Performance</td>
<td>3</td>
</tr>
<tr>
<td>Fraud</td>
<td>3</td>
</tr>
<tr>
<td>Quasi-Contract</td>
<td>2</td>
</tr>
<tr>
<td>Mortgage Foreclosure</td>
<td>2</td>
</tr>
<tr>
<td>Cancellation of Instrument</td>
<td>2</td>
</tr>
<tr>
<td>Alimony</td>
<td>1</td>
</tr>
<tr>
<td>Possession of Realty</td>
<td>1</td>
</tr>
<tr>
<td>Malpractice</td>
<td>1</td>
</tr>
<tr>
<td>Will Contest</td>
<td>1</td>
</tr>
<tr>
<td>Collection of Assessment</td>
<td>1</td>
</tr>
<tr>
<td>Account</td>
<td>1</td>
</tr>
<tr>
<td>Guaranty</td>
<td>1</td>
</tr>
<tr>
<td>Partition</td>
<td>1</td>
</tr>
<tr>
<td>Injunction</td>
<td>1</td>
</tr>
<tr>
<td>Mandatory Injunction</td>
<td>1</td>
</tr>
<tr>
<td>Dissolution of Partnership</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total 20 Different Types</strong></td>
<td><strong>50</strong></td>
</tr>
</tbody>
</table>

Favored, is not prohibited by the English courts. Discovery in divorce proceedings is forbidden by the courts of Indiana. Discovery in actions for criminal conversation is forbidden in Ontario. The New York courts have held that there can be no examination for discovery in summary actions, since discovery is deemed to be inconsistent with the theory and spirit of such actions.

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4 Annual Practice (1930) p. 494; Bray's Law of Discovery, 550 ff.
5 Barr v. Barr (1889) 31 Ind. 240 (this case applies only to discovery by written interrogatories and not to discovery by oral examination).
6 Ontario Judicature Act (Holmested, 1915) p. 796.
7 Inter-City Apartment House Co. v. Kern (1925) 212 N. Y. S. 284; Dubosky v. Goldsmith (1922) 195 N. Y. S. 67.
TYPES OF ACTIONS IN WHICH DISCOVERY IS RESTRICTED BUT NOT PROHIBITED IN SOME JURISDICTIONS

Peculiar rules which obtain in New York in regard to the scope of discovery examination generally have made it possible for courts to restrict discovery to such an extent that it becomes almost useless in some types of tort actions and particularly in automobile accident litigation. There is a distinct division of opinion among the several departments of the Appellate Division of the New York Supreme Court in regard to the allowable scope of examination before trial in negligence cases. The question at issue is whether the examination in these cases shall be limited to such items as ownership and control of the vehicle or shall extend also to the facts of liability and damage. Generally speaking, the First Department has adhered to the rule that the examination may extend only to such items as ownership and control of the vehicle, whereas the Second Department of the Appellate Division has allowed the examination to extend to the facts of liability and damage as well. Restrictions upon the scope of the examination similar to those enforced in automobile negligence cases are also applied in such tort actions as deceit, libel and malpractice. The English courts likewise have taken the position that in most accident cases both parties are able to call witnesses and therefore do not need to interrogate upon small questions of fact relating to the details of the accident.8

The experience of lawyers in California, Missouri and Wisconsin, particularly, suggests that discovery is more apt to be abused in certain types of litigation than in others, but that the remedy is to prevent publication of the results of the examination rather than to restrict the scope of the interrogation. An excerpt from the letter

8 Griebart v. Morris (1920) K. B. 659, 666.
of a Los Angeles attorney illustrates the problem which is involved: "In certain types of cases, such as seduction under promise of marriage, and malicious prosecution, depositions are frequently threatened and taken for blackmailing purposes. I recall particularly a case in which the newspapers were full of salacious details disclosed by a deposition. That was a year or so ago and I have never heard anything further of the case, so I presume it was finally disposed of out of court. No doubt everyone reading those articles thought that the witness interrogated had been guilty of the indiscretions charged and yet there may not have been a word of truth in the charges. However, this blackmailing use of a deposition is very infrequent. But it would be an easy matter to entirely guard against it by providing that on the application of either party the deposition would be taken behind closed doors, sealed by the notary and filed as sealed by him, and not opened until offered in evidence by one party or the other. I think any state granting rights similar to those given by our discovery statute should include some such provision." Missouri lawyers complain that in election contests, divorce proceedings and alienation of affection actions, particularly, an opportunity is afforded for what is called a "newspaper trial of the case." The Milwaukee courts have met this situation in the way suggested by the Los Angeles attorney. They have enacted a rule of court which forbids the opening of the record of a discovery examination except under order of court.
CHAPTER VI

RESPECTIVE RIGHTS OF PLAINTIFF AND DEFENDANT TO DISCOVERY

Discovery in equity was of more importance to the plaintiff than to the defendant. It was primarily the duty of the defendant to answer the interrogatories which the plaintiff had included in his bill. Less frequently did the defendant seek discovery from the plaintiff. The tendency under modern discovery practice is to make discovery equally available to both plaintiff and defendant. Where the written interrogatory procedure obtains either party may file interrogatories for his opponent to answer. Similarly either party may have an oral examination of his adversary where this form of discovery is employed.

There are, however, certain rules in a few jurisdictions which prevent discovery from being an entirely equal right of both parties. Especially under the New York practice is there an inequality of discovery. The New York rule is that a party can have discovery only as to the issues of which he has the affirmative under the pleadings. Obviously this allows a plaintiff far greater rights to discovery than is allowed the defendant, for the reason that the former usually has the affirmative of most of the issues. Similarly, a defendant is not allowed discovery under a mere denial.

Absence of a provision for examination of representatives of corporate parties may prevent discovery from being equal. While lawyers for a corporate party can examine the adverse party the latter obviously cannot examine the artificial body. This is the situation in New
Jersey. Even under the ordinary deposition procedure the rights to discovery are not absolutely equal in the event one party is a corporation, for the corporation can examine its adversary as a party while the latter can examine the corporate representatives only as witnesses. The difference is that in one case the answers constitute admissions, while in the other case they may not.

Even in those states in which as a matter of law the rights to discovery are equal the actual use of the procedure is not always so. In most of these states defendants use the procedure much more frequently than do plaintiffs. This, however, is not true in all jurisdictions. In Wisconsin, for example, both plaintiffs and defendants use the procedure widely. In fifty consecutive cases in which discovery had been used in Milwaukee the records showed that both parties were examined in eight cases, the plaintiff alone in thirty, and the defendant alone in twelve. Similarly in Madison both parties were examined in twenty-two out of fifty cases, the plaintiff alone in twelve, and the defendant alone in sixteen. One hundred consecutive cases studied in the Superior Court of Suffolk County, Boston, indicated that under the Massachusetts written interrogatory procedure defendants had filed interrogatories approximately five times to every three times plaintiffs had done so. The special procedure for an oral examination for discovery in New Jersey, however, has been used almost exclusively by defendants. Indeed one lawyer said that he had seen hundreds of examinations and applications for examinations by defendants' lawyers, especially those representing insurance and corporate interests, but that he could remember only two cases wherein lawyers for plaintiffs had sought an examination of the adverse party. In all of the states in which the deposition is used for discovery purposes defendants employ the process much more frequently than do plaintiffs.
The following reasons have been assigned why defendants use discovery more than plaintiffs: (1) The plaintiff generally is less able to afford the expense. (2) There is a tendency upon the part of many plaintiffs' lawyers to want to get to the jury and to disparage any dissipation of their strength in the form of pre-trial moves. Corporate interests, on the other hand, often are glad to use any expedient to avoid a trial. (3) Whereas much of the business of defendants is concentrated in the larger law firms, with skilled lawyers, the plaintiffs' business usually is scattered. Often actions are initiated by men with inferior training, and a more thoroughly trained lawyer is not called into the case on the plaintiff's behalf until immediately before trial. Accordingly, the case, up until the trial stage at least, is handled by men who are either ignorant or careless in their preparation for trial. This explanation is borne out by the fact that some plaintiffs' lawyers who are careful about their preparation for trial use the process just as frequently as do defendants' lawyers. But plaintiffs' lawyers as a whole do not.

It is a mistake to suppose that simply because defendants use the process more widely the procedure favors the defendant and prejudices the plaintiff. Even in states in which plaintiffs' lawyers make little use of the device, they say that they have no hostility toward the process. Outside of New Jersey, practically no opposition to discovery was found among the several hundred lawyers who were interviewed. A typical response upon the part of the lawyers who specialize in representing plaintiffs in automobile accident litigation was that they welcomed the examination of their client if he had a good case because it enhanced the possibility of an advantageous settlement. In some states which have no provision for the oral examination of parties before trial lawyers for the plaintiff sometimes will grant an
examination of their client as a basis for settlement negotiations. This is testimony to its effectiveness in this regard. Again, many plaintiffs' lawyers said that the process had afforded them a valuable remedy in certain cases. Some stressed the fact that it afforded the outsider a means of preparation for trial which placed him more nearly on an equality with the larger firms which have at their disposal independent means of investigation. Still others said that in cases in which employees of the defendant were witnesses to the accident they had found it desirable to examine such employees just as soon as possible after filing suit, and that oftentimes these employees at such an early stage of the litigation were more sympathetic to the victim of the accident than they would be after adroit and suggestive questioning by claim agents, fear of loss of their jobs, or merely the lapse of time had dampened their sympathies.

In fairness it should be said that the little prejudice toward discovery which was found in the fourteen jurisdictions which were visited, was confined to lawyers who specialize in representing plaintiffs. In New Jersey these lawyers were uniformly opposed to the procedure, whereas defendants' lawyers favored it. But in other states no such wide-spread prejudice was found. Upon occasion defendants' lawyers said that they supposed some prejudice toward the procedure would be found among plaintiffs' attorneys. They were asked to name particular men whom they supposed entertained such prejudice. Interviews with the latter did not bear out the suppositions. Even those plaintiffs' lawyers who were said to dislike the procedure because of its dealing with so-called fake claims concealed their animosity, if they had such. While many lawyers of all types said that they had in mind specific instances in which the process had been abused, very few were willing to say
that the process as a whole was not a good thing. On the contrary, the great majority were outspoken in their praise of the device.

The ideal, of course, is that all procedural devices be available to both sides equally. The often quoted words of the Kansas Supreme Court are in point: "It is said that this permits one to go on a 'fishing expedition' to ascertain his adversary's testimony. This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary's testimony."¹ Not only is it important that the opportunity for discovery be mutually available, but it is likewise important that a mutual use of the device be encouraged. Missouri has a provision which is unique in this regard. If one party takes depositions, the other party can begin taking depositions just as soon as his adversary has finished without giving formal notice. It is only required that he make known his desire sometime during the taking of depositions by the first party.² This encourages a party to take advantage of the process whenever his adversary does so, and to this extent it fosters an equal and a mutual use of discovery.

¹ In re Abeles (1874) 12 Kan. 451.
CHAPTER VII

PERSONS FROM WHOM DISCOVERY MAY BE HAD

Discovery from Parties

The statutes very generally provide either that "adverse" or that "opposite" parties may be examined or interrogated for discovery.1 The only exception is to be found in New York where, under the amendment of 1926, the words "any other party" have been substituted for the words "an adverse party."2 Various interpretations have been given to the words "adverse" and "opposite." The latter word has been construed by the English courts to mean parties on the other side of the record, parties between whom some right is to be adjusted in the action, and parties intervening to oppose the claim of the party seeking discovery.3 The Wisconsin court has held that a co-defendant may be examined if his interests in reality are adverse.4 In states in which depositions of parties and witnesses alike are taken for discovery the statutes usually make no mention of parties as such. There the right to examine a party is obtained by virtue of the fact that he is a witness, and separate statutes which make parties witnesses are relied upon for the connecting link.

On principle it would seem that the ordinary rules as to parties under the law of pleading would suffice to determine whether a particular person is examinable for

1 The statutes are set forth in the appendix at the back of this volume.
3 Bray, Digest of the Law of Discovery, 12, 48.
4 O'Day v. Meyers (1911) 147 Wis. 549, 133 N. W. 605.
discovery as a party. In this way a number of extraneous rules regarding the real party in interest, proper and necessary parties, and the like, can be used to define the bare word "party." Accordingly the Wisconsin court has held that the real party in interest rather than a mere nominal party is the person intended, and that proper as well as necessary parties are examinable. In New Jersey and Louisiana, on the contrary, only the parties to the record are examinable. The Georgia statute expressly provides that either nominal or real parties may be examined. Special provision is made for discovery from a person in whose behalf an action is prosecuted or defended in Ontario, North Carolina, South Carolina and South Dakota. The converse situation, namely, the right to discovery from assignors, who under the real party in interest statutes are not parties to the record, is specifically provided for in Ontario, New York, Michigan and California. The New York provision and the similar Michigan provision are the more elaborate in this regard: "the original owner of a claim which constitutes, or from which arose, a cause of action acquired by grant, conveyance, transfer, assignment, or endorsement and which is set forth in his pleading as a cause of action or counterclaim." But there is some doubt under the New York provision as to whether the phrase "original owner" includes an intermediate assignor. This defect is cured in the Michigan rules which add the words "or prior owner."

5 Rohleder v. Wright (1916) 162 Wis. 580, 156 N. W. 955.
6 Wells v. Green Bay & M. C. Co. (1895) 90 Wis. 442, 64 N. W. 69.
8 New York Civil Practice Act, sec. 288; Mich. Court Rules (1931) rule 41, sec. 1 (a slight difference of wording).
9 Question raised but not decided in Green v. Saisselein (1927) 214 N. Y. S. 776. But cf. for indication that intermediate assignors are not examinable, Wappler v. Woodbury Co. (1923) 201 N. Y. S. 503. See also 27 Col. L. Rev. 422.
Special questions have arisen as to what persons are properly examinable where an executor or administrator is a party to the action. In New York it has been held that, under appropriate circumstances, legatees, devisees or the representative may be examined. In New Jersey it has been held that the representative can be examined but that he cannot be compelled to testify to any transaction with or statement by the deceased person. Special provision has been made in Ontario for the situation where an infant is a party. Either the guardian or next friend is examinable, as is the infant also, unless he is incompetent to give evidence. The court rather than the special examiner is the judge of the capacity of the infant if his examination is contested.

Persons Examinable on Behalf of Corporation

If discovery was sought from a corporation defendant under the chancery procedure, it was the practice to add one of its officers as codefendant. Under the statutory practice the New Jersey court has held that in the absence of specific statutory authority it was not possible to examine representatives of a corporate party. The South Carolina court, on the contrary, has held that the word "party" is broad enough to include officers of a corporation which is a party. In states in which deposition procedure is used for purposes of discovery before trial representatives of corporations may be examined as witnesses generally. The question of their right to represent the corporation is reserved for the trial. The discovery statutes in a number of jurisdictions specify what particular representatives of a corporation

12 Wilson v. Church (1878) 9 Ch. D. 552.
may be examined on its behalf. Often the statutes provide both a general and a specific designation of the representatives who are examinable. The statement that "officers" may be examined is followed by the enumeration of specific officers. Jurisdictions in which the statutes employ the word "officer" are: Alabama, California, Connecticut, England, Florida, Georgia, Indiana, Iowa, Massachusetts, Michigan, New Jersey, New York, North Carolina, North Dakota, Virginia and Wisconsin. The following officers and agents are specifically designated in the various statutes:

President, in Connecticut, Massachusetts, North Dakota, Ohio and Quebec.

Vice-president, in Virginia.

Secretary, in North Dakota, Ohio, Quebec and Virginia.

Treasurer, in Connecticut, Massachusetts, Quebec and Virginia.

Superintendent, in Massachusetts and South Dakota.

Manager, business manager, or managing agent, in Massachusetts, Michigan, New York, South Dakota and Virginia.

Director, in Connecticut, Massachusetts, Michigan and New York.

Member, in California and England.

Agent, in Alabama, Indiana, Iowa, North Carolina, Quebec, Virginia and Wisconsin.

Clerk, in Connecticut and Massachusetts.

Cashier, in Virginia.

Statutes in the following states provide for the examination of corporate employees or servants: Michigan,
PERSONS SUBJECT TO DISCOVERY

New Jersey, New York, Ontario, Washington and Wisconsin. Since the theory is that the person examined represents the corporation and to that extent binds the corporation, it is natural that corporations should dispute the right of mere employees to be examined on their behalf. The decisions in Ontario as to what persons may be examined have been varied and numerous, the most nearly general test being the ability of the particular person to give the necessary information rather than his exact relation to the company.\textsuperscript{15} In New York it has been held that the word "managing" in the phrase "managing agents and employees" is applicable to both "agents" and "employees."\textsuperscript{16} The chief reason which prompted the present wording of the statute was that employees were to be examined as corporate representatives rather than as witnesses merely.\textsuperscript{17} Therefore the test generally followed is this: Can the particular employee whose examination is sought speak in any wise representatively for the corporation in regard to the particular matter in question? The important point is not the general relation of the employee to the corporation,\textsuperscript{18} but rather his relation to the particular transaction in dispute.\textsuperscript{19} Thus, under differing circumstances, identically the same employee of identically the same corporation may or may not be held a managing employee.


\textsuperscript{16} Swift v. General Baking Co. (1927) 220 N. Y. S. 554.

\textsuperscript{17} Cf. Rothschild, The Simplification of Civil Practice in New York, 23 Col. L. Rev. 732, 742.

\textsuperscript{18} The earliest cases indicated that this was the test. Friedman v. New York Central R. Co. (1923) 200 N. Y. S. 337; Bloede & Co. v. DeVine Co. (1924) 206 N. Y. S. 739. But there has been a constant and conscious backing away from the theory of the Friedman case. See Rothschild, The Simplification of Civil Practice in New York, 23 Col. L. Rev. 732, 742; 26 Col. L. Rev. 30, 56; 27 Col. L. Rev. 413, 422.

\textsuperscript{19} See Fulton v. Nat. Aniline & Chemical Co. (1925) 211 N. Y. S. 769; and cases in the next several footnotes.
within the meaning of the statute. Certainly few employees would have less right to represent a corporation generally than elevator operators, and yet in one case where the issue concerned the condition and state of repair of an elevator at the time of an accident, such an employee was deemed to be a fit representative of the corporation.

In such states as New Hampshire, Missouri, Kentucky, Indiana, Ohio and Nebraska, where it is possible to take the deposition of parties and witnesses alike for discovery purposes, there is no such trouble about the right to examine employees of corporations. Any and all employees may be examined just as if they were ordinary witnesses. The question as to whether, and to what extent, the statements of any particular employee can be used against the corporation, under such a procedure, is not raised until the trial.

Particular problems have arisen concerning the examination of former officers and employees of litigating corporations due to the prejudice which common experience has shown former employees may bear toward the very corporation on whose behalf they are examined. Such problems have been handled in the following ways:

New York. Although neither the Civil Practice Act nor the Rules cover the exact situation, it has been held that a trial court, under its general discretionary powers, may allow the examination before trial of a former employee of a corporation which is a party to the action. A rather practical expedient in the examination of such former employee for discovery is to allow the employee

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20 Cameron v. Rochester & S. R. Co. (1925) 210 N. Y. S. 241; Warner v. Rochester & S. R. Co. (1926) 214 N. Y. S. 579. In one case the claim agent was held a managing employee and in the other case not.

21 Bregman v. Edbro Realty Co. (1929) 135 Misc. 87, 236 N. Y. S. 409, where an examination of an elevator operator under such circumstances was allowed. See also Swift v. General Baking Company (1927) 129 Misc. 135, 220 N. Y. S. 554.

to be examined as a witness only and not as a corporate representative. This precludes an unfair use of the examination at the trial. This is the method used for the examination of all corporate officers and agents, both present and past, in states which allow the taking of depositions generally for discovery.

_Wisconsin_. There has been some complaint against the practice of allowing the examination of former employees as adverse witnesses on the ground that they are not in reality hostile. It is always possible, however, for the corporation, under the ordinary rules of evidence, to object at the trial that such examinations should not be used as admissions against it, regardless of the specific allowance of the examination by the discovery statutes.

_England_. The problem of former employees is handled by allowing interrogation of bona fide present representatives of the corporation only, but requiring such representatives to make due inquiry for information from past agents. It is, however, a reasonable excuse that it is impracticable or impossible to obtain the desired information from the former agents.

_Massachusetts_. Only persons in the present employ of corporations are examinable in its behalf and there is no duty of making inquiry from former employees and servants.

_Ontario_. It was at one time allowable to examine former officers for discovery, but later such a policy was abandoned.

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24 Bray’s Law of Discovery, 142.
26 See Canadian Encyclopedic Digest (Ontario Ed. 1927) vol. 3, page 789 as to the exact time as of which the officer shall be deemed a present or past officer of a corporation in cases where the connection is severed after the cause of action accrues or after the action is brought.
Several of the states make special provision for examination of officers of municipal corporations. In Massachusetts the mayor or chairman of the board is the proper representative to be interrogated. While an officer or employee of a municipal corporation may be examined for discovery in New York in a proper case, it has been held that the proceeding for such an examination must be initiated by court order rather than by notice as in the case of representatives of private corporations. Under the statutory provision for written interrogatories to corporate parties it has been held that a county can be compelled to answer through its officers. The federal equity rules treat private and public corporations alike in this respect, but in both instances, it is necessary to procure a court order for the examination, rather than to proceed by notice as in the case of an ordinary litigant.

If the theory is that the person examined is the alter ego of the corporation and that his answers are regarded as the answers of the corporation, it is of some moment whether the corporation or the applicant for discovery selects the representative who does the answering. This matter has been handled in the following way in different jurisdictions.

England. The applicant for discovery can serve the interrogatories upon the corporation and let it select a representative to answer for it, or he can show why some particular officer or member is better qualified than others to give an answer. But in the latter event the

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28 Ex parte Elmore County (1921) 207 Ala. 68, 91 So. 876.
30 Berkeley v. Standard Co. (1879) 13 C. D. 98. Some of the statutes provide that the corporate representative shall be examined "as if he were a party."
31 Authorities are collected in Annual Practice (1930) page 514; Bray’s Law of Discovery, 79.
corporation can contest the right of the person named to represent the body.

Massachusetts. Sometimes the proponent of the interrogatories specifies the officer from whom an answer is desired, but more often the questions are addressed to the corporation and it selects the officer to do the answering. Even in the former event the corporation can select some officer other than the one named.

Georgia. It is necessary to address the interrogatories to some particular officer of the corporation and to give notice of filing of the interrogatories to its attorney of record, or officers.

Ontario. The party seeking the examination rather than the corporation is the one to say what corporate officer shall be questioned.\footnote{Barry v. Toronto and Niagara Power Company (1906) 70 W. R. 700, 770.}

Other states. The usual practice is for the applicant for discovery to name the corporate officer whose examination is desired. Especially is this true in states which employ an oral examination for discovery, and this for the practical reason that the applicant not only must serve notice of the examination but he must also subpoena the particular person who is to be examined.

Shall only one representative be examined on behalf of a corporation, or may more than one be examined? The following variations of practice are to be found.

Wisconsin. It is possible to examine as many corporate representatives as are thought to have knowledge of any of the facts in dispute. Some complaint as to this practice was heard among Wisconsin lawyers, who reported several instances in which whole train crews had been examined at one time, causing some hardship.
Federal equity. In the absence of a special showing of necessity only one corporate officer can be examined.\(^8\)

New York. The policy has been to discourage the scheduling of simultaneous examinations of different corporate representatives, but to allow successive examinations until the necessary information is finally obtained.\(^4\)

Ontario. Only one corporate representative may be examined as of right, although discovery may be obtained from others upon court order for cause shown.\(^5\) Such leave seems to be seldom granted, unless the first examination has failed to give an adequate disclosure. Although there are cases of record in which a number of officers or agents have been examined,\(^6\) the tendency at present is to restrict the questioning to a single person who is entitled to speak for the corporation.

Other states. States in which it is permissible to take the depositions of both parties and witnesses for discovery obviously have a practice which allows the examination before trial of as many corporate officers and servants as the applicant desires, since they are examined upon the theory that they are witnesses rather than upon the theory that they are corporate representatives.

Discovery from Witnesses

Discovery could be had only from parties under the chancery practice. The rule was that only persons who had such an interest in the action that they would be directly affected by the decree could be parties for purposes of discovery.\(^7\) This was tantamount to saying

\(^8\) Texas Co. v. Gulf Refining Co. (1926) 12 F. (2d) 317.


\(^5\) Dawson v. London St. Ry. (1898) 18 P. R. 223.


\(^7\) Bray's Law of Discovery, 40.
that discovery could not be had from witnesses or from any other third persons not parties. This doctrine has been carried over into some of the special statutory substitutes for the chancery practice. A Massachusetts opinion is representative when it states that: "It is clear that courts do not compel discovery from persons who sustain no other relation to the contemplated litigation, or to the subject of the suit, than that of witnesses." In such a situation it is of importance to note the inroads which modern practice is making upon this principle.

Ontario. There is a rule of court which allows the court to order the examination of any person as upon deposition when it appears necessary for the purposes of justice. Up until 1894 some use was made of this provision to obtain discovery from persons not parties and from ordinary witnesses, and the practice was sanctioned. In that year, however, the court overruled the line of cases allowing this expedient and held that this provision could not be used to enlarge the power of discovery under the regular rules covering that subject. Toronto judges and practitioners are opposed to the allowance of widespread discovery from ordinary witnesses. Sometimes, however, there can be discovery of documentary evidence from persons not parties to the action. The test as to whether production for inspection will be ordered is whether production of the particular document at the trial could be compelled.

New York. The deposition of any other person, which is material and necessary may be taken if any of the following conditions are met:

(1) Where the person is about to depart from the state;

89 Rule 271.
90 See list of cases in Ontario Judicature Act (Holmested, 1915) page 738.
92 Rule 350.
(2) Where the person is out of the state;
(3) Where the person resides at a greater distance from the place of trial than one hundred miles;
(4) Where the person is so sick or infirm as to afford reasonable grounds of belief that he will not be able to attend the trial; or
(5) Where "other special circumstances" render it proper that his deposition should be taken. It is obvious that these provisions offer possibilities for discovery before trial from ordinary witnesses. The courts have been very liberal in their construction of (2) and (3), and one of the "special circumstances" under (5) is that the adverse party has wrongfully refused to furnish information in his possession which he has been ordered to disclose.

A memorandum decision has been rendered recently in the First Department which indicates an allowance of discovery of documents in the possession of persons not parties to the action. The brief for the successful party in the case stated: "The court has inherent power to require the production of any books and papers within its jurisdiction and to direct that those books and papers may be used to refresh the memory of any person without putting the subpoenaed person upon the stand to identify the books and papers or testify with regard to them. As a practical matter, the party producing the books and records would neither be sworn nor examined. He would merely be directed to turn over to the defendant, who was being examined, the books and records produced. The defendant would then examine these books which either

48 New York Civil Practice Act, sec. 288.
44 Muschler v. General Metalsmiths (1925) 125 Misc. 643, 211 N. Y. S. 693.
would or would not refresh his recollection. There the matter would end." An act was passed in 1929 providing for the production under compulsory process of hospital records but apparently only production at the trial is contemplated.

**Wisconsin.** There is a liberal provision for examination of parties and representatives of corporate parties in Wisconsin, but there is no provision for examination of witnesses before trial. Discovery procedure is quite widely used by Wisconsin lawyers and has given entire satisfaction. For this reason it was thought wise to ascertain the viewpoint of the bar of the state as to the wisdom of allowing discovery from witnesses generally. A variety of opinion is entertained. Slightly less than fifty per cent of those who were questioned about the matter (not counting the commissioners, whose opinion might be said to be of less weight because of personal interest) were in favor of allowing discovery from witnesses. Some of those favoring it added certain limitations, as for instance, that the party taking the examination of an ordinary witness be forced to pay for it and not be allowed to tax therefor. Several kinds of objections were offered by those who opposed the innovation: (1) It would make it even harder to get voluntary witnesses at the trial than it is now; (2) It would be too costly; (3) It might work injustice in particular actions such as actions for divorce; (4) It would prevent the lawyers from keeping back certain parts of their evidence which for tactical reasons is a valuable practice. The arguments advanced by those who favored the proposal were: (1) That the best way to get at the truth is to turn all of the light possible on the case; (2) That settlements would be facilitated; (3) That it would give

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47 See also the following cases for possibilities of discovery of documents from witnesses: Continental Ins. Co. v. Equitable Trust Co. (1930) 244 N. Y. S. 377; Meretsky v. Wolff (1928) 229 N. Y. S. 776.

a weapon with which to deal with witnesses who refuse
to give voluntary statements; (4) That the experience
with discovery so far has been so wholesome that the
extension would be worth a trial. Only one Wisconsin
lawyer gave as a reason for opposing discovery from
witnesses the one formerly employed against discovery
as a whole, namely, that if the party knew his opponent’s
evidence in advance of trial he would manufacture evi-
dence to meet it or would tamper with witnesses.

Ohio, Kentucky, New Hampshire, Missouri, Nebraska,
Indiana and Texas. The ordinary deposition procedure
did not follow the rule of chancery that only parties
should be examined, for its primary purpose was to
provide a way to take and preserve the testimony of
ordinary witnesses. Accordingly, in states in which the
deposition procedure has been used as a device for ob-
taining discovery, discovery from witnesses as well as
from parties is allowed. Such a practice exists and is
used in the following states: Ohio, Kentucky, New
Hampshire, Missouri, Nebraska, Indiana and Texas. It
likewise exists in a few other states but has not been
used to any considerable extent.

The policy behind a liberal allowance of discovery
from witnesses has been well stated by the late William
Howard Taft while he was Judge of the Superior Court
of Cincinnati, Ohio:

"There is likely to be no motive for fishing unless
the person whose deposition is sought has been unwilling
to state his knowledge upon inquiry. If a witness is so
reluctant as not to state his knowledge to a party asking
it, the witness cannot complain if the party presumes
that the knowledge thus withheld may be useful evidence
to him on the trial of the case, and that his refusal to
give information indicates a desire to avoid the trial.
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."

Even though it is possible to take depositions of any and all witnesses there is no inclination upon the part of lawyers to take them promiscuously for purely discovery purposes. In the first place there is no general necessity for doing so, because it is usually possible to get voluntary statements from witnesses. Only when a witness refuses to give a statement, or when the lawyer distrusts a witness, is there any need to employ the compulsory process. Occasionally, for tactical reasons, the deposition of an important witness is taken without first seeking his voluntary statement. Apparently the taking of depositions of witnesses for purposes of discovery is more widespread in New Hampshire and in Missouri than elsewhere. In the principal cities of both states quite a number of lawyers make it a regular practice to take the deposition of every witness who refuses to give a voluntary statement. In Ohio, Texas, Nebraska, Kentucky and Indiana there is a similar though less common practice. Several other reasons are assigned by practicing lawyers to explain why they do not take depositions of witnesses more frequently. One reason is that either party may use the deposition of a witness at the trial, if the witness is unavailable for oral testimony, regardless of which party has taken the deposition.

In Texas it can be used even if the witness is present. Since depositions would be taken for discovery purposes from hostile witnesses more often, there is some danger that by taking the depositions of such witnesses a lawyer might be supplying ammunition for his adversary. If the witness should die or become unavailable his testimony really would have been preserved by the adverse party. Even though the witness were available, there is a chance that the party favored by the testimony might induce the witness to be unavailable at the trial so as to be able to use the testimony without the witness being subjected to rigid cross examination, if the deposition has proved particularly unfavorable to the party who took it for discovery. Such is the fear expressed by some lawyers, especially in states where practically no use is made of the deposition procedure for discovery from either parties or witnesses. Of course the danger is less in the case of parties, for a party usually would lose more than he would gain by staying away from the trial.

Coupled with the fear of supplying testimony for the adverse party is the fear of "being bound" by the witness' testimony. The only relevant rule of law upon which such fear could be based is the rule that a party by using the deposition of a witness thereby makes the witness his own so as to preclude him from impeaching the credit of the witness. Clearly upon principle, and as a rule of law in most states, a party does not lose the right to impeach the credit of a witness by taking his deposition but only by using it. Dean Wigmore has set forth the rule thus:

"But the difficulty is, where A the taker, has made no use of the depositions, that he can hardly be said to have made the witness his own; indeed, his failure to use them is generally due to the discovery that the witness' testimony is unfavorable, and is practically a repudiation of
it; his taking the deposition was thus a mere unsuccessful voyage of discovery, and the first and only person to utilize the deposition as testimony is B; the witness therefore is B's; accordingly, B may not impeach him.'" 50

The final reason assigned why the practice of taking depositions of ordinary witnesses for discovery is not more widespread is the expense involved. Generally the party who takes depositions must pay for them in the first instance and he may tax them as costs only in case he uses them at the trial. That this rule has some bearing upon the practice under discussion is indicated by the experience in Missouri, where the cost of all depositions may be taxed regardless of whether they are used or not. The taking of depositions of witnesses is quite widespread in Missouri and the rule as to costs is assigned as one of the reasons why it is widespread.

50 Wigmore on Evidence, III, 912.
CHAPTER VIII

TIME OF DISCOVERY

Discovery Usually Available Only After Pleading

As a general rule discovery is available to a party only after he has filed his pleading. Nor is discovery before pleading often necessary. A party usually knows enough about his supposed cause of action to file a pleading. The statements contained in the pleading are regarded as an indication of the party's *bona fides* in seeking discovery.¹ Then, too, the proper scope of the examination is more easily ascertained after the pleadings have been filed. While discovery is not necessary until after pleading in most cases, there are occasional cases in which justice requires that a party have discovery before pleading. Several states have provided for this situation by specific statutes.

Right of Plaintiff to Discovery Before Pleading

Most of the states which have a written interrogatory procedure have adopted the rule of chancery that discovery can be had by a party only after pleading. Interrogatories must be attached to the pleading under the practice in some states.² In others the party is not required to annex his interrogatories but may serve them separately. Even so, it is usually provided that the plaintiff may do so only after filing his petition.³ In Eng-

¹Campbell v. Scott (1890) 14 P. R. 203.
²This is true in Indiana, Iowa, Ohio and Louisiana. The statutes are set forth in the appendix at the back of this volume.
³This is true in Connecticut, Washington, Florida and the United States Equity Courts. The New Jersey provision is even stricter, allowing discovery only after issue joined.
land a plaintiff is rarely if ever allowed discovery before statement of his claim, or defendant before statement of his defense. Bray aptly summarizes the English attitude when he says: "From the earliest times the courts have set their faces against allowing discovery for the purpose of fishing out a case." Within the last year the question whether the plaintiff can ever have discovery before he has delivered his statement of claim has been presented to the King's Bench Division of the High Court of Justice in England. The court held that such discovery would not be allowed except "in the most exceptional circumstances." Scrutton, L. J., said: "This is a daring experiment but I am afraid I am too old to yield to Mr. van den Berg's entreaties. The appeal is against an order made by the Master and Judge ordering the production of documents before the statement of claim in the action has been delivered. Neither Lawrence, L. J., nor I has ever known of such an order being made. I do not question for a moment that under the wide words of Order XXXI., rr. 12 and 14, there is power to make such an order, but equally I think that it should not be made unless in the most exceptional circumstances. A plaintiff who issues a writ must be taken to know what his case is. If he merely issues a writ on the chance of making a case he is issuing what used to be called a 'fishing bill' to try to find out whether he has a case or not. That kind of proceeding is not to be encouraged. For a plaintiff after issuing his writ but before delivering his statement of claim to say, 'Show me the documents which may be relevant, so that I may see whether I have a case or not,' is a most undesirable proceeding."

Several jurisdictions allow discovery by oral examination before pleading. The procedure, however, is dif-

4 British Thompson-Houston Co. v. Duram (1915) 1 Ch. 823; Disney v. Longbourne (1875) 2 C. D. 704.
5 Annual Practice (1929) 494.
6 Gale v. Denman Picture Houses, Ltd. (1930) 1 K. B. 588, 590.
different from that which obtains if the discovery is sought after pleading.

Wisconsin. If discovery is desired for the purpose of enabling the party to plead, the notice must be accompanied by an affidavit of the party, or his attorney or agent, stating the general nature and object of the action; that discovery is sought to enable him to plead; and the subjects upon which information is desired. The examination is allowed as a matter of course unless beforehand the judge further limits the subjects to which it may extend. This places the burden on the adverse party to raise the issue of the right to take the examination. It is not necessary that the affidavit set out facts sufficient to constitute a cause of action; nor even is it necessary that the affiant know that a cause of action exists. It is sufficient if the plaintiff shows that he may be entitled to recover against the defendant and that discovery is necessary to enable him to plead. The courts have even gone so far as to hold that bad faith in seeking an examination should not defeat the right thereto as long as the affidavit sets out the grounds mentioned in the statute, the view being that the statute itself affords ample protection against unnecessary or improper examination. Nor does it necessarily defeat the plaintiff’s right that he already has facts sufficient to frame a complaint general in its terms. After service of the complaint the defendant’s right to an examination of his opponent is the same as if the allegations of the complaint had already been put in issue. The notice should be served at least five days beforehand. If the examination is to be taken without the state three days’ notice

9 Schmidt v. Menasha W. W. Co. (1896) 92 Wis. 529, 66 N. W. 695.
plus an additional day's notice for each three hundred miles or fraction thereof after the first ten miles from the place where the notice is served, must be allowed. The notice must comply with the requirements of the statutes as to notices generally; it must be in writing and be served on all adverse parties or their attorneys. As a practical matter, it is usually not necessary for the court to limit the examination. Nor is it often requested. The records further indicate that in a large percentage of cases no action is ever brought after the discovery is completed. Some of the court clerks have a file for miscellaneous papers in which they place depositions which have not been followed up by any subsequent papers. The number of such depositions which accumulate in a year is rather remarkable.

**New York.** The earliest New York cases under the Code of Civil Procedure in 1848 held that discovery could be had only after issue joined but this construction was later refuted. The Civil Practice Act specifically provides that the examination may be had before pleading. The purpose of the provision is to allow an examination for the purpose of framing a pleading and the showing upon which the order allowing the examination is granted must be in accordance with this purpose. The procedure is equally available to a defendant to aid him in drawing his answer, although the Rules of Practice do not specifically cover the case. Of the two possible methods of initiating examinations for discovery in New

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York only one, an application for a court order in the first instance, can be used if discovery is sought before issue joined.\(^\text{16}\) The showing required on the application for such order is that the discovery is material and necessary for the purpose of framing a pleading.\(^\text{17}\) Under this general provision the test as outlined by the decisions is that the party must show reasonable grounds for belief that he has a meritorious cause of action;\(^\text{18}\) and must name the definite adverse parties.\(^\text{19}\) A distinction is drawn between facts constituting a good cause of action and facts constituting a good complaint, a distinction in line with which it has been held that an examination of the defendant to frame a complaint can be permitted only when the plaintiff states a good cause of action in his affidavit, but is unable to state material and necessary facts with sufficient definiteness or particularity to make a good pleading.\(^\text{20}\) Similarly a justifiable purpose in seeking discovery may be to find out the exact legal character of the claim so that the proper form of action may be ascertained.\(^\text{21}\) Again, a somewhat similar theory, under the disguise of different terminology, is that discovery before issue joined will be allowed when the party applicant can give an approximate forecast of what the issues may be.\(^\text{22}\)

Since it is conceived to be the very essence of the provision allowing an examination to enable a party to plead that it can be allowed only when otherwise injustice would result, an application for such an examination can

\(^\text{16}\) In re Titanium Alloy Mfg. Co. (1923) 198 N. Y. S. 503.
\(^\text{17}\) Rule 122.
\(^\text{20}\) Garbrinsky v. Meagher (1923) 198 N. Y. S. 833.
be defeated by a showing that the party already has the requisite knowledge, or could reasonably get it by following up the knowledge which he has.\textsuperscript{28} Discovery may be postponed until after the determination of some preliminary issue, if the court thinks it expedient.\textsuperscript{24} This is especially the desirable practice in actions for accounting, namely, to postpone the discovery until after the right to an accounting has been decided.\textsuperscript{25}

\textbf{Carolinas and Dakotas.} The statutes in North Carolina, South Carolina, North Dakota and South Dakota provide that the examination may be had "at any time before trial." Only in North Carolina has this provision been definitely construed to allow discovery to enable a party to plead. The applicant must show the necessity and materiality of the discovery by appropriate affidavits.\textsuperscript{26} The South Dakota Supreme Court has avoided the question of the right to examine before pleading saying, "whether under this statute an adverse party may be called for oral examination prior to issue joined is a question with which we are not concerned at this time."\textsuperscript{27}

\textbf{California, Indiana, Missouri, Ohio and Texas.} There are two different expedients under deposition procedure in some states by which it is possible for the plaintiff to obtain discovery before pleading. First, the statutes regarding depositions to perpetuate testimony, in contrast with the statutes regarding depositions generally, allow taking before commencement of the action.\textsuperscript{28} Such depo-


\textsuperscript{26} Bailey v. Matthews (1911) 156 N. C. 78, 72 S. E. 92; Smith v. Wooding (1919) 177 N. C. 546, 94 S. E. 404; Fields v. Coleman and Young (1912) 160 N. C. 11, 75 S. E. 1003; Chesson v. Washington County Bank (1923) 190 N. C. 187, 129 S. E. 403.

\textsuperscript{27} Niblo v. Ede (1917) 39 S. D. 338, 341, 164 N. W. 109, 111.

sitions can be taken only upon court order for cause shown. Very little actual use of this procedure for discovery before pleading has been found, but it offers possibilities which a few lawyers have used. The second device for obtaining what is in reality discovery before pleading is to file a skeleton pleading, take depositions and then amend. This expedient is used quite widely, especially in Missouri, Ohio, California and Texas. The Missouri courts have considered this practice at different times and have upheld it, saying that: "The failure of the petition to state a cause of action will not deprive a party to a suit of the right to obtain the deposition of a witness." "The institution of the suit" is regarded as the "guaranty of the plaintiff's earnestness." Similarly the California court has allowed the plaintiff to take the defendant's deposition for discovery after a general demurrer has been sustained to the pleading and before any amendment has been filed. While authority for obtaining discovery before pleading has not been set forth by the courts in other states the practice actually exists. It is a quite frequent thing for plaintiffs to serve notice to take depositions at the same time they serve the summons in the action, take depositions, and then file an amended complaint.

RIGHT OF DEFENDANT TO DISCOVERY BEFORE PLEADING

Some courts have taken the position that there should be more liberal allowance of discovery before pleading to defendants than to plaintiffs since the former may more reasonably be resisting claims as to which they

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29 This is not true in Texas; while no court order is necessary the procedure is more formal and complex than the ordinary deposition procedure. Tex. Stat. (1928) art. 3842.
31 Ex parte Munford (1874) 57 Mo. 603, 604.
have no knowledge. Moreover, defendants are involuntary participants to the controversy and less assurance is needed of their bona fides. Accordingly, in some jurisdictions either party may have discovery as soon as the plaintiff has filed his pleading. There is also the possibility of discovery before pleading for the defendant under deposition procedure. In Ohio, New Hampshire, Nebraska, Indiana, Texas and Missouri either party can take depositions for discovery as soon as the action is commenced. But in Kentucky the defendant may not take depositions until after he has filed his answer.

33 Hovey v. Gilbert (1887) 12 P. R. 114.
35 The statutes are set forth in the appendix at the back of this volume.
CHAPTER IX

INITIATING STEP IN OBTAINING ORAL EXAMINATION FOR DISCOVERY

WHERE EXAMINATION IS MATTER OF RIGHT

The examination is initiated by notice and subpoena in all jurisdictions in which the examination is a matter of right. This is the practice in Wisconsin, North Carolina, North Dakota, Ontario, Indiana, Kentucky, New Hampshire, Ohio, Nebraska, Missouri, California and Texas. Except in Ontario the notice is entirely an extra-judicial affair. In Ontario it takes the form of an appointment from the special examiner before whom the applicant desires that the examination be conducted. A somewhat similar practice exists in Wisconsin and elsewhere but with the difference that there is no necessity for the examining officer to issue the notice; he merely does so for convenience. In Wisconsin the commissioners send around to the various lawyers forms for the notice and subpoena, already signed by themselves. This is a convenience for the lawyers as well as a means of soliciting business for the commissioners. Printed forms for the notice are available in other states and, sometimes, the examining officer will effect service thereof for the party without extra charge.

Usually, the notice, in contrast with the subpoena, may be served either upon the adverse party or his attorney. The notice must be served upon each adverse party if there are several parties.\(^1\) Some of the statutes provide for substituted service of the notice in the event

\(^1\) Cf. First National Bank of Elkhorn v. Wood (1890) 26 Wis. 500.
neither the adverse party nor his attorney of record can be served.

The manner of service of the notice varies in different states. Sometimes it is required that it be served by an officer of court, but more usually it may be made in any way in which notices generally may be served under the practice of the particular state.

A common provision is that the notice must be served a specified number of days before the examination. The exact time differs from ten days in Texas to one day in Quebec. The most popular provision is that five days' notice be given, a provision which obtains in Indiana, Wisconsin, North Carolina, and North Dakota. Six days' notice is required in South Dakota. No specific period is provided in Kentucky but it is required that a reasonable time be allowed. In a few jurisdictions the time for service of the notice is arranged upon a graduated scale: a minimum of one clear day must be allowed for preparation and sufficient time for travel. This plan is employed in Nebraska and Missouri.

The usual requirement is that the notice must contain:

The title of the action; the court in which the action is pending; the time and place of the examination; the name of the officer before whom it will be held; and the name of the person to be examined. Ohio has a peculiar provision as to the specification of the time when the examination will be held. It is possible, instead of specifying the exact hour, to schedule the examination between two different specified hours. This provision has been the subject of some little abuse in Ohio, in that the opposing lawyer cannot tell exactly when the examination will begin. In Nebraska and Missouri the notice merely specifies that the examination will be held before "competent authority," without naming the particular officer. Of course the subsequent subpoena discloses the officer's

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2 Kyle v. Kyle (1876) 55 Ind. 387.
identity. While it is usual to require that the names of the particular persons to be examined be specified in the notice, Ohio and Kentucky omit this requirement. Since the ordinary deposition procedure is used, the only specification of the notice is that depositions of "sundry witnesses" will be taken. This form gives neither the party nor his attorney any indication as to whether an examination of the adverse party or an examination of witnesses is contemplated. Nor does it disclose the identity of the witnesses who will be examined. Sometimes, if an examination of the adverse party is contemplated, a phrase is added to the effect that the deposition will be taken "as if upon cross-examination." The practical result of the failure to specify the persons to be examined is that it is more difficult to coach such persons how to answer anticipated questions. The importance of this aspect of the notice is minimized somewhat by the fact that the subsequent subpoena divulges the identity of the person or persons whose depositions are desired. Some Ohio lawyers delay service of the subpoena as late as possible, so as to prevent disclosure of the identity of the persons to be examined.

States which employ the notice procedure require that the person to be examined be served with a subpoena for his attendance. Usually the officer before whom the examination will be held issues the subpoena, but in California the clerk of the court in which the action is pending issues it. It seems rather clear that American courts would not uphold penalties for contempt not predicated upon a subpoena and a refusal to comply therewith. A subpoena is necessary in Ontario only in the event that the person to be examined is not a party to the action. It is not necessary to subpoena the party

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3 In addition to the statutes, see Miller v. Frey (1896) 49 Neb. 472, 68 N. W. 630; Bartholomay Co. v. Regan (1924) 205 N. Y. S. 745.
nor yet to serve notice on the party. It is sufficient to
serve notice upon the party's solicitor. If the party
fails to appear for the examination his appropriate
pleading is stricken from the files. This procedure has
proved very popular with Toronto lawyers because it is
a step toward simplicity, and reduction of expense. In
New Jersey where the proceeding must be initiated
by court order in the first instance, the service of the
order is deemed a sufficient summons and notice to the
party to be examined.

The actual practice in the states in which an examina-
tion before trial is a matter of right indicates its effec-
tiveness in fostering that which is better than a forced
discovery, namely, a voluntary disclosure. Investigations
were made in nine states which exhibit such a practice.
There is a widespread tendency in six of the nine to
dispense with all formal steps in securing discovery.
The longer the practice has obtained in the state, it would
seem, the greater is the tendency to waive technicalities.
A convenient and inexpensive informality has been sub-
stituted for a theoretically technical practice by common
agreement amongst the bar, or at least amongst the
better element of the bar. The explanation given by
the lawyers is uniformly that lawyers will accord to their
opponents voluntarily anything which they know they
can be compelled to give. Take, for example, the New
Hampshire experience. All formalities and technical-
ities of every sort regarding the initiating step and other
formal details are waived in ninety-five per cent. of the
cases. The lawyer who desires an examination merely
calls the opposing attorney on the telephone and asks
to be allowed to examine the opposing party. Often he
offers to produce his own client for examination if it is
desired. All details as to time and place and as to the

\[\text{\small 5 Cf. Campbell v. Lennox (1919) 17 O. W. N. 179 as to possible con-
stitutional difficulties with such a practice in the United States.}\]
\[\text{\small 6 N. J. Laws of 1924, ch. 93, p. 183.}\]
officer to take down the examination are then agreed upon. Only when the applicant distrusts the opposing attorney, or when the examination of an ordinary witness rather than a party is desired, and the applicant thinks the witness will hesitate to come voluntarily, does he employ the formal process. The first part of a deposition in New Hampshire usually reads: "All technicalities and formalities are waived, so that this deposition can be used for all purposes as if they had been complied with." The same tendency is found in the following states in which the ordinary deposition procedure is used for discovery purposes: Kentucky, Indiana and Texas. In Louisville, Kentucky, and Indianapolis, Indiana, there is a widespread practice for the firms of reporters who report examinations to arrange all of the details. Individual lawyers in these states testify to another feature which is yet a step farther in the direction of an absolutely voluntary discovery. They say they offer to allow their opponents to inspect all of the statements which they have obtained from witnesses in the case, regardless of whether the statements favor themselves or their opponents. If the opponent can get the same information under a compulsory process why not accord him the same voluntarily and thus save expense and give evidence of an interest in finding the truth, regardless of the result? Lawyers who have tried it testify to its efficacy in gaining the respect of opposing counsel and in getting at the truth of the case. Moreover, such tactics are often reciprocated. Wisconsin lawyers often dispense with all technical formalities. Thirty-one of fifty examinations in Madison, and twelve out of fifty in Milwaukee were taken by stipulation. In Ohio, Nebraska, and Missouri the tendency to waive the formal steps is less noticeable. Some lawyers do so among their intimate associates but the bar generally still proceeds formally—at least up until the time the attendance of the witness has been secured.
Two different methods of initiating a discovery examination are employed in jurisdictions in which the examination is not a matter of right. The party who seeks discovery may either apply for a court order or he may proceed by notice. If he proceeds by notice, the opposite party may move to vacate the notice and thus raise the question of propriety of the examination. Some jurisdictions provide for both methods, while in others the examination can be had only by application for a court order in the first instance.

*New York.* Both methods are employed under the New York practice. Under the Code of Civil Procedure an examination for discovery could only be had upon court order in the first instance. But in the deliberations preceding the revision which culminated in the Civil Practice Act of 1921 there was "an active discussion as to the simplification of the practice relating to examinations before trial."7 "There was a large and active representation of the bar of New York City, who argued for an examination upon notice similar to the federal equity practice, but the board of statutory consolidation concluded that an examination should not be had, unless the testimony sought was material and necessary. The joint legislative committee, in passing upon the consolidation of the provisions of the Code of Civil Procedure on this subject prepared by the board, said: 'That the provisions on this subject should be restored for the present in practically the same language in which they now exist.' And in the final draft they were sub-

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7 This and the following quotations are taken from the opinion of Rodenbeck, J., in Swift v. General Baking Co. (1920) 220 N. Y. S. 554. Inasmuch as Judge Rodenbeck was the chairman of the Board of Statutory Consolidation which prepared the Report on the Simplification of Civil Practice in New York (usually called the "Rodenbeck Report") these statements are very significant. Compare also pages 200–205, 328–355 of that report.
stantially restored, but with a concession of a section to those who pleaded for more liberal provisions, which authorized the taking of depositions upon notice. As if afraid of this, however, the joint committee followed this section with one authorizing a motion to vacate or modify the notice. The result is that the profession is back about where it was under the Code of Civil Procedure, with a motion to vacate or modify in nearly every important case, where a notice is given, and with the practice growing of applying to the court, in the first instance, as was done in the present case.”

There are, then, two different initiating steps which may lead to approximately the same result. Discovery may be had either upon court order in the first instance, or upon notice, subject to the adversary turning the proceeding into one upon court order by his motion to vacate the notice. The two procedures, however, require separate descriptions.

The Civil Practice Act, as amended in 1923, provides: “A party entitled to take testimony by deposition may obtain an order of the court therefor in the first instance, instead of proceeding by notice. The motion shall be upon notice to the other parties who have appeared or answered.” There are three situations in which there is no alternative, and in which the only possible mode is to obtain a court order in the first instance. These are: first, where discovery is desired before issue joined; second, where the person whose deposition is desired is an officer or employee of a municipal corporation; and third, where it is desired to force the party to be examined to bring with him books and papers for inspection. Where the deposition of a party is to be

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9 Sec. 292. See also 23 Col. L. Rev. 734.
10 See 24 Col. L. Rev. 876.
11 Ritzwoller v. Lurie (1923) 198 N. Y. S. 754; New York City Car Advertising Co. v. E. Regensburg & Sons, Inc. (1923) 200 N. Y. S. 152; Bartholomay Co. v. Regan (1924) 205 N. Y. S. 745. See also for fine dis-
taken before issue joined it is not only necessary that the proceeding be upon court order, but a notice of the motion for the order and supporting affidavit must be served upon all adverse parties. But the deposition of a witness can be taken upon notice, if the statutory grounds for taking exist. The latter rule, however, does not sanction an evasion of the former rule so as to allow an examination of the party on the ground that he is a witness and resides more than one hundred miles away from the place of trial. While an officer or employee of a municipal corporation may be examined in a proper case, it has been held that the proceeding for such examination must be initiated by court order rather than by notice as in the case of representatives of private corporations.

The party desiring an examination for discovery, instead of applying for a court order in the first instance, may serve a notice five days beforehand upon his adversary. The notice must set forth:

1. The person before whom the testimony is to be taken.
2. The time and place at which it is to be taken;
3. The name or names of the persons to be examined;
4. The matters upon which such person or persons are to be examined;
5. The title of the action; and
6. The name and address of the party giving the notice.

Discussion of these cases, Rothschild, The Simplification of the Civil Practice in New York, 23 Col. L. Rev. 732; 24 Col. L. Rev. 881.


New York Civil Practice Act, sec. 290; Rules of Civil Practice, rule 121.
The requirement that the names of the persons to be examined be specified applies equally to corporate employees; each employee whose deposition is desired must be named and a blanket notice will not suffice.\(^{17}\) The notice should state that the applicant desires the examination of the corporation through the specified officers or employees.\(^{18}\)

The requirement that the subject matter of the examination be stated has caused more difficulty than any other. At first there was a variance of opinion among the several departments as to whether the rule under the Code that the issues must be definitely stated without reference to outside papers, should apply. The First Department held in favor of the older rule; the Third Department held the opposite, namely, that it was sufficient to state that the examination would be upon the issues formed by the pleadings.\(^{19}\) In 1923 the Act was so amended as to substitute the word "matters" for the word "issues."\(^{20}\) The purpose of this change seems to have been to establish the older rule that the subject matter of the examination must be specifically stated in the notice. It has been held improper merely to state that the examination will be "upon the issues in this action."\(^{21}\) But "the fact that the items are in part stated as in the complaint is not a defect, especially in view of the fact that the allegations of the complaint are unusually full and detailed."\(^{22}\) The Surrogate’s Court of Bronx County, has allowed the statement to be made by reference to an attached exhibit.\(^{23}\) It is safer

\(^{17}\) Bartholomay Co. v. Regan (1924) 205 N. Y. S. 745.

\(^{18}\) Nedlin Realty Co. v. Bachner (1928) 232 N. Y. S. 126.

\(^{19}\) The cases are listed in Rothschild, The Simplification of Civil Practice in New York, 23 Col. L. Rev. 732, 736.

\(^{20}\) N. Y. Laws of 1923, ch. 205; Standard Oil Co. v. Morse Dry Dock & Repair Co. (1927) 221 N. Y. S. 289. See also letter of Senator J. G. Saxe in New York Law Journal, April 24, 1923, for explanation of reasons for the change.


\(^{22}\) Heslin v. Whalen (1925) 212 N. Y. S. 830, 831.

\(^{23}\) In re Kimmerle’s Will (1927) 225 N. Y. S. 779.
to state the matters of the proposed inquiry rather fully, for it is impossible to add additional matters by a subsequent notice as long as the first one is outstanding. While the usual mode is to state the matters in question form, the expression "whether or not" should be avoided.

Service of the notice upon the attorney of the defendant will not suffice so as to render it possible to punish the defendant if he fails to appear at the examination, but service upon the attorney of the plaintiff makes it possible for the court to stay the proceedings until the plaintiff submits to the examination. It does not suffice to serve the notice on the person to be examined. He must also be served with a subpoena before he can be punished for contempt.

It is not permissible for a party to serve successive notices or applications for orders for examinations, before trial, while others are outstanding. The reason for such rule has been well stated by Rodenbeck, J.: "The plaintiff is not entitled to pursue the remedy by notice for an examination under the Civil Practice Act, having already obtained an order therefor under the Code of Civil Procedure, any more than he may duplicate orders or notices for the examination under the present practice. He must stand on the proceedings taken. This course is required by an orderly administration of the law. The principle that prohibits a party from instituting a second suit for the same cause of action between the same parties underlies the prohibition against dupli-
eating motions. The object is to prevent a multiplicity of actions and motions and to obviate a waste of judicial time.

Lawyers in New York City and Rochester say that four out of five times examinations before trial are initiated by notice rather than by court order, except in situations where there is no alternative. Only when the applicant for discovery expects that his opponent will contest the right is it desirable to proceed by order. In this event there are the following tactical advantages by proceeding by court order in the first instance: it effects a saving of time; it allows the applicant for discovery to put his opponent on the defensive; and it simplifies the procedure for getting a contempt ruling if the opponent proves contumacious.

There is a much less noticeable tendency to waive formalities where the examination is not a matter of right than where it is a matter of right. The New York situation is illustrative of lack of waiver of formalities under the former type of procedure. The fact that the adverse party is allowed to make a motion to vacate the notice serves as a sort of inducement to him to contest the proceedings and to seek a restriction upon the scope of the examination from the court, or, at least, to obtain the delay incident to a motion to vacate. The New York rule that the court has a discretionary control over the extent of the discovery to be allowed in each case serves as an invitation to adverse parties to appeal to the court’s discretion. In such a situation it is no wonder that the extent of stipulations and waivers is not as large as elsewhere. A voluntary and mutual discovery does not obtain in New York. Rather discovery is looked

upon as a device with which to extract information from opponents.

**Michigan.** The new Michigan Court Rules contain a provision which is modeled in part after the New York practice to the effect that the adverse party can move to vacate or modify the notice and that such a motion shall operate as a stay of the proceedings until its determination. This prevents the examination from being entirely a matter of right. These Rules have also copied another feature of the New York practice which is in the direction of limiting the scope of the examination, since the notice is required to state the "matters as to which such persons are to be examined." In New York this requirement is incidental to the more basic rule that the examination should be limited in scope to the issues of which the examining party has the affirmative under the pleadings. Since the hope has been expressed by one of the draftsmen of the Michigan Rules that the examination may not be thus limited in Michigan the requirement seems anomalous. The experience in New York has been that the setting forth of the subject matter of the proposed inquiry serves as an invitation to the attorney for the party to be examined to coach the party on the matters set forth. The contrary experience in states in which there is no such requirement is that there is less coaching in preparation for an examination before trial than for an examination at the trial and that the testimony accordingly is more spontaneous and truthful.

**Indiana, North Carolina and South Dakota.** The statutes in Indiana, North Carolina and South Dakota provide that the examination may be had on previous notice of a specified number of days "unless for good cause

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31 Id. sec. 3.
shown the court orders otherwise.’ Arguably this could be held to offer a possibility of restricting the examination. But the North Carolina court has held that the restrictive clause applies only to the time provision and that the examination is absolutely a matter of right. The effect of this construction is to allow the court to order the examination earlier than the time provided by the statute, but not to allow the court to restrict the right to the examination after that period.

New Jersey. Originally an examination could be had only upon court order. In 1914, however, an amendment to the statute was passed, making discovery a matter of course upon the service of a subpoena, and without a court order. A case arose under this provision wherein a party summoned for an examination for discovery appeared before the officer but refused to answer the questions propounded. Thereupon his adversary moved the trial court for a committal for contempt. The recalcitrant party, on appeal, contended that the amendment allowing an examination without a court order was unconstitutional. The court, while upholding the constitutionality of the amendment, held that there was a lapsus in the method of procedure outlined by the statute and that before a party could be punished for contempt it was requisite that he should have violated some order of the court. The implication was that the party seeking discovery should first obtain an order requiring an answer to the questions, if his opponent refused to answer voluntarily, and then use such order as a basis for contempt proceedings. Again, in 1924, the statute

88 Vann v. Lawrence (1892) 111 N. C. 32, 15 S. E. 1031; Abbitt v. Gregory (1928) 196 N. C. 9, 144 S. E. 297; Cartwright v. Norfolk Southern R. Co. (1918) 176 N. C. 36, 96 S. E. 647.
84 See also Hardman v. Lasell (S. D., 1929) 225 N. W. 301.
86 N. J. Laws of 1914, c. 95, p. 151.
was amended so as to require a court order in the first instance.\textsuperscript{88} Moreover the granting of the order now is discretionary with the court. While it might be suspected that the purpose of the amendment was to cure the \textit{lapsus} in the former procedure, the real purpose was to discard the former practice of allowing unrestricted examinations for discovery. The trial courts, under the power conferred by the 1924 amendment have enforced several rules, all of which indicate the illiberality which obtains: The application for the order must be upon notice to the adverse party rather than merely \textit{ex parte}; the application must state the special circumstances which are relied upon to show the propriety of an examination; an order will not be granted, if other remedies, such as interrogatories or bills of particulars, will suffice; and the scope of the examination may be restricted to particular subjects.

\textit{South Carolina.} Since 1923 it has been required that an order of the court be obtained for an examination before trial.\textsuperscript{89} Prior to that time it had been held that the examination could be initiated by mere notice to the adverse party and that it was a matter of right.\textsuperscript{40} The amendment has made it necessary for the applicant to give four days' notice and to show "good and sufficient cause" for the examination.\textsuperscript{41}

\begin{itemize}
  \item \textsuperscript{88} N. J. Laws of 1924, ch. 93, p. 183.
  \item \textsuperscript{89} Session Laws (1923) page 170.
  \item \textsuperscript{40} Fox v. Clifton Mfg. Co. (1922) 122 S. C. 86, 114 S. E. 700.
\end{itemize}
CHAPTER X

PLACE OF EXAMINATION

PLACE OF EXAMINATION OF RESIDENT

The statutes generally provide that the examination of a party or witness who is a resident of the state may be held in the county in which the party or witness resides or in the county in which he is served with summons. The place of the examination should conform to the place stated in the notice. The proposed Uniform Deposition Act provides that the examination may be had "at any place within twenty miles of the abode of such witness."  

PLACE OF EXAMINATION OF NONRESIDENT

There is a statute in Wisconsin which provides that if the person to be examined "is a nonresident individual who is a party to the action or proceeding or is a nonresident president, secretary, treasurer or managing agent of a foreign corporation that is a party to the action, the court may upon just terms, fix the time and place of such examination either within or without the state and such nonresident shall attend at such time and place and submit to the examination, and, if required, attend the reading and signing of such deposition, without service of subpoenas. Such examination shall not be compelled in any county other than that in which the person examined resides, except when a different county
shall be designated for the examination of a nonresident, and except that any nonresident subject to examination may be examined in any county of this state and states in which he is personally served with notice and subpoena. The Wisconsin Supreme Court had held that prior to the passage of this statute a trial court was without power to order an examination of a nonresident party to take place within the state when he could not be personally served with notice and subpoena. The court indicated further that there might be serious doubt as to the constitutionality of the statute quoted above. The court said: "There may be important and serious questions raised and argued when an order is made under this statute compelling a party in a distant state to appear in Wisconsin for examination under section 4096. We shall not anticipate those questions now." The United States Supreme Court subsequently held that since the law of Wisconsin under the George case was that a nonresident individual could not be compelled to submit to examination within the state unless personally served with notice and subpoena, it was discriminatory and a denial of the equal protection of the laws to compel an examination of officers of a foreign corporation within the state when they could not be served with notice and subpoena within the state. The Court did not hold that it was a denial of due process to require nonresident parties to submit to an examination before trial within the state. It merely held that to distinguish between individual nonresidents and foreign corporations constituted unjust discrimination. The dissenting opinion of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, contains interesting language concerning the question as to the right of a state
to compel attendance of nonresidents generally for examination before trial within the state: "That there may be cases in which oral examination of a plaintiff in the presence of defendant and by counsel familiar with the matter in issue is essential to an adequate presentation of the facts cannot be doubted. If so, it is within the power of a state to require that a plaintiff shall submit to such preliminary examination somewhere. Whether this was a case requiring such examination could be determined properly only upon hearing the parties; and for such hearing opportunity was given by the judge of the trial court. If this was a case in which oral examination and inspection of the documents was essential to an adequate presentation of the matter in controversy, it was necessary, in order to secure it, that either the plaintiff's secretary should go to Milwaukee for examination, or that defendant and counsel should go to Louisville. Whether, under such circumstances, the plaintiff should in fairness be required to come to the place where it instituted suit or the defendants be obliged to go with counsel to the plaintiff's place of residence, was, likewise, a matter which could properly be determined only upon hearing the parties; and this opportunity was given by the judge of the trial court. It cannot be that the due process clause of the Fourteenth Amendment deprives a state of the power to authorize its courts to so mould their process as to secure, in this way, the adequate presentation of a case."

The New York Civil Practice Act provides that where a person to be examined is not a resident, he shall not be required to attend in any other county than that where he is served with a subpoena; except that where the examination is held pursuant to order, he may be compelled to attend in any county specified in the order.  

6 Id. 552.
7 New York Civil Practice Act, sec. 300.
Examination of nonresident parties or witnesses under the general deposition procedure is usually conducted upon commission or letters rogatory. A witness must be within the jurisdiction before a court has power to compel him to give testimony. Therefore, if a witness is without the jurisdiction in which the action is to be tried the right to take his testimony rests on the comity between courts of different jurisdictions. It has been held that a court has no inherent power to compel the attendance of witnesses before an officer or commissioner appointed by the courts of another state, although it may do so when authorized by a statute. The court to which letters rogatory are addressed is vested with a discretion to compel or refuse to compel a witness to attend and testify.

Office in Which Examination Is Held

States in which deposition procedure is used for discovery purposes exhibit the practice of the examination being held in the office of the examining lawyer, unless necessity or convenience dictates a different place. This is simply a matter of common practice and is not covered by the statutes. The choice of the examining lawyer's office as the place for holding the examination appears to be a matter of practical convenience rather than of tactical advantage. This is also the New York practice. Even where the motion for an order is returnable at the Special Term, the actual examination usually is adjourned to the lawyer's office, after the court has decided the proper subject matters of the inquiry. Neither the examination nor the swearing of the party takes place in the court house.

8 State v. Kennan (1903) 33 Wash. 247, 74 Pac. 381; In re Hughbanks (1890) 44 Kans. 105, 24 Pac. 75.
Under the Wisconsin and Ontario procedure the officer in charge of the examination has quarters wherein the examination is held. In some of the smaller Wisconsin towns the officer uses a room in the court house in preference to his office. The officer’s quarters in the larger cities, notably Milwaukee, Wisconsin, and Toronto, Ontario, are arranged to accommodate the holding of several examinations at one time. All examinations in Montreal, Quebec, are conducted in the clerk’s office in the court house. This office is arranged somewhat on the order of a modern banking institution, with barred windows, a lobby and surrounding booths. It is in these latter that all discovery examinations are conducted.
CHAPTER XI

GENERAL CONDUCT OF ORAL EXAMINATION

SWEARING OF WITNESS

The statutes uniformly require that the party to be examined be sworn by the officer in charge.

EXAMINATION BY ATTORNEY FOR PARTY SEEKING DISCOVERY

The attorney who desires discovery propounds oral questions to the witness. The Wisconsin statutes specifically provide that the examination may assume the form of a cross-examination. Some of the states which allow use of deposition procedure for discovery have extraneous statutes which provide that a party may be examined as if under cross-examination by the adverse party, either orally or by deposition as any other witness. Such a statute, taken together with the deposition statute, allows the discovery questioning to be in the form of a cross-examination. Without such a statute the theoretical rule is that questions shall not be leading, because the party makes the witness his own by taking his deposition. But as a practical matter lawyers in conducting discovery hearings usually probe a party, or even a witness, about as thoroughly as if a cross-examination were allowed. The chief reason for this is that the attorney for the party who is being examined seldom makes objection to the form of the questions. Of course there is the danger that the adverse party may take advantage of his right to file written objections to the form of the questions before trial and thus deprive the examining lawyer of that part of the testimony which was obtained upon leading questions. This is very infrequently done in actual practice.
Examination by Attorney for Party Against Whom Discovery Is Sought

After the attorney seeking discovery has finished questioning the witness, his own attorney is allowed to propound questions. Only in Wisconsin was it found that attempts have been made to limit the extent of questioning by the latter on the ground that it is a misconception of the purposes of discovery and works a hardship in that it forces the applicant to pay in the first instance for folios increased by his adversary. Ordinarily there is no desire upon the part of the party's lawyer to ask questions, unless they are for the purpose of explaining some incidental statement or straightening out the witness where it is thought he has misunderstood the question. Occasionally such questions are interposed during the course of the principal examination. Lawyers who have had experience in the matter say they refrain from questioning their client at a discovery hearing initiated by the adverse party, not because it is considered improper but simply because they have no desire to add to the adversary's knowledge. In only three cases out of fifty examined in Toronto, for instance, did the party's solicitor ask a single question. When a lawyer becomes accustomed to the use of discovery procedure he adjusts his tactics and does not ordinarily ask questions of his own client. The fact that either party can use the deposition if the deponent is unavailable at the trial does not counteract the tactical advantages of non-questioning in the usual discovery situation.

Art of Examining for Discovery

Lawyers who have had considerable experience in conducting discovery examinations say that they have developed a peculiar technique as to the mode of questioning. Seldom is a hostile cross-examination indulged. The reasons are that a hostile cross-examination would reveal
the examining party's own line of attack, and would render less effective the cross-examination at the trial. The tactics which are employed are: The lawyer assumes a friendly role; sometimes he assumes a false front of more or less aimless, haphazard searching after information; his principal object is to get the witness to talk and to disclose the whole story in his own way. His object is to get as much information as he can from the witness and to disclose as little of his own objective as possible. Ontario practitioners have developed this art to a finer point than found elsewhere but various lawyers throughout the states which were visited said they employed the same technique.

Usually a discovery hearing is very informal, amounting in some instances to a virtual conference between adversaries. This is especially true in states which allow use of the ordinary deposition procedure for discovery. Perhaps too great an informality prevails. Examinations have been witnessed in which attorneys and parties alike smoked cigarettes as they pleased. This feature seemed especially soothing to one particular party who was being probed in an action wherein he sought to obtain payment of an insured loss which the insurance company claimed was the result of a fire started by himself. The informality of discovery hearings reaches its height in Montreal, Quebec. In true French style banter and repartee are indulged in by the lawyers throughout the proceedings.

**Record of Examination**

In Wisconsin and Ontario either the officer in charge of the examination takes it down and transcribes it or a reporter does so under his direction. The latter practice is the more general in the larger cities. The usual practice elsewhere, especially under the ordinary deposition procedure, is for the officer to do the reporting himself.
There are statutory requirements in some states that the deposition be written up by the officer in the presence of the deponent. The courts have not applied such requirements strictly but have allowed the reporting to be done in the fashion now generally employed by firms of reporters. The usual practice is for the reporter to take down all questions, answers and objections. If the officer is allowed to make rulings upon the objections, as in Wisconsin, such rulings also are noted. The more careful reporters make it a practice to number the questions so as to expedite any subsequent use of, or objection to, the record of the examination. In New York the statute provides that no objections, except those to the form of the questions, are to be noted.

Except in Wisconsin, the applicant for discovery has an option as to whether or not the examination shall be transcribed. In Wisconsin it is always written up. The practical importance of the matter is that if there is no necessity of writing up, the examining lawyer can save that expense if he cares to. Perchance the questioning has proved entirely futile, or perchance the lawyer’s own stenographer, by agreement, has done the reporting, in which event he can simply have the shorthand notes preserved. It is a quite usual practice in some offices, especially in the smaller towns, for the examining lawyer to take enough notes to refresh his memory as to the testimony of the witness, and, if it becomes necessary to use the examination at the trial, to call the stenographer and have her read her notes. If an outside reporter is used it usually is possible to adjust the fees if transcription of the notes is not desired. In the larger offices, especially in the cities, the expense is considered secondary to the more thorough preparation and depositions always are written up. This is especially true

1 The discussion of the Ohio situation in 14 Ohio Jurisprudence, pages 41, 42, is representative.
2 Rules of Civil Practice 129.
where the examination for discovery and the trial work are handled by different members of the law office.

**Right to Copies of Record**

The rules discussed in the preceding section are subject to the limitation that the adverse party can compel that the deposition be written up so that he can obtain a copy, if he will agree to pay the cost thereof. This is the uniform practice with the possible exception of Indiana. While the statutes are silent on the matter, a majority of the Indiana lawyers who were interviewed were of the opinion that the only way a copy of the examination could be had, over the objection of the taker, was for the party examined to bring his own stenographer. The theory seems to be that the examination is the taker’s own private affair until it is filed. In New Hampshire and in Texas some of the lawyers go to the other extreme of giving their opponents copies free of charge. But the usual rule is that the adverse party can have a copy if, and only if, he will pay for it.

**Reading Over and Signing Record**

There is a uniform requirement, except in Ontario, Quebec and West Virginia, that the party examined read over and sign the record of the examination. But in almost every jurisdiction there is a widespread waiver of the requirement. In Wisconsin, for instance, there had been a waiver of signature in ninety-one of the hundred cases which were inspected in Milwaukee and Madison. Commissioners said that this was about the usual ratio. Even so, a majority of the lawyers in the states which have the requirement do not favor its abolition. They prefer to be able to require a signature if they choose to, so as to render use of the deposition more
effective at the trial. Ontario and Quebec have abolished the requirement. In Toronto, the Examiner (officer in charge) signs the deposition and either he, if he reports it himself, or the reporter certifies that it is correct.\(^8\) Toronto practitioners regard this as a distinct improvement over the older practice of having the party read over and sign the deposition. One of the advantages pointed out is that a saving of time and trouble is effected, since it is no longer necessary for the parties to reappear for the signing formalities. West Virginia has tried the same expedient in regard to depositions, but no use is made of the deposition for discovery purposes in the state.\(^4\) A number of West Virginia lawyers to whom letters of inquiry were addressed replied that there is general satisfaction with the provision as far as ordinary depositions are concerned.

**Correcting Record**

Uniformly the deponent is allowed to make corrections of clerical errors on the part of the reporter. His right to make substantial corrections to the testimony which he has previously given presents a more difficult problem. A case taken from the records in Milwaukee, Wisconsin, indicates the character of the problem. In a case involving fraud the parties came back three weeks after the deposition was taken, for the signing thereof. At this time the following occurred:

Mr. A: “I ask for another adjournment so I can have the witness correct some errors in the testimony.”

Mr. B: “I object to this.”

Commissioner: “Do you mean errors on part of witness or in the transcribing?”

Mr. A: “On part of witness.”

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\(^8\) Rule 340.

\(^4\) W. Va. Code (Barnes, 1923) ch. 130, sec. 33.
Commissioner: "This is cross-examination, no direct examination is permitted except on the trial, because this is supposed to be discovery of one side only."

Mr. A: "Do I understand the rule to be that a party may not read over his deposition and any corrections he desires to make, the witness may make them?"

Commissioner: "I understand he may correct any errors of the reporter in writing the testimony."

Mr. A: "He may correct any errors he has made in the testimony. I understand that to be the rule."

Commissioner: "I understand the rule that any correction, not taking into consideration mistakes of the reporter, cannot be made before the commissioner over objection, because this is strictly a cross-examination. Now I have never been reversed on that, but I don't think it has ever been tried out. It might be certified up and get a ruling from the Circuit Court. That has been my ruling for upward of ten years. I may be wrong but if I am I would like to be corrected. I do not want to rule one way in one case and another way in another case."

Mr. A: "I know of rulings of that kind where the deposition is closed and adjournment taken simply for the purpose of permitting the witness to read it over and sign it. I appreciate your position that the opposite side may not directly examine their own witness, but I think this is true, that if a witness testified in the forenoon and came back in the afternoon and said to the commissioner 'I said so and so in the forenoon but I was mistaken', that the witness might have an opportunity to correct his testimony."

Commissioner: "Suppose on the trial he made a mistake in testifying, and I want to correct the testimony—the court may say 'You may when your counsel examines you, correct your testimony.' But the only opportunity he has to make it is at the close of the trial, or when a
deposition is taken at the close of the reading of the deposition.’’

Mr. A: ‘‘It seems to me you do not catch my distinc­tion. I appreciate a witness may not be asked to explain his testimony. But if the witness says, ‘I made a mistake in my testimony’, I think the court will and should per­mit correction at any time.’’

Commissioner: ‘‘I think it is in the discretion of the trial court, ‘You may correct it now or you may correct it when you have your direct examination.’’

Mr. A: ‘‘Well, I will ask some questions in order to get the matter before the court.’’

He then asked 23 questions by telling the witness what he had stated and asking if he desired now to correct it. These questions covered almost the whole case. Then Mr. A said: ‘‘There are other questions of the same character but these are enough to get a ruling.’’

The case was certified to the trial judge and he ruled that the correction should be allowed. The exact words of the ruling were: ‘‘Said party is hereby given leave to correct the answers to questions asked on said examina­tion and his counsel may examine him as to all mat­ters tending to explain or qualify any testimony given by her on said examination.’’ 5 A number of the Wiscon­sin commissioners refuse to follow such practice but require the witness to sign without corrections.

Corrections, even substantial corrections, are allowed under the New York practice. In one case it was dis­closed on appeal that there had been thirty-five different corrections, varying from slight changes in figures to very substantial changes. It was urged that the de­ponent should have signed the transcript as prepared by the reporter but the court held otherwise. The reasoning of the court was that there would be no sense in having

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5 Milwaukee Circuit Court Records, No. 79847.
the transcribed testimony read before it is signed, if no corrections are to be allowed.\(^6\)

The view of the Ohio court is indicated by the following quotation from Minshall, J.: "The witness must be the judge as to whether his testimony had been accurately taken down by whomever it is done. What he signs is his sworn statement, and he should not be required to sign what he under oath says is not accurate. In case of a controversy about the matter, witnesses might be called at the trial to state what the defendant stated in the first instance, for the purpose of reflecting on his credibility, but he cannot be compelled to sign a deposition which he says on oath is not correct."\(^7\)

Officers in charge of discovery proceedings have devised practical ways of solving disputes as to the right to correct the record. Sometimes they instruct the deponent to sign and to write out any corrections he desires to make underneath as a qualification of the signature. This allows the correction, and yet does not deprive the examining party of the full effect of the previous discovery. Any scheme which will separate the corrections from the previous testimony and label the latter as such has a similar effect. In fact, if the correction is obviously a change of testimony upon advice of other persons, it does little harm to the examining party so long as the contradictory statements are preserved. Indeed some lawyers say they are glad to get such corrections because they tend to discredit the whole story of the witness. Other officers allow corrections subject to the proviso that the party allow himself to be re-examined by his adversary as to the new part.

**Filing the Record**

The statutes uniformly require that the officer file the record of the examination, with the proper certification,

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\(^7\) Ex parte Hafer (1901) 65 O. S. 170, 172, 61 N. E. 702.
with the clerk of the court in which the action is pending. The clerk then places the record with the papers of the case. In Wisconsin always, and in Missouri and Nebraska usually, the officers obey this rule. In Missouri this is due in part to the fact that all depositions which are filed may be taxed as costs. In Ontario the record need be filed only in the event that the taker requests the transcription of the reporter's notes, but it must be filed then. There is a widespread disregard of the statutory requirement in all other jurisdictions. The reasoning in justification of the failure to follow the statutes is that they prescribe the requirement only as a condition precedent to the use of the deposition as such at the trial; that ordinarily a deposition taken for discovery purposes will be used only for purposes of impeachment at the trial, rather than as original evidence, and that it can be used for this purpose as a signed statement, or as a contradictory previous statement, without any official sanctions. Another reason why some lawyers do not file the record is that such tactics deprive the adverse party, or his attorney, of access to the record for purposes of preparation for trial, unless he is willing to pay for a copy. Accordingly, it is a widespread practice for the officer to return the record to the examining attorney, unless directed otherwise by him, and for the latter to keep the same in his files. Court rules in Concord, New Hampshire and in Louisville, Kentucky, specifically directed at this practice, have been disregarded by the bar. Of course, if a lawyer thinks there may be occasion for the use of the deposition as original evidence at the trial he should have the record filed. If he is the attorney for the party examined in a state where either party is entitled to use the deposition at the trial if the deponent is unavailable, he may obtain a court order requiring that the particular deposition be filed for his use.
A difference of practice exists as to whether depositions which are filed must remain sealed until opened by court order or until published by the taker. Usually it is required that it be sent sealed to the clerk by the officer taking. In Ontario there is no such requirement. But even in some states where the deposition is sent sealed, the clerk opens it as soon as he receives it. This is the general practice in Wisconsin, but within the last year or so the Milwaukee judges have required that all depositions be kept sealed until the court orders them opened. The purpose is to check the activities of certain newspaper reporters. An Indiana appellate court has held that once a deposition is filed the taker loses control over it so that he cannot remove it from the files.8

8 Grant v. Davis (1892) 5 Ind. App. 116.
CHAPTER XII

EXAMINATION BY WRITTEN INTERROGATORIES

FILING INTERROGATORIES

All of the jurisdictions which allow discovery by written interrogatories, except England, allow the filing of the interrogatories as a matter of right, with any objections being decided subsequently. In a few jurisdictions the questions are annexed to the appropriate pleading, but the more usual practice is to file the questions separately. The following American jurisdictions require some additional step in the nature of a showing of the propriety of the interrogation either by petition or affidavit: Alabama, Connecticut, Tennessee, Louisiana, and New Mexico. Indiana requires that the proponent also obtain a rule to answer, which is given as of course. Virginia requires that the proponent, after filing interrogatories, require the clerk to issue a summons to be served by the proper officer. Georgia requires that he take out a commission, as in deposition procedure. Statutes in the following states specify that the adverse party be served with a copy of the questions: Massachusetts, United States Equity, New Mexico, Washington, Alabama and Florida.

The English practice is slightly different from that which obtains in the United States. Up until 1893 interrogatories were delivered directly to the party to be interrogated and then he entered his objections, as is generally the practice in American jurisdictions at present. But since 1893 it has been necessary to first obtain leave of court before filing interrogatories.1 The par-

1 Annual Practice, order 31, rule 1.
ticular interrogatories proposed to be delivered are first submitted for approval to a master in chambers on summons for directions. A copy of the proposed questions is usually served with the notice of the application, which is filed two days before the hearing. At the hearing the master may either grant or deny the application, in whole or in part, or he may alter the number, extent or form of the questions. The English system contemplates the obtaining of judicial approval to the particular questions before they are put to the adverse party.

**NUMBER OF QUESTIONS ALLOWED**

One of the most troublesome problems in some American jurisdictions, notably in Massachusetts, has been whether a party may file as many questions as he chooses to. The Massachusetts experience in this regard throws an interesting sidelight upon the relative effectiveness of an oral interrogation and a written interrogation. Prior to 1929 there was no limit to the number of interrogatories which might be filed. In one case 2,258 interrogatories were filed. Gradually there came into use mimeographed and printed forms which contained two, three and four hundred interrogatories. These questions were not prepared with reference to the particular case in which they were to be used, but were stock forms entirely. Their most widespread use was in automobile accident litigation. One of the purposes in using so many questions was to put each principal question in so many forms that evasion would be difficult. It was urged by way of justification of the practice that, "Most automobile collision cases involve the same questions, which can be covered by a prepared set of interrogatories, and, where plaintiffs' lawyers flood the courts with

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3 Id. rule 2; Stringer, A. B. C. Guide to Practice (1928), 66.
3 Rosenbaum, Rule Making Authority, 128.
4 First Report of Massachusetts Judicial Council (1925) 42.
thousands of cases where merit does not exist, or is very
doubtful, there is no sense or reason for the defendant
trying to get up a special set of interrogatories where
the same principles are involved; and in order to do it,
a company, under the laws of compulsory insurance,
would have to hire a separate building and a corps of
lawyers and stenographers and the work would be much
less accurate than under a system of mimeographing.”

In time the practice became extremely burdensome
upon the courts. Almost all of the various motion hours
were taken up in deciding objections to interrogatories.
Oftentimes the questions asked, as applied to the par­
ticular case, were quite ludicrous. The burden on the
clerk’s office was surprisingly heavy. Yet, in a test case
which was carried to the Massachusetts Supreme Court,
the practice was allowed. Just recently a statute has
been enacted limiting the number of interrogatories
which may be filed as of right to thirty. Nor can several
questions be grouped in one interrogatory so as to escape
the rule, for the thirty include “interrogatories subsis­
diary or incidental to, or dependent upon, other interro­
gatories, however the same may be grouped, combined or
arranged.” There is little or no complaint with the
operation of the new rule. Usually, it is said, thirty
questions, if fully answered, are sufficient. Additional
interrogatories can be propounded in a proper case by
special leave of court. The burden upon the court has
been greatly lessened, although it is still considerable.
Other effects of the change are that considerably more
care is spent in the framing of interrogatories and an­
dswers; and the use of motions for specifications and par­

tic*lar has increased. Mimeographed and printed

5 From the defendant’s brief in the case of Goldman v. Ashkins (1929)
266 Mass. 374, 165 N. E. 513.
7 Acts 1929, ch. 303. Cf. suggestion that this be done, First Report of
Massachusetts Judicial Council (1925) 42.
forms are still in use, but they comply with the rule. Usually about sixteen interrogatories are included in the printed form. The questions have to do chiefly with matters bearing upon items of damage, extent of injuries, physicians and nurses employed, earnings at the time of the accident, and similar matters. "Forms used by plaintiffs usually include questions as to ownership and agency. Clerks who handle such work in some of the larger law offices have a dozen or so of these mimeographed forms from which they can select the one most nearly appropriate to the particular case.

Other American states have had less trouble in this regard principally because they confine the interrogatories to so narrow a scope that they are not used for the purpose of eliciting a full discovery upon all the issues of the case. In Washington one hundred and sixty interrogatories were filed in one case. While there is no arbitrary limit upon the number of questions under the federal equity practice, the courts look with disfavor upon an excessive number being filed. In the few states in which both an oral examination for discovery and one upon written interrogatories are allowed, there is no need nor desire to increase the number of the written interrogatories. Rather they are used, if at all, for the purpose of obtaining a few formal admissions.

**Answering Interrogatories**

It is uniformly provided that the party served with interrogatories file an explicit, responsive, and full answer to each question separately. Of course, as a practical matter, one of the chief complaints with the written interrogatory procedure is that answers usually are so evasive as to give little enlightenment. The time

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8 Pearce v. Greek Boys' Min. Co. (1907) 48 Wash. 38, 92 Pac. 773.
But for a late case in which 345 interrogatories were filed see O'Brien v. Makey (1929) 36 F. (2d) 89.
within which answers should be filed varies in the different jurisdictions. Three different schemes are employed in various jurisdictions: (1) Some statutes provide a specific time within which answers must be filed unless the court orders otherwise. Provisions of this character are: England, ten days; United States Equity, fifteen days; Massachusetts, ten days; Alabama, sixty days; Washington, twenty days. (2) Statutes in the following states provide that the interrogatories shall be answered in such time as the court may prescribe; Indiana, Iowa, Connecticut and Virginia. (3) States which allow interrogatories to be annexed to the pleading require that answers be filed within the time allowed for answering the pleading to which they are annexed. This is the provision in Ohio, and under the special interrogatory procedure in equitable actions in Kentucky and Arkansas. The adverse party usually is allowed to include in his answers relevant matters in avoidance.

10 In Virginia sixty days is the maximum allowance that the court can grant.

11 In addition to the statutes see Baxter v. Massasoit Ins. Co. (1866) 95 Mass. 320; Railsback v. Koons (1862) 18 Ind. 274; Phelps v. Mulhaupt (1920) 146 La. 1078, 84 So. 362. See also 1 A. L. R. 76, 91, for a note as to the theoretical basis for such a rule in connection with self-serving declarations; and Grinnell, Discovery in Massachusetts, 16 Harv. L. Rev. 110, 193, as to policy considerations.
CHAPTER XIII

DECIDING OBJECTIONS AND COMPELLING ANSWERS UPON ORAL EXAMINATION

WHERE OFFICER DOES NOT HAVE POWER TO COMPEL ANSWERS OR TO DECIDE OBJECTIONS

A number of states follow this plan in administering discovery examinations: the officer in charge is a reporter with power only to swear the witness and preserve the orderly conduct of the hearing; he has no power to compel answers or to decide objections to questions; if objections arise which cannot be decided among counsel, the examination is adjourned until a ruling can be obtained from the trial court. This is the plan which obtains in California, Indiana, Kentucky, New Jersey, North Carolina, Ontario, Quebec and Texas.

The officer under the plan in question is any officer qualified under the statutes to take depositions generally. Such an arrangement has the following advantages: (1) It does not require an additional officer for discovery examinations but allows the use of officers already provided; (2) It fosters an assimilation of discovery procedure and deposition procedure both of which are his-

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1 This plan now obtains in New Jersey: Backel v. Linn (N. J., 1928) 140 Atl. 285. But this decision was rendered after the right to, and the scope of, the examination had been drastically restricted. A large part of the dissatisfaction which finally lead to the substitution of a restricted examination upon court order for a full examination upon notice is attributable to an earlier decision to the effect that a lawyer ran great danger, either of being committed for contempt or of being scolded by the judge, if he instructed his client not to answer a question, however incompetent it might be, at a discovery examination. Brown and Seccomb v. Shafman (1923) 2 N. J. Misc. 13.

2 In addition to the statutes which are set forth in the appendix, see Cartwright v. Norfolk Southern R. Co. (1918) 176 N. C. 36, 96 S. E. 647; Fertilizer Co. v. Taylor (1893) 112 N. C. 141, 17 S. E. 69.
A disadvantage sometimes supposed is that an effective discovery can be obtained only when the officer in charge has certain judicial and quasi-judicial powers. It is said that the officers who take depositions generally are not qualified to exercise such powers.

The statutory enumeration of the officers eligible to take depositions varies in the different states, but the following persons generally are included: judges, justices of the peace, clerks of courts of record and notaries public. As a practical matter reporters and stenographers who are notaries public are almost always used. Many of the statutes forbid a notary from serving if he is kin to the parties or interested in the cause. The general view of the lawyers who were interviewed is that this prevents a notary in the office of either lawyer in the cause from serving, unless allowed to do so by agreement. It is a quite usual thing in many towns and cities of less than one hundred thousand population, for the stenographer in the office of the examining lawyer to take down the examination. In such cities as Fort Wayne, Indiana, Concord and Manchester, New Hampshire, and Lexington, Kentucky, for instance, the best law firms do this, and the sentiment of the bar supports it. The principal reason, of course, is to save expense. Skilled reporters are scarce and the office stenographers are about as accurate as the reporters who are available. No complaint of unfairness due to the fact that the stenographer is an employee of one of the lawyers has been found. While the practice also obtains to an extent in the larger cities, there is a general feeling upon the part of the bar that it is preferable to employ an outside reporter in order to remove even the semblance of over-

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8 Cf. Singer Mfg. Co. v. McAllister Bros. (1887) 22 Neb. 359, 35 N. W. 181, where the practice is allowed, without any agreement, but is discouraged.
reaching and in order to get more accurate reporting. In many such cities there are firms of reporters who are available and whose work is of the highest character. Large law firms find it convenient to give all of their work of this nature to some particular firm of reporters, and the latter in turn feel obligated to have a man available at all times. There are no official court reporters in Cleveland, Ohio, so some law firms use the same reporter for deposition work and trial work. Then if any dispute arises at the trial as to the correctness of a deposition the reporter who took it is there to verify it. It is said that the jury looks upon such a reporter as an officer of the court, and that it makes the use of the deposition more effective for purposes of contradiction if the lawyer can ask the witness whether he did not make the alleged statements before this supposed officer.

The officer in charge merely notes the objection made by the attorney for the party who is being examined. Sometimes the party gives an answer subject to objection. More often the opposing lawyer’s objections are addressed to the examining counsel rather than to the officer. They serve as a word of warning that the inquiry has reached the limits of its proper scope. Both lawyers know that the officer has neither power to compel an answer nor to relieve a witness from answering. What actually happens is that when the lawyer for the party under examination objects to the question and instructs his client not to answer, he and the lawyer conducting the examination argue the ground of the objection informally among themselves, first of all; usually they reach an agreement; the proponent either agrees to withdraw or to restate the question or the opponent agrees to allow an answer subject to objection. If, however, the lawyers are unable thus to adjust the matter and the proponent of the question meets with a refusal to answer which he considers unjustified, he can take either
one of two courses. (1) He may adopt the policy of getting what he can and letting the rest go. In this event he will waive his right to an answer and proceed to propound other questions. This is usually the course adopted in practice unless the question is especially important or the witness becomes especially balky and refuses to answer any and all questions. (2) He can adjourn the examination and go before the court and move that an answer be compelled. The actual operation of discovery examinations in Toronto is slightly different from this. The examiners who have had legal training exercise limited powers. While they cannot compel an answer, they often order the witness to answer, or relieve him from answering if they think the question is improper. Of course the witness has the power to relieve himself from answering by merely refusing, and thus forcing the proponent to go before a judge or master and move that an answer be compelled. The essential difference from the American practice is that the examiner enters into the discussion with the lawyers as to the propriety of the question and aids a decision.

Under the American practice the proponent of a question to which an answer has been refused has the right to go before the trial judge and move that an answer be compelled by contempt proceedings. Usually the procedure is informal: after having met with a refusal to answer a particular question, the examining lawyer proceeds to propound a number of representative questions so as to cover all angles of the matter in dispute; then he adjourns the examination and takes the matter to the judge in chambers. A few courts require that the matter be presented by formal petition or motion, but a majority allow an informal resort to the judge in chambers. While the procedure is informal it is not always as expeditious as it might be. Access to the judge, especially in the larger cities, often is difficult. In New York
City it is often necessary to wait a considerable time before reaching the judge, even after an appointment has been secured from his secretary. In some of the smaller towns in Indiana, Kentucky and elsewhere local lawyers sometimes take advantage of lawyers from the city who have come to conduct an examination for discovery. Knowing that their opponents are anxious to finish the examination and return to the city and are not apt to wait over until a rather tardy judge compels an answer, they instruct their clients to refuse to answer questions which clearly are proper. Ontario and Quebec have a somewhat different method of handling this problem. In Ontario the master (an intermediate officer not used in American practice) relieves the trial court of most of this type of work and settles the matter expeditiously. In Montreal, all such questions, instead of being presented to a judge or a master in chambers, are presented to the Practice Court, a court which sits each afternoon from two to four. This court is presided over by an expert in matters of practice who handles all the chamber work of the various judges. Inasmuch as discovery examinations usually are conducted during the hours at which the Practice Court sits it is possible to carry disputes which arise directly to the court and obtain a decision quickly.

The exact balancing of the scales between unjust concealment, on the one hand, and unjust discovery, on the other, is largely dependent upon the question whether a ruling can be expeditiously secured from the trial court when an objection arises during the course of the examination. The indirect effect of this consideration is even more important than the direct effect. Usually lawyers know whether a question is proper or improper. Little danger exists of a party being forced to disclose improper matters since he can refuse to answer until compelled to do so by the judge. If the party under exami-
ination can, without unnecessary delay, be compelled to answer a question, scant encouragement is afforded to a party to withhold information on the ground that he knows his adversary will prefer to let the matter drop rather than to pursue his rather clumsy remedy of enforcing an answer. Lawyers are willing to do voluntarily that which they know they can be forced to do. In a majority of the cities which were visited the means of compelling an answer is sufficiently expeditious to discourage unjust concealment. The remedy in places where it is otherwise, lies with the trial judge.

There are two factors which foster a voluntary answering of proper questions even when the means of compelling answers is clumsy. (1) It is possible to adjourn the whole examination to the trial judge for its completion. Some lawyers have found that the mere threat of using this expedient has proved effective in persuading the witness to answer voluntarily. (2) Some lawyers are glad to obtain a refusal on the part of the witness to answer a question. They would prefer to be able to display the refusal to the jury, rather than to have an answer. Their adversaries sense this desire and do not care to gratify it; consequently they refrain from instructing a refusal to answer.

The New York rule that examinations before trial must be confined to issues of which the applicant has the burden of proof has necessitated a somewhat different method of deciding objections. An attempt is made to settle the major objections before they arise, by allowing the trial judge to fix the proper matters of inquiry. To this end the party applicant is required to set forth the matters upon which he desires to question his adversary. Then the latter is allowed to contest the propriety of the matters set forth by a motion to vacate the notice. The motion to vacate or modify the notice is applicable when
it is desired to make an objection as to any of the following matters:

1. The right of the party seeking to examine;
2. The time of the examination;
3. The place of the examination;
4. The person before whom the examination is scheduled; and
5. The matters upon which the examination is to be had.4

The notice of motion to vacate or modify must specify the grounds relied on and may be supported by appropriate affidavits.5 The service of the motion, if made for the first term or sitting of court at which the motion can be heard, operates to stay the examination until the determination of the motion. The order given by the court, whether requested by the applicant in the first instance or whether made necessary by a motion to vacate the notice is framed in accordance with approximately the same regulations.6 The terms of the order are largely in the discretion of the court under its power to determine whether the examination sought is material and necessary.7

The new Michigan Court Rules provide for a motion to vacate the notice, similar in character to the New York practice.8 Since the principal objective of the device in New York is to limit the scope of the examination in a way which seems undesirable, there is danger that the very availability of the device in Michigan may serve as an invitation to limit the scope in a similar fashion.

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4 New York Civil Practice Act, sec. 291.
5 Rules of Civil Practice, 124.
7 New York Civil Practice Act, secs. 288, 294; Rules of Civil Practice, 124.
8 Michigan Court Rules (1931) rule 41, sec. 4.
WHERE OFFICER HAS POWER TO COMPEL ANSWERS AND TO DECIDE OBJECTIONS

Some jurisdictions, instead of providing a powerless officer to supervise the examination and allowing all disputes to be presented to the trial court directly, provide an officer who is empowered to compel answers and to decide objections. This plan is followed in Wisconsin, Missouri, Ohio, New Hampshire and Nebraska.

Wisconsin. The examination is supervised by a court commissioner who is an officer of the court appointed by the circuit judge and holding office during the term of office of the judge who appoints him. Only a limited number can be appointed in each county. In Milwaukee and elsewhere the commissioners are practically all lawyers, but in some of the smaller towns it has been difficult to obtain the services of men with legal training and reporters have been appointed instead.

A variety of opinion exists in Wisconsin as to the power of a commissioner. In Milwaukee the view is that a court commissioner is vested with the powers of a judge in chambers. He decides all objections which arise during the course of the adverse examination and, when necessary, exercises the power to punish for contempt. The theory advanced to support this view is that if the commissioner did not have such powers the examination might as well be taken before a notary as are ordinary depositions, yet this latter has been expressly disallowed by the Supreme Court. The general opinion in Madison, Wisconsin, is that the commissioner has only the power to decide objections bearing on the question of relevancy. The theory in support of this view is that the statute says an adverse examination shall be conducted as the taking of ordinary depositions except where other-

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10 Hincliff v. Hinman (1864) 18 Wis. 139.
wise provided and that the statute provides the party must not be compelled to disclose matters not relevant to the issues. This theory is carried to such an extent that when objections as to incompetency, privilege, hearsay, and the like, are presented, as the records show they occasionally are, the commissioners rule that they have no power to decide whether the question is improper. They even go so far as to refuse to strike irrelevant matter once it is in. Asked what they do with the objection that an answer would incriminate the party, they say that they do not decide the objection but that the counsel for the party instructs him not to answer and that the examining counsel does not ask for a contempt certification.

A third view is taken in some of the other Wisconsin cities and towns, namely, that commissioners have no power to decide objections but must simply note them on the record. If objections become very frequent counsel often asks that it be noted of record that all the subsequent testimony is taken subject to objection. In some sections such a practice has led to the complaint that parties are being forced to disclose family affairs and other matters entirely irrelevant to the controversies. Possibly this is what has led the Advisory Committee on Rules to propose that the words "but the deponent shall not be compelled to disclose anything not relevant to the controversy," which were formerly in the statute and which have been omitted in recent revisions of the statutes, be re-inserted. The saving feature in the practice in these outlying districts is that the commissioners also refuse to punish for contempt. A party can refuse to answer clearly objectionable questions and place the burden on his opponent to ask for contempt proceedings before the trial judge.

The explanation of such a diversity of opinion in Wisconsin probably is this. The commissioner, under the stat-

11 Proposed Changes in Rules of Pleading Practice and Procedure, October, 1930, item 18.
utes, does have the power which he is thought to have by the Milwaukee lawyers. But the question as to how much power he should exercise has been decided by the practicalities of the situation in each locality. The chief factor in determining the policy has been the training and ability of the various commissioners. The commissioners exercise only that portion of their powers which experience has demonstrated they can exercise to the satisfaction of the judges and the lawyers. In those localities where the view is taken that the commissioner has no power except to note the objection, the commissioners are not lawyers but are former court reporters. Then there is another factor which helps explain the difference between the practice at Milwaukee and Madison. Milwaukee circuit judges are so overworked that they can find no time to decide objections arising out of examination before trial, whereas Madison judges can and do devote a greater amount of their time to this feature of the procedure. Consequently the attitude of the judges in the former city is to discourage certification of questions, and to encourage the commissioners to rule on objections. The situation at Madison is just the opposite. There the judges are readily available to decide certified questions.

A further word should be said about the administration of the machinery in Milwaukee. There the commissioner, who is a trained lawyer, employs reporters to take down the examination. The commissioner who has the largest amount of the work maintains a suite of offices which are so arranged that offices for the reporters surround a central office in which the commissioner sits. Under this plan he is able to conduct as many as four examinations simultaneously. Each examination is in charge of the reporter entirely until a dispute arises which the lawyers are unable to settle among themselves. At this juncture the commissioner is called in. Resort
is thus had to the commissioner in much the same manner as to the trial court in other places, except it is much more expeditious.

If the commissioner punishes for contempt the order is reviewable by the trial court on habeas corpus proceedings. If the commissioner refuses to compel an answer to a question and the proponent thinks the decision is erroneous he can ask for a certification to the trial judge. The officer upon granting the certification sends up the relevant part of the record. In Milwaukee the whole record is sent up together with a formal statement pointing out the location of the objections. To the usual certification at the end of the deposition are added words such as these: "And I hereby certify and return the foregoing deposition to the above named court in pursuance of request of counsel for them to obtain a ruling on the matters shown at pages 45, 48 and 50, to the end that the above named court may direct whether the rulings are correct and whether they should be affirmed or reversed and for such other orders as the court may think proper." The commissioner then mails the deposition to the clerk as usual. In Madison and other places the certification is informal; the appropriate questions, answers and objections are written up and carried directly to the judge. Certification upon request is practically a matter of course in Madison but most commissioners in Milwaukee will only certify important matters. The position is taken that the judges are too busy to be worried with minor matters and that certification is often asked for the purpose of delay. Several commissioners make it a regular practice to refuse to certify questions. The only remedy in such case is to go directly to the trial judge and move that he order the record sent up.

Missouri. In Missouri cities of a greater population than fifty thousand inhabitants, it is the privilege of the party served with a notice that his deposition is to be
taken, to apply to the court for the appointment of a special commissioner to supervise the examination.12 When the party applies for the appointment of a special commissioner, there is no necessity for service of a subpoena by the latter, the original service of the subpoena by the notary sufficing. The commissioner must be "an attorney of record in such court, learned in the law, disinterested, and of no kin to either party to such cause." The policy behind the provision for trained officers to supervise examinations has been explained by the Court of Appeals: "Manifestly, in providing—for the appointment by the court, on the motion of the adverse party, of a special commissioner, learned in the law, to preside as an officer of the court at the taking of depositions in large cities, the Legislature was guided by the belief that the abuses of the power to take depositions before a notary public of the selection of the party giving the notice were greater in large cities than in other communities, and that the adverse party should be accorded the protection of the right to have a special and disinterested commissioner to preside at the taking of the testimony, to the end that the inquiry might be confined to the legitimate issues of the case and not range over other and impertinent fields." 18 A special commissioner has all the power which any officer empowered to take depositions has, including the power to compel answers by attachment for contempt, and, in addition, has "power and authority to hear and determine all objections to testimony and evidence, and to admit and exclude the same, in the same manner and to the same extent as the circuit court might in a trial of said cause before said circuit court." 14 In cases in which such an officer is used he actually exercises his powers.

As a matter of practice it is the exception rather than the rule that the opposite party requests the appointment of a commissioner. It is almost never done in automobile accident litigation. Even so, Missouri lawyers generally regard the provision as a wise one. They say that it affords a sort of residuary protection for those who feel that an examination before a notary is subject to abuse. While there is neither need for nor desire to have such protection in the usual case, there is satisfaction in knowing that it is available. That the expedient is seldom used is further attested by the fact that there are no lawyers who make it a special business to serve as commissioners at such examinations. In the event the opposite party desires that the examination be supervised by a commissioner the lawyers usually agree among themselves as to who shall serve and do not apply to the court to appoint a commissioner.

The following provision is made in Missouri for appeals from the special commissioners' rulings to the circuit court. If the officer rules that the question need not be answered, the proponent of the question can demand that he refer the matter to the circuit court for a decision. In this event the circuit court is required to give a ruling forthwith as to the correctness of the commissioner's ruling. If the circuit court rules that the question should be answered the commissioner holds a further examination of the witness for that purpose. It should be noticed that the statute does not provide that the witness can appeal from a ruling of the commissioner which, instead of relieving him from answering a question, requires that an answer be given. The only way the witness can present his objection to the trial court before trial is to refuse to answer the question, suffer commitment for contempt and, by habeas corpus proceedings, get a review by the trial court. His rights in this regard are the same as if the examination were held before a notary rather than a commissioner.
New Hampshire, Nebraska, and Ohio. The practice in New Hampshire,\textsuperscript{15} Nebraska,\textsuperscript{16} and Ohio,\textsuperscript{17} is to allow the notary who takes depositions to compel answers by attachment for contempt. The notary who takes a deposition in Missouri has power to enforce answers by attachment for contempt\textsuperscript{18} but, as already pointed out, in Missouri cities of a greater population than fifty thousand inhabitants, it is possible to require the appointment of a special commissioner instead of a notary to supervise the examination.\textsuperscript{19} In all cases in which a special commissioner is not appointed the practice in New Hampshire, Nebraska, and Ohio approximates that in Missouri.

The primary object in giving the notary in these states power to punish for contempt was to insure that witnesses in giving their depositions would answer all questions except those involving personal privilege.\textsuperscript{20} It was not contemplated that notaries should decide objections involving relevancy and similar questions. Rather it was contemplated that the witness should answer the questions and then object at the trial if they were improper. Such system was intended primarily for the taking of ordinary depositions rather than for the taking of discovery examinations. The question arises when the pro-

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\item \textsuperscript{15}N. H. Public Laws (1926) ch. 336, sec. 1–7; ch. 17, secs. 3, 12; Eaton v. Farmer (1865) 46 N. H. 200; Robertson v. Hale (1896) 68 N. H. 538, 44 A. 695.
\item \textsuperscript{16}Dogge v. State (1887) 21 Neb. 272, 31 N. W. 929; In re Hammond (1909) 83 Neb. 636, 120 N. W. 203.
\item \textsuperscript{17}Ohio Gen. Code (Throckmorton, 1926) sec. 11510; DeCamp v. Archebald (1893) 60 O. S. 618, 35 N. E. 1056. See also for a full treatment of the cases 9 Ohio Jurisprudence, pages 58, 111, 121; 14 Id. page 38.
\item \textsuperscript{18}Recently the Missouri Supreme Court said: "For almost three quarters of a century this court * * * has uniformly held that a notary public in taking depositions is authorized to commit a witness for contempt for refusing to answer questions other than those which it is his personal privilege to refuse to answer." Ex parte Noell v. Bender (1927) 317 Mo. 392, 396, 295 S. W. 532. For a long list of Missouri decisions upholding the right of the notary to punish for contempt, see Missouri Digest, "Depositions," sec. 17.
\item \textsuperscript{19}The latter aspect of the Missouri practice has been treated in detail in the paragraphs immediately preceding.
\item \textsuperscript{20}Re Nushuler (1878) 4 O. Dec. Rep. 299.
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procedure is used for discovery purposes whether the notary may relieve a party from answering questions. An Ohio opinion has suggested a way in which the notary can assert the right whether the statutes contemplate it or not. Said the court: "It is said that a notary public when taking a deposition has not power to decide as to the competency or relevancy of a question. For the purposes of the deposition and of the case in which the deposition is taken, he has not. But for the purpose of punishing a witness for contempt, he has. A notary public in committing a witness for contempt exercises judicial power. The exercise of that power requires that he should find a witness who refuses to answer a question guilty of contempt. To find the witness guilty of contempt the notary must determine whether the question asked was one which the witness could lawfully be ordered to answer; the determination of that fact necessarily requires the notary to pass upon the competency of the question."

It is a very rare thing that a notary punishes a party for contempt, even where the power to punish exists. Only when the examining lawyer persuades the notary to do so, does the latter assert his prerogative. Even then he seldom goes so far as to actually commit. If he does anything it is merely to order the witness to answer and to threaten to exercise his power. Reasons assigned why the notary will not exercise his power are that he is afraid he will be liable upon his bond for making a wrongful committal, and that, as a practical matter it is very

22 The Nebraska court has said the following about the liability of a notary. In a case wherein a person who had been committed by the notary sued that officer for damages for false imprisonment the court sustained a demurrer to the petition, saying: "In order to state a cause of action in such a case the petition must allege * * * that the evidence sought to be elicited from the witness was of such a character as would justify him in refusing to testify. It is a familiar rule that a judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred upon him by law. He is not liable for a mere error of judgment while acting
hard for a lady reporter (as is often the case) to make
the actual arrest and it is troublesome to call the sheriff.
The notary does not know, and makes no pretense of
knowing, whether or not the question is proper.

For these reasons the practice usually approximates
that which obtains in states wherein the officer has no
power. If the witness refuses to answer a particular
question, upon advice of counsel, and the examining law­
yer thinks it important enough, he must move the trial
court to compel an answer. There is one advantage, how­
ever, to the plan under discussion. The fact that the
notary has power to punish, and the fact that he can
order the witness to answer upon threat of punishment
has a tendency to foster voluntary answers to all ques­
tions. A disadvantage of the plan is that it places within
the hands of a nonjudicial officer a power which is ca­
pable of abuse and which has been abused upon more
than one occasion. Occasional abuses of this sort have
caused dissatisfaction with discovery procedure as a
whole in a few localities. Last year companion bills were
introduced in the Nebraska legislature, the one to take
away the notary's power to punish for contempt, the
other to curb the use of depositions for purposes of dis­
covery before trial. Investigation revealed that the bills
were introduced by a layman, and that they were intro­
duced as a protest against the abuse which one of his
friends had suffered at the hands of a notary in a par­
ticular case. The Omaha Bar Association opposed the
bills and they were defeated. The incident which
prompted them indicates the danger of placing a judicial
power in the hands of a non-judicial officer.

The uniform mode of obtaining a review by the trial
court is upon habeas corpus proceedings when the

within his jurisdiction but he is not protected if he assumes to act
beyond the scope of his authority." Olmsted v. Edson (1904) 71 Neb.
17, 21, 98 N. W. 415.

23 Eaton v. Farmer (1865) 46 N. H. 200; In re Hammond (1909) 83
Neb. 636, 120 N. W. 203; Re Rauh (1901) 65 O. S. 128, 61 N. E. 701.
notary punishes a party for refusing to answer a question at a discovery hearing. The commitment will stand or be vacated by the court, depending upon whether the witness had a right to refuse to answer the particular question. While the witness can justify his refusal to answer upon the ground that the evidence elicited is immaterial or irrelevant, such practice is not encouraged, for, as the Ohio Supreme Court has said: "If the witness assumes to decide these questions for himself at the time, unless the interrogatory involves a question of privilege, he must do so at his peril. If he should be right in his decision [to refuse to answer] he would lose nothing; if wrong, he must suffer the consequences." Presumably the court means the witness would lose nothing because he could have the improper matter stricken at the trial.
CHAPTER XIV

DECIDING OBJECTIONS AND COMPELLING ANSWERS TO WRITTEN INTERROGATORIES

There are several administrative problems involved in deciding objections and compelling answers to written interrogatories. The problem of first importance is, who shall decide objections which are raised to interrogatories. Shall the court or shall a special officer? The trial judge decides all objections to written interrogatories under the American practice. The English plan of administration calls for a special officer, a master. Objections to, and controversies about, written interrogatories are presented to the court in one of the following three ways under the American practice: (1) The party upon whom interrogatories are served must either answer or make objections to the questions by motion to strike within a limited time after they have been served upon him under the practice in some jurisdictions. (2) It is possible under the practice in some states for him to present his objections for the first time in response to the proponent’s motion that the penalty for failing to answer be enforced. (3) Even after answers have been filed the proponent of the questions may move that further and more explicit answers be compelled and thus precipitate a controversy as to the propriety of particular questions.

The English practice is quite different. Leave of court is necessary in the first instance before the questions are submitted to the adverse party.1 The practice is for the

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1 Annual Practice (1929) order 31.
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Particular interrogatories which are proposed to be delivered to be submitted first for approval to a master in chambers by notice for directions. A copy of the proposed interrogatories usually is served with the application at least two days before the hearing. The master takes into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or make admissions, or produce documents, and allows only such particular interrogatories as he "considers necessary either for disposing fairly of the cause or matter, or for saving costs." He has the fullest discretion as to postponing, limiting, conditioning or refusing the application. The hearing upon notice for directions is an effective auxiliary to discovery procedure proper. By getting the parties together the master is able to foster mutual disclosure and admissions and in a measure to supply some of the benefits attendant upon an oral examination.

In England up until 1893 interrogatories were delivered directly to the party to be interrogated and then he entered his objections, as is generally the practice in the United States today. But since 1893 in England this practice has been greatly improved by the provision for the interlocutory applications described above. The regulations of 1893 have been described as "the most satisfactory arrangement that could be arrived at, since they have remained unaltered since. The principal change they made is that the leave of a master must first be obtained and he must approve the specific questions to be asked; he may, if he considers proper, alter their number, extent or form." Of course objections may be taken by the adverse party after the interrogatories have

2 Stringer, A. B. C. Guide to Practice (1928) 66.
3 Id. 68.
4 Order 31, rules 12, 18.
5 Rosenbaum, Rule-Making Authority, 128.
been approved and submitted, yet it is less frequently done than formerly.

The two most glaring defects in the practice of some of the American states are, that the proponent often has to make a number of motions before he gets anything like a complete answer to his questions, and that the burden on the court is considerable. Not all of the states have experienced the same trouble about the administration of written interrogatories that has been experienced in Massachusetts. One reason the trouble has been less pronounced elsewhere is that the attempt has not been made to use written interrogatories on a wholesale scale as a means of obtaining a full discovery. Such attempt has been made in Massachusetts and the experience thereunder is worthy of a more detailed consideration. While the trial judge is supposed to decide all objections that arise, a considerable portion of the administrative details is handled by a very efficient chief clerk in Boston. Prior to 1903 it was necessary for the proponent to move the court to compel an answer before the party served with interrogatories had any obligation to answer. In 1922 a statute was enacted for the purpose of shifting this burden. According to its terms a party served with interrogatories was required to answer within ten days, unless he obtained an order of court relieving him from so doing. But the statute failed of its intended effect for the reason that it was generally thought unfair for the penalty to be self-operative, when there was no showing that the proponent had served copies of the interrogatories. It is necessary for the proponent, if answers are not duly filed, to move the court, upon notice to his adversary, that a default or nonsuit be granted. Upon the hearing, the opponent can present any objections to specific questions. Usually, however, the clerk

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6 Order 31, rule 6.
7 Stringer, Op. Cit. 68.
simply enters a formal order: "Allowed by the court. Defendant (or plaintiff) defaulted (or nonsuited). Default (or nonsuit) to be removed without further order if answers to interrogatories are filed within ten days." This is in reality an order to answer. The consequence is that more often than otherwise the parties do not answer voluntarily, but simply wait until forced to do so by an order. Sometimes interrogatories remain on file for months before the proponent moves for an answer. If the opponent files evasive or incomplete answers, it is necessary for the proponent to make a motion that further and fuller answers be required. It is required that such a motion contain:

1. A general statement of the nature of the action.
2. The interrogatories and such answers thereto as are deemed insufficient.
3. The basis of the claim for fuller answers. Occasionally it is necessary that this procedure be repeated several times. Each of these steps costs time and trouble. It seems that every consideration is accorded the party upon whom interrogatories have been served, so that the default or nonsuit, if such be entered, can be removed if he repents seasonably. Usually the proponent contents himself with whatever answer he has elicited by the original motion for a default or nonsuit.

This particular feature is generally recognized by the Massachusetts bench and bar as the weakest point in the present interrogatory machinery. The economic waste incident to it is considerable. The defect would be remedied somewhat under the revision of the Rules of the Superior Court which was recommended in 1931. In substance the proposal is that a conditional default be entered, without motion and hearing, upon the filing of an affidavit by the proponent to the effect that a copy

of the interrogatories has been served and that the time for answering has elapsed.

The Washington procedure is representative of that which obtains in a number of other states. Under it a part of the burden placed upon the proponent of interrogatories has been eliminated. Once interrogatories have been duly filed and served the real burden is upon the party upon whom they are served to either answer them or present his objections within twenty days to the court by motion to strike. If he does nothing, the proponent need only move that the penalty be enforced. There is no way by which the party served with interrogatories can simply allow the time to elapse and force the proponent to take additional steps such as by motion for an order to answer, as in Massachusetts. After the time has elapsed the proper procedure is for the proponent to move that the appropriate pleading be stricken and judgment rendered accordingly, rather than to move for judgment. There are two courses open to the proponent if the interrogated party files incomplete or insufficient answers. Generally he should proceed by motion to make the answers more specific. But if the answers are palpably insufficient he may move to strike them from the files and then proceed as if no answer had been given.

The practice in most of the states falls somewhere between that of Massachusetts and that of Washington. The statutes provide that the party served must make his objections or answer. Yet before a penalty can be enforced it is necessary for the proponent to move either

13 Lowry v. Moore (1897) 16 Wash. 476, 48 Pac. 238 (where answers were very evasive); Saar v. Weeks (1919) 105 Wash. 628, 178 Pac. 819 (where only 2 of 44 interrogatories were answered). Cf. Lawson v. Black Diamond Coal Mining Co. (1906) 44 Wash. 26, 86 Pac. 1120.
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that the penalty be enforced or that answers be com­
pelled. It is not clear under some of the statutes and
decisions whether the party served with interrogatories
is entitled to contest the propriety of the questions, after
time for answering has elapsed.14

Prior to the recent amendment to the Massachusetts
statutes which limits the number of interrogatories to
thirty, the burden upon both the judge and the clerk’s
office was very great. Although conditions have im-
proved since the number of interrogatories has been
limited, there is still a considerable administrative bur­
den upon the court in connection with interrogatories.
The same has been true under the federal equity practice.
Wallace R. Lane has said: “In some instances quite
as much time of the court has been taken in hearing
arguments concerning interrogatories and deciding what
should or should not be answered, as is occupied in the
actual trial of the case.” 16

14 In addition to the statutes which are set forth in the appendix see:
16 Lane, Federal Equity Rules, 35 Harv. L. Rev. 276, 294.
CHAPTER XV

MAY A PARTY BE REQUIRED TO DISCLOSE EVIDENCE OF HIS OWN CASE?

DISCLOSURE OF WHAT PARTY WILL TESTIFY TO IN SUPPORT OF HIS CASE

The lawyer who is examining a party for discovery before trial may interrogate upon all of the issues of the case in some thirteen jurisdictions. Disclosure of everything relevant to the controversy may be required. The examination may assume the same latitude as an examination of the party at the trial. In none of the jurisdictions in which deposition procedure is used for purposes of discovery before trial is the scope of the examination restricted to narrower limits than would obtain upon examination at the trial. As a matter of practice the scope is even broader than at the trial. Attempts have been made to restrict the examination, but they have been unsuccessful. The epithet "fishing excursion for the adverse party's evidence" has been employed against the taking of depositions for discovery in every state where it has been attempted, first for the purpose of preventing the examination entirely, and failing of this, for the purpose of restricting its scope. Judicial opinion, however, has been opposed to restriction. The late William Howard Taft expressed the Ohio view when he said: "There is no objection that I know why each party should not know the other's case."  

1 Such states are Indiana, Kentucky, Missouri, Nebraska, New Hampshire, Ohio and Texas.  
missioner Clay of the Kentucky Court of Appeals, in the classic case setting forth the Kentucky discovery practice, said: "It is earnestly insisted that the right given by subsection 8 of section 606 (allowing cross-examination of adverse party by deposition), if interpreted according to the contention of appellant, is liable to great abuse; that it will enable the party to find out his opponent's evidence in advance of trial. As, however, the right is given to each party, they will be upon terms of equality; and, as it is to be presumed that neither will offer any evidence other than the exact facts and truth of the case, we do not see how either could be prejudiced." The New Hampshire Supreme Court has said: "We think it cannot admit of a serious doubt that the deposition of either party may be taken as to all the matters in issue between them, except disclosing the names of witnesses and the manner of proving his case. So far as the plaintiff is concerned it would hardly occur to any that the defendant could not take his deposition to all the material matters on which the suit is founded. To hold otherwise would render this provision nearly nugatory. * * * We see no reason to doubt that in taking the deposition of a party he may be required to answer all questions relating to the issue on either side, much as if he were on the stand." The actual practice in Missouri, Nebraska, Texas and Indiana, as described by lawyers in those states, permits the examination by deposition before trial to be at least as broad as an examination at the trial, and frequently, much broader.

Ohio statutory provision that the examination may assume the form of a cross-examination has been instrumental in fostering this liberal Ohio rule as to the scope of the examination.

3 Western Union Tel. Co. v. Williams (1908) 129 Ky. 515, 112 S. W. 651, 653.

4 This limitation is imposed by the statutes. N. H. Public Laws (1926) ch. 336, sec. 25.

The Wisconsin Supreme Court has taken the position that examination for discovery may assume the form of, and be as broad as, cross-examination at the trial, and that everything relevant to the controversy should be disclosed.\(^6\) In the case in which this policy was first set forth the trial court had made an order stating "that the proposed examination be, and the same is hereby, limited to such subjects as may be material to the defendant's case, but the same shall not extend to any examination into the facts essential to support the plaintiff's case."\(^7\) The Supreme Court set aside the order and held that it was improper thus to limit the examination.\(^8\) The Ontario discovery procedure is similar to that of Wisconsin. There is a similar liberality as to the scope of the inquiry, permitting questions to be asked regarding any or all of the issues of the case.\(^9\)

Limitations were imposed upon the scope of written interrogatories for discovery under the earlier Massachusetts practice, but more recently such limitations have been discarded. Today interrogation may be upon all of the issues of the case. This change in rules is the result of statutes which were enacted for the specific purpose of liberalizing the practice. The early decisions held that discovery from a party was limited "to matters in aid of a case to be established against the party interrogated."\(^{10}\) In applying the rule the court said: "It is difficult to imagine a question relative to material facts in support of a case against a party the answer to which would not necessarily involve a disclosure of the mode of the proof." It was held that a party need not

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\(^6\) Kelly v. Railroad Co. (1884) 60 Wis. 480, 19 N. W. 521; Horlick's Malted Milk Co. v. A. Spiegel Co. (1913) 155 Wis. 201, 144 N. W. 272.

\(^7\) Kelly v. Railroad Co. (1884) 60 Wis. 480, 19 N. W. 521. The briefs in the case show clearly that such was the main issue before the court.

\(^8\) Id.


\(^{10}\) Wilson v. Webber (1854) 2 Gray 553.
answer "concerning the proofs of his own case." A party was permitted to refuse to answer such a question as "What caused the collision?" on the ground that it would disclose his own case. The view was maintained that the word "case" meant "case set up in his own pleadings." In 1910, however, the Massachusetts Supreme Court indicated a more liberal view when it said: "But this does not mean that he could file interrogatories only as to matters upon which he had the burden of proof, or that a defendant whose answer was merely a general denial could not require the plaintiff to answer any interrogatories." Again in 1912 the court held that interrogatories could approximate in scope an examination at the trial. But the court was not certain whether "interrogation as to specific facts in contradiction of a definite claim set up by the adverse party" would be permitted. Shortly thereafter it was held that a plaintiff could not be questioned for a detailed account of an accident. The statute of 1913 provided the final and decided liberalization of discovery in Massachusetts. It provided that a party might interrogate an adverse party for the discovery of all facts and documents admissible at the trial, the only limitations being that he could not discover the names of witnesses or title papers not material to issues in the action. This statute has been given a liberal construction. Recently it has been construed to "enable a party to interrogate his adversary to the same extent as would be permissible

11 Id.
15 Id.
16 Wakeley v. Boston Elevated Railway (1914) 217 Mass. 488, 105 N. E. 436. This case did not involve the statutes of 1913.
if he were called as a witness at the trial." 18 Quebec, Iowa, Louisiana and Alabama also allow written interro­gatories to cover all of the issues of the case. 19

Field investigations were made by the author in the following jurisdictions which do not restrict an examination before trial more narrowly than an examination at the trial: Wisconsin, Massachusetts, Ohio, Ontario, Quebec, Indiana, Kentucky, Texas, Missouri, New Hamp­shire and Nebraska. Practically every lawyer and judge who was interviewed in these states was asked whether a party who is allowed to find out in advance of trial what his adversary and his adversary’s witnesses will testify to, is not encouraged to manufacture evidence to meet that disclosed. The uniform answer was that this had not been the experience but that on the contrary a chief use of the procedure was to curb perjured testi­mony and to eliminate false claims. A few terse ex­pressions of opinion representative of those given gen­erally are as follows: (1) “It does not foster perjury for this reason. If each party can first of all pin his oppo­nent down to a definite and detailed position in regard to the facts in controversy, there is little reason to fear that the party thus pinned down will concoct evidence in any fashion. He is already bound. The mutuality of discovery is a saving feature.” (2) “The procedure is very helpful in keeping in line that class of witnesses who have not much regard for the sanctity of an oath.” (3) “Instead of finding that a ruthless discovery will foster perjury, as some lawyers supposed at first, our experience has been that it is the greatest preventive of perjury.” (4) “We find that our opponents do not coach

their witnesses in preparation for a discovery examination like they do for the trial. They are so busy that they think little of preparation until the necessities of trial arise. Consequently we get the witness before he has been coached to any extent. The very spontaneity of the testimony is an evident guaranty of its truthfulness.”

(5) “Inasmuch as it is often more than a year before trial is reached it means a good deal just to be able to obtain a witness’s story while his memory is fresh.”

(6) “Our chief use of the procedure is to eliminate the most elaborate form of perjury—the fake claim.”

(7) “It has proved to be a weapon of the utmost value to our bar in ascertaining the truth where the claim of the person whose deposition is being taken is believed to be a fictitious one. Many lawyers refer to it as a fishing expedition and there are a good many cases where it is abused as such, but where a party is likely to shift his story after learning the theory of the case of his opponent, it is a most satisfactory means of confining him to one story. It has proved to be the terror of the lying litigant.”

These statements are representative of those given by some two hundred practicing lawyers in jurisdictions which employ the unrestricted examination for discovery before trial. There is said to be some coaching of witnesses upon the basis of what they and others have testified to upon their depositions, but this coaching is done in an effort to square up the testimony of witnesses within the bounds of limitations prescribed by a knowledge that the opposing attorney has copies of their previous testimony and will point out any flagrant change of position.

A final word should be said about the Massachusetts experience. There, discovery is upon written interrogatories. Both the narrow rule and the liberal rule have been tried, the latter obtaining at present. Not a single Boston lawyer who was interviewed expressed the opin-
ion that the scope of the inquiry was too broad at present, or that it was resulting in increased perjury. On the contrary, a number said that they favored augmenting the written interrogatory procedure with an oral examination so that the theoretical scope of the inquiry would be utilized under a more effective machinery.

Discovery has been limited in several jurisdictions to facts relating to the issues upon which the party seeking discovery has the burden of proof under the pleadings. The most striking example of the disastrous effect of this rule upon discovery procedure is furnished by the New York practice. There was a conflict from the very adoption of discovery in New York as to whether and to what extent, a party could be required to disclose evidence in support of his own case. A rule of court was adopted in 1870 which limited discovery to facts "material in proving the case or defense of the party" seeking the examination. The Throop code subsequently combined the several methods of taking testimony before trial into a single deposition procedure, and since it had formerly been possible to take depositions to perpetuate testimony, when necessity required it, this element found its way into the consolidated procedure and the word "necessary" was added to the word "material." The two requirements that a party must show that the discovery sought was material and necessary to his cause of action or defense produced a very strict rule, so that finally the general statement of the rule in New York became: "The applicant can have an examination to prove his own case only." This was taken to mean that a party could not have an examination merely to establish the negative of a proposition which his adversary was required to establish affirmatively,

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20 Rule 21, quoted in Adams v. Cavanaugh (1885) 37 Hun 232, 233, see also cases cited in 1 Silvernail 7.
22 Kimball v. John Budd Co. (1925) 212 N. Y. S. 404.
word ""case"" being interpreted to include the issues as to which the party had the burden of proof under the pleadings. The following quotation is representative of the reasons which the courts set forth as justifying restrictions upon discovery: ""The provisions for such examinations are not intended to enable a party to discover what his opponent's testimony will be, so that he may obtain witnesses to contradict it. Experience shows that if a party discovers what his opponent's testimony will be, and has time enough, he is often successful in discovering also witnesses for contradiction."" The four departments of the Appellate Division of the New York Supreme Court at present enforce a fairly uniform rule in regard to the scope of an examination before trial, in other than tort cases. It is this: Ordinarily the examination will be confined to the issues concerning which the party applicant has the burden of proof under the pleadings.

Some of the New York courts use the rule that a party is entitled only to discovery of facts material and necessary to his cause of action or defense as the basis for imposing special restrictions upon discovery in automobile accident litigation. There is a conflict of opinion among the several departments of the Appellate Division concerning the exact scope of examinations for discovery in this type of litigation. The question at issue is whether the examination should be limited to such items

as ownership and control of the vehicle or should extend also to the facts of liability and damage. Prior to the adoption of the Civil Practice Act there was substantial authority to the effect that a general examination would not be allowed, the reason being that it "would amount to nothing more than a cross-examination of plaintiff and an inquiry into his case." Under the Civil Practice Act the First Department has committed itself to the same rule. Reasons assigned for adhering to the rule are that the Civil Practice Act changed only the procedure and not the right to examinations before trial, and that "considerations of sound public policy" do not favor general examinations before trial in negligence cases. The Second Department has consistently adhered to the contrary view and has sanctioned general examinations. This allows an inquiry into the facts of liability, whereas the rule enforced in the First Department does not. The reasons given for allowing a general examination are that the Civil Practice Act was intended to liberalize the practice, that anything which will bring out facts before the trial should be encouraged, that the experience of the bar with the more liberal practice has been favorable, and that the fact that the action is in tort is no reason for limiting the examination. It results from this conflict that in New York City (First Department) the strict rule is followed while nearby Brooklyn (Second Department) has the liberal rule. The Rochester practice seems to follow that in Brooklyn more nearly than that in New York City, although it is somewhat less liberal than the practice in Brooklyn. The possibility

26 Shaw v. Samley Realty Co. (1922) 194 N. Y. S. 531.
of a uniformity of practice throughout the state seems rather remote since the Court of Appeals has refused to lay down a uniform rule, on the ground that the matter is discretionary with the Supreme Court. Even in courts where the stricter rule is followed, a more liberal examination may be allowed if "special circumstances" are shown to exist. The general test as to what constitutes such special circumstances is whether the plaintiff would "be unable to prove a cause of action without an examination of the defendant." The "necessity" factor may sometimes operate to enlarge the scope of the examination, and sometimes, though less frequently, it may operate to restrict it. The fact that the party seeking discovery already has knowledge of the facts sought, or that he has witnesses who could testify to the facts, is not conclusive proof that the discovery is unnecessary, inasmuch as a legitimate purpose of discovery is to obtain admissions.

Special restrictions upon the scope of the examination similar to those which are applied in negligence cases are also applied in other types of tort actions in New York. The scope of the examination is restricted in such actions as deceit, libel, and malpractice.

90 Illustrative examples of "special circumstances" may be found in the following cases: Palmer v. Hampton (1927) 220 N. Y. S. 768; Laurino v. Pratt (1927) 226 N. Y. S. 848; Schonhous v. Weiner (1930) 246 N. Y. S. 73; Oshinsky v. Gumber (1919) 176 N. Y. S. 406.
92 Citizen's Trust Co. of Utica v. Prescott & Sons, Inc. (1927) 223 N. Y. S. 184.
96 Sands v. Comerford (1925) 207 N. Y. S. 398.
The New York practice illustrates the ineffectiveness of restrictions upon the scope of the discovery as an aid in arriving at the truth. The following discussion is based upon interviews with representative lawyers in New York City and Rochester, and upon a comparison of their views with those found in the states in which an unrestricted examination is allowed. The experience of lawyers in states in which an unrestricted examination is allowed is that where each party pins his adversary down to a definite and detailed story in advance of trial, the truth is discovered and perjury curtailed. The mutuality of discovery is the saving factor. In New York, on the contrary, one party, the plaintiff, can find out his opponent’s expected testimony as to one side of the controversy, and perhaps, by fishing, get glimpses of the other side also. Is there anything to prevent the plaintiff from manufacturing a story to meet this? Elsewhere the saving feature is that he is prevented from such tactics by virtue of the fact that he has already bound himself as to his detailed position with regard to the facts. The defendant may have a similar right to discovery as to his affirmative defenses, but this is by no means sufficient to bind his adversary definitely. Or perchance he has no affirmative defense.

Again, it may be possible for either party to get unrestricted discovery from adverse witnesses on the ground that they reside more than one hundred miles from the place of trial. The experience elsewhere has been that little harm comes from a party examining his opponent’s witnesses if it is possible to bind such party to his own story before he starts on his quest for information. Without this safe-guard there are considerable possibilities of unfair advantage.

Another result of the lack of a full and mutual disclosure is that the plaintiff may be allowed to seek material with which to build up a case to such an extent
that it amounts to a species of blackmail. There is no reciprocal right of the defendant to a weapon with which to meet a nonmeritorious case. The result is that instead of discovery being regarded as an instrument of truth, it is regarded as a tactical weapon. Instead of the procedure encouraging settlements by disclosing the exact status of the controversy, it is employed quite differently as a mode of forcing settlements. If there is a suit against a prominent business man or a prominent society woman the first move is for an examination before trial, not so much for the purpose of discovering the truth as upon the theory that such a person will prefer to settle rather than to suffer the humiliation of the examination.

To enforce the New York rule as to the scope of the examination it has been necessary to require that the applicant set forth the subject-matter of his intended inquiry. This has the effect of notifying the opposing attorney as to the points on which he should instruct his client to disclose as little as possible. Indeed it serves as a sort of invitation for such coaching. The contrary experience in states where the applicant is only required to state that he desires an examination without disclosing the points thereof, has been that lawyers do comparatively little coaching of the witness in preparation for facing the examination. They are not careful in this regard until the necessities of the trial appear. The New York rule serves to counteract this natural tendency and, accordingly, to give less assurance of spontaneous testimony.

The New York rule as to the scope of the examination has been the means of effecting severe limitations upon the use of discovery in that type of litigation in which it has found its greatest usefulness elsewhere, namely, personal injury actions. Similarly, it restricts employment of discovery examinations by the class of litigants who elsewhere have found the device most helpful,
namely, defendants. Thus, from two different angles, the practical utility of discovery procedure is curtailed.

In some states discovery has had a salutary effect on pleading in that it has divided the labor of the reduction of the controversy to precise issues. In New York the situation is exactly the reverse, in one particular, at least. Since the defendant can have no discovery except on his affirmative defenses, he often puts in fictitious defenses for the sole purpose of securing an examination of his adversary. Indeed several New York lawyers pointed to this as one of the chief defects in the present system.

Finally, the theory that the right to discovery is within the discretion of the court and that each case has its peculiar status as regards discovery, serves as an invitation for needless presentation of disputes to an already overburdened court. The experience elsewhere has been that when lawyers know what their opponents can have, as a matter of right, they will accord them the same voluntarily. And when the basis of adjustment is the ordinary law of evidence there is sufficient definiteness of knowledge to allow the lawyers to settle a majority of the disputes among themselves without resort to the court.

It is a mistake to suppose, as some courts apparently have done, that the New York rule that a party can have discovery only of facts relating to the issues of which he has the burden of proof under the pleadings is substantially the same as the chancery rule that a party could not be compelled to disclose his evidence or the manner of proving his own case. As a matter of fact, the chancery rule was not as illiberal as the New York rule. Wigram stated the chancery rule thus: "The right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the 'plaintiff's case'—and does not extend
to a discovery of the manner in which, or of the evidence by means of which the defendant’s case is to be established, or to any discovery of the defendant’s evidence.” 89 Similarly, Hare said that, “The defendant is not compelled to discover his evidence if it cannot tend to establish affirmatively the case of the plaintiff.” 40 The chancery rule did not restrict the examination to the issues of which the party had the burden of proof under the pleadings. The correct interpretation of the rule has been set forth by Bray, the leading English authority on discovery: “It is, however, plain from the general scope of the book (Wigram, on Discovery) that the meaning which he attaches to the expression ‘the party’s own evidence’ is not in principle different from that of the expression ‘matter in question in the action’ here adopted. It must also be remembered that under the chancery practice a plaintiff ex necessitate rei had to deliver his interrogatories before the defense was put in, and therefore their relevancy could only be referred to the plaintiff’s statement of his case in the bill.” 41

Several other jurisdictions besides New York restrict the scope of discovery examinations. The question has not yet been decided under the new Michigan rules for discovery as to whether or to what extent the New York decisions limiting the scope of the examination will be followed. There is some danger of such an undesirable result because the rules are modeled after the provisions of the New York Civil Practice Act, and employ the words “‘material’” and “‘necessary,’” the very words which have been seized upon by the New York courts as the basis for restricting the scope of the examination. One of the draftsmen of the Michigan rules of court has

89 Wigram on Law of Discovery, 13 Law Library Series 41.
40 Hare on Discovery, 198. For similar definitions see Bray’s Law of Discovery, 444; Wigmore on Evidence, vol. 3, sec. 1846, 1856; Story, Equity Pleading (10th ed.) sec. 572.
41 Bray’s Law of Discovery, 12.
said concerning the rule on discovery: "Unfortunately it has been given a rather narrow interpretation by the New York courts, which have held that the examining party may interrogate regarding his own case only, but not regarding the case of the other party. It is to be hoped that the courts of Michigan will give the rule a wider scope." 42

There is a distinct division of authority as to the allowable scope of interrogatories in the Federal equity courts under Equity Rule 58. The greater number of decisions, however, limit discovery to facts in support of the case of the applicant. As in New York, the "necessity" factor has played a part in limiting discovery. The general theory of the federal courts which adhere to the strict rule as to the scope of the examination is illustrated by the leading case of J. H. Day Company v. Mountain City Milling Company, in which Sanford, J., says: "After careful consideration I think it is clear that the 58th Equity Rule was intended merely to change the procedure in reference to obtaining discovery and to extend this right to a defendant as well as to a plaintiff, and was not intended to change the long established rule in reference to the subject matter of such discovery or to extend such right in favor of either party beyond the matters relating to his own ground of action or defense, respectively, and enable him to obtain discovery in reference to matters relating solely to the ground of action or defense of the other party." 43

The liberal view which obtains in some federal courts is set forth by Trippet, J.: "Some of the courts seem inclined to throw difficulties in the way of discovering the truth as provided by the rule under discussion, and oppose the evident purpose of it. The old rules are abolished. There is no reason why the procedure now should be hampered by restrictions imposed by any previous rules of procedure. The truth should always be sought after, and the courts should eagerly enforce any method of securing the truth. It makes no difference whether the facts are as much within the knowledge of the plaintiff as of the defendant. The facts have to be proven, and if the plaintiff can get an admission from the defendant, it saves the necessity of proving the facts, except by such admission of the defendant. The rule expressly provides that the plaintiff may propose interrogatories to elicit facts material to the support or defense of the case. To say that the plaintiff shall not inquire about the facts that may relate to the defense is to construe the rule in plain derogation of its language and purpose. * * * The plain object of this rule is to dispose of issues in advance of the trial by compelling the parties to make admissions. This rule, properly enforced, will compel the parties to be honest concerning their pleadings, and parties to litigation ought to be compelled to be honest by putting them on oath and requiring them to be specific about the facts at issue. There is no reason why the parties should wait until the day of trial, and then bring in witnesses to prove facts that the parties may be compelled to admit under oath prior to the trial. The truth is always the truth and telling the truth will not hurt anyone, except in so far as he ought to be hurt. The only protection that should be afforded any litigant from answering any interrogatories, which call for material facts for the plaintiff or the defendant, is to protect him in his constitutional rights, such as to be
compelled in a criminal case to be a witness against himself, and in matters of public policy, where the statute prohibits disclosures, etc. Such a practice as here indicated would tend to shorten trials, and materially aid the administration of justice, and that is the very purpose of the rule under discussion.

Under the Washington statute interrogatories for discovery are confined to matters "material to the support or defense of the action." In its narrower construction this has been taken to limit discovery to evidence in support of the issues as to which the party proponent has the affirmative under the pleadings. For instance, the Washington Supreme Court has held that "since they were propounded by the defense, they must call for matters material to the defense. Those here propounded had no tendency in that direction. They rather required the plaintiff to state with particularity what evidence she intended to give in support of her complaint. * * *

Seemingly, it ought not to require argument to demonstrate that the statute furnishes no sanction for interrogatories such as these." It is even possible, under this statute, to refuse discovery as to evidence in support of the case of the party applicant, for it has been held that: "It is not the purpose of the statute to enable the one party to a lawsuit to require the other party thereto to supply him with all the facts and documents that may be material to his side of the case, or even to secure admissions against interest. Its purpose is to enable him to discover material facts and documents solely within

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46 Hill v. Hill (1923) 126 Wash. 560, 561, 219 Pac. 18, followed in Schmit v. Campbell (1926) 140 Wash. 376, 249 Pac. 487, and in Kelly-Springfield Tire Co. v. Lotta Miles Tire Co. (1926) 139 Wash. 159, 245 Pac. 921: "It does not enable him to pry into the opposite party's case."
the knowledge, possession, or control of the other party to which he has not access.'" 47

The New Jersey provision for written interrogatories in actions at law has been so construed as to limit the scope of the discovery to facts in support of the issues upon which the applicant for discovery has the burden of proof.48 Questions about the following items have been held improper in automobile negligence cases in New Jersey: extent of injuries; time of confinement in hospital; the value of the automobile before and after the accident.49

South Carolina courts have restricted the scope of the examination for discovery. The supreme court, upon several occasions, has said that it would not compel "a disclosure before trial of the evidence by which the opposite party will support his own allegations." 50 These cases are based upon the amendment of 1923 requiring an order upon good cause shown before an adversary can be examined. The statute represents legislative protest against the liberal rule laid down in the Fox case in 1922 wherein it was held that a party to an action was entitled, as a matter of right, to examine his adversary before trial. As Mr. Justice Fraser has pointed out in his dissenting opinion in that case: "If the right to examine the adverse party is an absolute right, then the scope of the examination cannot be restricted." 51

There is a rule of court in England to the effect that discovery may be allowed or disallowed, depending upon whether it is "necessary either for disposing fairly of

47 Brooke v. Boyd (1914) 80 Wash. 213, 141 Pac. 357.
the cause or matter or for saving costs." 53 It is this provision which the English court has used to restrict the scope of the inquiry in automobile accident cases. In a recent decision Scrutton, L. J., explains the English practice in this regard: "In most accident cases both parties are able to call witnesses, and therefore to interrogate upon small questions of fact relating to the details of the accident cannot be necessary for the fair trial of the action, and interrogatories should not be allowed. * * *. These considerations are probably sufficient to disentitle the party to interrogate in most accident cases. But there should be no other fetter." 58 The last sentence quoted refers to a prior English rule to the effect that interrogatories would not be allowed at all in automobile accident cases except for "very special reasons." 54 Although the English court does not adhere to the view that a party is limited in discovery to the issues upon which he has the affirmative, 55 yet it restricts the examination in accident litigation by use of the "necessity" factor.

The Connecticut statute provides that discovery shall deal with matters "'material to the support or defense of the suit.'" 56 The Connecticut Judicial Council has interpreted this provision as meaning: "Discovery may be had of facts supporting the mover's cause of action or defense either in chief or on rebuttal, but not of facts pertinent only to the adverse party's cause of action or defense. Thus, in an action for negligence the facts showing defendant's conduct at the time of the accident may be discovered by the plaintiff, for he must establish the defendant's negligence. The defendant, however, in action for negligence may have discovery

53 Annual Practice (1930) order 31, rule 2.
54 Griebart v. Morris (1920) 1 K. B. 659, 666.
of facts tending to show that the plaintiff's conduct was negligent." 57

Disclosure of Names of Witnesses Whom Party Will Introduce

Chancery in granting bills of discovery adhered to the rule that a party could not be compelled to disclose the names of witnesses whom he intended to introduce at the trial. 58 It was supposed that any contrary rule might encourage a party to tamper with his adversary's witnesses. The rule has been preserved under modern discovery practice in many jurisdictions. 59 A somewhat unusual reason for retention of the rule has been given by the Committee on Legislation of the Massachusetts Bar Association: "A danger applies to the disclosure of the names of witnesses, in the use of the system, not merely to ascertain the names of witnesses not known to the interrogating party, but to find out which of his witnesses are known to the other party with a view to gambling for a settlement or surprise if he is ignorant. The way to avoid this abuse seems to be for the court, before ordering a party to disclose the names of all of his witnesses, to require as a condition precedent that the interrogating party disclose the names of all of his witnesses in order that the court may know whether 'justice requires' a disclosure from the other party." 60 In sharp contrast with the theory underlying this reason is the terse statement of the late William Howard Taft, while he was Judge of the Superior Court of Cincinnati, Ohio: "Witnesses do not belong to one party more than to another." 61

57 Second Report (1930) p. 66.
58 Bray's Law of Discovery, 471.
59 In addition to the statutes which are set forth in the appendix at the back of this volume, see Ex Parte Schoepf (1906) 74 O. S. 1.
60 The report of this committee is to be found in the Simplification of Procedure Series, vol. 4, No. 46, Library of the Association of the Bar of the City of New York.
Inroads have been made upon the rule that a party need not disclose the evidence of his own case in some jurisdictions. The Massachusetts statutes, for instance, were amended to provide that the court may order a witness to disclose the names of witnesses "if justice requires" it.63 The English court has held that in a libel action a plaintiff can be forced to disclose the names of persons to whom the libel was published even though such persons would be witnesses for the plaintiff, the reason being that the names of such persons are a substantial part of the facts of the case.64 The names of employees of a defendant who were immediately connected with the transaction in question can be compelled in New Jersey.64 A similar rule to the effect that discovery can be had of the name of a person who was an active participant rather than a mere stranger to the affair in dispute is enforced by some of the Toronto examiners. The Missouri Supreme Court has hinted that it might allow a similar exception. In a case wherein it was sought to compel the claim agent of a large corporation to tell the names of those persons known to him to have witnessed an accident, the court said: "We have not before us at this time the question whether one eye-witness may not be asked who the other eye-witnesses of an accident were. That information might be useful in chief to identify and earmark the transaction, or in rebuttal. But we do have the question whether one litigant may compel the employee of the other to disclose the names of those persons his master may, might, or purposes to use as witnesses. We are of opinion he is not entitled to such discovery, absent a statute requiring

63 Marriott v. Chamberlain (1886) 17 Q. B. D. 154.
it. Such was the rule relating to discovery in chancery from which the rationale of this character of deposition is borrowed."\(^{65}\) In New Hampshire the servant of a corporation whose duty it is to procure and report in writing the names of witnesses to an accident, may be compelled to disclose such information, when he is summoned to give a deposition in an action against his employer.\(^{66}\) The reason assigned for this ruling is that the statutory exemption from discovery is limited in its terms to parties. In actual practice the rule is largely avoided by the expedient of the corporate investigator surrendering all of his reports to the corporate counsel, so as to make them privileged matter.

The Wisconsin court has gone further than any other in the direction of abolishing the restriction upon discovery of the names of witnesses. The problem as to whether a party could be compelled to disclose the names of his witnesses first came before the Wisconsin Supreme Court in an incidental way and was not expressly decided.\(^{67}\) Some years later it was presented again. In this later case the court said: "It is further insisted that a group of questions asking for names and addresses of witnesses were improper. For example, question No. 405 reads: 'You say you had some reports concerning the facts alleged to which I have called your attention. Who were those reports from?' Q. No. 371: 'Where can Mr. Jack Bates, one of your employees whom

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\(^{65}\) State ex rel. Evans v. Broaddus (1912) 245 Mo. 123, 142, 149 S. W. 473. The court distinguishes Devoy v. Transit Company (1905) 192 Mo. 197, 220, 91 S. W. 140, wherein it is said: "The deposition of respondent could have been taken timely and he could have been forced to uncover his witnesses." See also State ex rel. Mo. Pac. Ry. v. Hall (Mo. 1930) 27 S. W. (2d) 1027.

\(^{66}\) Petition of Bradley (1901) 71 N. H. 54, 51 Atl. 264.

\(^{67}\) Phipps v. Wisconsin Central Ry. (1907) 130 Wis. 279, 110 N. W. 207. In the brief of counsel in a later case this statement is found: "The question came up incidentally in that case but was not passed upon, and an examination of the record there shows that the court below while compelling an answer to many questions expressly omitted the names of the party's witnesses." Wis. Cases and Briefs, vol. 1104, No. 129, p. 29.
you got to call on Mr. Spiegel, be addressed so that he can be reached?’ Q. 444: ‘What is the chemist’s name?’ There was no abuse of discretion in ordering these questions answered under the authorities hereinbefore cited. Counsel cites, on this point, Collins v. Chicago & N. W. Ry. Co., 150 Wis. 305, 136 N. W. 628. In that case it was held on trial of the case not error to exclude a question on cross-examination of plaintiff as to whether he had subpoenaed a certain named witness, and as to whether he knew that such person would be a witness. The case has no bearing here.’ The court then distinguished the Massachusetts cases saying that they ‘turned upon a statute providing that the party interrogated shall not be obliged to disclose the names of the witnesses by whom, or the manner in which he will prove his own case.’ A further contention of the losing party was that ‘the names of witnesses are not facts, nor are they points set out in the complaint.’ This latter contention raised the question of relevancy under the provision of the Wisconsin statute that a party shall not be compelled to disclose matters not relevant to the issues. Some of the Wisconsin commissioners compel the disclosure of names of witnesses, while others do not. A bill was introduced before the Wisconsin legislature in 1930 providing that one party might, by court order, obtain the names of his adversaries’ witnesses. The chief objection offered by the opponents of the bill, which was defeated, was that it would enable lawyers for insurance companies to prepare cases with a minimum of effort by utilizing the preparation of their opponents. Judges and examining officers frequently refuse to compel discovery upon the ground that inquiries as to what witnesses a party intends to call are irrelevant, rather than

68 Horlick’s Malted Milk Co. v. A. Spiegel & Co. (1913) 155 Wis. 201, 144 N. W. 272, 278.
69 Wis. Cases and Briefs, vol. 1104, No. 129.
upon the ground that there is an absolute privilege. This is the reason assigned by the Wisconsin commissioners who refuse to compel disclosure.70 Such a basis of exclusion may indicate a want of confidence in the reality of the supposed danger of tampering with witnesses. At least it furnishes a relative standard as a substitute for what was formerly an absolute privilege, thereby encouraging devices for avoiding the rule. Realizing the irrelevancy of such blunt questions as, Who are your witnesses? or, Have you any witnesses?, lawyers are led to ask: Whom did you see at the scene of the accident?, Was there anyone near you that you knew when you were injured?, Who was riding with you?, and similar disguised questions of all sorts. By laying the proper foundation it is often possible, within the limits of relevancy, to obtain the desired information. Two simple illustrations taken from trial court records illustrate the tactics which are employed to obtain the names of witnesses:

(1) In a fraud action:
Q. Where was it that the defendant made these representations?
A. The Lakeview Apartments.
Q. In your apartment?
A. No, a friend’s apartment when I was there.
Q. You and he were at this friend’s apartment?
A. Yes.
Q. Who was this friend?

(2) In an automobile accident action:
Q. Did Elizabeth see the motor car coming?
A. There was no motor car coming when she was going across the street.
Q. Who did see it?
A. Well, I suppose the traffic cop would see it and some person else.

70 See also Montgomery Light and Traction Co. v. Harris (1916) 197 Ala. 358, 72 So. 545.
Q. Did they say it was going fast?
A. Yes.
Q. Who are they?

DISCLOSURE OF DOCUMENTS BY WHICH PARTY WILL PROVE CASE

Chancery adhered to the rule that a party could not be compelled to disclose the documents by which he intended to prove his own case.71 The chief application of the rule was to documents which proved title to land.72 Some jurisdictions apply the same rule to modern discovery practice. In England it is held that a party need not disclose documentary evidence of his own case and especially that he need not disclose his title papers.73 Documents are privileged from inspection if they relate exclusively to the party’s own case and contain nothing supporting or tending to support his adversary’s case.74 The party’s statement as to the matter is conclusive unless the court is satisfied from certain sources of information or upon his own inspection of the documents that the party has falsely or mistakenly claimed the privilege.75 There are certain well recognized limitations on the extent of the privilege. In an action where the title to land is in question, for example, a party must disclose the nature of his title, as distinguished from the evidence thereof, where that title is a fundamental part of the case.76 An exception is also made in the case of documents referred to in the pleadings, for these must always be disclosed. Discovery of all documents which relate as much to the case of one party as to the case of the other may be compelled.77 Some jurisdictions which

72 Combe v. London (1840) 4 Y. & C. 139, 155.
73 Bray’s Law of Discovery, 445.
74 A. G. v. Newcastle (1899) 2 Q. B. 278.
75 Annual Practice (1929) 508, 532.
76 Stringer, The A. B. C. Guide to Practice (1928) 68.
are much more liberal than England regarding the general scope of a discovery examination restrict discovery of documentary evidence about as England does. This is the case in Massachusetts, Ohio, New Hampshire, and Ontario.

79 Ex parte Schoepf (1906) 74 O. S. 1, 77 N. E. 276.
81 Ontario Judicature Act (Holmested, 1915) p. 835.
CHAPTER XVI

APPLICATION OF ORDINARY RULES OF EVIDENCE TO DISCOVERY EXAMINATIONS

PRIVILEGE

Every objection which would be tenable as of right at the trial is tenable when the examination is held before the trial. It is as well a futile as an unjust thing to allow the discovery of evidence which can be excluded at the trial on the ground that it is privileged. There is no necessity to inquire into reasons behind the rules of privilege, for the paramount policies have already been decided in connection with the law of evidence generally. The safer course is to rely on the decisions in the law of evidence which have been developed over a much longer period of time and which have withstood the scrutiny of a more careful scholarship. The question to be asked is, would a similar objection be tenable upon the actual trial of the case? Courts generally have applied such a theory of decision in regard to objections which raise questions of privilege.¹

Three objections as of right, or grounds of privilege, upon discovery examinations are generally recognized in England, the United States and Ontario. These are: (1) as being criminatory or penal; (2) as being within the doctrine of professional privilege; (3) as be-

ing injurious to the public interests. A comparison of the rules given by Bray on Discovery and Wigmore on Evidence, respectively, indicates how closely the rules applied to discovery parallel those which have a recognized standing in the law of evidence. Detailed citations to decisions which apply these rules to discovery examinations are purposely omitted at this point. It seems futile to clutter up the law of discovery with matters which, if not more appropriate to the law of evidence, at least have been more thoroughly tested in that branch of the law. Take for example the matter of privilege from self-incrimination. Is it reasonable to suppose that a privilege which has been accorded constitutional sanction in most jurisdictions would differ greatly whether applied to examinations before or at the trial?

While a party can safely refuse to disclose privileged matter regardless of the type of discovery procedure which obtains, there are differences as to the practical ease with which a party can protect his privilege in the several jurisdictions. Lawyers in states in which the officer in charge of the examination has no power to compel answers, but in which it is necessary to resort to the court, say that opposing lawyers instantly respect objections of privilege. A party can protect himself, for he knows that the examining lawyer dares not ask the

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3 Compare Wigmore on Evidence, IV, 2250 ff. (as to privilege from self-incrimination); Id. V, 2290 ff. (as to professional legal privilege); 40 Cyc. 2391 (as to matters injurious to public interests); with the matter set forth in the last preceding citation.

4 Representative decisions are: F. Speidel Co. v. N. Barstow Co., (1916) 232 Fed. 617; Quirk v. Quirk (1919) 259 Fed. 597; French v. Venneman (1860) 14 Ind. 282; Whicher v. Davis (1899) 70 N.,H. 237, 46 A. 458; Sloss-Sheffield Steel Co. v. Maryland Casualty Co. (1910) 167 Ala. 557, 52 So. 751; Plunkett v. Hamilton (1911) 136 Ga. 72, 70 S. E. 781; De Camp v. Archibald (1893) 50 O. S. 618, 35 N. E. 1056; Ex parte Schoepf (1906) 74 O. S. 1, 77 N. E. 276; Volusia County Bank v. Bigelow (1903) 45 Fla. 638, 33 So. 704; Knight v. Empire Land Company (1908) 55 Fla. 301, 45 So. 1025; Ex parte Mumford (1874) 57 Mo. 603.
court to compel a disclosure of privileged matter. Lawyers in states in which the notary has power to punish for contempt also respect objections of privilege as a general rule, but there have been occasional instances of abuse under this type of procedure.

The New Jersey court, for a season, adhered to the rule that a lawyer had no right to instruct his client to refuse to answer a question at a discovery examination, even though an answer to the question might incriminate the client. Said Chief Justice Gummere to a lawyer who had advised his client to refuse to answer certain questions: "It does not concern you, as an attorney, one iota whether the answer of your client to a question put to him will incriminate him or whether it will not. The fact that the answer may incriminate him does not make the answer incompetent. If it will incriminate him he may refuse to answer upon that ground; but whether he will refuse to answer on that ground is a matter for him personally to determine, without advice from his lawyer or from the court. It is a personal privilege, which he may assert or waive, as he sees fit. A question is not objectionable at all merely because the answer will tend to incriminate; and counsel has no business—I mean legal business—to object for any such reason to a question which is competent. Much less is there any justification for his action in advising his client to refuse to answer a question for such a reason." From this and similar language in the Chief Justice's opinion the New Jersey lawyers got the idea that a lawyer was in danger of contempt if he instructed his client to refuse to answer any question however improper it might be. Five years later the New Jersey Supreme Court held that a party examined before trial could not be held in contempt for refusal to answer a question, unless the court had ordered an answer, and that counsel who directed

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such a refusal to answer could not be held in contempt.\footnote{Backel v. Linn (1928) 104 N. J. L. 243, 140 Atl. 285.} The court said: "Our view is that, when the party is not examined before the judge himself, if he or his counsel deem a question improper, then, as the commissioner or master is not clothed with the judicial power of compelling an answer, the party may refuse for the time being to answer, and the court or a judge is then to decide on the propriety of the question. As a rule, reputable counsel when in court, or even before a commissioner, will refrain from putting questions plainly incompetent, and from advising their clients to refuse an answer to questions unless they are plainly incompetent; and cases in which the parties reach an impasse on such an issue are too few to be of importance. When they do occur, the remedy is the extremely simple if somewhat inconvenient one of the judge taking over the examination himself; and when this is done the trouble vanishes at once. But normally the purposes of justice are subserved by an appeal to the judge, who will pass on contested questions and give the parties the benefit of his view of the situation."\footnote{Id. 286.}

\textbf{Relevancy}

Objections that questions are irrelevant, if made at the trial, are addressed to the sound discretion of the court. While the same general rules as to relevancy control at discovery examinations as at the trial, the practical application of these rules differs. Relevancy always presupposes a standard, i.e. relevant to what? Moreover it is equally clear that the standard must be a factual one, for no question can be relevant to a pure question of law. The standard is more certain by the time trial is reached because the issues of the case have been determined. The basic rule that the interrogation must be
relevant to some matter in dispute between the parties applies to discovery examinations, but with this difference arising from the necessity of the case, namely, the matter in dispute is not likely to have been as accurately determined as it would be at the trial. For this reason some courts adopt the test that discovery may be allowed if it is material for the determination of any matter in question about to come on for trial between the parties to the action.\(^8\) Other courts say that the test is not whether the matter inquired of will be competent at the trial, but merely whether it may be.\(^9\) Still other courts adopt a "reasonably relevant" test.\(^{10}\) Such reasoning has particular application when discovery before pleading is allowed. The only available standard is the more or less hypothetical case which the party seeking discovery sets up in his affidavit.\(^{11}\)

Where ordinary deposition procedure is used for discovery purposes there is great liberality as far as relevancy is concerned for the reason that the statutes contemplate that the witness should answer all questions except those involving privilege, and that he should save all objections until the trial. The question arises whether a party or witness can safely refuse to answer a question merely because it is irrelevant. The answer necessarily is two-fold: The party or witness can safely refuse to answer if the notary in charge of the examination has no power to punish for contempt. When the matter is taken to the trial judge upon motion to compel an answer the objection that the question is not relevant can be duly presented. If the notary has no power to punish for

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\(^8\) Free v. Western Union Tel. Co. (1907) 135 Iowa 69, 110 N. W. 143. See also Bray, Discovery, 11.


\(^{10}\) Volusia County Bank v. Bigelow (1903) 45 Fla. 638, 33 So. 704.

\(^{11}\) Horlick's Malted Milk Co. v. Spiegel Co. (1913) 155 Wis. 201, 144 N. W. 272; Kelly v. Ry. Co. (1884) 60 Wis. 480, 19 N. W. 521.
contempt the witness does not need to obtain permission to refuse an answer to impertinent queries; he may do so as of course. If, however, the officer has power to punish but not to relieve from answering except upon grounds of privilege, the witness runs some danger in refusing to answer upon the mere ground of irrelevancy. The Ohio Supreme Court has said: “If the witness assumes to decide these questions for himself at the time, unless the interrogatory involves a question of privilege, he must do so at his peril. If he should be right in his decision he would lose nothing; if wrong, he must suffer the consequences.” This is the general theory adhered to by courts in states in which the officer taking the deposition has power to punish for contempt. A witness who is examined for discovery, just as a witness whose testimony is taken for purposes of preservation of evidence, should answer all questions except those involving privilege. While there is a possibility of obtaining relief from the penalty if the witness refuses to answer questions which clearly are impertinent, there are, as a practical matter, virtually no limits as to relevancy under this type of procedure. One of the factors which called forth the provision for special commissioners to supervise the examinations in Missouri was that insufficient protection was afforded a witness who refused to answer upon the ground of irrelevancy.

Statistics indicate how infrequently lawyers actually object to questions during the course of a discovery examination. The records of 100 examinations for discovery were inspected in Wisconsin, 50 each in Milwaukee and

14 Re Rauh (1901) 65 O. S. 128, 61 N. E. 701.
15 Ex parte Krieger (1879) 7 Mo. App. 367; Tyson v. Savings and Loan Association (1900) 156 Mo. 588, 57 S. W. 740; Ex parte Livingston (1882) 12 Mo. App. 80.
16 Ex parte Mumford (1874) 57 Mo. 603.
Madison. In these 100 examinations there were 13487 folios of questions and answers, and only 785 objections to questions. This means that on the average only one objection was offered during the taking of each seventeen folios of the examination. Moreover no ruling was given to the great majority of the objections which were noted. A large portion of them evidently were raised merely as warnings to opposing counsel. Similarly, in Ontario only 83 out of 18437 questions which were asked during the course of 76 examinations for discovery were objected to. Less than ten per cent. of the objections were sustained by the special examiner. Not a single objection was registered in 50 out of the 76 examinations which were inspected. In a will contest case, for instance, where many objections might be expected, there was no objection to any of the 804 questions which were propounded. Similarly fraud, malpractice, and alimony actions were among those in the list in which no objections were registered. It is impossible to offer similar figures for all states for the reason that it is not always necessary to note the objection. 17. But lawyers say that objections are comparatively infrequent; that for tactical reasons, it is preferable to let irrelevant matters come in rather than to object.

The only complaint that harm is done by the disclosure of impertinent matters comes from lawyers in jurisdictions where officers in charge of the examination have power to punish for contempt. In other states lawyers take the position that, as long as they can prevent the disclosure of harmful, irrelevant matter, they will not worry about irrelevancy in the usual case. Consequently the conscious practice of many lawyers is to entirely refrain from objecting, unless the questions relate to privileged matter. They explain that little harm is done by the disclosure of immaterial matter so long as

17Cf. N. Y. Rules of Civil Practice 122, for instance.
it can be excluded from the jury’s consideration at the trial. The chief cause of complaint arises when a notary compels an answer which discloses matter the privacy of which should be respected. This can only happen in states in which the notary has power to punish for contempt.

Rules of evidence in regard to relevancy are tacitly rather than expressly applied at discovery hearings. Objections usually are addressed to the examining lawyer. They serve as a word of warning that the questioning has reached the limits of its proper scope. Often times a question is argued informally among the lawyers and an adjustment effected. The norm which the lawyers keep in mind is the general law of evidence, but there is recognition that the standard should be liberally applied in reference to discovery. Hence there is a practical disregard of the more technical rules.

Jurisdictions which apply the New York rule that the examination cannot extend to the issues of which the adverse party has the affirmative under the pleading have little trouble with the question of relevancy. It is taken for granted that the questions must be relevant to the issues of the case because they must first of all be relevant to the matters upon which the examination is sought, which is only that portion of the issues as to which the applicant has the burden of proof. This feature is made doubly perspicuous in New York by the fact that the general scope of the inquiry is settled before the examination starts.

CHAPTER XVII

PENALTIES FOR UNJUST REFUSAL TO DISCLOSE

Most jurisdictions provide that a party who refuses to disclose, when ordered by the court to do so, may be punished by having his pleading stricken. Such a penalty is derived from the chancery practice. The question has been raised in some jurisdictions whether there are not constitutional limitations upon the power of a court to strike a party's pleading for failure to disclose. The question was first raised in the case of Hovey v. Elliott. In that case the United States Supreme Court, speaking through Mr. Justice White, held that such a penalty lacked due process of law. But the particular disobedient act was a refusal to pay certain money into court. The circumstances show rather clearly that the punishment was given as for contempt. The court considered thoroughly the history of punishment for civil contempt, and less thoroughly the ancient chancery practice of taking the bills pro confesso upon refusal to discover by answer. A decade later in a case in which a similar punishment was meted out, but this time for unjust refusal to discover books and papers, the Supreme Court distinguished the earlier case in a way which was in accord with the historic rules as to the penalty in discovery proceedings in chancery. The gist of the distinction was that the earlier case only prohibited the striking of a pleading as a contempt penalty and did not

1 Langdell, Summary of Equity Pleading, 84.
2 (1897) 167 U. S. 409.
prevent its use in imputing an admission of a want of merit in the pleading by refusal to discover. Since then the practical application of the doctrine of the Hovey case has been still further limited by the Supreme Court and the lower federal courts have practically disregarded the case in so far as discovery proceedings are concerned.

Many of the state courts have upheld the default penalty without any quibbles over constitutional questions. Others have expressly decided that there is no want of due process. The New York Court of Appeals has pretended to follow the federal decisions in the matter. The exact position taken is evidenced by a quotation from an opinion by Pound, J.: "The line may thus be definitely drawn between the proper punishment for suppressing evidence and the improper punishment as for contempt merely." The California court has held that the plaintiff’s pleading may be stricken but that the defendant’s may not. The latter is said to be unconstitutional as restricting the right of defense. The default penalty has been held constitutional in Washington upon the ground that failure to answer may be construed as an admission. Hence it is held that the penalty can be applied only when the facts elicited are material and go to all of the issues of the case. Lawyers in various

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8 Hammond Packing Co. v. Arkansas (1908) 212 U. S. 322.
10 Wittenberg Coal Co. v. Compagnie Havraise Peninsulaire de Navigation a Vapeur (1927) 22 F. (2d) 904.
11 See a long list of such cases cited in the case in the preceding footnote.
12 Kwiatkowski v. Putzhaven (1919) 189 Ind. 119, 126 N. E. 3; Emond v. Federal Securities Co. (1930) 131 Kan. 11, 290 Pac. 3; Miles v. Armour (1911) 239 Mo. 438, 144 S. W. 424.
13 Peingold v. Walworth Bros. (1924) 238 N. Y. 446, 454, 144 N. E. 675. See also comment of Dean Wigmore on the case in 19 Illinois Law Rev. 594.
14 Summerville v. Kelliher (1904) 144 Cal. 155, 77 Pac. 889; Oneill v. Thomas Day Co. (1907) 152 Cal. 557, 92 Pac. 856.
15 Lawson v. Black Diamond Coal Mining Co. (1906) 44 Wash. 26, 86 Pac. 1120; Capps v. Frederick (1906) 44 Wash. 38, 86 Pac. 1128.
states say that there are several considerations which are worthy of note in regard to the practical enforcement of the default penalty. First, courts are very reluctant to actually enforce punishment. But it is possible sometimes to obtain a modified form of the penalty, namely, a stay of proceedings until discovery is granted. Such an expedient is encouraged under the New York practice by the rule that proceedings may be stayed if notice of the examination has been served upon the attorney for the party to be examined, whereas a party can be defaulted only after he has been served with subpoena.

It is said further that the very threat of the penalty has the effect of encouraging a full and voluntary disclosure; that the indirect effect of the sanction is salutary. Judges say that, as a practical matter, it is easier to strike the party's pleading than it is to put him in jail for contempt. There is seldom any necessity of a final application of either penalty, but the gesture of the former is more easily accomplished. Indeed, such reasoning prompted the introduction of the penalty in Ontario, for it was thought that it provided a convenient escape for the court when it appeared undesirable to put the party in jail.

All of the states which have a procedure for discovery, except Connecticut, provide as one of the penalties that the party may be punished as for contempt. Attachment for contempt is the only way a recalcitrant witness can be punished, for he has no pleading to be stricken. Lawyers in jurisdictions in which this penalty, and only this, obtains say that it offers a sufficient sanction for a full discovery.

11 An analysis of the cases in the American Digest under "Discovery," Key-Nos. 70, 77, 107, will show that this is so.
PENALTIES

Louisiana has adopted the view of the civil law and, accordingly, provides a *pro tanto* punishment. If a party wrongfully refuses to answer interrogatories the particular interrogatories, rather than the whole cause, are taken for confessed.\(^{18}\) Texas formerly had a similar provision. But curiously enough, that which was intended as a *pro tanto* penalty turned out to be even more stringent in its practical operation than are penalties which are supposedly very harsh. Prior to 1897 if a party who was being examined for discovery refused to answer a question the notary simply noted down the refusal and the question, which might be in leading form, was deemed admitted. If the examining lawyer met with one refusal he could put the same question in such varied forms as to place his adversary in a very unfavorable position. Usually the lawyer would continue to ply questions until the party in desperation would give an answer rather than suffer such an imputed admission.

A Kentucky lawyer uses a rather novel expedient when a party whom he is examining refuses to answer. It is in the direction of the Texas practice. As soon as the party refuses to answer, the examining lawyer makes an avowal as to what he thinks the party would testify if he did answer. Of course the avowal has no legal status. But sometimes, it does incite the party to give his own answer, and the general psychological effect, it is said, is advantageous to the examiner.

*Pro tanto* penalties are effected by some of the special statutes for production and inspection of documents: if inspection is unjustly refused the court may exclude the document from evidence or may instruct the jury to believe it to be such as the applicant for discovery affirms that it is.

\(^{18}\) Rev. Code of Prac. (Marr, 1927) sec. 349.
CHAPTER XVIII

USE AT TRIAL OF RECORD OF EXAMINATION FOR DISCOVERY

WHO MAY USE RECORD

There are three different types of provisions as to who may use the record of the discovery examination at the trial. Some jurisdictions allow the taker only to use it. Others allow use by either party. The third type of provision is that neither party may use the deposition of a witness as original evidence unless the witness is unavailable for oral testimony, although the opponent of the party who calls the witness at the trial may use the deposition to contradict the witness; that the taker only may use the deposition of an adverse party as evidence of an admission; and that either party may use it in the event the deponent is unavailable for oral testimony at the trial.

The following jurisdictions allow use by the taker only: Wisconsin, Massachusetts, England, Ontario, Washington, Virginia, Indiana and New Jersey.1 The earlier Wisconsin provision was that either party could use the deposition at the trial. Later this was changed so as to allow use only by the party taking. Even then a few decisions seemed to indicate that once the deposition had been offered in evidence either party could

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1 Ontario Judicature Act (Holmested, 1915) page 806 ff.; Denny v. Sayward (1894) 10 Wash. 422, 39 Pac. 119; Moore v. Palmer (1896) 14 Wash. 134, 44 Pac. 142; Faut v. Miller (1867) 58 Va. 187; Annual Practice (1930) order 31, rule 24; Bray's Law of Discovery, 600. See also the statutes listed in the appendix and the cases in the next several footnotes.
use it, but the Revisor of Statutes in 1927 purposely modified the language of the statute so as to remove this possibility. The trend of development in Massachusetts has been in exactly the opposite direction. While the present provision is that only the proponent of the interrogatories can use the answers thereto at the trial, there is a considerable sentiment amongst the Massachusetts bar for an amendment to the statute to the effect that either party be allowed to use. The proponents of the change argue that it would make a party more careful as to the particular questions he propounds and thus eliminate considerable surplusage in interrogatories. Opponents of the change point out that it would increase the amount of self-serving material in the answers, and that it is founded upon a misconception of the basic purposes of discovery. Massachusetts lawyers have considered the problem whether the examination should not be usable in behalf of the party making the answers in the event that he dies after answering and before the trial. Recently the Massachusetts Judicial Council has recommended a statutory change to the effect that: "If a party who has filed sworn answers to interrogatories dies, so much of such answers as the court finds have been made upon the personal knowledge of the deceased shall not be inadmissible as hearsay or self-serving if offered in evidence by a representative of the deceased party." The possibility that the examination may be used by the taker after the deponent has died and that a very partial story may be presented to the jury, a story lacking the direct testimony of the deponent, has troubled the Wisconsin bar. This has led to the suggestion that the taking of an adverse examination be made an addi-

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2Lamberson v. Lamberson (1921) 175 Wis. 398, 184 N. W. 708; Lange v. Heckel (1920) 171 Wis. 59, 175 N. W. 788.
3Revisor's Notes (1927) on ch. 326, sec. 12.
5Sixth Report, p. 15.
tional cause for taking depositions under the general deposition statute. Another suggestion made by some Wisconsin lawyers is that the deposition statute be so amended as to allow taking of a deposition without showing cause, with use thereof being conditioned upon the witness' unavailability at the trial. This is the plan in states wherein the ordinary deposition procedure is the means of obtaining discovery before trial.

Under the Ontario discovery procedure only the examination of a party can be used as original evidence. Examinations of corporate officers, assignors, and other persons from whom discovery may be had, but who are not themselves adverse parties, are confined to the purpose of discovery only and cannot be used at the trial against the parties to the action. This is explicitly provided as to examinations of corporate officers and servants and has been held equally applicable to other persons not parties who have been examined for discovery. This merely limits use of the examination as original evidence. It does not prevent use to contradict the witness or to refresh his memory. This, again, is in the direction of the practice under the ordinary deposition procedure which obtains in other jurisdictions.

The following jurisdictions allow either party to use the examination of a party, or representative of a party, at the trial: New York, South Dakota, Michigan, North Carolina, North Dakota, New Jersey, Quebec, and Louisiana. The theory is adhered to in both Louisiana and Quebec that the answers to interrogatories for discovery become automatically a part of the record of the case.

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6 Rule 327; Ontario Judicature Act (Holmested, 1915) p. 806.
and that hence no formal introduction as evidence is necessary. Mr. Justice Surveyer, of Montreal, has said the following concerning the Quebec practice: "Mr. Justice Mignault, whom I consulted with regard to the deficiencies of our Code, wrote me on this subject: 'A reform which would be very useful would be to render the discovery really a discovery. In the province of Quebec, the preliminary interrogatory forms a part of the proof which embarrasses the liberty of the attorney of the opposite party, because he exposes himself to the introduction in the procedure of testimony which his adversary otherwise could not make except with a commencement of proof in writing. In the other provinces, the adversary is freely questioned and then there is introduced into the proof of the case the parts of his deposition which are believed useful, saving the adversary's right to demand the addition of the replies which explain those which have been produced.' I am not certain if, in view of our laws of evidence, the system formerly in force in the jurisdictions of which I spoke is not preferable for us. Following this system, the judge presiding over the case asks you whether or not you intend putting your preliminary interrogatory on the record. In the affirmative, it forms part of the record. If you are not satisfied, you are free to re-examine the party during the inquiry on the points where he replied favorably, saving, if it is less favorable the second time, to remind him of his previous declarations in accordance with article 329.'

Texas, under the regular deposition procedure, allows depositions of parties and witnesses alike to be used at the trial by either party regardless of whether the deponent is present in court. This procedure differs from that which obtains in other states in which a use has been made of the procedure for purposes of discovery.

before trial in this respect, namely, there are neither restrictions upon the taking of depositions nor upon the use thereof. In a number of other states depositions may be taken as a matter of right, but their use at the trial is limited to instances in which the deponent is unavailable as a witness. But in Texas depositions are often used when the deponents are present in court. While some of the lawyers are of the opinion that it is within the discretion of the court whether a party will be allowed to read the deposition of a witness who is present in court in lieu of placing him upon the stand, it is agreed that as a practical matter it is usually allowed. This practice is not a salutary one. The preferable mode of giving testimony is upon an oral examination in open court. Only when a witness is unavailable for the purpose of giving his oral testimony in open court should written statements be received from him. There is a difference between taking depositions for the dual purpose of preserving testimony in the event that the witness should become unavailable and of pinning him down to a definite story before trial on the one hand and taking depositions as the regular mode of adducing evidence on the other hand. In the former event the deposition serves merely as a dress-rehearsal for a trial conducted in the orthodox manner; in the latter it fosters all of the vices which are attendant upon a trial of the case on paper only. Specific vices attributable to this rule are pointed out by the Texas bar. Suppose, for example, that a lawyer takes the deposition of a witness, that he gets a favorable statement from him, and that the adverse party does not see fit at the time to cross-examine the witness to any extent. The chances are that the lawyer will read the deposition to the jury and keep the witness off of the stand so that he may not be subjected to further cross-examination. Of course the adverse party could call the witness but in doing so he would
make the witness his own. The unfairness of such a practice is made more perspicuous when the witness happens to be a person of poor courtroom appearance or of weak voice and when the lawyer reads the deposition with the added force of his own personality. There is a tendency upon the part of witnesses whose deposition has been taken to be reluctant to appear at the trial. They reason that there is no necessity that they should give further of their time when their depositions can be used instead.9

All states which employ the regular deposition procedure as the mode of discovery before trial, except Texas, have the following rules in regard to use of the deposition at the trial: (1) Neither party may use the deposition of a mere witness as original evidence unless the witness is unavailable for oral testimony, but the opponent of the party who calls the witness at the trial may use the deposition to contradict the witness. (2) The taker only may use the deposition of an adverse party (but not of a mere witness) as evidence of an admission. (3) Either party, regardless of who has taken the deposition and regardless of whether it is the deposition of a party or of a witness, may use the deposition in the event the deponent is unavailable for oral testimony at the trial.10

**Purpose For Which Record May Be Used**

There are two principal purposes for which depositions may be used at the trial. The first and most frequent use is for the purpose of contradicting the deponent when

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9 The deposition of a party can be used by either party, but the deposition of a witness can be used by either party only when there has been cross-interrogation. Tex. Stat. (1928) arts. 3764, 3769.

10 For general statements of the above rules see, in addition to the statutes and the next several footnotes, the following decisions: Great Western Despatch South Shore Line v. Glenny (1884) 41 O. S. 166 (see also 14 Ohio Jurisprudence, p. 66 ff.); The Phenix Mutual Life Ins. Co. v. Clark (1877) 58 N. H. 164; Carter v. Beals (1862) 44 N. H. 408; In re Hammond (1909) 83 Neb. 636, 120 N. W. 203; Banks v. Refrigerating Co. (1911) 236 Mo. 407, 139 S. W. 545.
he testifies at the trial. Dean Wigmore has said: "* * * use of a deposition to show in it a contrary statement of the deponent, who has already testified on the stand, is allowable even though the witness be present and available; for the deposition is here used not as substantive testimony, but only as containing a statement inconsistent with the same witness's testimony already given." Lawyers in Boston, Massachusetts, say that even answers to written interrogatories for discovery are more frequently used for purposes of contradiction than as original evidence.

The second important mode of use is for the purpose of proving an admission. Dean Wigmore has stated the general rule thus: "The general principle that the witness must be shown unavailable for testifying in court does not apply to use of his party-opponent's deposition (taken, as usual, under statutes allowing in common law courts a process similar to a bill for discovery)—for the simple reason that every statement of an opponent may be used against him as an admission without calling him; the opponent's sworn statement, though called a deposition, is no less an admission than any other statement of his." Lawyers sometimes exhibit to the jury a refusal upon the part of the witness at the discovery examination to answer particular questions with the purpose of showing that the witness sought to conceal something. Such a practice seems to go unquestioned in most states, but the Massachusetts court has held that it is improper to refer to a party's refusal to answer interrogatories before he has been ordered to answer by the court.


There is usually no necessity of using the examination for discovery at the trial. Indeed, it is more frequent than otherwise that the sole purpose of the inquiry is for discovery and that no subsequent use is made of the deposition. The usual rule is that the proponent has the option of using all or any part of the deposition, subject in the latter event to the right of the adverse party to demand the reading of other parts which are relevant to those which have been read.\(^{14}\) Alabama and Virginia require that all of the answers to written interrogatories be introduced, if any part are.\(^{15}\) The whole of a deposition must be introduced in California and in Indiana if the purpose is to prove an admission, but a part may be used for the purpose of contradicting the witness.\(^{16}\) There has been considerable trouble in Missouri concerning the correct way of using a deposition for purposes of contradiction. In 1922 the Supreme Court criticized the practice of using detached portions only of depositions. Said the court: "We have, in no uncertain terms condemned the practice, that sometimes finds its way into court, of counsel, on cross-examination, reading a detached portion of the deposition or instrument and then asking the witness whether he made such a statement."\(^{17}\)

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\(^{16}\) Bank of Finnell (1901) 133 Cal. 475, 65 Pac. 976; Scott v. Indianapolis Wagon Works (1874) 48 Ind. 75; Cook Brewing Co. v. Ball (1899) 22 Ind. App. 656, 52 N. E. 1002.

\(^{17}\) Littig v. Urbauer-Atwood Heating Co. (1922) 292 Mo. 226, 247, 237 S. W. 779.
The court pointed out that the correct mode of use was to show the deposition to the witness, ask him if he had signed it and then introduce the whole thereof in evidence. Such a practice, however, was not satisfactory to the lawyers, the easier and more effective mode being to ask the witness whether he had not previously made such and such statements. The Supreme Court in 1926 ameliorated its former ruling to the extent that it is now required that “the party attempting impeachment must refrain from garbling facts, must be fair to the witness, the court and the jury, in the examination, and must read in evidence all portions of the deposition that bear on the particular questions and answers about which the witness is interrogated.”

As a practical matter the impeaching party now uses such portions of the deposition as he cares to and the adverse party then reads the additional portions which he deems explanatory of those already read. The present practice is more satisfactory to the bar. It also provides a more effective way of exposing a lying witness.

There is some complaint among the lawyers of several states that the examination for discovery is sometimes allowed to be used at the trial in such a way as to jeopardize its orderly conduct. Wisconsin is the only state in which this complaint is especially widespread. Two types of abuses were pointed out. It is said that the deposition is used as a weapon with which to argue with the witness and play up inconsistencies of an immaterial nature between the testimony given at the trial and that given at the discovery hearing; and that the deposition is used as a means of covering the same point twice, so as

\[18\] Peppers v. Railway Co. (1926) 312 Mo. 1104, 1116, 295 S. W. 757.


\[20\] Dean Wigmore’s comment on the Littig case is: “This is unsound; a lying witness could not be exposed under such restrictions, e. g. Sir Charles Russell could never have exposed the forger Piggott, in the cross-examination quoted ante sec. 1260.” Wigmore on Evidence, IV, 2103, note 1.
to impress the jury and encumber the record. Most lawyers say that the remedy for the latter abuse is with the trial judge who can put a stop to the reading of the examination where the ground had already been covered. Some lawyers, however, feel that the former abuse requires a specific rule. The Advisory Committee on Rules has been considering a proposal to the effect that, "In case the witness shall have been adversely examined before trial, his examination at the trial shall be limited to such facts as were not inquired about on the former examination, unless the scope of the examination be extended by permission of the court." It has been suggested that the proposed rule be modified to the extent of putting the onus of objecting to the use of the deposition on the opponent, rather than requiring the proponent to obtain permission. The majority opinion among the lawyers seems to be that such a rule, in any form, would do more harm than good. They fear any tampering with the present rigorous cross-examination. They point to its effectiveness in revealing the truth. The proposed rule might also have the unsalutary effect of subordinating oral testimony to written testimony and of discouraging examinations before trial.

The usual rule is that any objections to the questions and answers may be made for the first time at the trial when it is sought to introduce the examination in evidence, except those going to the form of the question. The same rule applies as to the competency of the deponent, except that some courts have held that a party who takes a deposition waives the objection that the witness is incompetent. Suppose the trial judge has already decided objections to particular questions and

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21 In re Hammond (1909) 83 Neb. 636, 120 N. W. 203. The rule under the written interrogatory procedure in Indiana is contra, Combs v. Union Co. (1896) 146 Ind. 688, 46 N. E. 16; B. & O. R. R. Co. v. Berdon (1924) 195 Ind. 265, 150 N. E. 407.

22 Gowdy v. Gowdy (1930) 230 Ky. 545, 20 S. W. (2d) 170. See also note in 18 Ky. L. Jour. 302.
answers at the discovery examination. Does such ruling preclude him from rejecting evidence at the trial which he has admitted at the discovery hearing? On principle it would seem that the trial judge can decide de novo whether the answers are admissible in evidence, because the standards in regard to discovery are more liberal than in regard to evidence at the trial. But some of the trial judges in Massachusetts, at least, have decided otherwise.

**Conclusive Effect Upon Party Who Uses Record**

The uniform rule is that introduction in evidence of the examination of the adverse party does not preclude the party who so introduces it from rebutting the testimony by other evidence. The theory is that the situation is analogous to that where one witness called for a party contradicts the testimony of a previous witness. Similarly, the New York Civil Practice Act provides that the examination when read in evidence "has the same effect, and no other, as the oral testimony of a witness would have." The truth of the testimony stands as against the party introducing until contradicting evidence is introduced.

The usual rule is that a party does not lose the right to impeach the credit of a witness by taking his deposition, but that the party who uses the deposition, regardless of who took it, does lose the right since, by using the deposition, he makes the deponent his own witness. This rule does not prevent contradiction of the deposition by other testimony; it merely prevents attacks upon the

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25 Section 305.

credit of the deponent. Nor should it have even this effect in the event that the deponent is an adverse party. The same reasons which are set forth by Dean Wigmore against application of the rule that a party who calls a witness cannot impeach him, to the situation where the witness is a party-opponent, can be relied upon here: "If there is any situation in which any semblance of reason disappears for the application of the rule against impeaching one's own witness, it is when the opposing party is himself called by the first party, and is sought to be compelled to disclose under oath that truth which he knows but is naturally unwilling to make known. To say that the first party guarantees the opponent's credibility is to mock him with a false formula * * *".

Of course the question may be raised whether the problem will arise in connection with discovery: i.e., will the party introduce his adversary's deposition as original evidence unless he deems the testimony true? Does he not use it for the very purpose of proving an admission? If so, why should he desire to attack the credit of the person who gave the admission? Such argument overlooks the fact that the party who introduces the deposition may rely upon the truth of parts thereof as admissions, and yet desire to impeach the credit of the deponent as a whole. Yet it is true that one link in the reasoning in regard to the trial situation, namely, that the party cannot tell whether his opponent will speak truly or falsely when he calls him as a witness, is missing as far as discovery is concerned. The party already knows his opponent's testimony before he introduces it.

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27 Wigmore on Evidence, II, 916 (with citations to cases); III, 1856 a.
CHAPTER XIX

COST OF DISCOVERY EXAMINATION

There are certain fixed charges for serving the subpoena, swearing the witness, and certifying the record of the examination. The exact amount allowed for each of these incidentals varies in the different states. While the amount for serving the subpoena usually is small the very fact that there is any charge is one of the things which encourages the taking of examinations by stipulation. There is usually a requirement that witness' fees be tendered or paid. Three plans are in use as to the fees for taking down the testimony: (1) The compensation may be upon the basis of the amount of the testimony which is taken down, i. e., either by the page, folio or hundred words. This is the most extensively used plan. Representative allowances under this plan are: Wisconsin, twelve cents per folio; New Jersey, twenty cents per page; Missouri, fifteen cents per hundred words; Ohio and Nebraska, ten cents per hundred words. (2) The compensation may be upon the basis of the amount of testimony, plus a fee to the officer for the general conduct of the examination. Some form of this plan is necessary in the states wherein a trained officer is employed in addition to the stenographer. (3) The compensation may be upon the basis of the time consumed in taking down the examination. Only Ontario employs this plan. If there is no request for copies the only recompense is two dollars per hour. The comparative smallness of the fee is revealed by the testimony of reporters that approximately thirty-five to forty folios are taken down on the average per hour.
In Wisconsin and in Missouri where a commissioner with legal training supervises the examination the fees run slightly higher. The fees allowed in Wisconsin are as follows: three dollars per diem for the commissioner; twelve cents per folio for taking down and writing up the original; five cents to eight cents for copies. The rate varies in different localities. The commissioner gets his per diem fee and in addition a portion of the fees for stenographic service. The division of fees between the commissioner and the reporter varies in different places and among different officers. In Madison the usual division is ten cents to the reporter and two cents to the commissioner on the original, with copies at five cents each going entirely to the reporter. Of course the commissioner keeps all of the per diem charges as well as the other incidental charges, if any. In Milwaukee there is a variance but the average division seems to be eight cents to the reporter and four cents to the commissioner on originals, and four cents to the reporter and two cents to the commissioner on copies. Sometimes a flat fifty-fifty division obtains. In Milwaukee the business of court commissioners is not unprofitable, something like one hundred thousand dollars being the combined earnings of the various commissioners. A different plan for the payment of the commissioner is followed in Missouri. If either party requests the appointment of a commissioner, the latter must be paid an additional per diem charge, which supposedly shall not exceed ten dollars.¹

The average cost per examination, excluding the cost of copies, seems to be between ten dollars and fifteen dollars in the states wherein the ordinary deposition procedure is used. Both the testimony of lawyers and inspection of records with the notary’s fees marked thereon indicates that this is the average cost. Some lawyers

¹ Cf. Manning v. Roberts (1900) 83 Mo. App. 627.
said that the average cost was nearer to twenty dollars per examination than to either fifteen dollars or ten dollars. That the average figure in these states will not run over fifteen dollars is indicated by statistics concerning costs in Wisconsin, for there the fee rate is higher than in the states which use the deposition procedure. In Madison, Wisconsin, the average cost, excluding copies, among seventy-two examinations which were inspected was fifteen dollars and ninety-one cents, whereas the similar figure for fifty-eight examinations in Milwaukee was fifteen dollars and two cents. The highest cost found was sixty-six dollars and sixty cents, and the lowest, four dollars and twenty cents. Two devices for reducing expense in discovery examination are being used, especially in the smaller cities and towns. These are use of the stenographer of the examining lawyer's office, by agreement, rather than use of a special officer, and elimination of the necessity of having the stenographer's shorthand notes transcribed.

It is uniformly provided that the applicant for discovery shall pay all costs of the examination in the first instance. The usual rule is that the costs of the deposition may be taxed to the losing party only in the event the deposition is used at the trial.² The right to tax in Missouri is dependent upon whether the depositions are filed rather than upon whether they are used. This rule has caused the cost element to play an unusually prominent part in discovery examinations. More objection is made by Missouri lawyers to the expense of depositions than to any other feature. Complaint is less noticeable in other states where the theory is that until the deposition is used at the trial all expense incident there-to should be considered as a part of the cost of prepara-

²In addition to the statutes see: Citizens Nat. Bank v. Alexander (1905) 34 Ind. App. 596, 73 N. E. 279.
tion for trial and should be borne by the party taking the deposition.

An illustration of the manner in which costs may be handled as a weapon to secure the effective administration of other incidents of an examination for discovery is afforded by the Missouri experience. If a party in taking a deposition requests the officer in charge to commit the witness for a refusal to answer a question, and the circuit court later decides that the refusal of the witness was justified, the court may force the party who requested the commitment to pay the witness all costs incurred by him in effecting his discharge, and in addition an attorney's fee not exceeding twenty-five dollars, and may delay any further examination of the witness until such costs are paid. In Massachusetts the court may direct who shall bear the cost either by general rule or by special order in each case. In Ontario the costs of an examination are borne in the first instance by the party taking and cannot be taxed as disbursements unless the taxing officer so directs. He may allow either all or only a part to be taxed. Whether the deposition was used at the trial or not is not controlling as to whether the cost of the examination was reasonably incurred. In 1894 a rule was passed making costs of a discovery examination to be borne in any event by the party taking same unless otherwise ordered by the trial judge, but this rule was later changed so as to leave the matter in the discretion of the taxing officer as it is at present. As a matter of practice costs of discovery are usually taxed to the losing party. But the possibility that they may not be allowed has been found to be a salutary protection.

4 Rule 654.
5 Ontario Judicature Act (Holmested, 1915) p. 1326.
6 Cf. 39 Canada L. Jour. 772.
Defendants pay the greater portion of the costs of discovery examinations as a practical matter. Representatives of insurance, railway and traction companies, make the most frequent use of the procedure. They regard costs as secondary to the successful defense or settlement of the action. If they are successful in defending the action it usually happens that they cannot tax for depositions which they have taken, either because there has been no use of them at the trial, or because it is impossible to recover the costs from the plaintiff. If a settlement is effected, it is usually provided that the defendant will assume all costs.
CHAPTER XX

REVIEW OF RULINGS MADE UPON DISCOVERY EXAMINATION

The following two principles are generally accepted: (1) Rulings granting or denying discovery usually are not proper subjects of a separate appeal; (2) Rulings which enforce a penalty for contempt or which strike a pleading are appealable. The general rule in regard to interlocutory orders is the basis of the first principle. The policy behind the rule has been stated by the North Carolina Supreme Court thus: "To stop the trial of a cause, pending an appeal to this court, upon every isolated question of practice, or the admissibility of evidence, or the competency of a witness, and the like, would indefinitely protract litigation and swell its cost."¹ The second principle is based upon the theory that an order which enforces a penalty is to be regarded as a final order and therefore is subject to a separate appeal. These principles are so widely accepted that it will be profitable to note only the exceptions.²

While a ruling which disallows specific questions usually is not appealable as a separate item a clear abuse of discretion may make an appeal possible.³ The chief

¹ Vann v. Lawrence (1893) 111 N. C. 32, 15 S. E. 1031.
³ Horlick's Malted Milk Co. v. A. Spiegel Co. (1913) 155 Wis. 201, 144 N. W. 272; American Food Products Co. v. American Milling Co. (1912) 151 Wis. 385, 138 N. W. 1123.

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application of this exception is to be found in cases wherein the order of the trial court has amounted to a virtual denial of any discovery. The North Carolina court has evidenced unusual liberality in regard to appeals. While the ordinary rule is that separate appeals will not be countenanced, appeals have been allowed in spite of the rule in several cases; once where a question of "first importance" was deemed to be involved, and again where the order for the examination was not founded upon proper affidavits. Indication has been given that appeals will be allowed whenever substantial rights are involved.

The rule that a penalty for contempt is appealable seems to be followed generally except in the federal courts. While an order striking a pleading is regarded by the federal courts as final and reviewable separately, an order, even though wrongfully made, which punishes for civil contempt is regarded as interlocutory.

The federal circuit court of appeals and the Supreme Courts of Washington and Iowa, respectively, have held that the extraordinary methods of review cannot be used as a means of obtaining separate review of discovery rulings. If the Missouri circuit courts attempt to interfere with the right of a party to take depositions by

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5 Johnson v. The Harriett Mills Inc. (1928) 196 N. C. 93, 144 S. E. 534.
6 Ward v. Martin (1918) 175 N. C. 287, 95 S. E. 621.
7 Chesson v. Washington County Bank (1925) 190 N. C. 187, 129 S. E. 403.
11 Keaton v. Kennamer (1930) 42 F. (2d) 814 (writ of prohibition); State v. Superior Court (1910) 56 Wash. 649, 106 Pac. 150 (certiorari); Winneshiek-County Bank v. District Court (1927) 203 Iowa 1277, 212 N. W. 391 (certiorari). There is a vigorous dissent in the last case on the ground that if the order is oppressive certiorari should lie under the general constitutional power of the court "to secure justice to parties." Cf. Ward v. Martin (1918) 175 N. C. 287, 95 S. E. 621.
issuing an injunction, the Supreme Court will grant a writ of prohibition against such injunction.\textsuperscript{12} If a court wrongfully allows or disallows discovery of particular items of evidence and the case goes on to a final judgment may error be predicated upon the discovery rulings? If so, must prejudice be shown or is the mere wrongful allowance or disallowance of discovery in itself prejudicial? The second question really is the point of dispute, for the first question generally is answered in the affirmative. In Washington it has been held that actual prejudice must be shown and that an erroneous ruling is not ipso facto prejudicial.\textsuperscript{13} The Indiana court has held that there is no prejudice if the facts which were sought and wrongfully denied upon the discovery examination are later proved by the evidence at the trial.\textsuperscript{14} The Massachusetts court takes a different view, as indicated by the following quotation from an opinion by Rugg, C. J.: "The principle of trial evidence, to the effect that ordinarily no exception will be sustained to the refusal to allow a question to be put unless the substance of the answer expected in reply is stated to the court, does not apply to interrogatories. Where questions are asked of a witness at the trial, if there has been proper preparation counsel usually has more or less well grounded reason for anticipating the testimony to be given. Interrogatories commonly are propounded to an adverse party for the purpose of ascertaining material facts in advance of the trial. The interrogator may be in utter ignorance of the information likely to be disclosed, and be unable to make any offer of proof. His right to interrogate does not depend primarily upon the question whether the answers will

\textsuperscript{12} State ex rel. Methudy v. Killoren (Mo. App., 1921) 229 S. W. 1097.
\textsuperscript{13} Moberg v. McCauley (1929) 150 Wash. 494, 273 Pac. 739; Gostina v. Whitham (1928) 145 Wash. 72, 268 Pac. 132.
\textsuperscript{14} Meyer v. Manhattan Life Ins. Co. (1895) 144 Ind. 439, 43 N. E. 448; Alesworth v. Brown (1869) 31 Ind. 270.
help or harm him in the ultimate decision of the case. On the other hand, exceptions ought not to be sustained unless there is solid foundation for belief that substantial injury has resulted. Interrogatories should not be suffered to become a training field for the saving of exceptions possessing only a theoretical merit having no relation to the practical administration of justice."  

While appeals in New York from the trial courts to the appellate divisions (intermediate courts of appeal) of the four different departments of the supreme court may be had, appeals to the Court of Appeals (highest appellate tribunal), on matters of discovery are generally not countenanced. Only where such questions as want of due process of law are raised, will appeal lie.  

15 Cutler v. Cooper (1920) 234 Mass. 307, 125 N. E. 634, 637.  
17 Feingold v. Walworth Bros. (1924) 238 N. Y. 335, 144 N. E. 675.
CHAPTER "XXI

DISCOVERY AND INSPECTION OF DOCUMENTS

ASCERTAINING WHAT DOCUMENTS ARE IN POSSESSION OF ADVERSE PARTY

The two primary problems connected with discovery of documents are: (1) How may a party ascertain what documents are in the possession of the adverse party relating to the action? (2) Having ascertained what documents are in the possession of the adverse party, how may he obtain an inspection of them before trial? Provision has been made in a majority of the jurisdictions of this country for the latter of these two problems but the first one has been ignored. Insufficient remedy is afforded the party who is unable to specify particular documents in the possession of his adversary and yet desires to ascertain what documents are in his possession. New York has attempted to correct this situation but the procedure is much less effective than that which is used in England and in Ontario. The applicant for discovery must file an affidavit stating his belief that certain specified documents are in the possession or control of the adverse party and make a motion for an order that his opponent be required to disclose by affidavit whether or not he has these specified documents.\(^1\) In some states it is possible, apart from statutory authorization, to interrogate as to the documents which the adverse party possesses during the course of the examination for discovery, and to adjourn the examination

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\(^1\) New York Civil Practice Act, sec. 328; Schmoll Fils Associated v. Baltic American Lines (1931) 247 N. Y. S. 305.
for the production of the documents, the possession of which is admitted. Under the Massachusetts written interrogatory practice it is possible for the proponent of the interrogatories to ask: "Do you have in your possession or power such and such documents? If so, will you furnish a copy of such document, or state the time and place that it may be inspected?" Or he may ask as a prefatory question to the entire interrogation: "Will you look into all the books and papers which you have relating to this action so that you can make complete answers to the following questions?" A considerably more effective procedure has been established in England, Ontario and other British jurisdictions. The theory underlying the procedure is that there should be a disclosure, as of course, of the identity of all documents relating to the action and that there should be a disclosure of the contents of the documents unless they are privileged. The English practice is for the party who desires discovery of documents to apply to the court, or to a master in chambers, for an order requiring his opponent to give an affidavit of documents. An order of court no longer is required in Ontario, but the discovery may be had upon mere notice to the party. The only reason from a policy standpoint that it is not required in every case that each party grant disclosure as of course of his own documents is that, in some cases, it might not be desired by the opposite party, in which event the costs might be increased unnecessarily.

2 The English and Ontario provisions are set forth in the appendix at the back of this volume. Citations to the similar provisions in other British jurisdictions are: Alberta, Rules of Court (1914, as amended to 1923) 364–378; Australia, County Court Practice, 130, 133; British Columbia, Court Rules (1925) order 31; Manitoba, Acts Relating to Court of King's Bench (1914) 424–440; New Brunswick, Judicature Act and Rules of Court (1909), order 31; New Foundlancl, Cons. Stat. (1919) ch. 83, order 31; Nova Scotia, Judicature Act (1920) order 30; Quebec, Code of Civ. Prac. (1922) 286–290; Queensland, Supreme Court Practice (1921) order 35; Saskatchewan, Cons. Orders and Rules of the Court of King's Bench (1921) order 21; Victoria, Sup. Court Rules (1916) order 31.

The affidavit of documents, as will be seen from the following form, must set forth respectively: (1) all the documents which the party has which he does not object to producing; (2) all documents which he has, but which he objects to producing, and the ground for such objections; and (3) all documents which the party formerly had in his possession or power but are now elsewhere, together with a rigid accounting for the same. The following form is used:

"In the High Court of Justice.

Division.

Between A. B., Plaintiff,

and


I, the above named defendant, C. D., make oath and say as follows:

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto (state grounds for objection).

3. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

4. The last-mentioned documents were last in my possession or power on (state when, and what has become of them, and in whose possession they now are).

5. According to the best of my knowledge, information and belief I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons or person on my behalf, any deed, account, book

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4 For a fine practical description of the composition of the affidavit of documents see the note of Sir Willes Chitty in 58 Law Journal 574.
of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto."

As a matter of practice in Ontario, very few documents are entered in the schedule provided for those which the party objects to producing. Out of more than a hundred such affidavits inspected in the central office at Osgoode Hall, Toronto, in which hundreds of documents were listed, only three documents were specified, as to which production was objected to. Two of these were stated to be privileged as communications between counsel and client while the third entry was listed as "bank books" without any reason for the objection being assigned. In all other cases this particular schedule was either left blank or, as more often, filled only by the printed word "NIL." In a fraud action, for instance, the plaintiff and five defendants each filed separate affidavits of documents, listing altogether more than 300 items, yet no objection was made to the production of any of them.

The affidavit of documents may not be contradicted by counter-affidavits. If a party has reason to believe that the affidavit of documents omits certain books or papers he may apply for a further affidavit as to these specific books or papers, according to the English practice. But when this further affidavit has been made it is practically conclusive of the matter, and the court usually will not disregard the oath. The Ontario rule is that only when the documents actually produced, or

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5 Annual Practice (1932) 1539.
6 See annotation in Annual Practice (1932) p. 529.
admissions of the party himself, disclose additional documents, may the affidavit be attacked. In practice, however, it is quite usual to find a party seeking disclosure of documents not listed in the affidavit. When he finds such the examination is adjourned until the documents are produced. The following excerpt from an actual record shows just how the matter is presented:

Q. Have you got any record anywhere of that money?
A. Yes, possibly I have.
Q. I am asking if you have. If you have, I want it produced here now.
A. I have not got it here now.
Q. Is it mentioned in your affidavit on production?
A. I don't know that it is.
Q. Show it to me—you signed the affidavit?
A. It is some time ago. It is hard to remember everything that is in here.

Attorney for party: I don't think there is anything in the affidavit on production.

**Inspection of Documents**

After a party has ascertained what documents relating to the action are in the possession of his adversary he may desire to inspect them before trial. There are two ways by which he should be able to make inspection. He should be able to require their production and inspect them as an incident of, and during the progress of, an oral examination for discovery or he should be able to inspect them separately, by virtue of a special statutory provision for inspection of documents.

The Ontario practice is illustrative of the way in which the affidavit of document procedure can be integrated with the general procedure for an oral examination before trial. By the affidavit of documents a party

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7 Canadian Encyclopedic Digest (Ontario Ed.) vol. 3, p. 751.
can ascertain the identity of documents which may be of help to him in preparing his case. Then he can compel production for inspection of the particular books and papers which he desires to see. According to the literal rule production and deposit for inspection must be made at the office where the proceedings are being taken. In practice, however, it is customary for the inspection to be arranged by the solicitors in the manner most convenient to all concerned. Usually after the inspection the party knows which documents he will want produced at the oral examination for discovery and the opposite party either agrees to bring these along or is directed by the notice of appointment to do so. At the examination the documents actually referred to are marked as exhibits and returned to the party until the trial. In almost all cases wherein oral examinations for discovery are had affidavits and production of documents are first required. This was true in forty-three out of the fifty consecutive cases, the records of which were studied in Toronto. In addition affidavits of documents are required in many cases wherein no oral examination is used.

In most of the states which allow use of the ordinary deposition procedure for purposes of discovery before trial, it is possible for the party to require, by the service of a subpoena *duces tecum*, that the party to be examined bring with him specified books and papers. This is the practice in Ohio, Nebraska, Indiana and Kentucky. The Missouri court, on the contrary, has held that a party cannot be forced to produce his books and papers for inspection as an incident of an examination for dis-

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8 Re Raugh (1901) 65 O. S. 128, 61 N. E. 701; Ex parte Schoepf (1906) 74 O. S. 1, 77 N. E. 276.
10 This is the actual practice in Indiana and Kentucky, although there are no clear-cut decisions on the matter.
covery before either a notary or a commissioner. There is a difference of opinion among the lawyers of New Hampshire as to whether a party whose deposition is being taken can be forced to produce his documents for inspection. In 1889 the Wisconsin statute on discovery was so amended as to authorize the officer in charge of a discovery examination to compel the party examined to produce his books and papers, by contempt proceedings. Inspection is easily obtained under this plan. The form of the notice for an adverse examination contains the words: "You are further commanded that you bring with you and have at the time and place above named," followed by an appropriate blank. Known papers are specified and a blanket clause covering "all other papers relating to the action" is added. It is permissible at the examination to interrogate thoroughly as to what other documents the party has in his possession or power. If others are disclosed the examination can be adjourned until they are produced. If the books are too large to carry or if the inspection would consume too much time, there is usually a stipulation allowing inspection at the party's offices. Usually the documents are not copied, nor are they kept with the record. Rather they are referred to, marked for identification, and returned to the party until the trial.

There is a conflict among the New York decisions as to how largely discovery and inspection of documents may be had in connection with an oral examination of a party for discovery before trial. The extreme degree of liberality is evidenced by the Appellate Division of the Second Department which, in a recent memorandum decision, seems to hold that production of papers may be

12 The view that a party can be forced to produce seems to be sustained in Boston & Maine R. R. v. State (1910) 75 N. H. 513, 77 A. 996. The contrary view is attributable to the wording of N. H. Public Laws (1926) ch. 336, sec. 25.
required at the examination by a mere notice to produce. At the other extreme is a decision from the Appellate Division of the Fourth Department to the effect that proceedings for the discovery and inspection of documents are entirely separate from examinations of parties and witnesses. The view more generally followed and the one which seems more in accord with the statutory provisions is that, while there may be no production and inspection if the examination for discovery is initiated by notice, there may be a combined court order allowing both the examination and the inspection. Under such a view the proper procedure is to name the books and papers of which inspection is desired in the application for an order for the examination so that the court can combine the two things in its order. There have been several rulings to the effect that production of documents at an adverse examination before trial may be compelled by subpoena duces tecum but that the only use which can be made of the documents after they are produced is to identify them or refresh the memory of the witness by them. The actual practice in New York as to discovery of documents is very illiberal.

Most jurisdictions also provide procedure for the inspection of documents other than and apart from procedure for discovery of testimony generally. The English practice is for the party applicant to serve a notice

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18 Meretsky v. Wolff (1928) 229 N. Y. S. 776. (Possibly the documents were such as to come within sec. 327 of the Civil Practice Act, but it is not so specified.)
14 Citizens' Trust Co. of Utica v. R. Prescott & Son (1927) 223 N. Y. S. 184. Note that the only case cited in support of this decision does not go so far as a matter of fact.
upon the party who has admitted possession of relevant documents to produce them for inspection. If production is refused an order may then be applied for.\(^\text{18}\) The court then makes an order for inspection in such place and in such manner as he thinks fit, unless the document is privileged or unless inspection is unnecessary either for disposing fairly of the cause or for saving costs.\(^\text{19}\) A majority of the jurisdictions of this country have provision for production and inspection of documents. But in many of them the procedure is clumsy, and the limitations upon its use make it very ineffective. The most serious limitation concerns the time of the discovery. In the federal law courts and in quite a few of the states the statutes seem to intend only production at the trial and not inspection before the trial. The federal statute is representative of these provisions: "In trials of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. • • • "\(^\text{20}\) For more than a century trial courts disagreed as to whether this allowed inspection before trial or was limited to production at the trial, but the United States Supreme Court has now finally decided that it is the latter.\(^\text{21}\)

The procedure for obtaining production and inspection of documents varies as to details in different jurisdictions.\(^\text{22}\) The following jurisdictions have statutes which provide that the court, on application and notice, may order the party to give inspection and copy of docu-

\(^{18}\) Annual Practice (1930) order 31, rule 15 ff.

\(^{19}\) Id. rule 18.


\(^{21}\) Carpenter v. Winn (1911) 221 U. S. 533.

\(^{22}\) The statutes are set forth in the appendix at the back of this volume.
mentary evidence, without need of a prior demand: Alabama, Alaska, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Porto Rico, South Carolina, South Dakota, United States Admiralty, United States Court of Claims, United States Law, Utah, Vermont, West Virginia and Wisconsin. Statutes in the following states require that the party applicant first make a demand on the adverse party, which upon his refusal may be followed by a motion for an order for inspection: Kansas, Maine, Nebraska, Ohio, Oklahoma and Wyoming. The following states require the applicant for discovery of documents to file a petition or application in writing: Arkansas, Iowa, Michigan, New Jersey, New York, Rhode Island and Virginia.

Special provision is made in many jurisdictions for inspection of documents which are referred to in the pleadings. Inspection of such documents is a matter of right. In some of the jurisdictions of this country this includes only such documents as are the foundation of the action, but in England and some states of this country it includes all documents referred to in either pleadings or affidavits. This latter has proved so highly desirable that its application has been extended, by construction, beyond its patent intent to include affidavits of documents also. In Victoria the statute goes even further and makes inspection a matter of right as to all documents referred to in writ, pleading, particulars or affidavit.

28 A list of the statutes may be found in Wigmore on Evidence, vol. III, sec. 1859 a, note 4.
24 Bray, Digest of the Law of Discovery, sec. 66.
25 Victoria Supreme Court Rules (1916) order 51, sec. 15.
CHAPTER XXII

EXAMINATION OF PROPERTY AND PERSON

Dean Wigmore has summed up the respective viewpoints and practices of the courts of common law and of chancery thus: "So far as concerned chattels and premises in his possession or control, the adversary in common law actions, like the true gamester that the law encouraged him to be, held safely the trump cards of the situation, free from any legal liability of disclosure before trial; in this respect there was not recognized even the limited right of inspection which after the days of Lord Mansfield had been conceded for documentary evidence. But in chancery, under the same wholesome principle and practice by which bills of discovery were allowed for ascertaining the opponent's testimony and the documents in his possession the inspection of chattels and premises in his possession or control was obtainable wherever fairness seemed to demand it." ¹

It is the practice now in England for the court, or a master on a summons for directions, upon the application of a party after notice to his opponent, to order the inspection of any property or thing which is the subject of the cause or matter, or as to which any question may arise therein. The court or master may also authorize persons to go on the land or property and inspect it or to make any necessary observations and experiments, or take any necessary samples.² In a proper case the court will allow photographs to be taken, if this is necessary to preserve the evidence for trial.³

¹ Wigmore on Evidence, III, 1862.
² Annual Practice (1932) order 50, rules 2–6.
³ Lewis v. Ltd. Londesborough (1893) 2 Q. B. 191.
Similar rules also obtain in most of the Canadian provinces. 4

Several American states have statutes which provide for the inspection of property, which are rather limited in scope. In some of them, the provision is apparently limited to special kinds of actions, as for instance the California provision that the court may order inspection in actions for the recovery of real property or for damages for an injury thereto. 5 A still more conspicuous limitation is like that noted in connection with statutes authorizing inspection of documents, namely, it is not clear whether the statutes contemplate inspection before trial or not. In New York and Wisconsin and Michigan, however, it is clear that the inspection may be had before trial. 6 The New York statute provides: "A court of record, other than a justices' court in a city, by order may compel a party to an action pending therein to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy or photograph of a book, document or other paper, or to make discovery of any article or property in his possession or under his control, relating to the merits of the action, or of the defense therein. The procedure for obtaining such order shall be regulated by rules." The Wisconsin statute is as follows: "In any civil action or proceeding in a court of record the court or the presiding judge may, after issue joined, and on application, order a party to permit an opposite party and his witnesses to inspect any property, the inspection of which may be deemed material and necessary." The New Michigan Court Rules provide: "In any action for dam-

4 Ontario, Cons. Rules of Practice (1913) rule 266; Ross on Discovery (Boulton, Can. Ed.), 126.
5 Cf. Wigmore on Evidence, III, sec. 1862, and note 8, in which a number of such special statutes are cited.
ages for injuries to person or property, or to recover upon any policy of insurance respecting sickness or bodily injuries or damages or injuries to property, physical examination by physicians of the person sick or injured, or by the defendant or his agent of the property damaged or injured, may be ordered in advance of the trial, on motion with due notice, upon such just and reasonable terms and conditions as the court may prescribe."

It is of great facility in determining the exact nature, extent and probable duration of the injury in personal injury cases that the defendant be allowed to have an examination of the plaintiff by a competent physician. On the other hand, it is necessary that the examination be so conducted and supervised that no abuse or unnecessary violation of the rights of personal privacy may be allowed.

A decided majority of the decisions are to the effect that a court has power upon the trial to require the plaintiff to submit to a physical examination by physicians selected by the court. On principal it would seem that no substantial injustice would be done the plaintiff by moving up the time for such an examination, and allowing it to be ordered before the trial. This would prove a time saving expedient as far as the court and jury are concerned. But, apart from statute, the courts have been rather equally divided as to whether or not there is inherent power in the courts to compel submission to such an examination before trial. There is one line of authority, headed by the United States Supreme Court, which has held quite flatly that courts have no such power. Other courts have taken the position that the

7 Michigan Court Rules (1930) rule 41, sec. 5.
discovery of truth and the prevention of fraud is so necessary in administering justice in personal injury cases that the slight inroad on the right of personal privacy must be tolerated and that the courts have inherent power to allow physical examinations.\textsuperscript{10}

After the New York Court of Appeals had held that trial courts had no power, apart from statute, to order a physical examination of a party before trial, the legislature promptly enacted a statute which conferred this power upon the courts. The New York statute provides: "In an action to recover damages for personal injuries, if the defendant shall present to the court satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court, by order, shall direct that the plaintiff submit to a physical examination by one or more physicians or surgeons to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. If the party to be examined shall be a female she shall be entitled to have such examination before a physician or surgeon of her own sex. The order for such physical examination, upon the application of the defendant, may also direct that the testimony of such party be taken by deposition pursuant to this article."\textsuperscript{11} Subsequently five other states have adopted similar measures.\textsuperscript{12} The constitutionality of such measures has been upheld in New York\textsuperscript{13} and New Jersey.\textsuperscript{14} The New Jersey statute was attacked on the ground that if the examination were allowed before trial, it would constitute an infringement

\textsuperscript{10}The cases are fully listed in 14 L. R. A. 466, and 23 L. R. A. N. S. 465.
\textsuperscript{11}New York Civil Practice Act, sec. 306.
\textsuperscript{13}Lyon v. Railway Co. (1894) 142 N. Y. 298, 37 N. E. 113.
\textsuperscript{14}McGovern v. Hope (1899) 63 N. J. L. 76, 42 Atl. 830.
of the constitutional right of a party in a civil suit to be confronted by witnesses, but the court rejected the contention. No such provision is to be found in the general rules regarding discovery in England, but a special statute was enacted in 1868, which still is in force, whereby a person who is injured in a railway accident can be compelled to submit to a physical examination.\textsuperscript{15} Ontario allows physical examinations in all personal injury actions.\textsuperscript{16}

The following practical problems have arisen in the various jurisdictions in regard to the conduct of the medical examination: May an X-ray examination be required? Is a female party entitled to demand a physician of her own sex? May the physician ask questions of the party while he is making the physical examination? There is a division of authority as to the use of the X-ray in New York, although the predominant view seems to be that it is permissible.\textsuperscript{17} Only in New York is a female party entitled to demand that the examination be conducted by a physician of her own sex.\textsuperscript{18} The examining physician, under the Ontario practice, is not allowed to ask questions of the person whom he is examining. The court, in so construing the rule, said: ‘‘To permit the plaintiff to be physically examined is a sufficient invasion of his personal rights without giving the surgeon the right to hold an inquisition on him.’’\textsuperscript{19}

\textsuperscript{15} 31 & 32 Vict., ch. 119, sec. 26.
\textsuperscript{16} Canadian Encyclopedic Digest (Ontario Ed.) III, 792.
\textsuperscript{17} Gilbert v. Klar (1928) 228 N. Y. S. 183 (the court will take judicial knowledge that there is little or no danger from such examinations at the present time); Boyland v. Libman (1927) 220 N. Y. S. 632; Hollister v. Robertson (1924) 203 N. Y. S. 514. Contra: Lacqua v. General Linen Supply & Laundry Co. (1929) 237 N. Y. S. 197; Van Orden v. Madow (1923) 201 N. Y. S. 954.
\textsuperscript{18} Young v. Fairfax (1923) 200 N. Y. S. 815.
\textsuperscript{19} Falconbridge, J., in Clouse v. Coleman (1895) 16 P. R. 496. See generally as to the Ontario practice, Ontario Judicature Act (Holmested, 1915) page 234; Ross on Discovery (Canadian Ed.) page 125.
CHAPTER XXIII

PROCEDURE FOR OBTAINING ADMISSIONS

Notice to Admit Existence of Facts

England and several American jurisdictions provide a special procedure by which either party may call upon his adversary to admit, for purposes of the trial only, the existence of facts. The penalty for unjust refusal to admit is the cost of proving the items concerning which admissions were asked and refused. A chief reason for the adoption of this procedure in England is that written interrogatories have proved a somewhat inadequate means of discovery before trial, and have proved burdensome upon the parties and the court. One of the attractions of this special admission procedure is that it is extra-judicial in its operation. Massachusetts judges have encouraged use of the device for the express purpose of relieving themselves of a part of the administrative burden in connection with interrogatories. A Boston judge instructed the members of the bar who practiced before him that he would not allow interrogatories in the event the same result could be obtained by notices to admit. The following quotation from Kekewich, J., indicates the use of the procedure in England and its relation to other pre-trial devices: "The modern practice of exacting particulars and admission of facts not really in dispute, added to the large means of discovery by disclosure of documents and, where occasion requires it, inspection of premises or machinery, has rendered unnecessary and inconvenient interrogatories of the ancient type which were always open to objection. My practice is to decline applications for leave to administer inter-
rogatories where the object is to demand admission of fact alleged by the interrogating party, and denied or not admitted by the opponent, or to obtain information which may equally well be supplied by particulars. As regards admissions of fact, it is often urged, as it was here, that a litigant will hesitate to state on oath what he will without hesitation state in pleadings, and that there is difficulty in otherwise obtaining admission of facts, even though not really in dispute; and it is further urged that an admission by an affidavit in answer to interrogatories is useful in limiting the issues to be tried, and therefore in reducing the time occupied by the trial and the costs. I recognize the importance of this in the abstract; but practically I find that the interrogated party seldom makes such clean admissions as secure the advantages aimed at, and, failing that, little if anything is gained. As regards facts not really in dispute, I believe that the power of requiring admissions is not sufficiently used. If parties insist, as they generally do, on asking their opponents to admit facts, dates and events about which there is room for doubt or argument, of course the endeavor to obtain admissions breaks down; but if the demand is limited to facts not really in dispute, that is, which can be admitted cleanly, or subject to some simple qualifications, I find that it is generally acceded to, and the power which the court has of throwing the costs on any one who has increased them by declining reasonable admissions is not forgotten.''

The notice to admit facts is employed in England, Massachusetts, Michigan, New York, New Jersey and Wisconsin. The English provision is as follows:

"Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any

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1 Clarke v. Clarke (1899) 34 W. N. 130, 131.
specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct. Provided, that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just."

The Massachusetts statute is as follows:

"In any action at law or suit in equity a party by written notice filed in the clerk's office and served by copy on the other party or his attorney, not less than ten days before the trial of the action or suit, may call upon the other party to admit, for the purposes of the case only, any material fact or facts or the execution of any material paper or document which he intends to use at the trial. The court may delay the trial until such notice is answered and on motion before trial may strike out of such notice or any answer filed in response thereto any matter which is irrelevant, immaterial or improperly included therein. If no answer is filed in the clerk's office within ten days after the filing therein of said notice or within such further time as the court may on motion allow, the truth of the fact or facts or the execution of the paper or document shall, for the purposes of the case, be held to be admitted. Such notice, in so far as it

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2 Annual Prac. (1932) order 32, rule 4.
relates to a material fact or document, and any answer filed in response thereto shall, if offered by the party who filed such notice, be admitted in evidence. If the party upon whom such notice is served refuses to admit any fact or the execution of any paper or document mentioned in the notice, the reasonable expense of proving such fact or the execution of such paper or document, as determined after summary hearing by the justice presiding at the trial, shall, unless the justice certifies that the refusal to admit was reasonable, be paid by said party to the other party and the amount thereof shall be added to the taxable costs of the party in whose favor such amount is awarded or deducted from the amount of any judgment or decree against him."

The new Michigan Court Rules make the following provision for admission of facts:

"Any party, by notice in writing, given not later than ten days before the trial, may call on any other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. In case of refusal or neglect to admit the same within four days after service of such notice, or within such further time as may be allowed by the court or a judge, the expenses incurred in proving such fact or facts, including a reasonable counsel fee for the time and attention devoted thereto, must be ascertained at the trial and paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing, the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge, at any time, shall order or direct otherwise. Any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter or issue, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving

the notice. The court or a judge, at any time, may allow any party to amend or withdraw any admission so made on such terms as may be just.” 4

The New York Civil Practice Act provides that:

“Any party, by notice in writing, given not later than ten days before the trial, may call on any other party to admit, for the purposes of the cause, matter or issue only, any specific fact or facts mentioned in such notice. In case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the expenses incurred in proving such fact or facts must be ascertained at the trial and paid by the party so neglecting or refusing, whatever the result of the cause, matter or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge, at any time, shall order or direct otherwise. Any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter or issue, and not as an admission to be used against the party on any other occasion or in favor of any person other than the party giving the notice. The court or a judge, at any time, may allow any party to amend or withdraw any admission so made on such terms as may be just.” 5

The New Jersey statute is as follows:

“Any party may call upon any other party, by written notice, to admit (but only for the purposes of the cause), the existence, due execution, signing or mailing of any document; and to admit any other specific facts relevant to the issue mentioned in the notice. In case of refusal or neglect to make such admission within such time as may be fixed by rules or special order, the reasonable expense of proving the same (to be taxed by the court) shall be paid by the party so notified, whatever the result

4 Mich. Court Rules (1931) rule 42, sec. 2.
5 New York Civil Practice Act, sec. 323.
of the trial may be, unless the trial judge shall certify that the neglect or refusal was reasonable. But the court may allow any party to amend or withdraw such admission on terms."  

The Wisconsin statute is as follows:

"Any party to an action may, by notice in writing delivered not later than ten days before the trial, call upon any other party within five days after receiving the notice, to admit or deny under oath, or to state under oath what the fact is, according to the best of his knowledge, information and belief with regard to, or to state under oath that he has no knowledge or information sufficient to form a belief with regard to: (a) The existence, due execution, correctness, validity, signing, sending or receiving of any document, or, (b) The correctness of any specific fact or facts material in the action and stated in the notice.

"Such admission if made shall be taken as conclusive evidence against the party making it, but only for that particular action and in favor of the party giving the notice; it shall not be used against him in any other action or proceeding or on any other occasion, and shall not be received in evidence in any other action or trial.

"If the party receiving such notice fails to comply therewith within the time specified, the facts therein stated shall be taken to be admitted.

"In case of refusal to make such admission, the reasonable expense of proving any fact or document mentioned in the notice shall be paid by the party so notified in any event, unless the court is satisfied the refusal was reasonable.

"The court may allow the party making any such admission to withdraw or amend it upon such terms as may be just, and may, for good cause shown, relieve a party from the consequences of a default."  

7 Wis. Stat. (1927) ch. 327, sec. 22; see proposed amendments in Re-
The notice to admit facts is required to be served at least nine days before the day set for trial in England, and at least ten days in Massachusetts, New York and Wisconsin. The New Jersey statute does not specify the time within which the notice must be served. The usual rule is that the notice may be served informally by counsel upon opposing counsel. Recently the Massachusetts Supreme Court has required that notices to admit be served by an officer of the court. This ruling has proved decidedly unpopular with the bar, for as the Massachusetts Judicial Council has said, "This interpretation reverses the practice of thirteen years and appears to require the unusual method of notifying the attorney of the other side by an officer. The new interpretation of the statute has caused much confusion and uncertainty and involves the additional expense of service in making use of a statute which was intended to reduce expense." 

One of the most troublesome points in the actual use of the procedure concerns the type of fact which is the proper subject of a request to admit. Is it intended that a party may call upon his adversary to admit detailed items of evidence, about which there is room for argument and doubt, or is it intended that notices to admit shall include only items which are either true or false? The different jurisdictions exhibit a variety of practice in this regard.

The following excerpt from the opinion of Kekewick, J., indicates that the problem has been encountered in England and that no definite rule has been reached: "If parties insist as they generally do, on asking their opponents to admit facts, dates and events about which there is room for doubt or argument, of course the en-

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deavor to obtain admissions breaks down; but if the demand is limited to facts not really in dispute, that is, which can be admitted cleanly, or subject to some simple qualifications, I find that it is generally acceded to • • • " 10

The New York court has criticized the practice of covering the whole field of evidence under notices to admit: "In the present case we have what probably is to date the most comprehensive notice and demand made under section 323. This notice covers 115 folios, and contains 226 separately numbered paragraphs. It apparently covers to a great extent the field of the defendant's proof. To allow all these demands would be calling upon the plaintiff to prove his adversary's case, to disprove his own, and at the same time to pay all the expense. Some of the demands, if allowed, would call upon plaintiff to go to trouble and expense to acquire the knowledge to admit facts that are peculiarly within the knowledge of the defendant itself; some call for what, insofar as the papers before me show, is purely opinion evidence, or evidence that would be inadmissible at the trial. Others of the demands call for what, for want of a better term, we shall call half a fact, which standing alone, might have to the court or jury an entirely different meaning than if the whole fact were presented." 11

Some Wisconsin lawyers are using the device in exactly the same fashion which the New York court has criticized. They call upon their opponents to admit practically every item of evidence. Several cases were found in which as many as one hundred specific admissions had been requested. The chief use of admission procedure in such a form is as a tactical weapon, rather than as a means of eliminating undisputed items of proof. Thus far, however, the Wisconsin courts have not condemned the practice.

10 Clarke v. Clarke (1899) 34 W. N. 130, 131.
The following two forms indicate the practice which is contemplated in England and in Massachusetts. The model English form is as follows:

"Take notice that the plaintiff (or defendant) in this cause requires the defendant (or plaintiff) to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the defendant (or plaintiff) is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Dated, &c.

G. H., solicitor (or agent) for the plaintiff (or defendant).
To E. F., solicitor (or agent) for the defendant (or plaintiff).

The facts, the admission of which is required, are—

1. That John Smith died on the 1st of January, 1890.
2. That he died intestate.
3. That James Smith was his only lawful son.
4. That Julius Smith died on the 1st of April, 1896.
5. That Julius Smith never was married."

The following excerpt from the record of a Massachusetts case indicates the form of the statement of the facts of which an admission is requested:

"(1) That on June 23, 1930, the defendant was the owner of a motor vehicle bearing Massachusetts Motor Vehicle Registration No. . . . . .

(2) That on June 23, 1930, a certain motor vehicle bearing Mass. Motor Vehicle Registration No. . . . . . was registered in the name of the defendant.

(3) That on June 23, 1930, a motor vehicle bearing Massachusetts Motor Vehicle Registration No. . . . . . stood in the name of the defendant.

(4) That on June 23, 1930, J. L. D.—was in the employ of the defendant.

(5) That on June 23, 1930, at about 4:30 P. M. a motor vehicle bearing Massachusetts Motor Vehicle Registration No. . . . . . was being operated by J. L. D.

(6) That on June 23, 1930, at about 4:30 P. M. a motor vehicle bearing Massachusetts Motor Vehicle Registration

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No. . . . . . . . was operated by an employee of the defendant in the course of his employment.”

The statutes provide that the party who is served with a notice to admit facts must either admit or refuse to admit them within a certain time after the notice is served. The time requirement varies: in England and New York it is six days; in Massachusetts, ten days; and in Wisconsin and New Jersey, five days. Only Wisconsin requires that the admission be made under oath. The form of admission which is used in England is as follows:

“The defendant (or plaintiff) in this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of such facts, or any of them, as evidence in this cause.

“Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the defendant (or plaintiff) on any other occasion, or by anyone other than the plaintiff (or defendant, or party requiring the admission).

Delivered, &c.

“E. F., solicitor (or agent) for the defendant (or plaintiff).

“To G. H., solicitor (or agent) for the plaintiff (or defendant).”

<table>
<thead>
<tr>
<th>Facts Admitted</th>
<th>Qualifications or Limitations, if Any, Subject to Which They Are Admitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. That John Smith died on the 1st of January, 1870.</td>
<td>1.</td>
</tr>
<tr>
<td>2. That he died intestate.</td>
<td>2.</td>
</tr>
<tr>
<td>3. That James Smith was his lawful son.</td>
<td>3. But not that he was his only lawful son.</td>
</tr>
<tr>
<td>4. That Julius Smith died.</td>
<td>4. But not that he died on the 1st of April, 1896.</td>
</tr>
<tr>
<td>5. That Julius Smith never was married.</td>
<td>5.</td>
</tr>
</tbody>
</table>

18 Suffolk Superior Court Record No. 249952.
England, New York and New Jersey provide that where the adverse party neither admits nor refuses to admit within the prescribed time, such action shall constitute a refusal to admit. Massachusetts and Wisconsin, on the contrary, provide that a failure to either admit or deny shall be treated as an admission. Thus a failure to admit is more drastically penalized than a refusal to admit.

The statutes uniformly provide that the reasonable cost of proving a fact, an admission of which is unjustly refused, shall be taxed against the party making the refusal, regardless of the outcome of the trial. The trial judge is supposed to decide summarily (1) whether the refusal to admit was reasonable and justifiable, and (2) what cost shall be allowed.

The question has arisen in England and in New York as to whether a party may apply to the trial court for relief when he thinks he has been served with an improper notice to admit. The English practice is indicated by the following excerpt from an opinion by Field, J.: "I cannot strike out proceedings, unless there is express power to do so. There is a specific power given by the Rules to strike out interrogatories and pleadings; there is no power given to strike out a notice such as this. On the contrary a remedy is provided by the rule, which makes such an application unnecessary; namely, that the notice can be left unanswered. If the refusal to admit is reasonable, the party so refusing will suffer nothing from the notice having been served upon him." 14

It has been held in New York that the only appropriate and allowable motions in connection with demands to admit are: (1) for an extension of time; (2) for permission to amend or withdraw an admission. 15 There was an indication at first that applications to strike no-

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14 Crawford v. Chorley (1883) 18 W. N. 198.
PROCEDURE FOR OBTAINING ADMISSIONS

Admissions to admit might be entertained. Later, however, this position was expressly repudiated, on the ground that it would cast too great a burden on the trial judges, and on the further ground that a party has sufficient protection if he waits until the trial and presents the facts in support of his contention that the refusal to admit was reasonable.

Under the English practice it is possible for the party to add certain limitations and qualifications to the admissions which he makes. The Supreme Court of New York County, on the contrary, has held that a qualified admission is no admission and may be treated as a refusal to admit. The Wisconsin statute gives the party the right to admit, deny, or "state what the fact is." This innovation has not proved satisfactory. Sometimes a party is served with a notice to admit facts which cover practically all of the evidence of the case. He, in turn, instead of admitting or denying, takes advantage of his right to "state what the fact is" and seeks to evade in a mass of words. The fact that the answer must be under oath encourages such a practice. The result is that the answer is even more voluminous than the already lengthy notice to admit.

Lawyers in New York, Wisconsin and Massachusetts say that the procedure is not used by the bar as a whole but that some lawyers have found it very helpful. The following are typical instances of effective and legitimate use which various lawyers say they have made of the device: (1) in a case involving a shipment by express,

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19 The Advisory Committee on Rules to the Supreme Court has recommended that the two features which have caused this trouble be eliminated, namely, the allowance that the party state what the fact is, and the requirement that he make his answer under oath. Report (1930), item 19. Cf. Bulletin XIV of the American Judicature Society, p. 153.
to prove that certain routine inspections were made at each stop between Milwaukee, Wisconsin, and Rochester, New York; (2) to prove a municipal ordinance; (3) to prove that a certain highway on which an accident had occurred was a public highway; (4) to prove the ownership of a certain automobile; (5) to prove an employer-employee relationship. A member of the Wisconsin bar has related still another effective type of use in an address before the Board of Circuit Judges of Wisconsin in 1927: "Almost immediately after its publication, I saw a very effective use of this statute. An action had been brought on a contract in which the defendant had agreed to indemnify the plaintiff against failure of title to certain lands covered by a mortgage sold to the plaintiff. The mortgagor had made an entry under the homestead laws; but had died before the time when he would have been entitled to a patent. It was alleged in the complaint that his sole heir was a minor son. It was alleged in the answer that his heirs were a brother and a sister, that a patent had subsequently been issued to the heirs and that these heirs were ready to confirm the lien of the mortgage. That a minor could not do. The plaintiff had been endeavoring to locate the former wife of the mortgagor; and finally succeeded in doing so in one of the Pacific states. The defendant's attorneys were immediately so advised and called upon to admit the fact and told that the demand was made with the intention of asking the imposition on the defendant of the entire expense of proving the fact if the demand were not complied with. Within forty-eight hours, they replied stating that they were ready to sign a stipulation as to the fact. This left in the case no substantial issue except that of damages; and an agreement on the subject of damages was arrived at and the case was disposed of without trial. If it were not for the fact that this remedy was thus open, the plaintiff would have been
compelled to employ counsel, to instruct them, to have
them communicate with the witness and to prepare for
the taking of the deposition, to issue a notice and to for­
ward instructions to the officer before whom the deposi­
tion was to be taken and, in addition, to pay the fees of
the officer and of the witness. Under this statute, the
plaintiff whether successful in the action or not, would
have been entitled to an order allowing to him the entire
expense, including a reasonable allowance for the serv­
ices of his attorneys and their corresponding counsel.”

NOTICE TO ADMIT EXECUTION OR GENUINENESS OF
DOCUMENTS

England, and some twenty of the United States
have statutes or rules allowing a party to call upon his
adversary for an admission of the execution or the gen­
uineness of writings. This differs from the notice to
admit facts only to the extent that documents, and not
facts generally, are the subject of the admission.

The following statutory provisions in England, New
York and Michigan, respectively, are representative of
those in the various jurisdictions. The English provi­
sion is:

“Either party may call upon the other party to admit
any document, saving all just exceptions; and in case of

20 Hardgrove, Reduction of Trial Issues Under Wisconsin Practice,
Proceedings of the Wisconsin Board of Circuit Judges (1927) 35, 47. In
this address Mr. Hardgrove pointed out a number of other possible
uses for the procedure.
21 Annual Prac. (1930) Order 32.
22 Conn. Gen. Stat. (1918) sec. 5776, Rules Under the Practice Act,
sec. 122; Mass. Gen. Laws (1921), ch. 231, sec. 69; Mich. Court Rules
(1919) sec. 1825; N. D. Comp. Laws Ann. (1913), sec. 7860; Ohio Gen.
Code (Throckmorton, 1926) sec. 11550; S. C. Code (1922), sec. 691; S. D.
Rev. Code (1919) sec. 2711; U. S. Equity Rule 58; Utah Comp. Laws
Ann. (1920) sec. 5854.
refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.”

The New York provision is:

“The attorney for a party, at any time before the trial, may exhibit to the attorney for the adverse party, a paper material to the action and request a written admission of its genuineness. If the admission is not given within four days after the request, and the paper is proved or admitted on the trial, the expenses incurred by the party exhibiting it in order to prove its genuineness must be ascertained at the trial and paid by the party refusing the admission, whatever the result of the cause, matter or issue may be; unless it appears to the satisfaction of the court that there was a good reason for the refusal.”

The Michigan provision is:

“Either party may exhibit to the other or to his attorney at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission within four days after the request, and the delivery to him of a copy thereof, if such copy be required, and if the party exhibiting the paper be afterward required to prove its genuineness, and the same be finally proved or admitted on the trial, the expense of proving the same, including a reasonable counsel fee for the time and attention devoted thereto, to be ascertained and summarily taxed at the trial, shall be paid by the party refusing the admission, unless it shall
appear to the satisfaction of the court that there were good reasons for the refusal, and an attachment or execution may be granted to enforce payment of such expense."

The party who desires admissions, or his attorney, should exhibit to his adversary or his attorney the paper or document and request a written admission of its genuineness. In case of unjust refusal or neglect to so admit the costs of proof fall on the party so refusing or neglecting.

The following form is provided for admission of documents in England: 28

NOTICE TO ADMIT DOCUMENTS

In the High Court of Justice
Division
Between A. B., Plaintiff
and

Take notice that the plaintiff (or defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant (or plaintiff), his solicitor or agent, at ........, on ........, between the hours of ........; and the defendant (or plaintiff) is hereby required, within forty-eight hours from the last mentioned hours, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated &c. \(\text{Signed}\)
G. H., solicitor (or agent) for plaintiff (or defendant)
To E. F., solicitor (or agent) for defendant (or plaintiff).

(Here describe the documents, the manner of doing which may be as follows:)

**Originals**

<table>
<thead>
<tr>
<th>Description of Documents</th>
<th>Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deed of covenant between A. B. and C. D. first part and E. F. second part.</td>
<td>January 1, 19—</td>
</tr>
<tr>
<td>Indenture of lease from A. B. to C. D.</td>
<td>February 1, 19—</td>
</tr>
<tr>
<td>Indenture of release between A. B. and C. D. first part, &amp;c.</td>
<td>February 2, 19—</td>
</tr>
<tr>
<td>Letter—defendant to plaintiff.</td>
<td>March 1, 19—</td>
</tr>
<tr>
<td>Policy of insurance on goods by ship “Isabella” on voyage from Oporto to London</td>
<td>December 3, 19—</td>
</tr>
<tr>
<td>Memorandum of agreement between C. D., captain of said ship, and E. F.</td>
<td>January 1, 19—</td>
</tr>
<tr>
<td>Bill of exchange for £100 at three months drawn by A. B. on and accepted by C. D., endorsed by E. F. and G. H.</td>
<td>May 1, 19—</td>
</tr>
</tbody>
</table>

**Copies**

<table>
<thead>
<tr>
<th>Description of Documents</th>
<th>Dates</th>
<th>Original or Duplicate Served, Sent or Delivered When, How and by Whom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Register of baptism of A. B. in parish of X</td>
<td>Jan. 1</td>
<td>Sent by general post, February 2, 19—</td>
</tr>
<tr>
<td>Letter—plaintiff to defendant</td>
<td>Feb. 1</td>
<td>Served Mar. 2, 19— on defendant’s attorney by E. F. of</td>
</tr>
<tr>
<td>Notice to produce papers</td>
<td>Mar. 1</td>
<td></td>
</tr>
<tr>
<td>Record of a judgment of the Court of Queen’s Bench, in an action F. S. v. F. N.</td>
<td>Trinity Term, 10th Vict.</td>
<td></td>
</tr>
<tr>
<td>Letters patent of King Charles II in the Rolls Chapel</td>
<td>Jan. 1, 1680</td>
<td></td>
</tr>
</tbody>
</table>
CHAPTER XXIV

USE OF DISCOVERY IN PREPARATION OF TRIAL BRIEF

A division of labor is effected in many law firms so that much of the work of preparing for trial is done by men other than those who conduct the actual trial. Younger members of the staff do most of the preparation for trial and the older and more experienced members handle the trial proper. The former compile what is known as a trial brief. Such a brief usually contains an analysis of the pleadings and issues of the case, memoranda of the relevant points of law, statements from witnesses, list of the papers and documents which will be introduced, suggested questions to be asked during the examination of the witnesses and drafts of such motions and instructions as may become necessary. The trial lawyer then uses this brief as a basis for conducting the case. Often the clerk who has prepared the particular brief accompanies his senior to court and aids him there. This serves the additional purpose of giving the clerk an opportunity to see how well his work measures up to the needs of the occasion and to get some little trial experience.

Procedure for discovery fits in well with the system which is thus employed in law offices. It affords means of preparation which are quite necessary in the compilation of a trial brief. The very fact that the adverse party can be examined is in itself a great help. The record of the examination forms an excellent basis for cross-examination at the trial. Many lawyers take an adverse examination and then rearrange and rephrase
the questions in such a fashion as to make the trial cross-examination more effective and more businesslike. Necessary documentary evidence in the possession of the adverse party can be obtained and arranged so that delay and confusion at the trial may be avoided. There is also provided a means of compelling statements from witnesses who refuse to give them voluntarily and a means of preserving the testimony of important witnesses against the contingency of death or removal.

Even law firms and individual lawyers who do not employ an elaborate trial brief system have found that discovery examinations furnish an excellent basis of preparation for trial. The following statement from an active trial lawyer in a large city in the middle west is representative of the way in which such an examination can be used: "When a case is called for trial I ask that the file record of the case be brought to me. Decidedly the most enlightening part and the part which will give me an insight into the case in a hurried fashion is the adverse party's deposition. Without it I would have difficulty in effecting any intelligent sort of handling of the case."

The trial brief system offers a possible way by which disclosure of the principal points of a controversy and of the principal items of evidence can be made known prior to the trial. At least one federal judge requires the lawyer on each side to furnish him before trial with a short statement of the issues, what it is proposed to prove and the principal items of evidence which will be adduced. This enables the judge to get a fairly accurate knowledge of the character of the case and affords him a more intelligent basis upon which to decide questions which may arise at the trial. Suggestions have been made at various times that lawyers for the plaintiff and defendant exchange trial briefs prior to the trial as well as furnish them to the court. Quite early Jeremy Bent-
ham proposed what he termed "An anticipative survey of the budget of evidence on both sides." 1 Recently a visiting French lawyer, Pierre le Paulle, the delegate of the French Society of Comparative Law to the American Bar Association, suggested that there should be some device to require "the parties to prescribe by writing before the trial the facts they want to prove by witnesses," and "oblige the lawyers to communicate the written evidence they have to their colleagues on the other side." 2 Similar proposals have been to the effect that each party be required to file a trial brief, setting forth the facts which would be proved by the witnesses. The object of such a brief, of course, would be to enlighten both the court and the adverse party and to guarantee preparation for trial upon the part of each lawyer. The most recent form of this suggestion is represented by the following bill which was recently proposed in the California Legislature:

"In every civil action, within ten days after issues of fact are joined, plaintiff shall file with the clerk of the court, without service, a statement of issues and witnesses, with affidavits of all witnesses to be used by plaintiff at the trial with as many copies of each as there are defendants. Said statement shall recite in brief numbered paragraphs what plaintiff considers to be the principal issues of fact, with the names under each issue of the witnesses by whom plaintiff expects to prove such issue. Within thirty days after issues of fact are joined, each defendant shall file a like statement of issues and witnesses, and affidavits of all witnesses to be used by defendants at the trial, with as many copies of each as there are plaintiffs.

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2 LePaulle, Administration of Justice in the United States, 4 Docket 3192.
"Said affidavits shall state in brief numbered paragraphs the principal facts known to such witness relevant to the said issues, including the date and parties to all documents and writings relevant thereto known to the witness.

"The clerk shall treat all such statements and affidavits as confidential and not permit examination of any of them until all are filed; after which time he shall, as soon as convenient, furnish to each party a copy of the statements and affidavits filed by his opponent.

"Persons having knowledge of facts, documents and/or writings relevant to the said issues, shall, upon request of and upon reasonable notice by a party or his attorney, make affidavit thereto. A party or his attorney may, in case of need, compel the attendance of such a witness before such party or attorney or a notary public, by subpoena at a time and place appointed, to then and there make said affidavit.

"Upon receipt of such copies of statement and affidavit, or affidavits, it shall be the duty of each party to the action to earnestly and actively seek a satisfactory settlement with the other party or parties thereto, to the end that a trial may be avoided. If it is not possible after diligent effort to settle the controversy in whole or in part, the questions of fact remaining in controversy may be tried, and any party to the action may move to set the action for trial. No motion to set for trial may be made until after all such statements and affidavits have been exchanged by the clerk, and said efforts to settle have been made and proven unsuccessful, and said facts are shown to the court.

"Thereafter, the court shall compare statements and affidavits in reference to the issues remaining in controversy, and designate the portions thereof considered by the court to be important in determining said issues.
"At the trial the court shall require the testimony of witnesses to be directed especially to the designated important facts relating to the issues upon which the witnesses appear by their affidavits or testimony to disagree. Unless for good cause shown, a witness shall not be permitted to testify unless the said affidavit of said witness as described in section 597 has been previously filed and copy furnished, nor shall a witness be permitted to testify to important facts not contained in said affidavit. Upon good cause appearing however, any such witness may be permitted to testify, upon such terms and conditions, and under such circumstances as the court may determine to be just."

[34 Southern Cal. L. Rev. 193]
CHAPTER XXV

USE OF DISCOVERY IN SUMMARY JUDGMENT PRACTICE

Summary judgment procedure is a device by which judgment may be entered summarily for the plaintiff in certain types of actions, on motion setting forth his demand and his belief that there is no defense to it, unless the defendant shows that he has a bona fide defense. The procedure has great usefulness in actions for a debt or liquidated demand in money. Its chief virtue is its effectiveness in securing speedy justice for creditors. It has long been an established feature of English practice and its popularity with the bar of this country is increasing rapidly. The usefulness of the device in England is indicated by the fact that in the year 1930, 5,535 summary judgments were rendered in the King’s Bench Division of the High Court of Justice, while only 1,226 judgments after trial were entered.¹ Similarly, in 1929, summary judgments outnumbered judgments after trial to the extent of 4,409 to 1,310.² The Ontario summary judgment procedure likewise is extensively used. In five hundred consecutive case records which were analyzed in Toronto, cases in which summary judgment was requested outnumbered other cases in the ratio of approximately three to two. There was no contest by the defendant in the great majority of the former cases and judgment was granted forthwith. Use of summary judgment procedure has become increasingly extensive in New York. The provision took effect October 1, 1921.

¹ Civil Judicial Statistics for England and Wales (1930) p. 16.
² Id.

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Only 11 motions for summary judgment were brought during the three months remaining in 1921. In 1922 there were 174 motions; in 1923 there were 447; and in 1924 there were approximately 700.³ Summary judgment procedure is proving popular with the Michigan bar. During the eight months from August 1, 1930 to March 31, 1931, 526 applications for summary judgments were made in the circuit court for Wayne County (Detroit), Michigan. Of these applications 409 were granted and 117 refused. During the same period of time there were 633 jury trials, and 1201 non-jury trials.⁴ These various statistics indicate that summary judgment procedure affords a remedy for congested court calendars and delay in the trial of cases.

A way has been suggested by which summary judgment procedure can be made even more effective than it is at present. The American Judicature Society has suggested that discovery examinations be employed as a means of ascertaining whether the defendant has a bona fide defense. Several jurisdictions already allow a limited use of discovery as an aid to summary practice. The procedure recommended by the American Judicature Society would allow the plaintiff, as soon as the defendant has filed his defense or notice of defense, to move for judgment upon discovery. The court would then order an examination of the defendant for discovery and upon the basis of the examination decide whether summary judgment should be rendered.⁵ The procedure for summary judgment which is now in use in England and in several American jurisdictions is in effect a judgment upon discovery.⁶ Under this practice in England the

³ Boesel, Summary Judgment, Proceedings of the Wisconsin Board of Circuit Judges (1926) p. 27.
⁴ These figures were obtained from statistics furnished the Judicial Council of Michigan by the clerk of the Circuit Court for Wayne County.
⁶ Annual Practice (1929), order 3, rule 6; order 14, rule 1; N. Y. Rules of Civ. Prac., rule 113; Rules of New Jersey Supreme Court, rules 80–84, found in 3 Misc. 1225; Michigan Court Rules (1931) rule 30.
creditor, instead of going through all the formalities of pleading, specially endorses the summons with a description of the debt, and files an affidavit made by himself, or any other person who can swear positively to the facts, verifying the claim and stating the belief that there is no defense. It is then up to the defendant to satisfy the judge by affidavit, by his own oral evidence, or otherwise, that he has a good defense to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend. If he does not do so judgment is rendered against him.\(^7\) The practice in the United States is somewhat different, the case proceeding as any ordinary action up until the time the answer is filed. After that the procedure is substantially similar to that used in England. Some American statutes have provided less effective procedures, whereby judgment is rendered unless the defendant files an affidavit of merits.\(^8\)

While the present form of summary judgment in most jurisdictions is a judgment upon disclosure, just as that advocated by the American Judicature Society is a judgment upon disclosure, the two procedures differ in the means of effecting the disclosure. Under the present practice the disclosure is effected by affidavits, or by oral proof before the court. Under the scheme suggested the disclosure would be effected by an examination for discovery. The latter should prove a more thorough means of eliciting the truth. The chief trouble with the present American summary judgment procedures, especially those which merely require the defendant to file an affidavit of merits, is that they do not necessarily disclose

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\(^8\) See Clark and Samenow, The Summary Judgment, 38 Yale L. Jour. 423, for a detailed survey of all of the jurisdictions.
whether or not there is a real defense. This defect would be remedied by a more thorough method of examining the defendant.

Several jurisdictions have allowed a greater use of discovery in connection with summary practice. The first American summary judgment procedure, that which was adopted in South Carolina about 1800 and which was a conspicuous feature of South Carolina judicature until the adoption of the Code of Civil Procedure in 1870, employed a method of obtaining discovery in connection therewith. One of the rules of court for the successful administration of the summary judgment provided: “If the plaintiff in an action by summary process shall desire to have the benefit of the defendant’s oath, he shall state, in writing, the points to which he shall require his oath, and serve him with a copy thereof, with notice of such intention, at least one day before the hearing of the cause; and the defendant may either give his answer in writing, to be sworn to before the clerk, or _ore tenus_ in open court; and if a defendant shall desire the benefit of the plaintiff’s oath, he shall proceed to require it in the same manner.”

Discovery is used in connection with summary practice in Ontario. In specified types of actions where a debt or liquidated demand in money is the subject of the action the plaintiff may specially endorse the originating summons with a statement of his claim. Contrary to the English practice there is no need for the plaintiff to file an affidavit stating that in his belief the defendant has no just defense. No complaint was found among Ontario practitioners to this innovation. They say that the presumption should always be against the defendant in actions to which summary procedure is applicable. The

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9 Cited by Professor Millar in his, Three American Ventures in Summary Civil Procedure, 38 Yale L. Jour. 193, 199. Professor Millar is unstinted in his praise of this procedure and, in particular, of the discovery feature of it.
defendant is required to file an affidavit that he has a good defense upon the merits and showing the nature of the defense together with the facts and circumstances which he deems entitle him to defend. The plaintiff is allowed to cross-examine as to its contents. Often plaintiff examines the defendant before a special examiner in the same mode as if for discovery. Sometimes there is a stipulation between parties that the one examination shall serve for discovery also should the defendant be allowed to defend the action and summary judgment be refused. This connection between discovery generally and summary judgment has proved very effective. The principle is adhered to that the examination as for discovery in aid of summary procedure is for the sole purpose of further probing the defendant as to whether he has any real defense to the action.

Under the Indiana practice a party is allowed to use the evidence obtained by discovery as the basis for a motion to strike the pleading of an opposite party on the ground that it is sham, false, frivolous, or intended for delay. However, discovery by written interrogatories only, and not discovery by an oral examination is so usable. The latter expedient has been declared unavailable simply as a matter of statutory construction and without regard to questions of policy. The practice would seem especially useful in actions for liquidated sums, as for instance actions on promissory notes, but it can be used in other actions as well. It furnishes a convenient weapon with which to attack a general de-

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14 Pittsburgh Ry. Co. v. Fraze (1898) 150 Ind. 576, 50 N. E. 576 (action for damages for personal injury); Tilden v. Louisville Company (1901) 157 Ind. 532, 62 N. E. 31 (action for damages for personal injury); Jones v. State (1928) 200 Ind. 328, 163 N. E. 260 (election contest case).
The court will strike the pleading as sham only when it is clear that there is no defense. It is not sufficient simply to elicit answers tending to show that the pleading is false, for the court will construe all doubts in favor of the pleader. The latent possibilities of this procedure are ignored by many Indiana lawyers. Some lawyers said they had never known a pleading to be stricken on the ground that it was sham. There is, however, a use of interrogatories to anticipate and prevent the effect of a sham pleading. By this use it is possible to avoid the effect of an unverified general denial. A few questions of the following character are attached to the petition in debt collection actions for the purpose of encouraging allowance of judgment by default:

1. What merchandise, if any, has been sold by plaintiff to you, or any one for you, at your request up to the present time since?

2. What merchandise, if any, has been delivered by plaintiff to you, or anyone for you, at your request up to the present time since?

3. What, if anything, was the cost price to you for merchandise, if any, that has been sold and delivered by plaintiff to you or anyone for you, at your request, up to the present time since?

4. How much, if anything, have you paid to plaintiff up to the present time since?

5. How much, if anything, is now due and owing by you to plaintiff?

6. What, if any, allegations of plaintiff's complaint are incorrect?

The practical advantages of this expedient are that: if the defendant answers the questions honestly and fully, it may be the means of getting what is virtually summary judgment; if the defendant answers evasively or answers

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that he does not know, it may be the means of limiting
his proof at the trial; and if the defendant does not
answer at all, a practice which the filing of questions
encourages, judgment as by default may be had. There
is an especial need in Indiana of some scheme of this
sort, to discourage the filing of unverified general de­
nials for the mere purpose of obtaining a delay. Inas­
much as the answer to interrogatories must be under
oath, it is possible to avoid the effect of the unverified
general denial in two respects, by getting a specification
of the basis of the denial and that under oath.
A few Ohio lawyers make an effective use of discovery,
both by deposition and written interrogatories, as an aid
to summary collection in actions for liquidated amounts,
and more particularly account actions. The practice is to
either take the defendant's deposition or annex interro­
gatories for him to answer, and then to use the information
obtained as the basis for a motion to strike his answer
as sham. Such tactics are effective in that they often
discourage the defendant from filing an answer.
The new Michigan Court Rules provide for the use of
depositions as well as affidavits as a means of disclosing
the absence of real issues of fact in connection with mo­
tions for summary judgment.
While New York has a summary judgment practice
which is rather extensively used and which requires the
defendant "by affidavit or other proof" to show that he
is entitled to defend, it is not possible to use discovery
in connection with this practice. The reason is that dis­
covery is generally limited to the case of the party appli­
cant whereas the subject of examination in summary pro­
ceedings would be the case of the opposing party.
A member of the New York City bar made the follow­
ing suggestion before the New York State Bar Asso­

17 See White v. Calhoun (1911) 83 O. S. 401, 94 N. E. 743; Butterick
18 Michigan Court Rules (1931) rule 30, secs. 6–7.
ciation in 1916: "Now the result (of liberal discovery before trial) is this: the very fact that evidence will be disclosed speedily by those having a knowledge of the facts, acts as a deterrent upon the litigant who would put in a false pleading. It is notice to him in a way that prosecution for perjury is impending. If you combine those provisions for obtaining evidence and summary relief • • • I dare say you would come to the end of your litigation in most cases, not in five years, but in five months."

The decisions as to the constitutionality of summary judgment practice in general indicate the extent to which discovery could be used as an aid to the procedure. In upholding the constitutionality of the summary practice employed in the District of Columbia, the United States Supreme Court, speaking through Mr. Justice McKenna, has said: "There is but one element in this contention—the right of a jury trial. In passing upon it we do not think it necessary to follow the details in counsel's elaborate argument. • • • If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses and to defeat attempts to use formal pleading as a means to delay the recovery of just demands."

The Massachusetts experience in regard to constitutional problems arising in connection with summary procedure may throw some light as to the extent to which ordinary discovery procedure can be used as an adjunct of summary practice. In 1925 the Judicial Council's first report, after according high praise to the English sum-

20 Fidelity & Deposit Co. v. United States, 187 U. S. 315, 319.
mary practice, stated: "The constitutional right to a trial by jury prevents the adoption of the English system under which the court or master may make an absolute order for summary judgment after hearing instead of merely advancing the case for speedy trial as is done here." 21 In their second report, however, the Council changed its stand on the matter. This report stated: "We believe that the legislation should go further than the proposed Act which we drafted a year ago. While the constitutional right to a jury trial sets a limit to the power of the legislature it seems clear that the right does not exist unless the court can be satisfied that there is a real issue of fact to be tried." And after setting forth the New York case of General Investment Company v. Interborough Rapid Transit Company 22 as one of the reasons for changing its stand the Council further stated: "It is plain that it would be within the constitutional power of the legislature to provide that in an action to recover a debt, where the plaintiff by affidavit verifies his cause of action and asserts that there is no defense, the defendant must do more than merely claim a trial by jury to become entitled to a jury trial and that he must by affidavit or otherwise satisfy the court that there is a bona fide dispute involving a substantial question of fact, the decision of which in his favor would establish a defense. We are led by these considerations to go further than we did a year ago and to recommend legislation providing for the entry of judgment forthwith, if the defendant fails to satisfy the court that there is a real question of fact to be tried. • • •" 23 An opinion rendered by Rugg, C. J., which also influenced the Judicial Council, defines more definitely the limits upon the use of discovery in connection with summary procedure: "Great preponderance of the apparent weight

21 Page 33.
22 (1923) 235 N. Y. 133, 139 N. E. 216.
23 Pages 45, 46.
of testimony will not warrant a denial of trial by jury provided there is seemingly enough to require a submission of the case to the jury under the familiar principles. • • • Doubtless it would be within the province of the court under the rule to require the parties to state the substance of the evidence which each expected to offer at the trial, and to ascertain whether there was upon such a statement any disputed question of fact to be found either directly or by inference; and also in appropriate instances to frame questions, answers to which would settle such disputed fact or facts. Of course great care must be exercised in the use of this power and the fullest opportunity given to parties to make a complete statement with the knowledge that it is to be made the basis of a ruling of law upon the rights of the parties. But there is no fundamental objection to a ruling of law made upon a fair statement of what the evidence is expected to be." 24

There was an unusual handicap to the constitutionality of summary procedure in New York due to the fact that in 1871 it had been held that a verified answer, even though it interposed only the general issue and could be shown to be absolutely false, could not be stricken out as sham pleading. 25 This led to the widespread belief among the bar that summary judgment would be unconstitutional. 26 But the New York Court of Appeals, when the matter was actually presented, in the famous test case which upheld the constitutionality of summary judgment procedure under the Civil Practice Act, said: "The argument that rule 113 infringes upon the right of trial by jury guaranteed by the Constitution cannot be sus-

25 This case and the cases following it are given in Report of N. Y. State Bar Ass'n (1916) p. 404.
26 Cf. Discussion before New York State Bar Association in 1916, in the report mentioned in preceding note, at pages 305, 402, 404. See also Pogson, Truth in Pleadings, 8 N. Y. Univ. L. Quar. Rev. 41.
tained. The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a bona fide issue exists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant summary judgment."

It is clear from these decisions that the viewpoint which safeguards the constitutionality of any summary judgment procedure is that the judge merely decides whether there is any bona fide defense, rather than that he determines the merit of any defense which is sufficient to raise an issue. Is this viewpoint any more jeopardized by requiring the disclosure to be made by a deposition taken upon an adverse examination than it is by requiring such disclosure to be made by affidavit? Indeed, does not such an examination come the nearer of the two to meeting the desiderata outlined by Judge Rugg, supra, that the "fullest opportunity be given to the parties to make a complete statement"?

CHAPTER XXVI

JUDICIAL CONTROL OF PRE-TRIAL PRACTICE

It has been said that "a disputed matter of fact or law or of both, cannot be resolved into simple, ultimate questions of the merits of a controversy by any system of procedure which leaves the formulation of these issues to the adversaries themselves." 1 Two methods of judicial control of the pre-trial stage of litigation have been employed under modern English procedure. These methods are known as settlement of issues and summons for directions. The purpose of both is to give the court a greater part in the formulation of the issues to be tried and in shaping the subsequent course of the action. Variations of the English practice have been attempted, but without especial success, in New York and in New Jersey.

Procedure for settling issues was first employed in Scotland and later introduced in a modified form into English practice. In Scotland there is first a simple pleading procedure aided by an auxiliary which is strikingly similar to the old positional procedure. The action is commenced by a summons which discloses only the general nature of the action. 2 Then the plaintiff files what is called a condescendence but which is in fact nothing more than charges of evidence or detailed allegations of fact to which he desires the defendant's personal answer. 3 The defendant may pursue a like course as to

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2 Balfour, Handbook of Court of Session Practice, p. 23; Maclaren, Court of Session Practice, 356.
3 Id.
any affirmative defense which he has. After this stage is completed, together with all pleas in law, the record is closed and a procedure is then in order with which we are especially concerned here, namely, the settlement of issues. Each party lodges the issues proposed by himself, and then the parties and the judge get together and decide on the issues which shall go to the jury. The issue is nothing more nor less than a succinct statement of the question the jury are desired to answer.4 "Thus, in an action of damages for personal injury," as Balfour explains, "it may take the form whether on or about (date), and at or near (place) the pursuer (plaintiff) was injured in his person through the fault of the defender to his loss, injury and damage. Damages laid at * * *." Similarly, "In an action for reduction of a will on the ground of incapacity it may be 'whether the pretended will, is not the deed of the late A. B.?'")5

A variation of the Scottish practice has been introduced in England under the following rule of court: "Where in any cause or matter it appears to the court or a judge that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues, and such issues shall, if the parties differ, be settled by the court or a judge."6 A famous English judge said that it was always his practice to get counsel to agree at the beginning of a trial as to the issues of fact to be tried.7 This provision merely moves up the time for such an agreement. Other British jurisdictions employ a similar plan. In Manitoba the judge, if he thinks the pleadings do not sufficiently define the issues of fact, may make "an order defining and setting forth the issues between the parties."8 The court rule in

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4 Id.
5 Id.
6 Annual Practice (1929) order 33.
8 Acts relating to Court of King's Bench (1914) 344.
Victoria is similar to the English one except that it has an additional provision which appears feasible, namely, any party may at any stage of the cause apply to the court for a direction to have issues prepared, and all of the parties, their solicitors, and other persons may be examined viva voce and all documents which may be necessary to the inquiry may be required to be produced for inspection. Other British states have enacted the English rules without any vital change.

Lord Denman advocated the adoption of the principle which was basis of the settlement of issues procedure, but he urged that it be adopted in a different form which has come to be known as the summons for directions. Said he: "After the action is commenced measures should be at once taken for affording to the litigants a pause for consideration, and opportunities for adjustment. The way ought to be cleared for a fair trial of the real point at issue, if tried it must be. A judge at chambers, or some similar authority, should bring the parties together, and require from both reasonable admissions, which ought to be preserved and handed forward for subsequent use in the progress of the cause." It was through the influence of Lord Shand, of the English Rule Committee, that this principle was actually enacted into a rule of court in 1881. The procedure adopted was first known as the "omnibus summons" and is now known as the "summons for directions."

A summons of directions is an official document which notifies the parties to appear before a master at an appointed time so that he can get the parties together and with their aid shape the future course of the litigation.

9 Victoria Court Rules (1916), order 33, rule 1 A.
10 Alberta Rules of Court (1914, as amended to 1923), 224; British Columbia Court Rules (1925), order 33; New Brunswick Judicature Act and Rules of Court (1909) order 33; Newfoundland Cons. Stat. (1918), 787; Saskatchewan Cons. Orders and Rules of the Court of King's Bench (1921), order 24.
11 Arnould's Life of Lord Denman, I, 201.
It is compulsory that it be applied for in practically every case, and at the hearing an order may be made covering any one or more of the following matters:

1. Pleadings
2. Particulars
3. Admissions
4. Discovery
5. Interrogatories
6. Inspection of documents
7. Inspection of real or personal property
8. Commissions
9. Examination of witnesses
10. Place of trial
11. Mode of trial
12. Related matters

This procedure has been appropriately called the "traffic officer" of English litigation. It is framed upon the two simple principles that the easiest way to find out the facts is to get the parties together for that purpose, and that the court, through an authorized officer, should at any early stage of the litigation obtain a measure of control over the suit, and supervise the proceedings.

The device is more needed in England than in jurisdictions which employ an oral examination for discovery. Indeed the procedure is used in the administration of the general scheme of discovery by written interrogatories and, by bringing the parties together, it supplies some of the advantages which would be attendant upon an oral examination. Lawyers in states which have an oral examination for discovery have not deemed this device necessary. William E. Fisher, a member of the Wis-

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13 Annual Practice (1930), order 30.
18 An equally apt phrase was used by the late Chief Justice Taft in describing such procedure before an English master: "He knocked the heads of the parties together so that a clear issue between them was quickly reached."
Wisconsin bar who studied the English procedure at first hand at the request of the Wisconsin State Bar Association, makes this significant remark: "We have many machines in our exhibit of pleading and practice that are superior to any existing elsewhere, including England. Of first importance in my opinion in this category, is section 4096 (the provision for an oral examination for discovery) • • •. You have often heard of the work of the English masters in eliminating unnecessary matters, and narrowing the issues before trial. The superiority of this work of the masters over the systems in vogue in the American states is largely because the other states have no provision similar to section 4096." 14 Similarly Mr. Justice Middleton, who for many years has been regarded as a leading Ontario authority on matters of practice, has said: "The summons for directions which has been adopted in the English practice has not commended itself to me."

A majority of the American lawyers who have visited English courts and watched in a more or less casual way the actual operation of the procedure before a master on a summons for directions have come back with high praise for it. They have seen the externalities of the practice—the speed with which the master despatches the hearings, the businesslike attitude of the lawyers, the number of cases handled—and they have marvelled.15

A number of attempts have been made to introduce the summons for directions into the New York practice. The Commission on the Law's Delays in 1904 recommended the adoption of a practice similar to the English Sum-

mons for Directions. The Commission made its recommenda-
tion after correspondence with leading English judges and lawyers. The chief reason that the proposal was defeated in the legislature was that it was accom-
panied by a bill providing for a body of standing and salaried commissioners to take the part of the English masters. In the years which intervened before the ap-
pearance of the report of the Board of Statutory Con-
solidation in 1915 leaders of the bar continued to stress the importance of this procedural device. Characteristic statements as to the effectiveness of the similar English practice made before the New York State Bar Associa-
tion during this period are:

(1) "They (the English rules) have been framed on the theory that the sooner the litigants are brought face to face and compelled to disclose to each other the strength or weakness of their respective lines of attack or defense, the more expeditiously and thoroughly will justice be done between them." 19

(2) "These masters sit in London on every business day and dispose each of about three hundred cases a week. Generally all the preliminaries up to the time of trial are under their control. The proceedings before the master are exceedingly simple and informal. He sits behind an office table in his room, and the solicitors or counsel who appear before him state their motions and argue their points in a conversational way." 20

(3) "The master accepts the statements of the parties or their solicitors or counsel as to the nature of the action, the proposed line of defense, and the assistance they respectively need to enable them properly to prepare for trial." 21

16 Cf. Reports of N. Y. State Bar Ass'n (1911) p. 59 ff.
19 Elbridge L. Adams, of the New York Bar, in Reports of New York State Bar Association (1908) p. 64.
20 Id. at pp. 65, 66.
21 Id. at p. 69.
(4) "I venture to say that there is not a judge on the bench, or a lawyer at the bar, who, in ten minutes informal talk with the two lawyers in the case, * * * would not know more clearly and correctly what interlocutory relief should be accorded parties than he would know from the perusal of realms of affidavits." 32

It is no wonder, therefore, that by 1917 a member of the bar of the City of New York was able to say: "Our Bar Associations in this city are all committed to the summons for directions. The judges are all in favor of it in this department." 33 In 1909 the Special Committee of the Bar of the City of New York sponsored a bill in the legislature which would have inaugurated such a practice, but after it had passed both houses of the legislature it was vetoed by the governor.34 Finally in 1911, however, a modified form of the English practice was enacted in the form of an "Omnibus Motion." 35 It was optional as to whether the parties used this procedure, and not compulsory as in England. It seems that the New York bar made little or no use of the device.

Just at the time when it seemed that this agitation would be fruitful in introducing a more elaborate provision into the New York Civil Practice Act, Samuel Rosenbaum, who had made a detailed special study of English civil procedure, read a paper before the New York State Bar Association in which he severely criticized the English practice. Said Mr. Rosenbaum: "I note with a great deal of interest that a large number of New York lawyers seem to favor the procedural step commonly called an omnibus summons or summons for directions. There has been discussion about that. Always the term has been mentioned as though it offered some relief from

33 Report of N. Y. State Bar Ass'n (1917) p. 133.
35 N. Y. Laws of 1911, ch. 763.
present defects in procedure. That surprised me a great deal, because the summons for directions, although, of course, it is a part of the English procedure at present is a most unsatisfactory part of that procedure, and is generally admitted to be a complete failure from the point of view of improving procedure, and I think you will pardon me for bringing to your attention a view which should be considered on account of the agitation concerning it in the New York practice.

"The reason for the adoption of that summons in England was not so much an effort to simplify procedure, but principally a desire to get away from the high cost of pleadings in the English practice. As you, of course, know there are solicitors and barristers in the English courts, and the practice is that solicitors never draft pleadings, but always retain counsel for drafting pleadings, no matter how small they are, so that right at the outset of a case the client is confronted with the expense of retaining not only a solicitor but also a barrister. Furthermore, under the English practice, every pleading over seven hundred twenty words has to be printed and every figure is counted as a word, and you have that expense. Added to that is the wretched system in the English courts for itemizing costs, by which every little step is separately charged for. Lord Bramwell characterized it as the 'apothecary's bill' system of itemizing costs. There is a separate fee for the solicitor for giving instructions for the statement of claim, then one for the barrister for drawing up the statement of claim, a separate fee for reading the proof when it comes from the printer, possibly a separate fee for conferring with the barrister for drawing up the statement of claim, always another for delivering it, and before very long the client finds he has run up a bill of fifteen or twenty dollars just to deliver a statement of claim. As a consequence of a popular out-cry against this, some effort has been made
to require upon the commencement of an action, that every action should come before an officer, who would determine whether the delivery of pleadings was necessary in that case. Now, while that may be very well in theory, in practice it has not worked well at all. The intention was to give the counsel or solicitor the right to appear before one of the masters of the court and lay before him in an informal way the facts of the case and then obtain from him general instructions as to the conduct of the case; * * * whether or not pleadings should be filed, whether there should be discovery or not; jury or nonjury trial; where the trial should take place; whether interrogatories should be administered or not, etc. The fact is when the writ is issued the solicitor knows little or nothing about the case, about the details, and the order is always made in a purely formal manner. The master is not told about the case, because the solicitors do not know anything about it themselves.

"A great deal of thought should be given before the summons for directions is inserted in the New York procedure, where it may not be doing any good. Mr. Justice Chitty, who is, perhaps, the greatest living authority on English civil procedure, says at present in the great majority of cases it is a useless expense. Testifying before the 1913 Royal Commission on Delay in the King's Bench Division, he said:

"At present, in the great majority of cases, it is a useless expense, and not an improvement on the system it displaced. The idea of the summons for directions is excellent, but in practice it fails, because as a rule neither of the representatives of the parties attending it knows anything about the nature of the requirements of the action in which it is taken out. It comes to this, if I might explain it: A summons is taken out and comes before the master. It is a document which leaves blanks to be filled in for the time at which the pleadings are to be
delivered and various other steps taken. In a great many cases you turn to the plaintiff’s solicitor or representative and he says, “This is a country case.” You say, “What is it about?” He says, “I do not know; the writ says it is an action for breach of contract.” “Cannot you tell me something about it?” “No, that is all I know; I have only had it up this morning.” Then you turn to the defendant’s solicitor or representative and you say, “What is the defense to the action?” He says, “I do not know; I do not even know what the claim is yet.” Of course all you have to do in that state of things is to fill in the number and say that the plaintiff must deliver his claim in so many days, and the defendant his defense in so many days and the plaintiff his reply in so many days; and then there must be discovery, because it is no use for you to ask the parties whether they want discovery; they do not know.

“Then you have to fix the mode and place of trial. At one time we used to leave it over until we knew something more about what the action was going to be, but owing to Order LIV, Rule 32, which was made some little time ago, it was considered compulsory upon us to fix the mode and place of trial in the first instance. That having to be done without any information you look at where the parties live and put in where the parties live, and if either of the parties ask for a jury you put in “jury” so that in this state of things all the master can do is to order pleadings and discovery and fix the mode and place of trial. All this might as well be done by a rule applicable to all cases, which would save the costs of the summons in each case.’

“Another prominent witness before the same commission was Lord Justice Phillimore, who said of the order made under a summons for directions:

“‘When you have drawn up that order, all you have done is to draw up an order that the case be conducted as
the rules say it shall be. You have established nothing. You have left the skeleton exactly where it was before. The only thing that has been done is, you have saved some stamps from the revenue because future applications can be made without a summons stamp. If you want interrogatories, you have to have a fresh summons; if you do not want trial by jury, you have to have a fresh summons; if you want to shift the venue from the place originally named, because nobody knows where it was to be, you have to have a fresh summons. In nine cases out of ten you do not get anything decided by the summons for directions, except that the case shall be tried according to the rules.'

"Finally I shall quote Mr. Justice Middleton, of Toronto, the draftsman of the 1913 Revised Rules of the High Court of Ontario. In the preface to the rules he says:

"'The summons for directions which has been adopted in the English practice has not commended itself to me. In practice in England it appears not to have accomplished that which was hoped from it. No doubt if counsel of ability, familiar with the details of the particular case, appear before an experienced judge and discuss the procedure in the particular case, the result ought to be satisfactory; but the actual result is far otherwise when the factors are different; and in practice it has been found that in most instances a stereotyped form of order is used which follows the general provisions found in the rules.'

"In a contributed article in the Law Times (133 L. T. 565), it is said: 'The compulsory summons for directions, from which certain judges hoped for so much, has proved very ineffective, and is deemed by all barristers in large practice with whom I have discussed it to perform the same functions as the fifth wheel of a coach. One has only to read the orders made on these sum-
mons to see that they are all of a stereotyped character and in the majority of cases wholly unnecessary.' The editorial comment on this is: 'It is quite difficult to see what useful purpose the summons for direction has served, and in the vast majority of cases it is wholly unnecessary.'

"These objections were foreseen from the beginning. At the time the summons was first invented in 1882, it was caricatured by a contemporary writer as 'this wonderful summons, requiring from the master the sagacity and prescience of Mr. Micawber at once to see and prescribe for all contingencies up to trial.'"  

New Jersey only, among American jurisdictions, has any procedure similar to the English summons for directions at the present time. The New Jersey Practice Act, which contains several innovations from the English practice, has provided an adaptation of the English Summons for Directions. The New Jersey procedure is called "Preliminary Reference."  

The idea, of course, is to relieve the trial judge of the necessity of hearing matters preliminary to trial and interlocutory matters generally, by placing a part of this burden on commissioners. But in contrast to the English system, the use of the device is not mandatory. An outline of the prac-

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26 Report of New York State Bar Ass'n (1917), vol. 40, pp. 121-126; Mr. Rosenbaum has expressed a similar opinion in his book, The Rule-making Authority in the English Supreme Court, pp. 144, 259: "Unfortunately the summons as administered is not fulfilling the purposes for which it was intended. The intention was that some idea of the nature of the case should be imparted to the master upon the first hearing so that his order could be molded to fit the requirements of each particular case. The fact is, however, that the solicitors' clerks who appear before the master when the summons is first heard usually know little or nothing about the case, and the order made is almost always in common form: pleadings by each side in so many days, mutual discovery, trial in London with or without a jury, and 'leave to apply.'"  

"In his (Master T. Wiles Chitty) testimony before the 1913 Royal Commission on Delay in the King's Bench Division, he laid much stress upon the failure of the Rules on summonses for directions to complement properly the Rules on proceedings under such summonses."

27 Supreme Court Rule 80, found in 2 Misc. 1225; Supreme Court Rules 92-95, found in 2 Misc. 1231; Chancery Rules 176-180, found in 1 Misc. 797.
tice is as follows: at any time after service of the com-
plaint either party may take out a summons approxi-
mately like the following:

John Doe
v. Commissioner’s Summons
Richard Roe
To Richard Roe, Defendant:

On motion of plaintiff you are notified that on the 10th day
of January, instant at 10 o’clock A. M., at my office, No. 10,
street, Trenton, I will hear any motion that may be
made by either party in the above stated cause respecting the
pleadings, issues, evidence or any other matter preliminary to,
and in preparation for trial; and will make such order respect-
ing the same as the parties respectively may be entitled to.
Dated January 4, 1912.

Supreme Court Commissioner

After the parties have appeared and been heard the com-
missioner may make an appropriate order as to any one
or more of these items: Pleadings, issues, particulars,
admissions, interrogatories, or discovery of documents.28
The possibilities of this device have been almost entirely
neglected by the bar. Instead the supreme court judges
still hear the practice motions at special motion hours
and find relief from their excessive burdens by distribut-
ing some of the trial work among the district court
judges, as well as some preliminary matters incidental
thereto.29 Perhaps the device may yet be utilized, for in
1929 the Committee on Law Reform of the State Bar
Association recommended the “appointment of six ade-
quately paid Supreme Court Commissioners to act under
sec. 17 of the 1912 supplement to the Practice Act, that
is to say, to take care of all practice motions and matters

28 There is a full discussion of this procedure in the Report of the
Board of Statutory Consolidation of New York (1915), I, 109, 205, 350.
29 N. J. Laws of 1926, p. 103; Rule of Supreme Court, as amended in
1929, found in 7 Misc. 1134.
preliminary to trial, thus relieving the Supreme Court judges of this work, which is somewhat a burden to them, and which because of the pressure of their other work does not receive adequate judicial attention.’’

One of the most striking features of the new German procedure is a provision for a preliminary hearing as a means of preparing the cause for decision by the court. It is not entirely unlike the English summons for directions. It was adopted in 1924 as a method of economizing judicial labor. A preliminary hearing may be held before an associate judge. The power and practice of the associate judge at the hearing is as follows: “He attempts, first of all, to bring about a conciliation; he decides the issue of law or fact arising upon most kinds of dilatory exceptions where these are not reserved for determination with the merits; he renders judgment in case of withdrawal of the action, renunciation of the claim or confession of the action, as also in case of default on the part of one of the parties, or under certain circumstances, on the part of both. He is explicitly charged with the duty of bringing about a discussion of the cause in all of its aspects and of seeing that it is so far forwarded as to admit of disposition, where feasible, at a single hearing before the collegial court.”

Similar expedients have been adopted in Italy and in Austria.

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30 N. J. State Bar Ass’n Year Book (1928–29) page 63.
31 Millar, The Recent Reforms in German Civil Procedure, 10 A. B. A. Jour. 703, 705.
32 Id.
CHAPTER XXVII
ADVANTAGES IN COMBINING DISCOVERY WITH PRESERVATION OF TESTIMONY

A number of American jurisdictions have combined the methods for discovering and preserving testimony into a single deposition procedure. General principles of policy would seem to favor such a combination. It is sound policy to consolidate previously separated devices which are related in their origins and functions. The end of reform is simplification. True reform does not confuse—it integrates, it synthesises, it leads back to first principles. Lawyers are already sufficiently acquainted with the procedure for taking depositions to insure its orderly operation from the start if it is used for purposes of discovery. Use of deposition procedure eliminates the necessity for an elaborate and detailed statutory provision for discovery. Statutory provisions for interlocutory practice should be both concise and simple in order that the occasion for appeals may be reduced and in order that the actual practice may be worked out in accordance with considerations of administrative facility rather than in obedience to pre-arranged technicalities. By making the right to take depositions unconditional liberal means of discovering as well as preserving testimony is provided.

The combination of discovery and preservation of testimony has proved expedient from the standpoint of the detailed incidents of practice which are involved. Practically all of the problems which have arisen in connection with discovery procedure have been more easily solved under the ordinary deposition statutes than under
elaborate statutory provisions dealing with discovery as such.

Discovery is available in all types of actions in states in which a combination of discovery and preservation of testimony has been effected. This is a more salutary rule than the one which obtains in New York, for instance, which limits discovery in certain types of actions. If discovery is abused in certain types of actions, the remedy seems to be in keeping the record of the examination secret rather than in curtailing the right to discovery.

The problem as to the persons from whom discovery should be allowed is easily handled under the ordinary deposition procedure. Such a solution has the several advantages over the elaborate statutory provisions which obtain in New York, Wisconsin and elsewhere. By elimination of complex statutory provisions, the occasion for appeals is lessened. The statute need only provide that depositions may be taken, without further specification. This eliminates the necessity of determining who is a party for purposes of discovery, because depositions of parties and witnesses alike may be taken. It eliminates the several problems as to who is examinable on behalf of a corporation by allowing the examination of any representative as a mere witness, with the question as to the use of the examination against the corporation being reserved for the trial. This is already the direction of development under several of the special discovery statutes. It allows discovery from witnesses as well as from parties. There are sufficient inhibitions upon the use of the process in this regard to prevent its abuse, and yet not enough to prevent its use in a proper case, namely, when an important witness refuses to give a voluntary statement. Finally, such a provision makes discovery equally available to the plaintiff and to the defendant.

The ordinary deposition procedure offers the most expedient solution of the problem as to whether dis-
covery before pleading should be allowed. It usually allows the defendant such discovery as of right, but requires that the plaintiff file some sort of pleading as a guaranty of his *bona fides*. By filing a skeleton pleading, taking depositions, and then amending, the plaintiff in reality obtains discovery before pleading. This process works satisfactorily enough in the states wherein it is employed. It has not been the subject of the numerous appeals which have attended the provisions in New York and Wisconsin which allow examinations for the purpose of enabling a party to plead, yet it accomplishes virtually the same purpose.

A primary requisite to the usefulness of any procedural device is that the lawyers know the details of the procedure. This is true of the particular item of discovery. If elaborate details are provided by statute it takes some time for the bar generally to become acquainted with them. Already most lawyers have an adequate knowledge of the procedural details incident to the taking of depositions. The experience of the states in which this regular deposition procedure has been used for discovery purposes is that the practitioners soon learn to vary certain details and to ignore others in such a fashion as to accommodate the procedure to its new use. This has proved true of the following items which are discussed in preceding chapters of this text: (1) The initiating step: with the allowance of an examination as of right upon the mere service of notice and subpoena, lawyers soon accord the same voluntarily. In contrast, the special New York provision for notice-order procedure has not proved as satisfactory. (2) The place of the examination can be adjusted to the convenience of all parties involved. (3) Lawyers have learned to adapt their own tactics so as to obtain the most effective discovery, and to solve the few problems which arise as to the orderliness of the proceeding.
(4) The procedure is adaptable to differences between the practice in cities and in smaller communities, and between the large and small law offices, as far as the necessity of having the shorthand notes transcribed is concerned. (5) Problems concerning the right of the deponent to make substantial corrections can be solved by practical expedients apart from special statutory regulation. (6) Lawyers have disregarded statutes and rules in regard to filing the deposition and have adapted their practices to their own convenience and to the most effective discovery. Any inadequacies which obtain in regard to any of these items in the practice of an individual lawyer are the subject of education rather than of legislation.

The most feasible solution of the problem of administering discovery examinations has been to allow the examination to be taken down by a mere reporter, who is qualified to take depositions, with all disputes being referred to the trial court. Most of the attempts to provide a different machinery have approximated this practice in their actual operation. Only in Milwaukee, Wisconsin, and in isolated cases in the larger cities of Missouri does a substantially different practice actually obtain. While there are some advantages in having an officer who can decide objections summarily and coerce answers, it is so difficult to obtain officers with sufficient knowledge and experience to exercise these powers intelligently that the chances of abuse outweigh the incidental benefits. Moreover the Missouri experience indicates that such an officer is not needed in the majority of cases. Trial courts can supply most of the benefits incident to the employment of such an officer by granting speedy and expeditious hearings to the disputes which are referred to them. The plan suggested has the following advantages: It uses a machinery already provided by the statutes and does not require special legislation; it is easily adapted to differ-
ences of practice between the large and small city, and between the large and small office; it is the least expensive; it offers the least chance of abuse of parties and witnesses, because each party and witness can safely refuse to answer any question which he deems improper until ordered to answer by the court; it provides for a sufficiently liberal discovery; it allows most of the disputes which arise to be adjusted informally among counsel, without resort to the court. Finally, if such a plan does not work satisfactorily in a particular locality, the Missouri plan appears to be the most feasible remedy, let the court appoint a practicing lawyer to supervise the examination if one of the parties requests it.

The comparative experience of states which try to restrict the examination and of states which allow it to be as broad as at the trial, respectively, indicates that the practical advantages are with the latter plan. The restrictive rules which have been applied by the New York courts have defeated their own ends. On the contrary, an examination before trial, restricted by the rules of evidence only, has proved a deterrent of perjury and an aid of disclosing the truth. It is noteworthy that states which have allowed use of deposition procedure for purposes of discovery before trial have not limited the scope of the inquiry.

Rules of evidence offer sufficient checks upon the scope of the examination. This has proved true in the taking of depositions. When lawyers for the examiner and the examined, respectively, know that answers to questions cannot be compelled without resort to the trial court by the examiner, but that this can be accomplished expeditiously, the following experience obtains: The lawyers adjust the majority of the objections among themselves; the inarticulate rationale of this adjustment is the law of evidence, modified in its application by due regard
for the practicalities of the situation and for the purposes of discovery. Under such a practice objections of privilege are respected forthwith. The liberality which obtains in regard to rules of relevancy is of the lawyers' own making and does little or no harm because irrelevant evidence can be stricken before it gets to the jury.

There are two penalties for unjust refusal to disclose, namely, attachment for contempt and default or nonsuit. The experience with these has been satisfactory. They furnish a sufficient sanction so that it seldom is necessary to actually apply either one, and so that a full disclosure is encouraged. Any dissatisfaction with the penalty provisions of the statutes has been attributable rather to the mode of their enforcement than to the penalties themselves.

The ordinary deposition procedure provides the most satisfactory solution of the problem as to who may use the discovery examination at the trial, and also as to the purpose of its use. The rules under this practice are: Neither party may use the deposition of a mere witness as original evidence unless the deponent is unavailable at the trial, but the taker may use it to contradict the witness. The taker only may use the deposition of an adverse party as evidence of an admission. Either party, regardless of who has taken the deposition, and regardless of whether it is the deposition of a party or of a witness, may use the deposition in the event the deponent is unavailable for oral testimony at the trial. While this plan does not answer categorically that either the taker only may use the examination, or that both parties may use it, it effects a happy compromise by answering that only the taker may use ordinarily, but that the opposite party may also use when he really needs to, namely, when the deponent is unavailable for oral testimony. In this way use both for discovery and for preservation of testimony is made feasible.
CHAPTER XXVIII

LEGISLATIVE BASIS FOR AN ADEQUATE DISCOVERY PROCEDURE

The experience of the various jurisdictions which exhibit an effective discovery practice suggests a way by which other jurisdictions can accomplish the same end with a minimum of legislation. The following three short and concise amendments to the statutes should afford the basis for an adequate discovery procedure and liberalize the procedure for preservation of testimony.

I. Amend the section of the statutes which sets forth the right to take depositions to read as follows: "Any party may take testimony by deposition as of right at any time after the court has acquired jurisdiction over the action, suit or proceeding, and the persons of the parties thereto against whom the depositions are to be introduced. Depositions may be taken of parties and of witnesses, and for the purpose either of discovering or of preserving testimony. An adverse party may be examined as if under cross examination upon the taking of his deposition."

II. Amend the section of the statute which provides for the use of depositions at the trial so as to incorporate the conditions as to the unavailability of the witness which at present are contained in the section regarding the right to take depositions. If these conditions already are provided in the section regarding the right to use rather than in the section regarding the right to take, there is no necessity for such an amendment. The
enumeration of these conditions could be left exactly as it is at present in the particular state. The essential change is that it be made clear that the conditions apply to the use only and not to the taking of depositions.

III. Amend the statutory provision on discovery and inspection of documents to read as follows: "Any party, at any time after the court has acquired jurisdiction over the action, suit or proceeding, and the persons of the parties thereto, may by notice require any other party within ten days to make a disclosure upon oath of all the documents which are or have been in his possession or power, relating to any matters in question in the action. Such a disclosure shall be made upon a printed form of the following kind which shall be kept available in the office of every clerk of a court of record:

Affidavit of Documents

State of .......... } ss.
County of ...... } ss.

Plaintiff
vs.

Defendant

I, the above named .......... make oath and say as follows:

1. I have in my possession or power the following documents relating to the matters in question in this action:

2. I object to produce the following of the documents which are listed in part I above:

3. The grounds upon which I object to produce these documents are:

4. I have had but have not now in my possession or power the following documents relating to the matters in question in this suit:
5. The last mentioned documents were last in my possession or power on ..........., and to the best of my knowledge and belief are now located as follows:

6. According to the best of my knowledge, information and belief, I have not now and never have had in my possession, custody or power or in the possession, custody or power of my attorneys or agents, or in the possession, custody or power of any other person or persons on my behalf, any deed, account, book of account, receipt, letter, memorandum, paper or writing or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in this action or any of them wherein any entry has been made relative to such matters or any of them other than and except the documents which have been set forth above and the pleadings and other proceedings in the action.

nikówed and sworn to by

Affiant

Production for inspection of documents which are thus disclosed may be required from the party who has possession or control of them by notice to produce. If a party refuses to make an affidavit of documents or to produce in response to the notice the court may order him to do so, and may enforce such order by the penalties which are applicable in the event a party refuses to answer a question during the taking of his deposition, after being ordered to answer by the court."

Procedural details can be left exactly as they are at present under the various statutes on depositions. While there are some defects in the deposition statutes of particular states, it is of greater moment in the initiation of the new use of the procedure that the lawyers be acquainted with the procedural details than that these latter be perfect. Glaring defects which become apparent during the actual use of the procedure may be remedied later by special statutes. Moreover, the experience of the states which have used this plan is that the bench
and bar adjust the details to suit the purpose, without the aid of legislation, once they are convinced that the purpose itself is justifiable. Only in the event that the statutes in the particular state do not allow the taking of depositions upon oral interrogatories need the procedure be changed at the start. Practically all jurisdictions already have subordinated the taking of depositions by written interrogation to the taking upon oral questions. The former method is used only in the event that the witness resides at such a distance as to make oral questioning impracticable, if it is used at all.
CHAPTER XXIX

CONTRIBUTION OF DISCOVERY TO THE GENERAL ADMINISTRATION OF JUSTICE

The description and evaluation of any particular mechanism of the legal machinery is incomplete unless it takes into account the relation of the part to the whole, for none of the interrelated processes can exist unto themselves. Innovations in pre-trial practice are to be judged by their contribution to the general administration of justice, and by their functional relationship to the other incidents of legal procedure. They are also to be judged by their contribution to the practical needs of the lawyer and the court.

Many have been the complaints in recent years in regard to the unscientific and unbusinesslike approach of legal procedure toward its various problems. Judges and lawyers in the states which allow a full and mutual discovery before trial say that it has had a salutary effect upon the whole tenor of the litigious process. Perhaps their views can best be summarized by quoting two terse sentences which are representative of the views encountered in field investigations in the various states:

"Litigation is no longer regarded as a game."

"The lawyer who does not use discovery procedure is in the position of a physician who treats a serious case without first using the X-ray."

Lawyers in states in which a full and equal discovery before trial is allowed say that it is a great aid in ascertaining the truth and a great preventative of perjury. Only where a limited or unequal discovery obtains has it been found that perjury, manufactured testimony and
kindred evils are fostered. Where a full and equal discovery is allowed lawyers say that they come much nearer to obtaining the truth because:

(1) The witness is examined while his memory is fresh;

(2) The witness usually is not coached in preparation for the trial, and consequently his testimony is more spontaneous;

(3) A party who has been pinned down to a definite and detailed story early in the litigation can ill afford to manufacture testimony contrary to this story, for he is already bound.

Sometimes a lawyer does not know the truth of his own client's story until after the opposing lawyer has examined him for discovery. A lawyer is often deceived as to the merit of his case, by the mere recital of the facts by the client. For instance, at the end of an examination for discovery in a certain case the attorney arose and addressed his client thus: "'Why—you did not tell me any such story in the office. I am sorry but I will have to withdraw from the case.'" Numerous incidents of a similar character were related in the various jurisdictions which were visited.

Discovery is a help in the ascertainment of truth in the conduct of litigation by reason of the further fact that it furnishes a means of preserving testimony. All too often injustice has been done because of the unavailability of necessary witnesses. A liberal provision for the discovery and preservation of evidence gives greater assurance that the facts of the case may be presented in full upon the trial.

Settlements have been greatly increased by liberal allowance of discovery before trial. The Wisconsin experience in this regard is especially significant both as to the extent of settlements and the manner of arriving at settlements. Similar, though less pointed, testimony
was given by lawyers in other jurisdictions. The following statement from a Milwaukee attorney is representative of the views which were encountered generally during the investigation in Wisconsin: "It is fair to say that a very large proportion of the controversies in which lawyers are consulted are disposed of without the commencement of any action. In the larger cities, at least, it is also true that only a relatively small portion of the actions which are commenced are brought to trial. They are disposed of by the attorneys in settlements which, in the majority of cases, are very carefully and deliberately worked out. These settlements have been made possible in a great many cases through the use of the discovery examination. The lawyers of Wisconsin have become quite skillful in the use of this examination. Many of them use it either solely or partly for the purpose of reducing the issues, much after the manner in which that is sought to be done elsewhere by a bill of particulars. After examinations have been had on both sides, it is a very common thing for the opposing attorneys to sit down and discuss the case anew with the issues for trial more clearly defined in the minds of the attorneys on each side and with all of them better able to judge of the probable result of a trial. The better trained the opposing attorneys are in the sifting of evidence and in the application of rules of law, the more reason is there to expect that the litigation will terminate in a fair and just settlement." ¹ General counsel for some insurance companies require that local counsel send up copies of the examination for settlement recommendations. Nor is there any considerable complaint on the part of plaintiffs' lawyers, for they say the more skillful insurance lawyers have tried enough automobile accident cases to

be able to predict rather accurately what the case would bring if tried, after all the facts and the condition of the injured party have been fully disclosed upon an adverse examination, supplemented by a physical examination if necessary. Some lawyers say that they welcome the examination of their own client by the adversary, that often they have not obtained a true picture of the case until after such examination. One circuit judge says that he has maintained a record for several years of effecting settlements in four out of five cases docketed for trial. He calls the lawyers into his office before time for the trial and asks what the prospects of settlement are. After a short discussion one of the lawyers suggests that the parties be called in. The judge explains in an informal way to the parties the uncertainties of litigation. Often the result is a settlement. In such a case the adverse examination is either expressly or tacitly used as the basis for the agreement.

But more often than otherwise the case does not get this far after discovery is had. Sometimes a settlement is effected in the presence of the commissioner before the examination is finished. In most cases the discovery results in a re-evaluation of the case by both sides and a consequent weighing of the probabilities of further litigation.

The following statement from a lawyer in a large city in the middle west indicates the use of the procedure by representatives of liability insurance companies and similar interests in the large cities: “When a case is filed against us we often find that we know almost nothing of either the plaintiff or the defendant. We call the defendant, whom we represent, to the office. It develops that his story is decidedly different from that related in the plaintiff’s petition. What is the truth? It is worth a good deal to us just to be able to force the plaintiff to come in and give his story. Our chief purposes in exam-
ining him are: To see what he looks like, whether he seems to be honest, and especially, how he stands up under questioning, and to question him in detail as to the extent of his injuries. If we find that the party has a good case and will make a good witness at the trial, we make every effort to effect a settlement.”

One attorney made the following statement which gives a very trenchant comparison of discovery and separate procedures for arbitration or conciliation: “The lawyers, after an adverse examination, really constitute themselves a board of arbitration in the case. And it is much more effective than regular arbitration and conciliation practice, because it is not artificial. I do not care for the type of arbitration which forces an award on the party, but in this way the lawyers and parties strike their own agreement.” There is afforded the judge the materials with which to foster the kind of conciliation which, after all, is most feasible, namely, conciliation handled by the established courts.\(^8\) The other type of conciliation procedure, by special conciliation tribunals, has been described as operating thus: “The conciliator points out the uncertainty of litigation, the burdensome expense of it, the danger of personal estrangement between neighbors and friends, and that, by slight concession on the part of each, the differences may be adjusted.”\(^3\) It has been pointed out that the judge of the established court can bring about such conciliation as well as a special conciliator. Discovery provides a means whereby the judge can do so upon an intelligent basis. Moreover the parties are in a position which is more conducive to their acceptance of the suggestion of the judge if they have already ascertained the testimony which can be expected at the trial. Or, to put the same

\(^8\) Cf. Randall, Conciliation as a Function of the Judge, 18 Ky. L. Jour. 330.

\(^3\) John A. Cline, in an address before the Ohio State Bar Association in 1925, Reports, vol. XLVI, p. 63.
idea in a slightly different manner, may not the "very soul of conciliation procedure, that before a person shall involve his neighbors and himself in legal warfare there shall be made an effort to secure a legal peace" be more readily attained "if a party, long before his legal battle is staged in the trial court, can go into his adversary's camp and inspect his battle array, * * * learn how strong his adversary is, and enter negotiations for peace or prepare for battle intelligently"?

Automobile accident litigation occupies as much time as all other types of litigation in courts generally at the present time. In many of the larger cities the ratio in the trial dockets is approximately two to one. In no type of litigation can plaintiffs, as a general rule, less afford to wait a long time for compensation, and in no type of litigation are defendants more often subjected to non-meritorious claims. The signs of the times indicate that unless the judicial system can speedily devise some way of remedying the situation, measures akin to the industrial accident compensation plan will be introduced. Discovery procedure offers a way of improving the handling of negligence cases. In every state in which an investigation was conducted, except New York, the greatest use of discovery procedure is in connection with personal injury litigation. The explanation for the New York exception is the arbitrary limitation which the courts have placed upon use of discovery in such litigation. Especially do lawyers for insurance companies favor the procedure. It enables them to arrive at settlements on an intelligent basis. Consequently in several states the main instruction in the use of discovery procedure has come from the head counsel for the insurance companies, who have sent instructions to counsel in outlying districts to take discovery examinations in every

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4 Id. page 67.
5 Max W. Nohl, Discovery Proceedings, 2 Marquette L. Rev. 137.
case involving their interests and to send the same to them for settlement recommendations. Plaintiffs' lawyers generally are as well satisfied with discovery as are the defendants' lawyers. The procedure provides them with a means of investigation which allows them to compete with the larger firms which have at their disposal independent means of investigation. To the firm which already has more cases than it can conveniently try, it affords a way to dispose of some of them and to collect fees, without needlessly protracted litigation. The lawyer who is prosecuting what he regards as a good case is glad to have his client examined with a view to obtaining a favorable settlement.

An oral examination for discovery affords as simple a way of arriving at the truth in automobile accident cases as could be had under any administrative tribunal. It has all of the elements of informality, avoidance of the ultra-technical rules of evidence, and general conciliation features, which any of the existing workmen's compensation plans affords. And it has the advantage that it is more easily adapted to, and supervised by, the existing judicial organization. It is integrated with the regular structural plan of the courts, and the business of lawyers, rather than being a separate system in itself. While possessing many of the advantages of extra-judicial procedure, it has less disadvantages.

The report of the Massachusetts Special Commission to Study Compulsory Motor Vehicle Insurance is of significance in this regard. Its recommendation is the more interesting in view of the fact that a majority of the commission were laymen. As an item in its discussion of the relation of court procedure to the compulsory automobile insurance situation, the commission stated: "Having thus suggested a prompt, informal and fair method of settling honest claims of those who wish them thus settled, with or without the assistance of lawyers, we now
turn to the matter of procedure for dealing with claims of parties who are not willing to submit to such judicial arbitration. These claims may be honest, or they may be false or exaggerated. How shall they be sifted out so that each may receive such, and only such, consideration as the facts merit? It is a commonplace, in the discussion of the administration of the criminal law, to say that a prompt hearing and disposition of a case while the evidence is fresh, and before the whole story is stale, is the most important object to be attained as a deterrent to crime. In our opinion this same promptness of investigation, hearing and disposition is essential in dealing with automobile accidents and unwarranted claims arising out of them.

"As pointed out by the Judicature Commission in its final report of 1920, Bentham a century ago criticized the orthodox methods of inquiry in many legal proceedings as 'epistolary' as distinguished from the stronger and more direct 'confrontatory' method which he advocated. Now, after a suit is brought, we have had for many years an 'epistolary' method by which each party may examine the other by written interrogatories to be answered in writing. While this system is useful and has been much used, it is cumbersome, it takes up a large amount of time and effort upon the part of the judges in passing upon objection to certain interrogatories before they are answered, and it has the weakness of an astute, and sometimes evasive, question and answer writing contest between the lawyers over the signatures of their clients, with a view to getting as much and giving as little information as their respective consciences will allow. In some other states they have more direct methods, and the Judicature Commission called attention particularly to the statute of New Hampshire which allows each party to take the oral deposition of the other party and of witnesses at any time after suit is brought. These deposi-
tions are taken, like the deposition of any witness under our own practice, upon notice to the other party, and may be used at the trial unless the other party produces the witness. Our practice allows such examination only of witnesses who are more than thirty miles from the place of trial, or who are so ill as to be unlikely to be able to attend the trial, and they cannot be used at the trial unless the illness or other reason for taking them still continues. We have no provision for an oral examination of the parties to the case until the actual trial is reached, which, as already pointed out, may be several years after the accident, when the memory of everybody may have been dulled, or unduly stimulated, to such an extent as to create more controversy than would arise if the story could be obtained under oath at an earlier period.

"Now we believe that the apparent frequency of unwarranted or exaggerated claims in connection with automobile accidents in Massachusetts today under our law is such as to demand the experiment, in that branch of litigation, of machinery for the prompt oral examination of parties and witnesses to the suit similar to the machinery which they have in New Hampshire. • • • It seems to us that the opportunity given to either party to examine the other and witnesses orally after suit is brought is the first necessary method of sifting the character of claims sued upon." 8

It is important from the standpoint of substantive law to improve the fact-sifting process by adoption of discovery procedure. Of course any device which will simplify legal procedure and help it to assume its proper relation of handmaid rather than mistress to the work of justice, 7 will, to that extent, effect an improvement of substantive law. This is poignantly true of the fact-

selecting process. The exact form in which the facts of a controversy are presented for decision has an important bearing both upon the determination of the rights of the parties in the particular case and also upon the determination of the scope of the authority of the decision under the doctrine of *stare decisis.* If all of the factual details of a controversy are presented, without any discriminating selection of the important facts, the judging function is handicapped by the very multiplicity of data. Not only is it necessary that there be an efficient fact-sifting process, but it is equally necessary that it be indulged prior to the time set for application of the law to the facts, the trial. Otherwise there is danger that the relative importance of particular facts be obscured in the riot of facts.

Discovery has a salutary effect upon the various mechanisms of legal procedure. Especially does it have a vital interrelation to pleadings, both in purpose and in function. The two together effect a division of labor toward a common end, namely, the formulation of the dispute into a justiciable form by disclosing the material controverted facts and eliminating the uncontroverted and unessential facts in each case prior to its final presentation for decision. Discovery procedure and pleading approach the problem from the same basic standpoint: both are equally in harmony with the traditional Anglo-American doctrine of party-formulation of issues. An oral examination for discovery is even more largely extra-judicial in its practical operation than are pleadings. Whatever are the theoretical arguments for the con-

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9 Dean Green has shown convincingly that "the net-work of theory increases in complexity with the multiplicity of data" and that there is accordingly more room for an improper grouping of facts to bolster up a particular theory which has happened to catch judicial fancy. Green, Judge and Jury, p. 25 ff.
trary principle of judicial control of pre-trial practice, the fact remains that under our present court structure the judges already have more than they can do. The practical necessities of the situation make the conservation of judicial energy a more important consideration at present than judicial formulation of issues.

The difficult problem under our present practice of pleading has been to determine just where to draw the distinction between facts, law and evidence. The distinction, it has been pointed out, is one of degree only, the "real problem" being "how specific must the pleader be?" With an adequate system of compelling discovery this problem vanishes, for when a party can obtain notice of all the facts by discovery he is not likely to complain that too small a percentage of the disclosure is effected by the pleadings. Likewise the issue-forming function of pleading can more conveniently be made secondary to the notice-giving function, as it should be, when some auxiliary is provided to eliminate unessential facts. Indeed, discovery has been recognized in England as a necessary complement of simplified pleading. A fortiori it has been recognized as an absolute necessity by the advocates of what is known as notice pleading. Not only in Anglo-American procedure but in the Continental systems as well there has been a recognition of the need for some such auxiliary to pleadings. The words of a prominent student of comparative procedure and of continental procedure in particular, Judge Gustaf Fahlcrantz, of Stockholm, Sweden, before the Universal Congress of Lawyers and Jurists in 1904 are significant in this regard: "But in order to avoid useless controversy and to keep the whole case most closely to the

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10 Cf. Cook, Statements of Fact in Pleading under the Codes, 21 Col. L. Rev. 416.
11 Clark on Code Pleading, 155.
12 Rosenbaum, Rule-Making Authority, 72.
actual issues, there is need at the very outset of the lawsuit to require the parties to state the true facts. In addition to the pleadings it is necessary to give the right to the parties to make interrogatories to be answered by the opponent under oath or under legal responsibility along with discovery and inspection of documents. And I take the liberty to consider such a right of the parties, or the exercise of that right of theirs, as a very part of the pleadings or a necessary appendix to them, because without that the pleadings must frequently be void of their proper effect and illusory."  

Pleading alone has never furnished an adequate basis of preparation for trial. Any formal process like written pleading has a natural tendency to become formalistic and even ritualistic. The natural tendency of lawyers, as of human beings generally, is to adopt the easiest course, and this accentuates the ineffectiveness of pleadings as a fact-sifting device. Why not, therefore, let pleadings assume the very character which it is their tendency to assume, namely, a mere preliminary forecast of the issues, and supplement them by a more workable fact-sifting device? There is abundant evidence that discovery aids in reducing and clarifying the issues. New Hampshire lawyers said that the simple pleadings in use in the state were made possible largely by the discovery practice. Ontario trial judges say the same is true under their practice. They say that they are able to come to the trial of many cases without ever having read the pleadings; that by the use of discovery the issues are so narrowed down that it will suffice to simply ask the lawyers at the opening of the trial: "Well, what's the dispute about?" While Wisconsin lawyers are rather indefinite about this particular contribution of discovery to the administration of justice it is a noticeable fact that pleadings are less technical than in many other states.

Under the Massachusetts written interrogatory practice it is possible to point to one way by which discovery affects the pleadings. Under the prevalent practice in Boston of having printed forms for the defendant to use, containing a general denial and pleas that the plaintiff was contributorily negligent and that the automobile was operated by a person without authority from the defendant, it sometimes happens that the defendant files such a form without really intending to press all of these matters. Cases of record were found in which interrogatories had brought to light exactly which of these items the defendant did intend to rely upon. In this connection the words of the Massachusetts Judicature Commission are significant: "The discussion of pleading naturally leads to the consideration of methods of defining issues before trial which the earlier technical system of pleading was intended to accomplish, and which the present looser system does not accomplish."

While there is this salutary effect on the pleading stage when a full discovery before trial is allowed, exactly the reverse may be true under a partial discovery before trial. Since the defendant can have no discovery except on his affirmative defenses in New York he often puts in fictitious defenses for the sole purpose of securing an examination of his adversary. Indeed, several New York lawyers pointed to this as one of the chief defects of the present New York system of discovery.

Discovery relieves the trial machinery in at least two distinct ways. It furnishes a means of eliminating a large number of non-meritorious cases and of settling others so that they are not allowed to reach the already overcrowded trial dockets. By eliminating such cases greater guaranty is given that meritorious cases will be accorded an expeditious trial. Discovery serves to pre-

pare the form of the controversy, in the cases which merit a trial, so that the trial proper can be expedited. The trial is expedited in proportion to the measure of clarity in the definition of the issues and freedom from all elements of surprise. As the element of surprise, which is the psychological child of trial by battle, is eliminated, the expectation of trials becoming more nearly business-like meetings is realized. There is no better way to prevent such surprise than by allowing a dress-rehearsal before the trial. The commissioners who drew up the first New York Code of Procedure set forth still another way in which discovery aids in the trial of cases: "One of the great benefits to be expected from the examination of the parties is the relief it will afford to the rest of the community in exempting them, to a considerable degree, from attendance as witnesses, to prove facts, which the parties respectively know, and ought never to dispute, and would not dispute if they were put to their oaths. To effect their object, it should seem necessary to permit the examination beforehand, that the admission of the party may save the necessity of a witness." 16

The practical operation of discovery procedure is rather interesting in light of the widespread demand for liberalization of the rules of evidence. One of the attractions of procedure before administrative tribunals is the relative freedom from the more technical rules of evidence. Discovery examinations and examinations before administrative tribunals exhibit similar conditions in this respect. In both instances the norm which lawyers keep in mind is the general law of evidence, but in both instances there is a practical disregard of the more technical rules. Yet there is this difference in the case of discovery: while there is freedom in finding the truth, there may be limitation upon use of the truth found, for it may subsequently be non-usable at the trial if it fails

16 Report of Commissioners on Practice and Pleading (1848) p. 244.
to comply with the various rules of evidence. In this way a happy compromise is effected between the two schools of thought to which, respectively, the rules of evidence are either nonsense or the height of wisdom.

A noticeable tendency in the reform of appellate procedure is to allow a broader scope of review of the controverted facts by the appellate court. Can this not prove more practicable when some way has been found to forever dispose of the uncontroverted and unessential facts at the beginning of the litigation so that they may not later be resurrected to confuse the issues on appeal? Cannot our appellate courts afford to spare the time necessary to review more thoroughly a few contested questions of fact? Is not the present limitation upon the scope of review maintained partly because the fact-range in the cases which are appealed is unnecessarily broad? Discovery also offers a means of reducing the size of the record on appeal. When the issues are not clarified and reduced before trial the transcript of testimony becomes unnecessarily large and the expense incident thereto becomes unnecessarily great. Dress-rehearsals before trial in the form of discovery examinations should make it possible to eliminate unnecessary circuity and prolixity in interrogation at the trial. To this extent the size of the transcript of testimony is reduced.

Not only has discovery procedure improved the general administration of justice, but it has also contributed to the practical needs of the lawyer and the court. Lawyers in jurisdictions in which the device has been thoroughly tested say that it has been advantageous to their personal interests as well as to the larger interests of justice. Interviews with several hundred lawyers in thirteen representative jurisdictions as well as correspondence with lawyers in fifteen other jurisdictions indicate that the bar favors allowance of an oral examination for discovery before trial, co-extensive in scope
with an examination at the trial, and available to both parties equally. In states where a partial discovery only is allowed [partial because: (a) not an equal discovery, (b) not a discovery as to all of the issues of the controversy, or (c) written interrogatories are the means of obtaining the discovery] there is a sharp division of opinion among the lawyers as to the merits of the procedure. The basic reasons why a full and equal discovery is acceptable to lawyers are that it furnishes a means of thorough preparation for trial, and that it makes possible the disposal of many cases without protracted litigation, the collection of fees earlier, and the handling of a greater volume of litigation.

The work of the judge is simplified in the states which employ an oral examination before trial. A considerable part of the pre-trial machinery for the formulation of the terms of the controversy becomes extra-judicial in practical operation. A great many cases are eliminated before they ever reach the trial dockets. The greater clarity in the definition of the issues and the elimination of elements of surprise expedites the actual trial in cases which must be tried. In many respects, therefore, discovery has made a vital contribution to the general administration of justice.
APPENDIX

STATUTORY PROVISIONS ON DISCOVERY IN THE VARIOUS JURISDICTIONS

United States Federal Courts

There is the following provision for discovery before trial in the federal equity courts:

"The plaintiff at any time after filing the bill and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause, with a note at the foot thereof stating which of the interrogatories each of the parties is required to answer. But no party shall file more than one set of interrogatories to the same party without leave of the court or judge.

"If any party to the cause is a public or private corporation, any opposite party may apply to the court or judge for an order allowing him to file interrogatories to be answered by any officer of the corporation, and an order may be made accordingly for the examination of such officer as may appear to be proper upon such interrogatories as the court or judge shall think fit.

"Copies shall be filed for the use of the interrogated party, and shall be sent by the clerk to the respective solicitors of record, or to the last known address of the opposite party, if there be no record solicitor."
"Interrogatories shall be answered, and the answers filed in the clerk's office, within fifteen days after they have been served unless the time be enlarged by the court or judge. Each interrogatory shall be answered separately and fully and the answers shall be in writing, under oath, and signed by the party or corporate officer interrogated. Within ten days after the service of interrogatories, objections to them, or any of them, may be presented to the court or judge, with proof of notice of the purpose so to do, and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. In so far as the objections are sustained, answers shall not be required.

"The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary. Any party failing or refusing to comply with such an order shall be liable to attachment, and shall also be liable, if a plaintiff, to have his bill dismissed, and if a defendant, to have his answer stricken out and be placed in the same situation as if he had failed to answer.

"By a demand served ten days before the trial, either party may call on the other to admit in writing the execution or genuineness of any document, letter or other writing, saving all just exceptions; and if such admission be not made within five days after such service, the costs of proving the document, letter or writing shall be paid by the party refusing or neglecting to make such admission, unless at the trial the court shall find that the refusal or neglect was reasonable." 1

The chief difficulties in the practical operation of the federal equity discovery practice have been said to be

that answers to interrogatories are usually so evasive as not to give the desired disclosure and that the burden of administration upon the trial courts is very heavy. Learned Hand, J., has said concerning the practice that, "Much the more convenient way would be for the parties to agree upon a master and allow the plaintiff an oral examination. This, however, I cannot compel; but much the same result may probably be obtained, though it must be confessed with the maximum of expense and time and labor, by allowing interrogatories to be renewed as often as justice requires." 

There is no provision for discovery in the law side of the federal courts. Nor do the federal statutes on depositions offer great possibilities in this regard. The federal statutes on depositions, from the original act of 1789 to the present time, always have made the right to take depositions conditional. The provision which obtains at present is as follows:

"The testimony of any witness may be taken in any civil cause depending in a district court by deposition de bene esse, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any clerk of a district court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reason-
able notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases in rem, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

The following federal statute was enacted in 1892: "In addition to the mode of taking the depositions of witnesses in causes pending at law or equity in the district courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held." The Supreme Court has held that this statute merely regulates the mode of taking and does not enlarge the grounds for taking so as to allow examinations before trial for purposes of discovery in accordance with local practice.

Judge Woolsey, of the District Court for the Southern District of New York recently made a vigorous criticism

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6 Hanks Dental Association v. International Tooth Crown Co. (1904) 194 U. S. 303. There has been some confusion in the decisions of the lower federal courts on this matter in spite of the Supreme Court ruling. See annotations to U. S. C. A., Tit. 28, secs. 635, 643.
of a federal rule as to discovery. He said: "In a former case I had occasion to express my regret that, after the commencement of an action on the law side of this court, so little could be done to facilitate the preparation of either party for the trial.

"That at this date the practice on the law side of the federal courts should be so lacking in plasticity with regard to interlocutory remedies seems extraordinary, when it is remembered that under the procedure in almost all the states, through examination before trial or otherwise, the plaintiff can secure evidence and documents in advance which he can use at the trial, and also that throughout the British Empire, including all its dominions, India and the Crown Colonies, every paper or letter, even remotely connected with a case, must, unless privileged, be discovered to the opposing party and remain available to him pendente lite that he may, if he wishes, offer it at the trial. It is unfortunate that the practice of automatic compulsory discovery is not in force here. *

"In view of several illuminating experiences which I have had in cases pending in the English courts, I feel hospitable to every form of interlocutory discovery. *

"The rationale of this attitude is, of course, not only that the court wants to know the truth, but also that it is good for both parties to learn the truth far enough ahead of the trial not only to enable them to prepare for trial, but also to enable them to decide whether or not it may be futile to proceed to trial. The number of cases which have been dropped before trial owing to the rigorous discovery practiced in the English courts is, I understand, almost unbelievable.'" 7

There is the following federal statute regarding production of books and writings:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

For more than a century trial courts disagreed as to whether this statute authorized inspection before trial or was limited to production at the trial, but the United States Supreme Court finally decided that only production at the trial was authorized.

Alabama.

There is the following provision for examination of parties by written interrogatories, in both law and equity actions in Alabama:

"Either party to a civil suit, whether in a court of law, or in a court of equity, and including proceedings on contest of answer of a garnishee, his agent or attorney, desiring the testimony of the other party, may file with the clerk or register interrogatories to be propounded to him, with an affidavit that the answers thereto will be material testimony for him in the cause.

"Upon the filing of such interrogatories, the clerk or register must issue a copy thereof, which must be served by the sheriff upon the party to whom the interrogatories are addressed, or his attorney of record, if either resides within the state. If such party and his attorney

9 Carpenter v. Winn (1911) 221 U. S. 533.
are non-residents, the clerk or register must send such copy by mail, postage prepaid, to one of them at his place of residence. The sheriff, clerk or register, as the case may be, must endorse upon the original interrogatories the fact, manner, and date of such service.

"The answers to such interrogatories may be sworn to before any officer authorized to take and certify affidavits; or if the party testifying be a nonresident, before one of the officers mentioned in section 7761 (3965) of this code, or a commissioner appointed by the clerk or register on the application of such party.

"When the party to whom the interrogatories are addressed is a corporation, the answers thereto must be made by such officer, agent, or servant of the corporation as may be cognizant of the facts.

"The answers to such interrogatories are evidence in the cause when offered by the party taking them.

"If the interrogatories are not pertinent to the issue or matter in dispute between the parties, there shall be no obligation to answer them, and if answered, the answers may be suppressed by the court at the trial.

"If answers to the interrogatories are not filed within sixty days after service of a copy of the interrogatories, or when the answers are not full, or are evasive, the court may either attach the party and cause him to answer fully in open court, or tax him with so much costs as may be just, and continue the cause until full answers are made, or direct a nonsuit or judgment by default or decree pro confesso, to be entitled, or render such judgment or decree as would be appropriate if such defaulting party offered no evidence.

"A resort to this mode of obtaining evidence does not preclude the party calling for it from adducing other proof of the same facts, or from contradicting it.

"Under the provision of this article, the party is bound to answer all pertinent interrogatories unless by the answers he subjects himself to a criminal prosecution.
The party may be required by the court to attach to his answers copies of letters and documents, the originals of which are in his possession or under his custody or control.

"If the court does not, of its own motion, enforce the penalties for failure to answer interrogatories, as is required by section 7770 (4055) of this Code, the party propounding the interrogatories, on failure of the other party to answer within sixty days, may file his motion with the judge of the circuit court for the enforcement of the penalties provided by statute after notice for ten days given to the opposite party so in default; and upon the hearing of such motion, the court may enforce the penalties, as is provided for in section 7770 of the Code." ¹⁰

Alabama has the illiberal type of deposition statute which imposes conditions as to the unavailability of the witness upon the taking rather than upon the use merely:

"The evidence of witnesses in civil cases may be taken by deposition by either party—

1. When the witness is a woman.

2. When the witness, from age, infirmity, or sickness, is unable to attend court.

3. When the witness resides more than one hundred miles from the place of trial, computing by the route usually traveled, or resides out of, or is absent from the state.

4. When the witness is about to leave the state, and will probably not return until after the trial.

5. When the claim or defense, or a material part thereof, depends exclusively on the evidence of the witness.

6. When the witness is the governor, secretary of state, state treasurer, state auditor, attorney-general, superintendent of education, commissioner of agriculture and industries, examiner of public accounts, or the head

of any other department or bureau of the state government, judge or clerk of any court of record, register in chancery, or sheriff; or president, director, or other officer of a bank incorporated in the state; postmaster or other officer of the United States; or practicing physician or lawyer; or a person constantly employed on any steamboat or other water craft, or on any turnpike, or manufactory, or about the engine or other machinery of a railroad, or is a superintendent, secretary, treasurer, master of road repairs, or conductor of any railroad, or is a telegraph operator; or a teacher of a public or private school actually engaged in teaching, or a minister of the gospel, or pastor of a religious society in charge of any diocese, parish, church, district or circuit.''

There is the following statutory provision on production of books and writings:

"In the trial of actions at law the court may, on motion and due notice thereof, require the parties to produce books, documents or writings in their possession, custody, control or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery cases.

"If plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if the defendant fails to comply with such order, the court may, on motion, give judgment against him by default." \(^{11}\)

Arizona.

There is the following provision in Arizona for taking the deposition of the opposite party:

"Either party to an action may take the deposition of the opposite party as a witness, or if a corporation, the deposition of the president, secretary, or other principal officer or general managing agent of such corporation, in

\(^{11}\) Id. secs. 7744, 7745.

\(^{12}\) Id. sec. 7744.
the manner and by the same process, and subject to the same rules, provided for the taking of depositions of other witnesses. The party taking such depositions shall not be concluded thereby, but may rebut the same, and may ask leading questions. The right to take such deposition is absolute and not dependent upon the residence of the person whose deposition is to be taken or upon sickness, infirmity, or attendance of such person upon the trial. If a party refuses to answer, the officer taking the deposition shall so certify and any question which the party refuses to answer or which he answers evasively shall be taken as confessed."

There is the following provision for inspection of books and papers:

"The court in which an action is pending, may order either party to give to the other with a specified time an inspection and copy, or permission to take a copy, of any book, document or paper in his possession or under his control, containing evidence relating to the action. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence, or may presume it to be such as the party applying alleges it to be; and may also punish the party refusing, for a contempt. This section shall not prevent a party from compelling another to produce books, papers or documents when he is examined as a witness. In an action by or against a corporation the court may compel the officers of the corporation to produce the books and records of the corporation, and to permit inspection and the making of copies thereof."

Arkansas.

Arkansas has the following provision for interrogatories annexed to pleadings in equity actions:

"In actions by equitable proceedings either party may annex to his complaint, answer or reply written interro-

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14 Id. sec. 4465.
atories to any one or more of the adverse parties con-
cerning any of the material matters in issue in the action; 
the answers to which, on oath, may be read by either 
party, as a deposition between the party interrogating 
and the party answering."  

There is a limited provision for interrogatories in ac-
tions at law: 

"In actions by proceedings at law either party may, in 
like manner, annex written interrogatories to his com-
plaint, answer or reply, directed to any one or more of 
the adverse parties concerning any material matter in 
issue in the action in the following cases: First. Where 
the party interrogated does not reside in the same or an 
adjoining county. Second. Where the party inter-
rogated is unable to attend court on account of age, in-
firmity or imprisonment, or is a female."  

Arkansas has the liberal type of deposition statute 
which imposes conditions upon the use rather than the 
taking: 

"Depositions may be used on the trial of all issues, and 
upon all motions in actions by equitable proceedings, 
except where the court otherwise directs on an issue tried 
by a jury. 

"They may be used on the trial of all issues in any 
action in the following cases: 

"First. Where the witness does not reside in the 
county where the action is pending, or in an adjoining 
county, or is absent from the state, or is in the military 
service of the United States, or of this state. 

"Second. Where the witness is the governor, secre-
tary of state, auditor or treasurer of this state, a judge 
or clerk of a court, a president, cashier, teller or clerk 
of a bank, a practicing physician, surgeon or lawyer, or 
keeper, officer or guard of the penitentiary."

16 Id. sec. 1252.
"Third. Where, from age, infirmity, or imprisonment, the witness is unable to attend court, or is dead.

"Fourth. Where the witness resides thirty or more miles from the place where the court sits in which the action is pending, unless the witness is in attendance at the court."  

Arkansas lawyers say that very little use is made of deposition procedure for purposes of discovery before trial. There is a statute which authorizes the court to compel production of books and papers at the trial but not before the trial.  

California.

Discovery by deposition is authorized in California by the following statute:

"The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

"1. When the witness is a party to the action or proceeding or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

"2. When the witness resides out of the county in which his testimony is to be used, or resides in the county but more than fifty miles distant from the place of trial or hearing by the nearest usual traveled route;

"3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

"4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend;

"5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required;"

17 Id. secs. 4205, 4206.
18 Id. sec. 4137.
"6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause." 19 It should be noted that the California plan constitutes virtually a compromise between the liberal type of deposition statute which allows unconditional taking of depositions of parties and witnesses alike and the illiberal type of statute which imposes conditions upon the taking of depositions of parties and witnesses alike. There is an absolute right to take the deposition of a party and a conditional right to take the deposition of witnesses generally. 20

The following provision is made for inspection of writings:

"Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness." 21

Correspondence with lawyers in Los Angeles and in San Francisco indicates that discovery procedure is

20 For a description of the California practice see Harkleroad, The Law of Discovery in the Courts of California, 4 Southern Cal. L. Rev. 169, 185.
21 Code of Civ. Pro. (Deering, 1931) sec. 1000.
widely used. Several lawyers said that they use it as of course in practically all cases. Others said that one party or the other takes depositions for discovery in more than three-fourths of all seriously contested actions. Satisfaction with the procedure appears to be general.

Colorado.

The Colorado plan for discovery before trial is modeled after that used in California. The statutes provide that:

"The testimony of a witness in this state may be taken by deposition in an action, at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

"First. When a witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

"Second. When the witness resides out of the county in which his testimony is to be used.

"Third. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

"Fourth. When the witness, otherwise liable to attend the trial, is, nevertheless, too infirm to attend.

"Fifth. When the witness is for any other cause expected to be unable to attend the trial."

Inspection and copy of documents is authorized by the following statute:

"Any court in which an action is pending, or a judge thereof, may upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document or paper in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused,
the court may exclude the book, document or paper from being given in evidence; or if wanted as evidence, by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness.”

Connecticut.

The following statutory procedure for discovery before trial exists in Connecticut:

“In any civil action in the superior court, any court of common pleas or any city court, the plaintiff at any time after entry of action, and the defendant at any time after answer, may file a motion praying for a disclosure of facts or production of papers, books or documents material to the support or defense of the suit, within the knowledge, possession or power of the adverse party, and such facts, papers, books or documents, being disclosed or produced, may be given in evidence by the party filing such motion. Upon affidavit being made by the person filing such motion, that he verily believes all the matters therein set forth to be true, the person of whom such disclosure or production is sought shall plead, answer or demur in such time as the court shall prescribe. If interrogatories shall be filed with such motion, each interrogatory shall be answered separately and fully and the answers shall be in writing, signed by the party and upon his oath. If a party shall fail to comply with such order of disclosure or production, he shall be nonsuited or defaulted; and, upon motion to set aside such nonsuit or default, the court may grant the motion upon compliance with such terms as it may impose.

“If a corporation shall be a party to an action, the opposite party may examine the president, treasurer,
secretary, clerk or any director or other officer thereof in the same manner as if he were a party to the suit.

"In the conduct of any hearing or trial, a party interrogated shall not be obliged to answer a question or produce a document the answering or producing of which would tend to incriminate him or to disclose his title to any property the title whereof is not material to the hearing or trial in the course of which he is interrogated, and the right to refuse to answer a question, produce a document or disclose a title may be claimed either by the party interrogated or by counsel in his behalf.

"When either party in any action shall have obtained from the other party a disclosure on oath, respecting the matters alleged in any pleading, the disclosure shall not be deemed conclusive, but may be contradicted like any other testimony." 24

This procedure is very clumsy and ineffective and little used by the bar. The Connecticut Judicial Council recently has suggested a revision to make it more effective.25 Connecticut has the illiberal type of deposition statute which imposes conditions upon the taking of depositions as well as upon the use thereof at the trial:

"If any witness in a civil action shall live out of the state or more than twenty miles from the place of trial, shall be going to sea or out of the state or, by reason of age or infirmity, shall be unable to travel to court, or shall be confined in jail, his deposition may be taken by a judge or clerk of any court, justice of the peace, notary public or commissioner of the superior court; but reasonable notice shall be given to the adverse party or his known agent or attorney, or left at his usual place of abode, to be present at the time of taking such deposition; and depositions may be taken in any other state or country by a notary public, a commissioner appointed

by the governor of this state or any magistrate having
power to administer oaths and, if taken out of the United
States, before any foreign minister, secretary of lega-
tion, consul or vice-consul, appointed by the United
States, or any person by him appointed for the purpose
and having authority under the laws of the country
where the deposition is to be taken; and the official char-
acter of any such person may be proved by a certificate
from the secretary of state of the United States. All
witnesses giving depositions shall be cautioned to speak
the whole truth, and carefully examined, and shall sub-
scribe their depositions, and make oath before the au-
thority taking the same, who shall attest the same and
certify whether or not the adverse party or his agent was
present, and whether or not he was notified, and shall
also certify the reason of taking such deposition, seal it
up, direct it to the court where it is to be used and
deliver it if desired to the party at whose request it was
taken." 86

Delaware.

The illiberal type of deposition statute which imposes
conditions upon the taking as well as the use obtains in
Delaware:

"If it appear, by affidavit, that there is a material
witness residing out of the County, whose attendance it
is not practicable to procure, the justice may make a
rule that his deposition be taken before a commissioner
named by him; and, unless it shall be otherwise agreed,
the party applying for such rule shall file in writing all
the questions to be put to such witness, giving at least
four days' notice to the other party, who may file other
questions. The justice shall forward a copy of the rule
and the questions to the commissioner, with a copy of
this section. The deposition must be taken in writing,
signed by the witness, certified by the commissioner, and

sent, sealed up, to the justice. The witness must first be sworn, or affirmed, by the commissioner, to answer the questions truly; neither party shall be present at the taking of deposition, and no question shall be put but those sent by the justice.” 27

The statute on production of books and writings is as follows:

"At any time during the pendency of actions at law, the court, on motion and due notice thereof, may order a party to produce books, or writings, in his possession, or control, which contain evidence pertinent to the issue, under circumstances in which the production of the same might be compelled by a court of chancery; and the court making such order, shall have the same power for enforcing it which is exercised by a court of chancery in like cases. Upon failure of a plaintiff to comply with such order, the court, on motion, may render judgment against him as in cases of nonsuit; and upon a like failure of a defendant, the court, on motion, may render judgment against him by default.” 28

**England.**

Order XXXI of the rules of the Supreme Court outline the present English procedure in regard to discovery and inspection. Order XXXI reads as follows:

"In any cause or matter the plaintiff or defendant by leave of the court or a judge may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwith-

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28 Id. sec. 4228.
standing that they might be admissible on the oral cross-examination of a witness.

"A copy of the interrogatories proposed to be delivered shall be delivered with the summons or notice of application for leave to deliver them at least two clear days before the hearing thereof (unless in any case the court or judge shall think fit to dispense with this requirement) and the particular interrogatories sought to be delivered shall be submitted to and considered by the court or judge. In deciding upon such application, the court or judge shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to any matter in question, and leave shall be given as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs.

"In adjusting the costs of the cause or matter inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

"If any party to a cause or matter be a body corporate or a joint-stock company, whether incorporated or not, or any other body of persons, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation, company, or body, and an order may be made accordingly.

"Any objection to answering any one or more of several interrogatories on the ground that it or they is or
are scandalous or irrelevant or not bona fide for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

"Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as a judge may allow.

"If any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by viva-voce examination, as the judge may direct.

"Any party may, without filing an affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may, in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

"The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned he objects to produce.

"On the hearing of any application for discovery of documents the court or judge in lieu of ordering an
affidavit of documents to be filed may order that the party from whom discovery is sought shall deliver to the opposite party a list of the documents which are or have been in his possession, custody or power relating to the matters in question. Provided that the ordering of such list shall not preclude the court or judge from afterwards ordering the party to make and file an affidavit of documents.

"It shall be lawful for the court or a judge, at any time during the pendency of any cause or matter, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such cause or matter, as the court or judge shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

"Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice, in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

"The party to whom such notice is given shall, within two days from the receipt of such notice, if all the documents therein referred to have been set forth by him in
the affidavit, or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within four days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground.

"If the party served with notice omits to give such notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his solicitor, the court or judge may, on the application of the party desiring it, make an order for inspection in such place and in such manner as he may think fit: Provided that the order shall not be made when and so far as the court or a judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

"Any application to inspect documents, except such as are referred to in the pleadings, particulars, or affidavits of the party against whom the application is made, or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The court or judge shall not make such order for inspection of such documents when and so far as the court or judge shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

"An order upon the lord of a manor to allow limited inspection of the court rolls may be made on the appli-
cation of a copyhold tenant, supported by an affidavit that he has applied for inspection and that the same has been refused.

"Where inspection of any business book is applied for, the court or a judge may, if they or he shall think fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations, or alterations. Provided that, notwithstanding that such copy has been supplied, the court or a judge may order inspection of the book from which the copy was made.

"Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

"The court or a judge may, on the application of any party to a cause or matter at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any particular document or documents or any class or classes of documents specified or indicated in the application, is or are, or has or have at any time been, in his possession, custody or power; and, if not then in his possession, custody or power when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had in his possession, custody or power the particular document or documents or the class or classes of documents specified or indicated in the application,
and that they relate to the matters in question in the cause or matter, or to some or one of them.

"If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court or a judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the cause or matter, or that for any other reason it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

"If any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall be liable to attachment. He shall also, if a plaintiff, be liable to have his action dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating may apply to the court or a judge for an order to that effect, and an order may be made accordingly.

"Service of an order for interrogatories or discovery or inspection made against any party on his solicitor shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that he has had no notice or knowledge of the order.

"A solicitor upon whom an order against any party for interrogatories or discovery or inspection is served under the last preceding rule, who neglects without reasonable excuse to give notice thereof to his client, shall be liable to attachment.

"Any party may, at the trial of a cause, matter, or issue, use in evidence any one or more of the answers or
any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always, that in such case the judge may look at the whole of the answers, and if he shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, he may direct them to be put in.

"Any party seeking discovery by interrogatories or otherwise may be ordered upon making application for discovery to pay into court to a separate account in the action to be called 'Security for Costs Account,' to abide further order the sum of 5l., or any less sum, and may be ordered further to pay into court such additional sum as the court or a judge shall direct. If security be so ordered the party seeking discovery shall, with his interrogatories or order for discovery serve a copy of the receipt for the said payment into court, and the time for answering or making discovery shall in such cases commence from the date of such service, and the party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment if so ordered has been made.

"Unless the court or a judge shall at or before the trial otherwise order, the amount standing to the credit of the 'Security for Costs Account' in any cause or matter, shall after the cause or matter has been finally disposed of be paid out to the party by whom the same was paid in on his request, or to his solicitor on such party's written authority, in the event of the costs of the cause or matter being adjudged to him, but in the event of the court or judge ordering him to pay the costs of the cause or matter, the amount in court shall be subject to a lien for the costs ordered to be paid to any other party.

"If after a cause or matter has been finally disposed of, by consent or otherwise, no taxation of costs shall be required, the taxing officer or Master (as the case may
be) may, either by consent of the parties, or on being satisfied that any party who has lodged any money to the 'Security for Costs Account' in such cause or matter has become entitled to have the same paid out to him, give a certificate to that effect, which certificate shall be acted on and have effect in all respects as if the same had been an order made in the said cause or matter.

"In any action against or by a sheriff in respect of any matters connected with the execution of his office, the court or a judge may, on the application of either party, order that the affidavit to be made in answer either to interrogatories or to an order for discovery shall be made by the officer actually concerned.

"This order shall apply to infant plaintiffs and defendants, and to their next friends and guardians ad litem."

The following British jurisdictions have provisions for discovery by written interrogatories which are fashioned after the English procedure:

(1) Australia; (2) British Columbia; (3) New Brunswick; (4) Newfoundland; (5) Nova Scotia; (6) Queensland; (7) South Australia; (8) Victoria.

**Florida.**

Discovery from adverse parties is provided by the following statutes in Florida:

"The courts of this state may, on the trial of causes cognizable before them respectively, upon ten days' notice to the opposite party or his attorney, require the party notified as aforesaid to produce books and other

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29 Annual Practice (1932) Order XXXI.
30 County Court Prac. p. 136 ff.
31 Court Rules (1925) Order XXXI. British Columbia also has provision for an oral examination for discovery.
32 Judicature Act and Rules of Court (1909) Order XXXI. New Brunswick also allows an oral examination for discovery.
34 Judicature Act (1920) Order XXXI.
35 Supreme Court Practice (1921) p. 23.
37 Supreme Court Rules (1916) Order XXXI.
writings in his possession, power or custody, which shall contain evidence pertinent to the issue; and if he shall fail to comply with such order, or to satisfy the court why the same is not complied with, it shall be lawful for the court, if the party so refusing be plaintiff, to give judgment for the defendant, as in case of nonsuit; and if defendant, to give judgment against him by default. The party requiring the production of books or papers as aforesaid shall, in all cases, satisfy the court of their materiality in the cause therein pending.

"In all causes in any of the courts of this state, the plaintiff may, at any time, after filing declaration, or the defendant, after filing plea, deliver to the opposite party, or his attorney, interrogatories in writing upon any matter as to which discovery may be sought, and require such party, or in case of a body corporate, any of the officers of such body corporate, within ten days, to file in the court in which the cause is pending, written answers under oath to such interrogatories. Such answers shall be evidence against, but not for, the party making them. A failure to answer such interrogatories shall be deemed a contempt of court.

"In cases of omission without just cause to answer sufficiently such written interrogatories, the court may, at its discretion, direct an oral examination of the interrogated party as to such points as it may direct, either before the court, or a person to be appointed by the court, and the court may command the attendance of such party for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, and may impose therein such terms as to such examination, and the costs of the application, and of the proceedings thereon and otherwise, as to it shall seem just.

"The deposition taken as aforesaid shall be reduced to writing and returned to and kept in the court in which the proceedings are pending."
"The person taking the examination shall, if required by either party, report to the court the absence or conduct of the person to be interrogated, and the court may make such order as to contempt or otherwise as it may see fit." 88 Florida has the illiberal type of deposition statute which makes the taking conditional. 89

Georgia.

The following provision for discovery is made in Georgia:

"The superior court in equitable proceedings may compel either party to discover facts within his knowledge, beneficial to the other party and material to his case; and this either upon a petition for discovery and relief, or for discovery alone, ancillary to some other civil proceedings. But the party seeking relief may waive discovery, and in such case the defendant's answer is not evidence.

"No party shall be required to discover matters tending to criminate himself, or to expose him to a penalty or forfeiture, nor to make discovery of irrelevant matters, nor the advice of his professional advisers, nor his consultation with them, nor matters relating to his own and not the plaintiff's case; nor can official persons be called on to disclose any state matters of which the policy of the state and the interest of the community require concealment.

"The discovery must be full and free as to all matters of fact of which it is properly sought, and must include the respondent's information and belief. If documents are desired, in defendant's possession or power, he must produce or satisfactorily account for them.

"The discovery must be under oath or affirmation, but may be confined to those points to which special interrogatories are placed in the petition.

89 Id. sec. 4413.
"The answer of a defendant, as to facts within his own knowledge, responsible to the discovery sought, is evidence in his favor, and can be rebutted only by two witnesses, or one witness and corroborating circumstances: Provided, discovery is expressly prayed for in the plaintiff's petition. The petitioner is not bound to read any portion of the answer, except that responsive to the petition. The defendant may read all as pleading. If the petition is for discovery alone, then the whole answer must be read together. And in the latter case the petitioner must pay the cost.

"What is responsive is a question for the court. Any explanation of an admission made, or fact necessarily connected with it, is part of the response. Any matter in avoidance thereof is new matter, and must be proved.

"The answer of one defendant is evidence for another, whenever it states facts against his own interest, and in favor of his co-defendants.

"Discovery may be had from the opposite party, either nominal or real, in any case pending in any court in this state.

"The party seeking such discovery may either subpoena the other party as a witness, or else file interrogatories, and sue out a commission, as in cases provided for other witnesses. In the latter event, the right of cross-examination exists as in other cases.

"And in all cases in any of the courts of this state, where either the plaintiff or defendant is a corporation, either foreign or domestic, public or private, it shall be the right of the opposite party to file, with the clerk of the court where such case is pending, interrogatories directed to the president, secretary, treasurer or other officer or agent of said corporation, and it shall be the duty of the officer or agent named in such interrogatories to sue out a commission directed to himself, and to have said interrogatories executed and returned to the next
term of the court; the opposite party, or his attorney, shall give twenty days’ notice before the sitting of said court, to the attorney of record, or to any officer or agent of such corporation in the county where suit is pending, that interrogatories have been so filed. Said corporation or its agent shall not be required to advance the costs of executing said interrogatories.

"When interrogatories are filed in office, and notice given thereof, it shall be the duty of the party sought to be examined to see to the execution and return of the same before the return term thereof.

"A party failing to appear, without sufficient excuse, when properly subpoenaed, or failing or refusing to answer either orally or to the interrogatories filed, or answering evasively, shall be subject to attachment for contempt, and the court may also dismiss his case if he be plaintiff, or strike his pleas if he be defendant, or give such other direction to the cause as is consistent with justice and equity; and if either party be a corporation, the officer called on to give testimony shall be subject to attachment for contempt upon his failure to answer, and the court may dismiss the case or strike the plea, according as the party corporation may be plaintiff or defendant, upon the failure of any of its officers or agents to give testimony or to execute and return interrogatories as provided by law.

"No party shall be required to testify as to any matter which may criminate or tend to criminate himself, or which shall tend to work a forfeiture of his estate, or which shall tend to bring infamy or disgrace or public contempt upon himself or any member of his family." 40

The Georgia deposition statute imposes conditions as to the availability of the witness for trial upon the taking as well as the use of the depositions.41

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41 Id. sec. 5886.
The following liberal provision on depositions obtains in Idaho:

“In all actions depositions may be taken by either party in vacation or term time; at any time after service of summons, without order of court therefor. They may be used in the trial of all issues, in any action in the following cases:

1. When the witness does not reside in the county, or when he resides in a county adjoining and more than 30 miles from the place of trial, or is absent from the state.

2. When the deponent is so aged, infirm or sick as not to be able to attend the court or place of trial, or is dead.

3. When the depositions have been taken by agreement of parties, or by the order of the court trying the cause.

4. When the deponent is a state or county officer, or judge or a practicing physician, or attorney at law, and the trial is to be had in any county in which the deponent does not reside. In either of the foregoing cases the attendance of the witness can not be enforced.

5. When notice is given fixing the time of taking any deposition on a day in term time, the court, if in session, or the judge thereof in vacation may, on notice given by the adverse party of the time and place of hearing the motion, fix another day for such taking, and the court on the hearing of such motion, may fix the time for such taking, from which there shall be no appeal.”

The following statute provides for inspection of writings:

“Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of account

in any book or of any document or paper in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be, and the court may also punish the party refusing, for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness." 48

Illinois.

The Illinois Chancery Act preserves the ancient method of obtaining discovery before trial, namely, by inserting interrogatories in the chancery bill.44 There is an unconditional right to take depositions of resident witnesses in chancery:

"When the testimony of any witness, residing or being within this state, shall be necessary in any suit in chancery in this state, the party wishing to use the same may cause the deposition of such witness to be taken before any judge, justice of the peace, clerk of a court, master in chancery or notary public, without a commission or filing interrogations for such purpose, on giving to the adverse party or his attorney ten days' notice of the time and place of taking the same, and one day in addition thereto (Sundays inclusive) for every fifty miles travel from the place of holding the court to the place where such deposition is to be taken. If the party entitled to notice and his attorney resides in the county where the deposition is to be taken, five days' notice shall be sufficient." 45

48 Id. sec. 7193.
45 Id. ch. 51, sec. 24.
The illiberal type of deposition statute, however, obtains in actions at law in Illinois:

"And it shall also be lawful, upon satisfactory affidavit being filed, to take the depositions of witnesses residing in this state, to be read in suits at law, in like manner and upon like notice as is above provided, in all cases where the witness resides in a different county from that in which the court is held, is about to depart from the state, is in custody on legal process, or is unable to attend such court on account of advanced age, sickness or other bodily infirmity." 46

There is the following provision for production of books and writings:

"The several courts shall have power, in any action pending before them, upon motion, and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue." 47

Section 32 of the Chicago Municipal Court Act provides for interrogatories in civil cases as follows:

"That the municipal court in any civil suit pending therein, at any time before the trial or final hearing thereof, may permit the filing therein of interrogatories to be answered by any party to such suit or any person for whose immediate benefit such suit is prosecuted or defended, or by the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such suit, at the instance of the adverse party or parties or any of them, and to require an answer under oath to all such interrogatories as the party to be interrogated might be required to answer, if called as a witness upon the trial or hearing of such suit, but the party filing such interrogatories shall not be concluded

46 Id. ch. 51, sec. 25.
47 Id. ch. 51, sec. 9.
by the answers thereto, if he shall elect to introduce the same or any or either of them upon the trial or final hearing.”

**Indiana.**

There are a variety of provisions for discovery before trial under the Indiana practice. There is the following express provision for examination of parties:

“A party to an action may be examined as a witness concerning any matter stated in the pleading(s), at the instance of the adverse party, or of any one of several adverse parties; and, for that purpose, may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify either at the trial, or conditionally, or upon commission.

“The examination, instead of being had at the trial, may be had at any time before the trial, at the option of the party claiming it, before any officer authorized to take depositions, on a previous notice to the party to be examined and any other adverse party of at least five days, unless, for good cause shown, the court orders otherwise. But the party to be examined before the trial shall not be compelled to attend in any other county than that of his residence.

“The attendance of the party to be examined may be enforced, and the examination shall be taken and filed as a deposition, in the cause, and may be read by the party taking it, at his option; but if not read, the party causing the examination shall pay the costs thereof.

“The evidence of the party thus taken may be rebutted by adverse testimony.

“Any party refusing to attend and testify, as above provided, may be punished as for a contempt; and his complaint, answer or reply may be stricken out.”

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48 Gilbert, Municipal Court of Chicago, 294.
Discovery by written interrogatories may also be had by virtue of the following statute:

"Either party may propound interrogatories, to be filed with the pleadings, relevant to the matter in controversy, and require the opposite party to answer the same under oath. And corporations, through their proper officers, agent or agents, shall be required to answer interrogatories as natural persons. All interrogatories must be answered within the time limited, positively and without evasion, and the court may enforce the answers by attachment or otherwise; and the party may, in addition thereto, set forth, in his answers, all relevant matter in avoidance. The answers to the interrogatories may be used on the trial or not, at the option of the party requiring it: Provided, that in the absence of such opposite party, the filing of the interrogatories shall not work a continuance of the cause, unless it be shown to the court, by affidavit, that the party who files such interrogatories expects to elicit facts by the answers material to him on the trial; that he believes such facts to be true; that he can not prove the same by any witness; and that he files the interrogatories, not for delay merely, but to obtain substantial justice at the trial."

The liberal type of deposition statute obtains in Indiana. This allows discovery before trial from witnesses generally as well as from parties. The statute provides:

"In all actions, depositions may be taken by either party, in vacation or term time, at any time after service of summons, without order of court therefor. They may be used in the trial of all issues, in any action, in the following cases:

"First. Where the witness does not reside in the county, or in a county adjoining the one in which the trial is to be held, or is absent from the state.

50Id. sec. 383.
"Second. When the deponent is so aged, infirm, or sick, as not to be able to attend the court or other place of trial, or is dead.

"Third. When the depositions have been taken by agreement of parties, or by the order of the court trying the cause.

"Fourth. When the deponent is a state or county officer, or a judge, or a practicing physician, or attorney at law, and the trial is to be had in any county in which the deponent does not reside. In either of the foregoing cases, the attendance of the witness can not be enforced.

"Fifth. When notice is given fixing the time of taking any deposition on a day in term time, the court may, if in session, or the judge thereof in vacation, on notice given by the adverse party of the time and place of hearing the motion, fix another day for such taking, and the court, on the hearing of such motion, may fix the time for such taking, from which there shall be no appeal." 51

There are the following provisions for production and inspection of books and papers:

"The court, or judge thereof, may, upon affidavit of their necessity and materiality, upon motion, compel, by order, either party to produce, at or before the trial, any book, paper or document in his possession or power; the order may be made upon application of either party, upon reasonable notice to the adverse party or his attorney. If not produced, parol evidence may be given of its contents.

"The court, or a judge thereof, may, under proper restrictions, upon due notice, order either party to give the other, within a specified time, an inspection and copy of any book or part thereof, paper or document in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein.

51 Id. sec. 465.
If compliance with the order be refused, the court, on motion, may exclude such evidence, or punish the party refusing, or both." 

Oral examinations for discovery are quite extensively used in the larger cities of Indiana. Attorneys for railway, traction and insurance companies use discovery as a matter of course. Written interrogatories are employed only when the action is of such a nature as not to justify the expense of an oral examination, or where the action is for a simple debt or account and it is thought that the filing of written interrogatories may encourage a failure to defend, or where it is desired to dispense with mere formal matters of proof.

Iowa.

There is the following provision for interrogatories annexed to pleading:

"Either party may annex to his petition, answer, or reply written interrogatories to any one or more of the adverse parties, concerning any of the material facts in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering." 

There is the illiberal type of deposition statute in Iowa:

"After the commencement of a civil action or other proceeding, if the witness is, or is about to go, beyond the reach of a subpoena, or is for any other cause expected to be unable to attend court at the time of trial, the party wishing his testimony may take his deposition in writing before any person having authority to administer oaths; and if the action is triable by equitable proceedings, then without any other reason therefor either party may so take the deposition of any witness." 

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52 Id. secs. 535, 536.
53 Id. see. 11185.
54 Id. sec. 11358.
The statute on production of books and papers follows:

"The district or superior court may in its discretion, by rule, require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them." 55

**Kansas.**

There are the following provisions for taking depositions in Kansas:

"The deposition of any witness may be used only in the following cases:

"First. When the witness does not reside in the county where the action or proceeding is pending, or is set for trial by change of venue, or is absent therefrom.

"Second. When from age, infirmity or imprisonment, the witness is unable to attend court, or is dead.

"Third. When the testimony is required upon a motion, or in any other case where the oral testimony of the witness is not required.

"Either party may commence taking testimony by deposition at any time after service upon the defendant of summons or the date of first publication of notice.

"In any action now pending or hereafter instituted in any court of competent jurisdiction in this state, any party shall have the right to take the deposition of the adverse party, his agent or employee, and in case the adverse party is a joint-stock association, corporation or copartnership, then of any officer, director, agent or employee of any such joint-stock association, corporation or copartnership, when such adverse party, or officer, director, agent or employee of such adverse party is without the jurisdiction of the court or cannot be reached by the process of the trial court; and in case said adverse party, when duly served with notice of the taking of such

55 Id. sec. 11316.
deposition, as provided by the code of civil procedure for the taking of depositions, shall fail to appear at the place fixed in said notice, which place shall be in the city or county of the usual place of residence or place of business of said witness, and testify and produce whatever books, papers and documents demanded by the party taking such deposition, or shall fail to produce at the time and place specified in such notice such officer, director, agent or employee the court before whom such action is pending may, upon application of the party seeking to take such deposition, and upon notice to the adverse party of such application, and upon hearing had to the trial court, strike the pleadings of such adverse party from the files and render judgment in favor of the party so seeking to take such depositions, in whole or in part, as prayed for in his pleadings."

The Kansas court early ruled that deposition procedure could be used for purposes of discovery before trial. The court reversed itself later and forbade the use of deposition procedure for what it termed "fishing expeditions."

Inspection or copy of documents is provided for in the following manner:

"Either party or his attorney 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 therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it; and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may in their

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57 In re Abeles (1874) 12 Kan. 451.
discretion order the adverse party to give to the other within a specified time an inspection and copy or permission to take a copy of such book, paper or document; and on failure to comply with such order the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying may direct the jury to presume it to be such as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness.'’ 59

**Kentucky.**

Discovery may be had under the ordinary deposition procedure in Kentucky. It is provided that: ‘‘The plaintiff may commence taking depositions immediately after the service of the summons; and the defendant immediately after filing his answer.’’ 60 It is further provided that:

‘‘A party may be examined as if under cross-examination at the instance of the adverse party, either orally or by deposition as any other witness; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony.’’ 61

The Kentucky Court of Appeals has held upon several occasions that discovery before trial is authorized under this procedure.62 The bar of Louisville and of Lexington use the procedure quite extensively but the practice has gained little headway in the smaller towns of Kentucky.

Written interrogatories may be allowed in certain events under the Kentucky statutes:

‘‘In equitable actions, a party may annex to his pleading written interrogatories to the adverse party, concern-
ing any material allegation thereof; and answers there­
to, on oath, may be read by either party, as a deposition
between the party interrogating and the party answering.

"The party answering shall not be confined to respond­
ing merely to the interrogatories, but may state any facts
concerning the cause of action to which the interrog­
atories refer, and they may likewise be read as a deposi­
tion.

"Interrogatories annexed to a petition shall be an­
swered when the party is required to answer the peti­
tion; if annexed to any other pleading, they shall be
answered in twenty days after notice of the filing thereof
shall be given to the adverse party or his attorney; but
if answered twenty days before the term at which the
action stands regularly for trial, the action shall not be
postponed on account of their not being sooner answered.

"In ordinary actions, a party may annex to his plead­
ing written interrogatories to an adverse party concern­
ing any material allegation—

"1. If the party interrogated do not reside within
twenty miles from the place where the action may be
pending.

"2. If the party interrogated be unable to attend
court on account of infirmity or imprisonment, or be a
female." 68

There is the following statute which authorizes pro­
duction of documents:

"The process by which the attendance of a witness is
required is a subpoena. It is a writ directed to the sher­
iff, requiring him to summon the person named therein
to attend at a particular time and place, to testify as a
witness. It may, when the court or the judge thereof so
directs, require the witness to bring with him any book,
writing or other thing, under his control, which he is
bound by law to produce in evidence." 64

68 Ky. Code (Carroll, 1927) secs. 140-143.
64 Id. sec. 528.
Louisiana has a procedure which is called "Interrogatories on Facts and Articles" and which is of similar derivation. There are the following provisions in the code of practice:

"Both plaintiff and defendant are permitted to annex, either to their petition or their answer, interrogatories on facts and articles.

"Interrogatories on facts and articles are questions put in writing, in the form of articles, and annexed to a petition or to an answer, to which one of the parties to the suit prays that the other be ordered to respond, under oath, in order to make use of his answers as testimony in support of his demand, or to aid him in his defense.

"The party interrogated on facts and articles is bound to answer, on oath and categorically, each of the questions put to him, unless he can not do so without confessing himself guilty of some crime.

"Except in the above case, if the party interrogated refuse or neglect to answer, on oath, to all the questions put to him, the facts concerning which he shall have so refused or neglected to answer, shall be taken for confessed, provided that no court shall make an order requiring a female to answer interrogatories on facts and articles, in open court, unless the party propounding them, or his or her agent or attorney, shall make oath, to the materiality of the interrogatories, and that they are not propounded for the purpose or in the hope of having them taken for confessed, but with the bona fide desire to have them truly answered by the party interrogated.

"To enable the defendant to obtain the answer of the plaintiff to interrogatories, he shall subjoin to the interrogatories proposed to be answered, his affidavit of their materiality, and that in his opinion the answer of the plaintiff would assist him in making his defense; but the party interrogated may object in writing to any of the questions as not pertinent, and the judge shall decide
summarily whether he ought to answer or not; if ordered to answer, he must do it, otherwise the facts unanswered will be deemed confessed.

"The party propounding the interrogatories may require the party interrogated to answer in open court, and in his presence, on the day appointed to that effect by the judge, if the party interrogated reside in the parish where the court holds its sittings.

"In all cases where a party interrogated resides out of the parish where the suit is pending, and whether within or without the state, it shall be his duty to file his answer to the interrogatories propounded to him within such period as shall be fixed by the court, on the motion of the party interrogating, and notice of which order, fixing the delay, together with a copy of the interrogatories propounded, shall be served on the attorney representing the party interrogated; provided, that when the party interrogated resides out of the state, his answers shall be taken by commission.

"In answering a question, the party must simply confess or deny the fact. Nevertheless, the party interrogated may state some other facts tending to his defense, provided they be closely linked to the fact on which he has been questioned and an appeal made to his conscience. His declarations, in such case, shall have as much effect as his answer to the question itself.

"The answers of the party interrogated are evidence, but do not exclude adverse testimony, and shall be weighed by the judge as other testimony.

"The party who sues for recovery of a debt, or the execution of an obligation arising from a written act, may be interrogated on the reality or simulation of the act.

"The party wishing to avail himself of the confessions made by the adverse party in his answer to an inter-
rogatory on facts and articles, must not divide them; they must be taken entire."  

**Maine.**

The ancient chancery practice is preserved in actions in equity in Maine:

"If discovery is sought, it may be by bill, with or without interrogatories annexed thereto, for the purpose of such discovery. Answers thereto shall be made within thirty days after the return day of such bill, or within such time as the court orders, and questions arising thereon shall be determined by the rules established by said court as herein provided, and in the absence thereof, by the rules applicable to bills of discovery in equity procedure."

The illiberal type of deposition statute which imposes conditions upon the taking of depositions as well as the use thereof at the trial is provided by the Maine statutes.

There is the following provision for production of books and papers:

"Where books, papers or written instruments material to the issue in any action at law pending in the superior court, are in the possession of the opposite party, and access thereto refused, the court upon motion, notice, and hearing, may require their production for inspection. In case of unreasonable delay or refusal in complying with such requirement the court may order a nonsuit or default as the case may require."

**Maryland.**

The following statute on depositions offers a means of discovery before trial:

"Either party in any action depending in said courts, after due notice to the other party or his attorney, agree-

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67 Id. ch. 121, sec. 4.
68 Id. ch. 96, sec. 23.
ably to such rule as shall be made by the said courts, respectively, may take the deposition of any witness before any of the said commissioners, to be used as testimony on the trial of such action, in case only of the death of such witness, or on proof to the satisfaction of the court of the inability of the party to produce the attendance of such witness at the time of trial and the probable continuance of said inability until and at the next term, before the court shall permit such testimony to be used; and the opposite party shall be entitled to cross-examine any witness whose deposition shall be so taken, or to examine him or her on notice, before the same or any other commissioner.”

There is the following statutory provision for discovery of documentary evidence:

“The court shall have power in the trial of actions at law, on motion made at the first court after the appearance court, supported by affidavit that the same is not intended for delay, and due notice thereof being given, to require the parties to produce copies, certified by a justice of the peace, of all such parts of all books or writings in their possession or power as contain evidence pertinent to the issue, or to answer any bill of discovery only which may be filed by the second court after the appearance court, in cases and under circumstances where they might be compelled to produce said original books or writings or answer such bill of discovery by the ordinary rules of proceeding in chancery, and if a plaintiff shall fail to comply with any such order to produce such books or writings or answer such bill of discovery, it shall be lawful for the said courts on motion to give the like judgment for the defendant as in cases of nonsuit, and if a defendant shall fail to comply with such order to produce books or writings, or to answer any bill of discovery only, it shall be lawful for the court, on motion, as aforesaid, to give judgment against him by

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default; provided, that any plaintiff or defendant may, in compliance with any rule for producing extracts of such books or papers, bring into court the original books or papers."

**Massachusetts.**

The following provision is made in Massachusetts for written interrogatories for discovery:

"Any party, after the entry of a writ or the filing of a bill or petition, may interrogate an adverse party for the discovery of facts and documents admissible in evidence at the trial of the case. The word 'party,' in this section, in sections sixty-two to sixty-five, inclusive, and in section sixty-seven, shall be deemed to include parties intervening or otherwise admitted after the beginning of the suit.

"The answers shall be in writing, on oath, and signed by the party interrogated, who shall, before making answer, make such inquiry of his agents, servants and attorneys as will enable him to make full and true answers to the interrogatories.

"Interrogatories shall be filed in the clerk's office, and notice of such filing, with a copy of the interrogatories, shall be sent by the party interrogating to the party interrogated, or to his attorney of record. If, within ten days after such notice, or in a district court within such less time as the court may by general or special order direct, the party interrogated does not answer the interrogatories, the court shall, upon motion, order the party interrogated to answer such of the interrogatories as it finds proper, within such time as it may fix; but no party interrogated shall be obliged to answer a question or produce a document tending to criminate him or to disclose his title to any property the title whereof is not material to an issue in the proceeding in the course of which he is interrogated, nor to disclose the names of

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70 Id. Art. 75, sec. 106.
witnesses, except that the court may compel the party interrogated to disclose the names of witnesses and their addresses if justice seems to require it, upon such terms and conditions as the court deems expedient. A party shall not interrogate an adverse party more than once unless the court otherwise orders, except as to any new matters disclosed by answers to interrogatories previously filed.

"If a corporation is a party, the adverse party may examine the president, treasurer, clerk or a director, manager or superintendent, or other officer thereof, as if he were a party. If a municipal corporation is a party, the mayor or the chairman of the board of selectmen may be examined as if he were a party, except that no city or town official shall be interrogated concerning matters of public record. If a minor or person under guardianship is a party, the adverse party may examine as if said party were not a minor or under guardianship; provided, that if the minor be not of such age as to appreciate an oath, or the person under guardianship be mentally incompetent to answer, the person appearing in the suit as the guardian, guardian ad litem or next friend of such party shall make answer.

"Such order may be made respecting costs, in the action or cause or otherwise, as the court may direct by general rule, or by a special order in each case.

"Sections sixty-one to sixty-six, inclusive, shall not affect the right of a party interrogated, under the direction of the court, to seal up or otherwise protect from examination such parts of any document, book, voucher or other writing as contain matters not pertinent to the subject of the action, or affect the power of the court to protect said right, or any right of the party interrogated, by suitable order." 71

Interrogatories are widely used by the Massachusetts bar. Interrogatories were found to be on file in approximately half of three hundred consecutive case records which were inspected in the clerk's office of the Supreme Court of Suffolk County (Boston). There have been several problems in connection with the administration of the procedure, however. Answers often are too evasive to be of any use to the party applicant; mimeographed forms with many questions have proved a burden on the court and on the lawyers. The majority of the Boston bar seem to be satisfied with the present procedure although there is considerable sentiment in favor of the adoption of an oral examination for discovery before trial similar to that which is employed in New Hampshire.

The following statute authorizes inspection of documents:

"Every party to any cause or proceeding may inspect and take copies of any document referred to in the pleading or particulars of any other party and relied on by such other party, unless the court is satisfied that the same is not in his possession or control or that he has some other reasonable excuse for not producing the same for such inspection, and the court may make orders for production of said purposes, enforceable in like manner as orders to answer interrogatories." 72

The illiberal type of deposition statute is employed in Massachusetts:

"If a witness or party whose testimony is wanted in a civil cause or proceeding pending in the commonwealth lives more than thirty miles from the place of trial, or is about to go out of the commonwealth and not to return in time for the trial, or is so ill, aged or infirm as to make it probable that he will not be able to attend at the trial, his deposition may be taken." 73

72 Id. ch. 231, sec. 68.
73 Id. ch. 233, sec. 25.
Michigan.

The new Michigan Court Rules make the following provision for discovery by deposition:

"Any party to an action or suit may cause to be taken by deposition according to the practice regulating the taking of depositions, at any time after action commenced and before trial, the testimony of any other party, or any person who has verified a pleading of another party, which is material and necessary in the prosecution or defense of the action or suit. A party to such action or suit also may cause to be so taken the testimony, which is material and necessary, of the original or prior owner of a claim which constitutes, or from which arose, a cause of action acquired by the adverse party by grant, conveyance, transfer, assignment or endorsement, and which is set forth in his pleading as a cause of action or claim of set-off or recoupment.

"When an adverse party, or an original owner of a claim mentioned in the foregoing section, whose testimony may be taken as provided in such section by deposition, is a corporation, joint stock association, or other unincorporated association, the testimony of one or more of its officers, directors, managing agents or employees, which is material and necessary, may be so taken.

"The notice of taking such deposition shall include a statement as to the matters upon which such persons are to be examined. Such notice shall operate as an order.

"Any question as to the right to take the testimony of such party, or the officers and employees of a corporation, joint stock association or other unincorporated association, or as to the time or place, or as to the matters as to which the testimony is to be taken, or as to the person before whom it is to be taken, may be raised by a motion to vacate or modify the notice. Such motion may be supported by affidavits and opposed by counter affidavits. The service of notice of the motion, if made for the
first sitting of court at which the motion can be heard, shall operate to stay the taking of testimony until the determination of the motion. If the taking of the testimony be not authorized by the provisions of the preceding paragraphs, the notice shall be vacated.

"In any action for damages for injuries to person or property, or to recover upon any policy of insurance respecting sickness or bodily injuries or damages or injuries to property, physical examination by physicians of the person sick or injured, or by the defendant or his agent of the property damaged or injured, may be ordered in advance of the trial, on motion with due notice, upon such just and reasonable terms and conditions as the court may prescribe." 74

There is the following procedure for production of books and papers:

"Application may be made by petition to any court of record in term time, or to the judge thereof in vacation, to compel the production and discovery of books, papers and documents relating to the merits of any action or suit pending in such court, or of any defense to such action or suit, in the following cases:

(a) By the plaintiff, to compel the discovery of papers or documents in the possession of or under the control of the defendant, which may be necessary to enable the plaintiff to declare or answer to any pleading of the defendant.

(b) The plaintiff may be compelled to make the discovery of papers or documents, where the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

(c) The plaintiff may be compelled, after declaring, and the defendant, after pleading, to produce and discover all papers or documents on which the action or defense is founded.

(d) After issue joined in any action, either party may be compelled to produce and discover all such books, papers and documents, as may be necessary to enable the party applying for such discovery to prepare for the trial of the cause.

"The petition for such discovery shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers and documents whereof discovery is sought are not in the possession or under the control of the party applying therefor, and that the party making such affidavit is advised by his counsel and verily believes, that the discovery of the books, papers and documents, mentioned in such petition, is necessary to enable him to declare, or answer, or to prepare for trial, as the case may be.

"The rule granting the discovery shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of matters to be discovered, or by requiring him to produce and deposit the same with the clerk of the court in which the trial is to be had. The order shall also specify the time within which the discovery should be made.

"The court, or presiding judge thereof, in granting such order, shall be governed by the principles and practice of the court of chancery in compelling discovery, except that the costs of such proceedings shall always be awarded in the discretion of the court.

"Every such order may be vacated by the court, or the judge granting the same:

"(a) Upon satisfactory evidence that it should not have been granted.

"(b) Upon the discovery sought being obtained.

"(c) Upon the party requiring to make discovery denying on oath the possession or control of the books, papers or documents ordered so to be produced.
"The order directing the discovery of books, papers or documents, shall operate as a stay of all other proceedings in the cause, until such order shall have been complied with or vacated; and the party obtaining such order, after the same shall have been complied with or vacated, shall have the like time to declare, plead or answer, to which he was entitled at the time of making the order.

"In case of the party refusing or neglecting to obey such order for a discovery, within such time as the court shall deem reasonable, the court may nonsuit him, or may strike out any plea or notice he may have given, or may debar him from any particular defense in relation to which such discovery was sought; and the power of the court to compel such discovery shall be confined to the remedies herein provided, and shall not extend to authorize any other proceedings against the person or property of the party so refusing or neglecting.

"The books, papers and documents, or sworn copies thereof, produced under any order made in pursuance of the preceding rules, shall have the same effect, when used by the party requiring them, as if produced upon notice according to the practice of the court."

Minnesota.

The Minnesota statute on depositions is as follows:

"The deposition of a witness whose testimony is wanted in any civil cause pending in this state before a court, magistrate, or other person authorized to examine witnesses, or in a controversy submitted to arbitrators, may be taken, upon notice to the adverse party of the time and place of such taking, by or before any officer authorized to administer an oath in the state or territory in which the same may be taken, when the witness:

"1. Is within the state and lives more than thirty miles from the place of trial or hearing; or is about to

75 Id. Rule 40.
go out of the state, not intending to return in time for the trial or hearing; or is so sick, infirm or aged as to make it probable that he will not be able to attend at the trial or hearing.

"2. Is without this state, and within any state or territory of the United States."

There is the following statute on inspection of documents:

"The court before which an action is pending may order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession or under his control, containing evidence relating to the merits of the case. If compliance is refused, the court may exclude the book, document, or paper, or, if wanted as evidence by the party applying, may direct the jury to presume it to be as alleged by him. The court may also punish the party refusing as for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers and documents when he is examined as a witness."

**Mississippi.**

Mississippi has retained the ancient chancery practice of inserting interrogatories in the bill.

The following, illiberal type of deposition statute obtains:

"After the declaration, bill or petition has been filed and summons served the plaintiff, complainant or petitioner may take the depositions of witnesses residing or being within the state in civil causes, including any matter in the chancery court, and the defendant, or cross complainant, or respondent may likewise take deposi-

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76 Minn. Stat. (Mason, 1927) sec. 9820.
77 Id. sec. 9886.
78 Miss. Code (1930) sec. 373.
tions, after filing of his plea or answer or cross bill, in the following cases:

1. When the person whose testimony is required shall be about to depart from the state, or, by reason of age, sickness, or other cause, shall be unable, or likely to be unable, to attend the court.

2. When the claim or defense, or a material point thereof, shall depend upon the testimony of a single witness.

3. When the person whose testimony is required shall be a judge of the Supreme Court, or circuit court, or chancellor, or any other officer of the government of the state or of the United States, who, on account of his official duties, cannot conveniently attend the court to give evidence.

4. When the testimony of the clerk of any court of record, or of any sheriff or justice of the peace, shall be required beyond the limits of the county of his residence.

5. When the witness shall be a female.

6. When the witness shall reside within the state, and more than sixty miles from the place of trial."

There is the following provision for discovery of documentary evidence:

The court in which any action or suit is pending may, on good cause shown, and after notice of the application to the opposite party, order either party to give to the other, within a specified time, and on such terms as may be imposed, an inspection and copy, or permission to take a copy, of any books, papers, or documents in his possession or under his control containing evidence relating to the merits of the action or proceeding or of the defense thereof; and if compliance with such order be refused, such books, papers or documents shall not be given in evidence in the action or proceeding by the party so refusing; and the court may punish the recusant party

79 Id. sec. 1538.
as for a contempt of court; and if a complainant, or plaintiff, fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit or dismissal; and if a defendant fails to comply with such order, the court may, on motion, give judgment or decree against him by default or confession.

Missouri.

The right to take depositions is unconditional in Missouri by virtue of the following statutes:

"Any party to a suit pending in any court in this state may obtain the deposition of any witness, to be used in such suit, conditionally.

"When the witness is found in this state, the deposition may be taken by the proper officer thereof without any commission or order from any court or clerk: Provided, that whenever a notice shall be given as required by law in a cause pending in any city which has, or which shall hereafter have, a population of over fifty thousand inhabitants at the time such notice shall be served, to take the depositions of witnesses at any place in such city, the party upon whom such notice shall be served, as provided by law, may at any time after the service of such notice, and before the taking of such depositions shall be commenced, after having given the party or his attorney, on whose behalf such notice shall have been given, one day's notice, in writing, to be served by delivering a copy thereof to the adverse party or his attorney of record, of his intention to apply for the appointment of a special commissioner to take such depositions, and of the time and place of making such application, apply to the circuit court, or the clerk or any judge thereof, to appoint a special commissioner to take the depositions under such notice, and thereupon such circuit court, or the clerk or judge thereof, upon such application, and

80 Id. sec. 744.
upon proof of service of the notice of such application, as above required, shall forthwith appoint such special commissioner to take such depositions, which said special commissioner shall be an attorney of record in such court, learned in the law, disinterested, and of no kin to either party to such cause; and the said court, judge or clerk, in the order appointing such special commissioner, shall designate the time and place at which such special commissioner shall take said depositions. Such special commissioner so appointed shall be alone authorized to take such depositions, but any subpoena which shall have been issued by any officer authorized by law to issue subpoenas in such cases, and which shall have been served upon any witness, as required by law, commanding his presence at the time and place designated in such notice to take depositions aforesaid, shall be effectual to require the attendance of such witness before such special commissioner at the time and place specified in such subpoena, or at the time and place designated by such court, judge or clerk in the order appointing such special commissioner as aforesaid; and in case such witness shall not attend in obedience thereto, such special commissioner shall be authorized to compel the attendance of such witness by attachment, as if such subpoena had been issued by such special commissioner under the authority conferred by this section. Such special commissioner, for the purposes of taking such depositions and of certifying and returning the same as required by law, shall possess the same power and authority and be subject to the same duties and obligations as now are or hereafter shall be conferred and imposed by law upon officers authorized to take depositions: Provided, however, that such special commissioner shall have power and authority to hear and determine all objections to testimony and evidence, and to admit and exclude the same, in the same manner and to the same extent as the
circuit court might in a trial of said cause before such circuit court; and whenever the special commissioner shall sustain such objection to testimony or evidence, the party against whom such ruling shall be made shall have the right to have such ruling reported by the special commissioner to the said circuit court, or a judge thereof, and it shall be the duty of such special commissioner to report the same forthwith, or at the close of the examination of any witness who may be under examination at the time such objection shall be made, or at the close of the taking of all the depositions to be taken under such notice, or at such other time during the taking thereof as shall be determined by such special commissioner to such circuit court, or any judge thereof; and upon such report being presented to the circuit court or judge thereof, the said court, or said judge thereof, shall forthwith pass upon the ruling so reported, and make an order affirming such ruling or reversing the same; and in case such ruling so reported shall be reversed by said circuit court, or judge thereof, the said circuit court or judge thereof shall enter an order of record, directing said special commissioner to cause the testimony or evidence so excluded to be admitted; and whenever the said special commissioner shall report his ruling to the circuit court as aforesaid, or to a judge thereof, said special commissioner shall adjourn the further taking of said depositions to such time and place as he may direct, and enforce the attendance of any witness thereat, by attachment or otherwise, so as to enable any party to have any question answered which the said special commissioner shall have ruled out, and which such circuit court, or judge thereof, may direct to be answered, together with such other questions as may appear proper under the ruling of such circuit court, or judge thereof, in reversing the ruling of such special commissioner." 81

The Missouri Supreme Court has held that these statutes authorize taking of depositions for purposes of discovery before trial.82 The bar of St. Louis and of Kansas City use the procedure extensively. Satisfaction with it appears to be general.

There is the following rather elaborate statutory provision for production and inspection of books and papers:

"Every court or judge thereof shall have power to compel any party to a suit pending therein to produce any books, papers and documents in his possession or power, relating to the merits of any such suit, or of any defense therein.

"To entitle a party to the production of such books, papers and documents, he shall present a petition, verified by the affidavit of himself or some other credible person, to the court, or to the judge thereof in vacation, upon which an order may be granted by such court or officer for the production of such books, papers and documents, or that the party show cause why the prayer of the petition should not be granted.

"Every such order may be vacated by the court or officer granting the same: First, upon satisfactory evidence that it ought not to have been granted; second, upon the party required to produce the books, papers and documents denying, on oath, the possession or control thereof.

"If the party neglect to obey such order for the production of books, papers and documents, within such time as the court or judge shall prescribe for that purpose, the court may nonsuit him, or strike out any answer, or debar him from any particular defense in relation to which such books, papers and documents were required to be produced, or may punish him as for a contempt.

"The court before which an action is pending, or a judge thereof, in vacation, may, in his discretion, and upon due notice, order either party to give to the other,

82 Tyson v. Savings and Loan Ass’n (1900) 156 Mo. 588, 57 S. W. 740.
within a specified time, an inspection and copy, or permission to take a copy, or to make a photograph of a paper in his possession or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing as for contempt, or both." 88

Montana.

There is the following statute on depositions, modeled after the California statute, which allows discovery from parties:

"The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases: 1. When the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended. 2. When the witness resides out of the county in which his testimony is to be used. 3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required. 4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend. 5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required. 6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause." 84

84 Rev. Mont. Code (1921) sec. 10645.
Inspection of documents is authorized by the following statute:

"Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, documents, or papers, when he is examined as a witness."

Nebraska.

Discovery under the ordinary deposition procedure is authorized by the following Nebraska statute:

"The deposition of any witness may be used only in the following cases: First. When the witness does not reside in the county where the action or proceeding is pending, or is sent for trial by change of venue, or is absent therefrom; Second. When, from age, infirmity or imprisonment, the witness is unable to attend the court, or is dead; Third. When the testimony is required upon a motion or in any other case where the oral examination of the witness is not required.

"Either party may commence taking testimony by depositions, at any time after service upon the defendant."

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85 Id. sec. 9771.
The Supreme Court of Nebraska has upon several occasions made liberal interpretation of this statute and has held that discovery before trial is authorized thereunder. The statute is used by Omaha lawyers for taking the deposition of adverse parties in approximately ten per cent. of all cases but depositions of witnesses are less frequently taken. The Nebraska bar seems to be well satisfied with the practice.

Discovery of documentary evidence is authorized by the following statutory provision:

"Either party or his attorney 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 therein. Such demand shall be in writing, specifying the book, paper or document, with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand within four days be refused, the court or judge, on motion and notice to the adverse party, may in their discretion order the adverse party to give the other, within a specified time, an inspection and copy, or permission to take a copy, of such book, paper, or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party by affidavit alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness.

"Either party or his attorney, if required, shall deliver to the other party or his attorney, a copy of any deed,

instrument or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence, at the trial, the original, of which a copy has been refused. This section shall not apply to any paper a copy of which is filed with a pleading."  

**Nevada.**

The following Nevada statute authorizes taking of the deposition of the adverse party for purposes of discovery:

"The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases: 1. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended. 2. When the witness is the president, vice-president, secretary, treasurer or general manager of a corporation for whose benefit the action is prosecuted or defended. 3. When the witness resides out of the county in which his testimony is to be used. 4. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required. 5. When the witness, otherwise liable to attend the trial is nevertheless too infirm to attend, or resides within the county, but more than fifty miles from the place of trial."  

Inspection of books and papers is provided for in the following terms:

"Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy of any book, document, or

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89 Nev. Comp. Laws (Hillyer, 1929) sec. 9001.
paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing for a contempt. This section shall not be construed to prevent a jury from compelling another to produce books, papers, or documents when he is examined as a witness.’’

New Hampshire.

The following concise and simple provision has furnished the means of a very liberal discovery practice in New Hampshire:

‘‘The deposition of any witness in a civil cause may be taken and used at the trial unless the adverse party procures him to attend so that he may be called to testify when the deposition is offered.’’

The New Hampshire Supreme Court has held that this statute authorizes examinations for discovery before trial. Today the New Hampshire bar uses the procedure extensively and with apparently uniform satisfaction. So satisfactory has been the New Hampshire experience that there is a strong sentiment in neighboring states, especially in Massachusetts, in favor of the adoption of a similar practice.

New Jersey.

The following provision for discovery before trial by written interrogatories obtains in New Jersey:

‘‘After an action is at issue either party may serve on the adverse party, whether such party be a natural per-

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90 Id. sec. 8963.
son or body corporate, written interrogatories upon any matter material to the issue, and written answers to the same under oath shall be served in ten days after service; the answers shall be strictly responsive, and in the case of a body corporate shall be under the oath of such of the officers, agents or employees of the corporation as have personal knowledge of the facts or custody of the books, records or papers a discovery of which is sought; the court or a judge may for the purpose of compelling an answer attach for contempt, suppress the defense or stay or dismiss the proceedings; the answer shall be evidence in the action if offered by the party proposing the interrogatories, but not otherwise; provided, the court or a judge may for good cause and on notice to the adverse party order any of the interrogatories to be stricken out or amended or new ones to be added or grant further time for answering or order or permit the answers to be amended."

An oral examination of the adverse party before trial is also allowed under the following statutory provisions:

"Any party to an action may by order of the court or a judge thereof or by a judge of the Court of Common Pleas, in the county in which such action is pending, in the absence of a Supreme Court justice a Circuit Court judge, if the action is pending in the Supreme Court or Circuit Court, be examined as a witness at the instance of the adverse party or any one of several adverse parties after issue joined and before trial; such examination may be before the court or a judge or a Supreme Court Commissioner or Examiner Master in Chancery on four days' notice to the party to be examined, unless a shorter time is for good cause prescribed; the granting of said order shall be discretionar y; the service of the order shall be sufficient summons and notice to the party named therein

to attend before the court, judge or officer named there-
in, and such attendance and examination may be enforced
in the same manner as answers to interrogatories.

"No party who shall reside in this state shall be com-
pelled to attend and testify in any other county than that
where he resides, but any party residing out of this state
may be compelled to attend and testify in any county
named in the order or in the state or country where he
resides; a nonresident party may be served out of this
state with personal notice to attend such examination.

"The examination and cross-examination shall be re-
duced to writing and shall be signed by the party so exam-
ing and certified by the court, judge or officer, and filed
with the clerk of the county where the cause is to be tried,
and said examination may be used by either party at the
trial; where the examination is made before the court
or a judge, such court or judge may authorize the same
to be reduced to writing by the clerk of any circuit court
or by an attorney or counselor; any question may be ob-
jected to and the answer taken subject to the objection;
if the party refuse to answer, the court or a judge shall
compel the party to answer, if the party examining is
legally entitled to have an answer; the examination thus
taken shall not be conclusive but may be rebutted at the
trial.

"The party examined shall receive the same fee as if
subpoenaed and attending as a witness on the trial of an
action, and the commissioner or examiner taking the
testimony shall receive the same fees for his services as
are allowed by law to a master in chancery for taking
testimony in a cause.

"The party examining shall in the first instance pay
the witness fees and all the costs and expenses of the
examination, unless the court or a judge otherwise or-
der, and shall tax therefor in his bill of costs only such
sum as the court or a judge shall certify to be reasonable and proper."  

There is the following statute which allows inspection of books and papers:

"The court in which an action is pending or a judge may on four days' notice and upon terms order either party to give to the other within a specified time an inspection and copy or permission to take a copy of any books, papers or documents in his possession or under his control, containing evidence relating to the merits of the action or the defense thereto, and if compliance with the order be refused, such books, papers or documents shall not be given in evidence in such action, and the court may punish the party so refusing as for contempt.

"Every such application shall be in writing and shall state the grounds upon which it is made, verified by the oath of the party or his attorney or agent; the affidavit of the adverse party or his attorney or agent may be read in opposition to such application without notice of the taking of such affidavit or either party or any other witness may on such application be examined in relation thereto."  

The New Jersey statute on depositions generally is of the illiberal type and provides as follows:

"If any material witness in an action or suit of a civil nature, or any material witness for any defendant in any indictment pending in any of the courts of this state, be in this state, but is ancient or very infirm, or is sick, or is about to go out of this state, then the deposition of such witness may, at the option of either party, in such civil suit, or at the option of the defendant in such indictment, be taken de bene esse before any justice of the supreme court, or judge of the court of common pleas, or supreme court commissioner, or master in chancery; provided, that the officer before whom the deposition is to

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94 Id. p. 4098 as amended by Laws of N. J. (1924) ch. 93, p. 183.
95 Id. p. 4098.
be taken shall cause notice to be given to the adverse party immediately, or at such short day as the case in the opinion of the said officer may require, to attend and be present at the taking thereof, and to put questions and cross-examine, if he shall think fit." 96

New Jersey courts at the present time are very strict in their allowance for discovery before trial. Newark lawyers stated that the only application for an oral examination which had been granted there during several months was made in the case of an infant plaintiff who had been struck by an automobile and who had not a single witness in his behalf. It is said the courts are so very strict in allowing examinations and that even when they allow them they restrict the scope of them to such an extent that they have little practical value to the profession.

**New Mexico.**

The following provision for depositions is made in New Mexico:

"Depositions of witnesses to be used in any court in this state, in all civil cases and proceedings, may be taken in the following cases: First. When, by reason of age, infirmity, sickness or official duty, it is probable that the witness will be unable to attend the court. Second. When the witness resides without the state or the county in which the suit is pending. Third. When the witness has left, or is about to leave the state or county in which the suit or proceeding is pending, and will probably not be present at the trial." 97

The New Mexico provision for inspection of papers in the possession of the opposite party is as follows:

"The court before which an action is pending, or the judge thereof, may, in his discretion and upon due notice, order either party to give to the other, within a specified

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96 Id. p. 2230.
time, an inspection and a copy or permission to take a copy of a paper in his possession or under his control containing evidence relating to the merits of the action. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence or punish the party refusing as for a contempt, or both.

"If the party neglect to obey such order for the production of books, papers and documents within such time as the court or judge may prescribe for that purpose, the court may nonsuit him or strike out any answer, or debar him from any particular defense in relation to which such books, papers and documents were required to be produced, or may punish him as for a contempt.

"Every such order may be vacated by the court or officer granting the same: First. Upon satisfactory evidence that it ought not to have been granted. Second. Upon the party required to produce the books, papers and documents denying, on oath, the possession or control thereof." 98

New York.

A short summary of the origin and history of the New York discovery practice is a necessary preface to an understanding of the complicated practice which exists today. The Code of Procedure of 1848 made a simple yet liberal provision for an oral examination before trial. A rule of court was adopted in 1870 limiting the scope of discovery to facts "material in proving the case or defense of the party." 99 Thereafter for about twenty years the rules which were applied became so strict as to defeat almost entirely the right to discovery.100 The so-called "Throop Code" effected even greater stringency by com-

98 Id. secs. 831-833.
bination of the several modes of taking testimony before trial into a single deposition procedure. In 1904 the Commission on the Laws Delays urged liberalization of the rules in regard to discovery.\(^{101}\) In 1907, in the case of *Goldmark v. U. S. Electro-Galvanizing Company*,\(^{102}\) a great liberalization was effected and examinations for discovery became more nearly a matter of right. In 1910 the Special Committee of the Bar of the City of New York on the Simplification of Procedure recommended "that either party might call his opponent, or any officer of any corporation that is a party, and cross-examine him." A bill to this effect was sponsored in 1910 but was defeated by the Senate.\(^{103}\) This would have enlarged the scope of the discovery as well as the right to discovery. During the years from 1910 to 1916 leaders of the New York Bar praised the English system of discovery in extravagant terms and urged that examinations for discovery in New York be allowed as of course.\(^{104}\) In 1912 and in 1915 the Board of Statutory Consolidation made its first reports on the Simplification of Procedure and therein recommended some liberalizations as to the discovery rules but still did not go so far as to make discovery a matter of course. The provisions as to discovery were contained in the proposed rules appended to the Act, rather than to the Civil Practice Act itself.\(^{105}\) The following year, 1916, the New York State Bar Association's Committee, appointed to examine the report of the Board of Statutory Consolidation, made its report, and one of the few points of difference was as to discovery. This committee recommended a considerably more liberal practice as to discovery, and

\(^{101}\) See *Doll v. Smith* (1904) 43 Misc. 417.

\(^{102}\) 111 A. D. 526, 97 N. Y. S. 1078.

\(^{103}\) See Report of N. Y. State Bar Association (1911) p. 434.


in addition recommended that the provisions be put in the Civil Practice Act itself, as well as in the Rules. The examination was to be had, unless the opposing party got an order from the court limiting the examination.\textsuperscript{106} The Joint Legislative Committee, which was appointed to study the report of the Board of Statutory Consolidation and which finally concluded that an independent revision should be its task, made some very liberal recommendations in its preliminary reports regarding discovery.\textsuperscript{107} In its final report, however, the Committee concluded that there was such a division of opinion in regard to discovery that "the provisions on this subject should be restored for the present in practically the same language as they now exist." However, the committee added: "The Committee recommends that the subject of examination of parties and witnesses before trial be further considered by the lawyers of the state to the end that a more simple procedure may be presented to the legislature."\textsuperscript{108} Later the Joint Legislative Committee made a supplemental report as to the particular matter of evidence before trial. The provisions of the supplemental report required that the applicant for discovery show that the testimony was material and necessary. It provided further that discovery examinations could be initiated either by court order or by notice, the latter of which could be contested by the opponent by a motion to vacate the notice. The Civil Practice Act of 1920 adopted the provisions recommended in the supplemental report.


\textsuperscript{107}Cf. Preliminary Report, No. 4 (1918) p. 9: "A party to an action in a court of record may examine an adverse party and have his deposition taken, within or without the state, after issue joined and before trial, and procure an order therefor as a matter of right, without showing the materiality of the expected testimony or the necessity for such examination." It was clear also from the explanatory notes that it was intended that the scope of discovery was to be broadened so as "not to exclude an inquiry pertinent to the issue."

\textsuperscript{108}Final Report (1919) found in Legislative Document No. 111, p. 44.
New York has the most elaborate statutory provisions for discovery before trial which exist in any of the various states, yet the actual practice thereunder is very illiberal and unsatisfactory. The following provisions of the Civil Practice Act outline the framework of the procedure:

"Any party to an action in a court of record may cause to be taken by deposition, before trial, his own testimony or that of any other party which is material and necessary in the prosecution or defense of the action. A party to such an action also may cause to be so taken the testimony which is material and necessary, of the original owner of a claim which constitutes, or from which arose, a cause of action acquired by the adverse party by grant, conveyance, transfer, assignment or endorsement and which is set forth in his pleading as a cause of action or counterclaim. Any party to such an action also may cause to be so taken the testimony of any other person, which is material and necessary, where such person is about to depart from the state, or is without the state, or resides at a greater distance from the place of trial than one hundred miles, or is so sick or infirm as to afford reasonable grounds of belief that he will not be able to attend the trial, or other special circumstances render it proper that his deposition should be taken:

"When an adverse party, or an original owner of a claim mentioned in the foregoing section, whose testimony may be taken as provided in such section by deposition, is a corporation, joint stock association or other unincorporated association, the testimony of one or more of its officers, directors, managing agents or employees, which is material and necessary, may be so taken.

"A party to an action desiring to obtain testimony therein by deposition shall give reasonable notice to his adversary, or if his adversary has appeared by attorney,
to such attorney, stating in writing: 1. The person before whom the testimony is to be taken; 2. The time and place at which it is to be taken; 3. The name or names of the person or persons to be examined; 4. The matters upon which such person or persons are to be examined.

"Any question as to the right to take the testimony, or as to the time or place, or as to the matters as to which the testimony is to be taken, or as to the persons before whom it is to be taken, may be raised by a motion to vacate or modify the notice. The service of notice of the motion, if made for the first term or sitting of court at which the motion can be heard, shall operate to stay the taking of the testimony until the determination of the motion. If the motion is brought on by order to show cause, the order may be returnable either at chambers or to the court and may contain such a stay. The motion shall be heard upon the notice of the taking of testimony, the pleadings, if any, and upon such affidavits in support of such notice, and in answer thereto, as the parties may submit. If the taking of the testimony be not authorized by the provisions of this article the court shall vacate the notice.

"A party entitled to take testimony by deposition may obtain an order of the court therefor in the first instance, instead of proceeding by notice. The motion shall be upon notice to the other parties who have appeared or answered.

"Upon motion, made upon notice and upon proof of facts and circumstances which render proper the taking of testimony by deposition during the trial of the action, or after judgment in order to carry the judgment into effect, the taking thereof may be ordered by the court.

"Testimony which is material to an expected party in the prosecution or defense of an action about to be brought in a court of record may be taken at his instance,
by deposition, if the taking or preservation thereof is necessary for the protection of his rights. Such testimony may be taken only in pursuance of an order of a court in which the action may be brought, or a judge thereof.

"If the deposition is to be taken pursuant to an order, the order may require, in a proper case, the production of books and papers in the custody of the party or person to be examined, as to the contents of which an examination or inspection is desired, and on the examination the books and papers or any part or parts thereof may be offered and received in evidence in addition to the use thereof by a witness to refresh his memory." 109

The following details of practice are added by the Rules of Civil Practice which are made pursuant to the Civil Practice Act:

"The notice of taking testimony by deposition shall contain the title of the action and be subscribed with the name and address of the person giving the same and shall be served at least five days before the time specified therein for the taking of the testimony.

"If a party desire to take the deposition of an adverse party or a witness to obtain information to enable him, to draw a complaint, he shall apply for an order, or if he shall apply for an order to take testimony by deposition under any provision of article twenty-nine of the civil practice act, he must present proof by affidavit that statutory grounds exist for taking the same; that the testimony of such person is material and necessary for the party making such application, or the prosecution or defense of such action. If an adverse party, or the original owner of a claim, whose testimony is sought, be a corporation, joint-stock or other unincorporated association, the affidavit must state the office or position in such corporation or association held by the person whose

testimony is material and necessary. If the production of books and papers be desired, the affidavit must describe them, so far as practicable, and state facts to show that their production is material and necessary.

"On an application for an order allowing testimony to be taken by deposition for use in an action about to be brought in a court of record, the applicant shall present to the court in which the action may be brought an affidavit setting forth the nature of the controversy which is expected to be the subject of the action and the circumstances which render it necessary for the protection of the applicant's rights that the witness' testimony be perpetuated.

"If a party on whom a notice to take testimony by deposition is served shall move to vacate, modify or limit the same, he shall specify in his notice of motion the grounds of the motion, and may support the same by affidavit, which shall be served with the notice of motion. If the court or judge who hears the motion shall deem that the testimony sought to be taken is not material or necessary for the party who served the notice, or for any reason that the interests of justice would not be subserved by such examination, an order may be made vacating and setting aside the notice to take the testimony or limiting the scope of the examination. If the court or judge shall deem that the testimony should be taken at a time or place, or before a person, other than specified in the notice, an order may be made fixing a different time or place for the taking of the testimony, and designating some other person to take the same, and imposing reasonable terms or conditions." 110

Discovery and inspection of documentary evidence is authorized under the following provisions:

"A court of record, other than a justices' court in a city, by order may compel a party to an action pending

therein to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy or photograph of a book, document, or other paper, or to make discovery of any article or property, in his possession or under his control, relating to the merits of the action, or of the defense therein. The procedure for obtaining such order shall be regulated by rules.

"Where an order directs a discovery or inspection, the party in whose behalf it was made upon proof that the adverse party has failed to obey it and upon notice to him, may apply to the court for an order to punish him for the failure. Upon the hearing of the application, the court, upon the payment of such a sum for the expenses of the applicant as the court fixes and upon compliance with such other terms as it deems just to impose, may permit the party in default to comply with the order for a discovery and inspection; and, for that purpose, it may direct that the application to punish him stand over to a future time. Upon the final hearing of the application to punish the party in default, the court, in a proper case, may direct that his complaint be dismissed or his answer or reply be stricken out and that judgment be rendered accordingly; or it may make an order striking out one or more causes of action, defenses, counterclaims or replies, interposed by him; or that he be debarred from maintaining a particular claim or defense in relation to which the discovery or inspection was sought. Where the party has failed to obey an order allowing an inspection by the adverse party and requiring him to furnish a copy or permit a copy to be taken, the court may also direct that the book, document or other paper be excluded from being given in evidence; or it may punish the party for a contempt; or both.

"A book, document or other paper produced under an order for its discovery has the same effect, when used by
the party requiring it, as if it was produced upon notice, according to the practice of the court.

"Every party to an action shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his attorney, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterward be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court that such document relates only to his own title, he being a defendant, or that he had some other cause or excuse which the court shall deem sufficient for not complying with such notice; in which case the court may allow the same to be put in evidence on such terms as to costs and otherwise as the court shall think fit.

"The court, on the application of any party to an action, also may make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been in his possession or power, and if not then in his possession, when he parted with the same, and what has become thereof. Such application shall be made upon an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the case or matter, or to some of them."

"A party to an action may apply to the court for an order requiring an adverse party to show cause why he should not be compelled to produce and discover, or to give an inspection and copy of, or permission to take a copy or photograph of a book, document, paper, machine
or other article, or to make a discovery of any article or property in his possession or under his control, relating to the merits of the action or of the defense therein. Such order to show cause shall be granted on an affidavit showing that the book, document, paper, machine, article or property whereof discovery or inspection is sought is not in the possession or under the control of the party applying therefor but is in the possession or under the control of the party against whom discovery or inspection is sought, or of his agent or attorney.

"On the return of such order to show cause, the court shall make such an order with respect to the discovery or inspection prayed for as justice requires. The order for discovery or inspection shall specify the time, place and manner in which it is to be made. The order may stay any other proceedings in the action until such order shall have been complied with or vacated.

"If discovery or inspection be directed, a referee may be appointed by the order to direct and superintend it, whose certificate, unless set aside by the court, is presumptive, and, except in proceedings for contempt, conclusive evidence of compliance or non-compliance with the terms of the order." 111

North Carolina.

There is the following statutory provision for examination of parties before trial:

"No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this article.

"A party to an action may be examined as a witness at the instance of any adverse party, and for that purpose may be compelled, in the same manner and subject to the same rules of examination as any other witness,

to testify, either at the trial or conditionally or upon commission. Where a corporation is a party to the action, this examination may be made of any of its officers or agents.

"The examination, instead of being had at the trial, as provided in the preceding section, may be had at any time before trial, at the option of the party claiming it, before a judge, commissioner duly appointed to take depositions, or clerk of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown the judge or court orders otherwise.

"The party to be examined, as provided in the preceding section, may be compelled to attend in the same manner as a witness who is to be examined conditionally; but he shall not be compelled to attend in any county other than that of his residence or where he may be served with a summons for his attendance. The examination shall be taken and filed by the judge, clerk or commissioner, as in case of witnesses examined conditionally, and may be read by either party on the trial.

"If a party refuses to attend and testify, as provided in the preceding sections, he may be punished as for a contempt and his pleadings may be stricken out.

"The examination of the party thus taken may be rebutted by adverse testimony.

"A party examined by an adverse party, as provided in this article, may be examined in his own behalf, subject to the same rules of examination as other witnesses. But if he testifies to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto or to discharge himself when his answers would charge himself, the adverse party may offer himself and must be received as a witness in his own behalf or in respect to the
new matter, subject to the same rules of examination as other witnesses.

"A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examinations, as if he was named as a party.

"A party may be examined on behalf of his co-plaintiff or co-defendant as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. He may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken cannot be used in behalf of the party examined. When one of several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself, and must be received, as a witness to the same cause of action or defense." 112

It is also possible to obtain discovery by use of the following ordinary deposition procedure in North Carolina:

"Any party in a civil action or special proceeding, upon giving notice to the adverse party or his attorney as provided by law, may take the depositions of persons whose evidence he may desire to use, without any special order therefor, unless the witness shall be beyond the limits of the United States.

"Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise: 1. If the witness is dead, or has become insane since the deposition was taken. 2. If the witness is a resident of a foreign country, or of an-

other state, and is not present at the trial. 3. If the witness is confined in a prison outside the county in which the trial takes place. 4. If the witness is so old, sick or infirm as to be unable to attend court. 5. If the witness is the President of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court. 6. If the witness is the governor of the state, or the head of any department of the state government, or the president of the university, or the head of any other incorporated college in the state, or the superintendent or any physician in the employ of any of the hospitals for the insane for the state. 7. If the witness is a justice of the supreme court, or a judge, presiding officer, clerk or solicitor of any court of record, and the trial shall take place during the term of such court. 8. If the witness is a member of the congress of the United States, or a member of the general assembly, and the trial shall take place during a session of the body of which he is a member. 9. If the witness has been duly summoned, and at the time of the trial is out of the state, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition. 10. If the action is pending in a justice's court the deposition may be read on the trial of the action, provided the witness is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting.”

Inspection of writings is authorized under the following statute:

“The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to

118 Id. sec. 1809 (in part), 1821.
take a copy, of any books, papers and documents in his possession or under his control containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.”

North Dakota.

There is the following statute for examination of parties before trial:

“No action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter. A party to an action, or in case a corporation is a party, the president, secretary or other principal officer or general managing agent of such corporation, may be examined as a witness at the instance of an adverse party or any of several adverse parties and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify either at the trial, or conditionally, or upon commission.

“The examination instead of being had at the trial as provided in the last section may be had at any time before the trial at the option of the party claiming it before a judge of the court, or by a referee appointed by the judge of the court for that purpose, on a previous notice to the party to be examined and any other adverse party of at least five days, unless for good cause shown the judge orders otherwise; but the party to be examined shall not be compelled to attend in any other county than that of his residence or where he may be served with a subpoena for his attendance. Where a referee shall be so appointed the referee shall take the testimony either

114 Id. sec. 1823.
himself or by a stenographer in his presence, which testimony shall be certified to by the referee.

"The examination of the party thus taken may be rebutted by adverse testimony.

"If a party refuses to attend and testify, he may be punished as for a contempt and his complaint, answer or reply may be stricken out.

"A party examined by an adverse party may be examined on his own behalf, subject to the same rules of examination as other witnesses.

"A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness in the same manner and subject to the same rules of examination as if he was named as a party.

"A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony."

The liberal type of deposition statute which makes the right to take depositions unconditional is used in North Dakota:

"The deposition of any witness may be used only in the following cases:

"1. When the witness does not reside in the county where the action or proceeding is pending or is sent for trial by change of venue, or is absent therefrom.

115 No. Dak. Comp. Laws (1913) secs. 7862-7870.
“2. When from age, infirmity or imprisonment the witness is unable to attend court or is dead.

“3. When the testimony is required upon a motion or in any other case when the oral examination of the witness is not required.

“Either party may commence taking testimony by depositions at any time after service upon or the appearance of the defendant in the action.”

Inspection and copy of documents is authorized by the following statute:

“The court before which an action is pending, or a judge thereof, may in its or his discretion and upon due notice order either party to give to the other within a specified time an inspection and copy, or permission to take a copy of any books, papers and documents in his possession or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order is refused, the court may on motion exclude the paper from being given in evidence, or punish the party refusing, or both.”

Ohio.

The Ohio statutes provide that: “Either party may commence taking testimony by deposition at any time after service upon the defendant.”

“At the instance of the adverse party, a party may be examined as if under cross-examination, either orally, or by deposition, like any other witness. If the party be a corporation, any or all the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by counter testimony.”

These two statutory provisions have been the means of establishing a very effective discovery practice in Ohio. The bar generally, in cities like Cleveland, Toledo and

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116 Id. secs. 7889, 7890.
117 Id. sec. 7861.
118 Ohio Code (Throckmorton, 1930) sec. 11526.
119 Id. sec. 11497.
Cincinnati, and to a lesser extent throughout the state, use the procedure extensively. There is apparently general satisfaction with the results obtained.

There is also provision for annexing interrogatories for discovery to pleadings:

"A party may annex to his pleading, other than a demurrer, interrogatories, pertinent to the issue made in the pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath, by the party to whom they are propounded, or if such party is a corporation, by the president, secretary or other officer thereof, as the party propounding requires.

"When annexed to the petition, the interrogatories shall be answered within the time limited for answer to the petition; when annexed to the answer, within the time limited for a reply; and when annexed to the reply, within the time allowed for an answer. But further time may be allowed in all cases by the court, or a judge thereof in vacation.

"Answers to interrogatories may be enforced by an order of dismissal, judgment by default, or by attachment, as the justice of the case requires. On the trial, such answers, so far as they contain competent testimony on the issue or issues made, may be used by either party." 180 This provision is not used often by the bar. Interrogatories are employed only when the action is of such a nature as not to justify the expense of an oral examination or when it is desired to dispense with mere formal matters of proof. When a thorough probing of the adverse party is desired, an oral examination is always employed in preference to written interrogatories in Ohio.

Discovery before pleading is authorized under the following statute:

"When a person claiming to have a cause of action, or a defense to an action commenced against him, with-

180 Id. secs. 11348–11350.
out a discovery of the fact from the adverse party, is unable to file his petition or answer, he may bring an action for discovery, setting forth in his petition the necessity therefor, and the grounds thereof, with such interrogatories relating to the subject matter of the discovery as are necessary to procure the discovery sought, which, if not demurred to, must be fully and directly answered under oath by the defendant. Upon the final disposition of the action, the costs thereof shall be taxed in such manner as the court deems equitable."

Inspection and copy of books and documents is provided for as follows:

"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 with sufficient particularity to enable the other party to distinguish it. If compliance with the demand within four days be 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 books, 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 shall not prevent a party from compelling another to produce any book, paper or document when he is examined as a witness.

"If the party in possession of any such book, paper, writing or document, alleges that it, or a part thereof is of mere private interest, or of such character that it ought not to be produced, or an inspection or copy allowed

\[191\] Id. sec. 11555.
or taken, on motion of either party, the court may direct a private examination of it by a master. If he finds that such book, paper, writing, or document contains matter pertinent to the case, and proper to be produced, inspected or copied, he shall report it to the court, or a copy of such part as he finds pertinent to the case, and proper to be produced, inspected or copied. The book, paper, writing or document, or part thereof, so reported, shall be admitted in evidence on the trial, unless for proper cause the court excludes it.

"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." 122

**Oklahoma.**

The following statute on depositions obtains in Oklahoma:

"The deposition of any witness may be used only in the following cases:

"First. When the witness does not reside in the county where the action or proceeding is pending or is sent for trial by change of venue, or is absent therefrom.

"Second. When, from age, infirmity, or imprisonment, the witness is unable to attend court or is dead.

"Third. When the testimony is required upon a motion, or in any other case where the oral testimony of the witness is not required.

"Either party may commence taking testimony by deposition at any time after service of summons upon the defendant." 123

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122 Id. secs. 11152–11154.
The Oklahoma Supreme Court, following the lead of the Kansas Supreme Court, has held that this statute does not authorize discovery before trial in spite of the fact that the statute apparently gives an unconditional right to take depositions.\textsuperscript{184}

There is the following provision for inspection of documents held by the adverse party:

"Either party, or his attorney, 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 therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand, within four days, be refused, the court or judge, on motion and notice to the adverse party, may, in their discretion, order the adverse party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of such book, paper or document; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness."\textsuperscript{185}

\textbf{Ontario.}

The rules of practice and procedure of the Supreme Court of Ontario make the following provision for oral examination for discovery:

"A party to an action whether plaintiff or defendant, may, without order, be orally examined before the trial touching the matters in question by any party ad-

\textsuperscript{184} Guinan v. Readdy (1920) 79 Okla. 111, 191 Pac. 602.
\textsuperscript{185} Okla. Comp. Stat. (1921) sec. 634.
verse in interest, and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination as a witness except as hereinafter provided.

"In the case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms and subject to the same rules of examination as a witness except as hereinafter provided; but such examination shall not be used as evidence at the trial.

"After the examination of an officer or servant of a corporation a party shall not be at liberty to examine any other officer or servant without an order.

"Where a party to be examined is out of Ontario the court may order the examination to be taken at such place and in such manner as may seem just and convenient, and service of the order and of all papers necessary to obtain the examination may be made on the solicitor of the party, and any conduct money may be paid to him unless the order makes other provisions therefor.

"The court may order the examination for discovery at such place and in such manner as may be deemed just and convenient of an officer residing out of Ontario of any corporation party to an action, and service of the order and of all papers necessary to obtain such examination may be made upon the solicitor for such party, and conduct money may be paid to him, and if the officer fails to attend and submit to such examination pursuant to such order the corporation shall be liable if a plaintiff to have its action dismissed, and if a defendant to have its defense struck out and to be placed in the same position as if it had not defended. Such examinations shall not be used in evidence at the trial.
"Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

"Any person who refuses or neglects to attend at the time and place appointed for his examination, or refuses to be sworn or to answer any proper question put to him, shall be deemed guilty of a contempt of court and proceedings may forthwith be had by attachment. He shall also be liable, if a plaintiff, to have his action dismissed, and if a defendant, to have his defense, if any, struck out.

"When an infant is a party the opposite party may examine the next friend or guardian of the infant or at his option the infant, if he is competent to give evidence.

"Any person examined for discovery may be further examined on his own behalf, or on behalf of the corporation whose officer or servant he is, in relation to any matter respecting which he has been so examined, and such explanatory examination shall be proceeded with immediately after the examination in chief.

"A person for whose immediate benefit an action is prosecuted or defended may without order be examined for discovery.

"Where an action is brought by an assignee the assignor may without order be examined for discovery.

"Examination for discovery may take place at any time after the statement of defense of the party examining or to be examined has been delivered or after the pleadings have been noted as closed as against the party to be examined, and the examination of a party to an issue may take place at any time after the issue has been filed.
"A party within Ontario shall attend for examination for discovery before the proper officer in the county in which he resides upon service of an appointment upon his solicitor seven days before the day appointed for the examination, and conduct money shall be paid or tendered to the solicitor.

"The solicitor shall forthwith communicate the appointment to the party required to attend, and shall not apply the money to any debt due to the solicitor or any other person, or pay the same otherwise than to such party for his conduct money, and the same shall not be liable to be attached.

"Any witness examined shall be subject to cross-examination and re-examination; and the examination, cross-examination and re-examination shall be conducted as nearly as may be as at a trial.

"The examination (unless otherwise ordered or agreed) shall, if the examiner is a shorthand writer or a shorthand writer is available, be taken in shorthand by the examiner or by a shorthand writer approved and duly sworn by him and shall be taken down by question and answer; and it shall not be necessary for the depositions to be read over to, or signed by, the person examined.

"A copy of the depositions so taken, certified by the person taking the same as correct, and if such person be not the examiner, also signed by the examiner, shall be received in evidence saving all just exceptions.

"The depositions taken by the examiner shall, upon payment of his fees, be returned to and filed in the office in which the proceedings are carried on.

"The person to be examined or any party to the action shall, if so required by the subpoena or notice, produce on the examination all books, papers and documents relating to the matters in issue which he could be required to produce at a trial.
Where any person admits, upon his examination, that he has in his custody or power any such document the examiner may direct him to produce it for the inspection of the party examining, and for that purpose allow a reasonable time.

If any person under examination objects to any question put to him, the question and the objection shall be noted, and the validity of such objection shall be decided by the examiner, whose decision shall also be noted.

Any direction or ruling of the examiner shall be subject to review upon any motion with respect to such examination without an appeal.

Any party who is liable to be examined may be required to attend before the proper officer in the county in which he resides, for examination, upon being served with an appointment and upon payment of the proper fees.

Any person not a party, liable to be examined, shall be served with a subpoena.

The party examining shall serve the appointment for such examination upon the solicitor of the opposite party at least forty-eight hours before the examination.

An order may be made for the examination of any person liable to be examined as aforesaid before any other person or in any other county."

Discovery of documentary evidence is provided for as follows:

Each party, after the defense is delivered, or an issue has been filed, may by notice require the other within ten days to make discovery on oath of the documents which are or have been in his possession or power, relating to any matters in question in the action; and to produce and deposit the same with the proper officer for the usual purposes. A copy of such affidavit shall be served forthwith after filing.

"The court may at any time order production and inspection of documents generally or of any particular document in the possession of any party.

"When a document is in possession of a person not a party to the action and the production of such document at a trial might be compelled, the court may at the instance of any party, on notice to such person and to the opposite party, direct the production and inspection thereof, and may give directions respecting the preparation of a certified copy which may be used for all purposes in lieu of the original.

"A party shall be entitled to obtain the production, for inspection, of any document referred to in the pleadings or affidavits of the opposite party, by giving notice to his solicitor, and shall be entitled to take copies of such documents when so produced for inspection.

"The party to whom such notice is given shall forthwith deliver to the party giving the same a notice stating a time within two days from the delivery thereof at which the document may be inspected at the office of his solicitor, and shall at the time named produce the document for inspection.

"If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the court, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute should be determined before deciding upon the right to the discovery or inspection, may order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

"If a party fails to comply with any notice or order for production or inspection of documents, he shall be liable to attachment and shall also be liable, if a plaintiff, to have his action dismissed, and if a defendant, to have his
defense, if any, struck out. Service of the notice of motion upon the solicitor of the party is, unless the court otherwise directs, sufficient."

Discovery procedure is extensively used and with uniform satisfaction by the bar of Ontario. Inspection of records of five hundred consecutive cases in Toronto indicates that discovery is used as of course in approximately fifty per cent. of all seriously contested cases. Toronto practitioners said that discovery examinations form one of the most satisfactory and salutary features of Ontario practice.

Oregon.

There is an unconditional right to take the deposition of a party before trial under the following Oregon statute:

"The testimony of a witness in this state may be taken by deposition in an action at law or suit in equity at any time after the service of the summons or the appearance of the defendant; and in a special proceeding after a question of fact has arisen therein, in the following cases:

"1. When a witness is a party, or an agent, officer, servant, or employee of a corporation which is a party to the action or proceeding by the adverse party.

"2. When the witness’s residence is such that he is not obliged to attend in obedience to a subpoena.

"3. When the witness is about to leave the county and go more than twenty miles beyond the place of trial.

"4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

"5. When the testimony is required upon a motion, or in any other case where the oral examination of the

187 Id. rules 348–353.
188 For general appraisals of the Ontario practice, see address of Mr. Justice William Renwick Riddell before the American Bar Association in 6 Am. Jud. Soc. Jour., 6, 11. See also rules of civil procedure recommended in 1919 by the American Judicature Society, Bulletin XXIV, p. 93 for a description and appraisal of the Ontario practice.
witness is not required; providing, however, that in any
case provided for in subdivision 1 of this section, such
deposition may be taken only before the court in which
said suit or action is pending, or before a judge of a court
of record within the county where such suit or action is
pending; but in case such witness be not within said
county such deposition may be taken before any judge
of a court of record in any county within the state where
such witness may reside or be found.""\footnote{189}

There is the following statutory provision for inspec-
tion of books and papers:

"The court or judge thereof, while an action or suit is
pending, may order either party to give the other, within
a specified time, an inspection and copy, or permission
to take a copy of any book, document, or paper in his
possession, or under his control, containing evidence or
matters relating to the merits of the action or suit, or the
defense therein. If obedience to the order be neglected
or refused, the court may exclude the book, document,
or paper from being given in evidence, or if wanted as
evidence by the party applying therefor, may direct the
jury to presume it to be such as he alleges it to be; and
the court may also punish the party so neglecting or re-
fusing as for a contempt. This section is not to be con-
strued to prevent a party from compelling another to
produce books, documents, or papers, when he is ex-
amined as a witness.""\footnote{180}

\textbf{Pennsylvania.}

There is a Pennsylvania statute which provides that:

"In any civil proceeding the testimony of any com-
petent witness may be taken by commission or deposi-
tion, in accordance with the laws of this commonwealth
and the rules of the proper court.""\footnote{181}

\footnote{189 Ore. Code (1930) ch. 9, sec. 1503.}
\footnote{180 Id. ch. 7, sec. 203.}
\footnote{181 Purdon's Penna. Stat. Ann. (1930) Tit. 28, sec. 5.}
It has been held, however, that a rule of court which provides that a rule may "be entered by either party to take the depositions of witnesses without regard to the circumstances of their being aged, infirm or going witnesses, stipulating, however, eight days’ notice to the adverse party" is contrary to law and void.\(^1\)\(^8\) The effect of this construction of the statute is to make the right to take depositions conditional upon the prospective unavailability of the witness at the trial.

There is the following statute on production of books and papers:

"The supreme court, and several courts of common pleas in this state, shall have power, in any action depending before them, on motion, and upon good and sufficient cause shown, by affidavit or affirmation, and due notice thereof being given, to require the parties, or either of them, to produce books or writings in their possession or power, which contain evidence pertinent to the issue; and if either party shall fail to comply with such order, and to produce such books or writings, or to satisfy said courts why the same is not in the party’s power so to do, it shall be lawful for the said courts, if the party so refusing shall be a plaintiff, to give judgment for the defendant as in cases of nonsuit, and if a defendant, to give judgment against him or her by default, as far as relates to such parts of the plaintiff’s or plaintiffs’ demand, or the defendant’s or defendants’ defense, to which the books or papers of the party are alleged to apply."\(^2\)\(^8\)

Quebec.

The Quebec discovery practice is a combination of the Ontario practice and the Continental interrogatory procedure.\(^3\)\(^4\)

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\(^1\)\(^8\) International Coal Mining Co. v. Pa. R. R. Co. (1906) 214 Pa. 496, 63 Atl. 880.


\(^3\)\(^4\) See the able articles of Judge E. Fabre-Surveyer in 2 La Revue du Droit, pp. 173, 204, 440 as to the respective French and English influences.
There is the following provision for an oral examination before trial:

"After defence filed, any party may, after one clear day's notice to the attorney of the opposite party, summon any of the following persons to answer as a witness, before the judge or the prothonotary, upon all facts relating to the action or the defence:

1. The opposite party, his bookkeeper, agent or manager;

2. When the opposite party is a corporation, the president, manager, treasurer, or secretary of such corporation;

3. When the opposite party is a foreign firm or corporation doing business in this province, the agent of such firm or corporation.

"The rules governing the summoning, examination and punishment of witnesses and the taking of evidence, apply, in so far as may be, to the cases mentioned in the preceding article.

"If any dispute arises during the examination before the prothonotary, the parties are sent before the judge to have it decided.

"The deposition taken by virtue of the preceding articles shall be used as evidence in the case; but if the party examined as a witness is still in the province, and can be produced at the trial, he may be examined again. The deposition taken before the trial shall, in any case, form part of the record, and the costs thereof shall enter into taxation.

"Upon the application of any party, the judge may, at any time after defence filed and before trial, order the opposite party to exhibit any object, or to give communication or furnish a copy or allow a copy to be made of, any book or document in his control, relating to the

which have contributed to the present Quebec discovery practice. For the parallel French interrogatory procedure see Cremieu, Precis de Procedure Civile, p. 255.
action or the defence, at such times and places, under such conditions and in such manner as are deemed proper.

"The costs of such examination form part of the costs in the cause unless the judge, in adjudicating upon costs, orders otherwise." 128

There is the following statutory procedure which is known as interrogatories upon articulated facts:

"The parties may be examined upon articulated facts as soon as the defence is filed, upon the facts in issue as then joined, and without retarding the trial or the judgment.

"If the defendant is in default to appear or to plead to the action, he may be examined on articulated facts as soon as he is so in default.

"Parties are summoned to answer interrogatories upon articulated facts by means of a process issued by the prothonotary, in the name of the Sovereign, upon a written requisition to that effect, and ordering the party to appear before the court, the judge or the prothonotary, to answer the interrogatories to be put to him, which are annexed to the process and are served upon him.

"The order to answer upon articulated facts is served upon the party personally or at his domicile, and not upon his attorney; unless such party is absent or absconding; and a copy both of the order and of the interrogatories must be left with him.

"If the party is absent, the attorney who has been served may apply to have delay given him to appear, or, if he declares the place where such party then is, the opposite party may require that he be examined under a commission.

"Even in the case where service is made on the party himself, a copy of the order and of the interrogatories

must be left with the attorney, observing the same delays as to service.

"A party summoned to answer interrogatories upon articulated facts must appear personally to give his answers under oath.

"When the service is made upon a corporation or legally recognized body or community, the answers may be given under oath by the president, manager, secretary, treasurer, or other officer or employee, if he holds a general or special authorization for that purpose; or the answers which he must give and swear to as being those which the party summoned intends to give, may be specified by special resolution.

"When such service is made upon a foreign corporation carrying on business in this province, the answers may also be given under oath by the person who is at the time intrusted with carrying on the affairs of the corporation, whatever be his designation or official title; but such answers may also be given by any person previously authorized by a resolution of the board of directors of such foreign corporation, to appear and answer in its behalf the interrogatories that may be served upon it.

"If the party served with the rule fails to attend or to answer the questions put to him, a default is recorded against him, and the facts may be held to be admitted.

"The judge may, nevertheless, for cause shown and upon such conditions as he thinks fit, allow the party so in default to answer the interrogatories afterwards, before the conclusion of the evidence of the party who summoned him.

"The interrogatories must be drawn up in a clear and precise form, in such a manner that the absence of an answer shall be an admission of the fact sought to be proved.

"The answers are taken down in writing and signed by the party.
"The court or the person before whom the party is summoned to answer, may put any other interrogatories he may deem necessary and pertinent.

"If the party refuses to answer such interrogatories, the court, the judge or the prothonotary, as the case may be, causes them to be written out and placed in the record, and they are held to be admitted.

"The answers must be direct to the question, categorical and precise.

"If any dispute arises during the examination, the parties are sent before the judge to have it decided.

"Every answer which is not direct, categorical and precise, may be rejected, and the facts mentioned in the interrogatory declared and held to be proved.

"The expense of interrogatories upon articulated facts forms part of the costs in the cause.

"Any party, on being served with a rule to answer interrogatories upon articulated facts, may demand the necessary funds to pay his travelling expenses; but when he is before the court, the judge or the prothonotary, he cannot refuse to be sworn or to answer unless he is paid.

"He has a right to have his expenses taxed, and such taxation may be enforced by execution against the opposite party."

Rhode Island.

The following statute on depositions obtains in Rhode Island:

"Except in equity causes, any justice of the supreme or superior court, justice of the peace, or notary public, may take the deposition of any witness, to be used in the trial of any civil suit, action, petition or proceeding, in which he is not interested, nor counsel, nor the attorney of either party, and which shall then be commenced or pending in this state, or in any other state, or in the District of Columbia, or in any territory, government, or

186 Id. secs. 359-370.
country; and in equity causes testimony may be taken by
deposition or orally.''

The Rhode Island Supreme Court, however, has held
that a party is not a witness in the sense that his deposi-
tion may be taken before trial. There is at present in
Rhode Island a concerted movement among the bar to so
amend the statutes as to allow adverse examinations be-
fore trial.

Discovery of documentary evidence is authorized un-
der the following statute:

"Whenever either party to any proceeding at law or
equity in the superior court shall set forth in writing,
under oath, upon his knowledge or belief, that the op-
posite party is in the possession or control of some docu-
ment which the applicant is entitled to examine, and
prays for its production, a justice of the court, to whom
application is so made, on such petition, may order the
opposite party, or if the same be a body corporate, then
some officer thereof, to make answer on oath at or before
a time to be fixed in said order, as to what document
he or it so has relating to the matter in dispute between
the parties, or what he knows as to the custody of such
document, and, if in his or its possession or control,
whether he or it objects to the production of the same
and the grounds of such objection; and thereupon such
justice, after hearing such petition, answer, and evidence,
shall decide whether or not said document shall be pro-
duced, and order, or decline to order, its production, and,
if proper, compel the party having the same in his or
its possession or control to allow the applicant to ex-
amine the same, and, if necessary, to take examined
copies of the same, or have such original documents im-
pounded, and may make such further order in the prem-
ises as shall be just."
There is the following provision for oral examination of parties before trial:

"No action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

"A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

"The examination, instead of being had at the trial, as provided in the last section, may be had at any time before trial, at the option of the party claiming it, before a judge of the court, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance; nor unless it be upon the order of a judge of the court granted after four days' notice, and upon good and sufficient cause being shown therefor.

"The party to be examined, as in the last section provided, may be compelled to attend in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

"The examination of the party, thus taken, may be rebutted by adverse testimony.

"If a party refuses to attend and testify, as in the last four sections provided, he may be punished as for
a contempt and his complaint, answer, or reply may be stricken out.

“A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf, subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsible to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received.

“A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner and subject to the same rules of examination as if he were named as a party.

“A party may be examined on behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever one of the several plaintiffs or defendants who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause or action or defense, and shall be so received.”

There is the following statute on depositions:

“The clerks of the courts of common pleas in this state, in all civil causes or proceedings at issue in the

courts of common pleas for their respective counties, shall, upon the application of either party to such cause or proceeding, after ten days’ notice to the adverse party, take, in writing, the depositions of said party, or of any witness or witnesses in said cause or proceeding, whose examination shall be required by the party making such application; upon taking which depositions, the several parties shall be entitled to the same rights of examination, cross-examination, and examination in reply, and the same exceptions to the admissibility of evidence, as are allowed by law upon examination before the court. And the depositions so taken shall be certified by the clerk before whom such examination was had, and may be read in evidence at the trial of the said cause or proceeding; subject, nevertheless, to the right of either party to require the personal attendance and *viva voce* examination of the witness or witnesses at the trial of said cause, or proceeding; the exercise of which right, however, not to cause a continuance or delay in the trial of the said cause or proceeding.

“In addition to the methods for taking testimony now provided by law the testimony of any witness may be taken in any civil action pending in the court of common pleas for any county within this state by deposition *de bene esse*, where the witness lives without the county in which such cause is to be tried, or at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of this state or out of the county in which the cause is to be tried, or to a greater distance than one hundred miles from the place of trial before the time of trial, or when he is aged or infirm. The deposition may be taken before any circuit judge of this state, or the clerk of any of the circuit courts of this state, or any magistrate or notary public of this state, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magis-
trate of a city, magistrate, judge of a county court or court of common pleas, of any of the United States or the Dominion of Canada or Kingdom of Great Britain, or any notary public not being of counsel or attorney to either of the parties interested in the event of the cause. Reasonable notice, not less than ten days, must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and whenever, by reason of absence from the state and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any of the circuit judges of this state shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section in the same manner as witnesses may be compelled to appear and testify in court." 142

There is the following provision for inspection of writings:

"The court before which an action is pending, or a judge or justice thereof may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both." 143

142 Id. secs. 719, 722.
143 Id. sec. 689 in part.
Examination of adverse parties is provided for by the following statutes:

"No action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

"A party to the record of any civil action or proceeding; a person for whose immediate benefit the action or proceeding is prosecuted or defended; or any officer, superintendent or managing agent of any corporation which is a party to the record, may be examined as a witness at the instance of the adverse party and for that purpose may be compelled, in the same manner as any other witness, to attend and testify either at the trial, conditionally or upon commission. Such examination shall be subject to the rules applicable to the examination of other witnesses, except as otherwise provided in this chapter. Such adverse party or witness may be examined by the adverse party as if under cross-examination; the party calling him shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him. Such witness, when so called, may be examined by his own counsel, but only as to matters testified to on such examination.

"The examination provided for in the preceding section may be had at any time before the trial, at the option of the party claiming it, before a judge of the court or a referee appointed for that purpose by a judge of the court, upon six days' notice to the party to be examined and any other adverse party, unless, for good cause shown, the court order otherwise; but the party or person to be examined shall not be compelled to attend in any county other than that of his residence or where he
may be served with notice of such examination; and the examination shall be taken and filed before the judge or referee as when a witness is examined conditionally, and may be read by either party at the trial.

"If a party refuse to attend and testify, as provided in this chapter, he may be punished as for a contempt, and his complaint, answer or reply may be stricken out." 144

There is the following liberal provision for taking depositions:

"Either party may commence taking testimony by depositions at any time after service upon the defendant.

"The deposition of any witness may be used only in the following cases:

"1. When the witness does not reside in or is absent from the county where the action or proceeding is pending or is sent for trial.

"2. When from age, infirmity or imprisonment, the witness is unable to attend court, or is dead.

"3. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required." 145

Inspection of writings is authorized as follows:

"The court before which an action is pending, or a judge thereof, may, in its or his discretion and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take copy, of any books, papers and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, may, on motion, exclude the paper from being given in evidence, or punish the party refusing, or both." 146

145 Id. secs. 2756, 2757.
146 Id. sec. 2712.
Examination of parties is provided for as follows:

“In all chancery causes, and proceedings in the nature of chancery causes, the depositions of parties may be taken by the opposite side, or by a coparty on the same side when the latter is entitled to such evidence, upon notice as in the case of other witnesses.

“Either party to a suit at law is entitled to a discovery from the other party of any matters material to the issue of such suit, in all cases where the same party would, by the rules of equity, be entitled to a discovery in aid of such suit.

“To obtain such discovery, he shall present his petition, verified by affidavit, to the court, judge, or justice, setting forth the matter upon which his claim to discovery is founded, the facts sought to be discovered, and such interrogatories in relation thereto as he may think necessary to exhibit in order to obtain a full discovery.

“This petition, in all cases pending in courts of record, should be presented at least five days before the trial term, or a sufficient excuse given by affidavit for not thus presenting it.

“The court, judge, or justice may, upon such petition, grant an order requiring the party from whom such discovery is sought, to answer the petition and interrogatories, or such of them as it may appear to the court or officer ought to be answered, or show cause why they should not be answered.

“The order shall prescribe the time within which the petition and interrogatories should be answered, or cause shown against the rule; and the trial of the cause will be stayed until the order is complied with or vacated.

“The petition and order will be filed with the other papers in the cause, and a copy served upon the party from whom discovery is sought, or his counsel, and such proceedings may be had as are had by a court of equity, upon a bill of discovery in aid of a suit at law.
The answer to the petition and interrogatories may be sworn to before the same officers, and in the same way, as answers in chancery to bills of discovery.

The answer of the party to the petition and interrogatories is evidence on the trial of the suit, in the same manner, and with like effect, as an answer to a bill in equity, for discovery.

If the answer is not filed in the time prescribed, or if it is not full, or is evasive, unless further time is given, the party filing the petition is entitled to take the same for confessed, or to proceed by process of contempt to enforce a full and satisfactory answer, as in the court of chancery.

If the petition is taken for confessed, the facts stated in the petition may be given in evidence as admitted by the person from whom the discovery is sought." 147

There is the following provision for depositions:

The evidence of witnesses may be taken by deposition, in civil actions, by either party:

1. When the witness, from age, bodily infirmity, or other cause, is incapable of attending, to give testimony at the trial.

2. When he resides out of the state.

3. When he resides in the state, but not within the limits of the county in which the suit is pending; in which case, the adverse party may, if he desire to have the witness examined in open court, cause him to be subpoenaed.

4. When he is under the necessity of leaving the state before the cause is tried, or even before it is at issue.

5. When he is about to leave the county in which the suit is pending, and will probably not return until after the trial.

6. When he is the only witness to a material fact.

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147 Code of Tenn. (1932) secs. 9868-9878.
"7. When he is an officer of the United States, an officer of this state, or of any county in the state, the clerk of any court of record other than that in which the suit is pending, a member of the general assembly while in session, or clerk or officer thereof, a practicing physician or attorney, a jailer or keeper of a public prison in any county other than that in which the suit is pending.

"8. When he is a notary public, whether a suit be pending or not; to be evidence between the same parties in any suit then or thereafter pending, should the notary die or remove out of the state before the trial.

"9. When the suit is brought by a party in forma pauperis." 148

There are the following statutory provisions for discovery and preservation of evidence under the ordinary deposition procedure in Texas:

"Depositions of witnesses may be taken when the party desires to perpetuate the testimony of a witness, and, in all civil suits heretofore or hereafter brought in this state, whether the witness resides in the county where the suit is brought or out of it; provided, the failure to secure the deposition of a male witness residing in the county in which the suit is pending shall not be regarded as want of diligence where diligence has been used to secure his personal attendance by the service of subpoena or attachment, under the rules of law, unless by reason of age, infirmity or sickness, or official duty, the witness will be unable to attend the court, or unless he is about to leave, or has left the state or county in which the suit is pending and will not probably be present at the trial.

"The testimony of any witness and of any party to a suit by oral deposition and answer may be taken in any civil case in any district or county court of this state, in

148 Id. sec. 9806.
any instance where depositions are now authorized by law to be taken.

"These rules shall govern the taking of the deposition of the adverse party:

"1. Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness.

"2. No notice of the filing of the interrogatories is necessary.

"3. A commission to take the answers of the party to the interrogatories shall be issued by the clerk or justice, and be executed and returned by any authorized officer as in other cases.

"4. A copy of the interrogatories need not be served on the adverse party before a commission shall issue to take the answers thereto.

"5. The examination of the adverse party shall be conducted and testimony received in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of this article.

"6. The party interrogated may, in answer to questions propounded, state any matter connected with the cause and pertinent to the issue to be tried; and the adverse party may contradict the answers by any other competent testimony in the same manner as he might contradict the testimony of any other witness.

"7. If the party interrogated refuses to answer, the officer executing the commission shall certify such refusal; and any interrogatory which the party refuses to answer, or which he answers evasively, shall be taken as confessed.

"8. The party interrogated may, upon the trial of the case, take exception to the interrogatories on the ground that they are not pertinent, and to the answers that they are not competent evidence.
"9. It shall be no objection to the interrogatories that they are leading in their character.

"10. Where any party to a suit is a corporation, such corporation shall not be permitted to take ex parte deposition, nor shall any ex parte deposition be taken of the agents of such corporation, but if there are more than two parties to the suit ex parte depositions may be taken by or of any such parties to the suit, except the corporation or its agents. It is hereby expressly provided that any party to a suit wherein a corporation is a party shall have the right to take written and oral depositions of any party to such suit or of any witness, after giving notice and complying with the other requirements of that statutes (statute) of the State of Texas, as to the taking of written and oral depositions of witnesses. It is further hereby expressly provided that when any ex parte deposition is taken in any suit whatever, either the party taking the same or the party giving the same shall have the right to introduce the deposition in evidence, subject to the general rules of evidence without regard to whether the person offering the same has crossed the interrogatories or not, and without regard to whether or not the witness who gave the deposition is present in court or has testified in the case." 149

Utah.

Examination of adverse parties may be had by deposition under the following Utah statute:

"The testimony of a witness in this state may be taken by deposition in an action, at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, after a question of fact has arisen therein in the following cases:

"1. When the witness is a party in the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;"

"2. When the witness resides out of the county in which his testimony is to be used;
"3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;
"4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend;
"5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required." 150

There is the following provision for inspection of books and papers:

"Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other within a specified time a copy, or permission to take a copy, of entries of account in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness." 151

Vermont.

There is the following statutory provision for taking depositions:

"Justices may take the deposition of a witness or party out of court:
"I. When he resides more than thirty miles from the place of trial;

150 Utah Comp. Laws (1917) sec. 7178.
151 Id. sec. 7204.
"II. When he is going out of the state, not to return before the time of trial;

"III. When by reason of age, sickness or other bodily infirmity, he is rendered incapable of traveling and appearing at court;

"IV. When he resides out of the state;

"V. When he is confined in jail;

"VI. When he is a judge of the supreme court and is going out of the county in which he resides to perform his official duties, not to return before the time of trial.

"VII. When she is a cloistered sister of a religious community.")

Virginia.

Interrogatories to the adverse party are authorized by the following statute:

"In a case at law a party may file in the clerk's office, and, in a case or matter before a commissioner of a court, any person interested may file with such commissioner interrogatories to any adverse party or claimant. The clerk or commissioner shall issue a summons, requiring the officer to summon the proper party to answer said interrogatories, and make return thereof within such time, not exceeding sixty days, as may be prescribed in the summons. With the summons there shall be a copy of the interrogatories, which shall be delivered to the person served with the summons at the time of such service; if the summons be against the plaintiff who is not a resident of this state, or a defendant who is not a resident of this state, but who has appeared in the case or been served with process in this state, the service may be on his attorney-at-law. When the court in which the case is, or whose commissioner issued the summons, is satisfied that the interrogatories are relevant, and such as the person to whom they are propounded would be bound to answer upon a bill for discovery, and sees also

that the interrogatories have not been unreasonably delayed, it may, if the said person do not in a reasonable time file answer thereto, upon oath, or, if he file answers which are evasive, attach him and compel him to answer in open court, or to answer more explicitly. It may also, if it see fit, set aside a plea of his, and give judgment against him by default, or if he be plaintiff, order his suit to be dismissed with costs, or, if he be claiming a debt before a commissioner, disallow such claim. Answers to such interrogatories may be used as evidence at the trial of the cause, in the same manner and with the same effect as if obtained upon a bill of discovery. A corporation may be required to answer proper interrogatories under this section, and shall answer by its president, vice-president, treasurer, secretary, cashier, business manager, or by any officer or agent, having the information sought in said interrogatories, and any such person may be summoned to answer said interrogatories for such corporation." 168

There is the following provision for taking depositions:

"In any pending case the deposition of a witness, whether a party to the suit or not, may be taken in this state after the declaration or bill has been filed by a justice, or notary, or by a commissioner in chancery; and, if certified under his hand, may be received without proof of the signature to such certificate." 164

Discovery of documentary evidence is provided for as follows:

"In any case at law a party may file in the clerk's office, and in any case or matter before a commissioner of a court any person interested may file with such commissioner, an affidavit, setting forth that there is, he verily believes, a book of accounts or other writing in

164 Id. sec. 6225.
possession of an adverse party or claimant containing material evidence for him, specifying with reasonable certainty such writing or the part of such book. The clerk or commissioner shall issue a summons, directed as under the preceding section, requiring him to summon the proper party to produce such writing, or an exact copy of such part of the said book, and make return thereof as under that section. With the summons there shall be a copy of the affidavit, which shall be delivered to the person served with the summons at the time of such service; if the summons be against a plaintiff, who is not a resident of this state, or a defendant who is not a resident of this state, but who has appeared in the case or been served with process in this state, the service may be on his attorney-at-law. When the court in which the case is, or whose commissioner issued the summons, is satisfied that the person filing such affidavit has no means of proving the contents of such writing, or of such part of the book, but by the person summoned producing what is required by the summons, and also that the call therefor has not been unreasonably delayed, it may, unless the person summoned shall, in a reasonable time, either produce what is so required, or answering in writing, upon oath, that he has not under his control such book or writing, or any of the like import, attach him and compel him to do the one or the other. It may also, if it see fit, set aside a plea of such person, and give judgment against him by default, or if he be plaintiff, order his suit to be dismissed with costs, or if he be claiming a debt before a commissioner, disallow such claim. This section shall apply to corporations and the court or commissioner, as the case may be, shall have jurisdiction to enforce its provisions as to a corporation by attaching the proper custodian of any such book or other writing, in the possession of such corporation.”

155 Id. sec. 6237.
Washington.

There is the following provision for examination of parties before trial:

"A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify at the trial or he may be examined on a commission.

"Instead of the examination being had at the trial, as provided by the last section, the plaintiff, at the time of filing his complaint or afterwards, and the defendant, at the time of filing his answer or afterwards, may file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party.

"Such interrogatories shall be served in the manner provided by law for the service of summons, or by service upon the attorney of the party to be interrogated, and the answers thereto shall be served and filed within twenty days after such service unless for cause shown a further time be allowed by the court. A private corporation may be interrogated in the same manner as individuals, and it shall not be excused for a failure to answer any proper interrogatory unless it shall show that no one in its employ or connected with, or interested in it, can give the desired answer or information.

"A party to an action or proceeding, having filed interrogatories to be answered by the adverse party, as prescribed by the last two sections, shall not thereby be precluded from examining such adverse party as a witness at the trial, nor from taking his deposition to be read at the trial.

"If a party refuse to attend and testify at the trial, or to give his deposition, or to answer any interrogatories filed, his complaint, answer or reply may be stricken out,
and judgment taken against him, and he may also, in the
discretion of the court, be proceeded against as in other
cases for a contempt: Provided, that the preceding sec­
tions shall not be construed so as to compel any person
to answer any question where such answer may tend to
criminate himself."  

There is the following provision by rule of court for
discovery by taking depositions:

"The testimony of a witness may be taken by deposi­
tion, to be read in evidence in an action; suit, or proceed­
ing commenced and pending in any court in this state, in
the following cases:

"1. When the witness resides out of the county, and
more than twenty miles from the place of trial;

"2. When the witness is about to leave the county, and
go more than twenty miles from the place of trial, and
there is probability that he will continue absent when the
testimony is required;

"3. When the witness is sick, infirm, or aged, so as
to make it probable that he will not be able to attend at
the trial;

"4. When the witness resides out of the state;

"5. When the witness is (a) a party to the action or
(b) an officer, agent, partner, stockholder or employee of
a party or (c) the next friend, guardian or guardian ad
litem of an infant party or party of unsound mind or
(d) the person or any of the persons for whose benefits
the action is prosecuted or defended.

"The deposition of a defendant or of an officer, agent,
partner, stockholder or employee of a defendant or of
the next friend, guardian or guardian ad litem of a de­
fendant or the person or any of the persons for whose
benefit the action is defended shall not be taken until the
expiration of twenty days after the service of summons
upon such defendant, Provided, however, that for good

cause shown the court may permit the taking of such deposition prior to the expiration of said twenty day period and in such case a copy of the order authorizing the taking of such deposition shall be served with the notice for the taking of the same." 157

**West Virginia.**

There is the following provision for taking and using depositions:

"In any pending case the deposition of a witness, whether a party to the suit or not, may, without commission, be taken in or out of this state by a justice, or notary public, or by a commissioner in chancery, or before any officer authorized to take depositions in the county or state where they may be taken. And such depositions may be taken in shorthand, or stenographic characters or notes, and shall be written out in full and transcribed into the English language by the stenographer taking the same, and certified to by the officer before whom the depositions are taken; and if certified by such officer under his hand and if further certified by him that such stenographic characters and notes were correctly taken and accurately transcribed by him, or under his direction and supervision, and that the witnesses were duly sworn, such depositions may be received and read in evidence without proof of the signature to such certificate and without the signature of the witness to such depositions. And in case the stenographer taking such depositions is not the officer before whom the same are being taken, then such stenographer, before proceeding to take any of said depositions, shall be sworn to take correctly and accurately transcribe the same, and the certificate of the officer before whom the depositions are taken shall state that the stenographer was so sworn." 158

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157 Supreme Court Rule 8, found in 150 Wash. XXXVII.
There is the following provision for production of writings:

"In any case at law, upon a party making affidavit that a particular book of accounts, or other writing or paper is important for him to have in the trial of his cause, he may procure from the clerk of the court in which the action is pending a subpoena duces tecum requiring any party to the action to appear before the court on a day named therein, and bring with him and produce before such court such book of accounts, or other writing or paper, as is specified in such process, in order that the same may be used as evidence on the trial of the action. And unless the person upon whom such process is served shall, at the time specified therein, produce what is so required, or show to the satisfaction of the court that he has not under his control such book, writing or paper, or unless, from an inspection or otherwise, the court is of opinion that the character of the book, writing or paper is such as should not be used as evidence on the trial of the action, the court may attach him and compel him to produce the same. It may also, if it see fit, set aside a plea of such person and give judgment against him by default, if he be a defendant, or, if he be a plaintiff, order his suit to be dismissed, with costs, or if he be claiming a debt before such court or commissioner, disallow such claim.

"When it appears by affidavit or otherwise that a writing or document in the possession of any person not a party to the matter in controversy is material and proper to be produced before the court, or any person appointed by it or acting under its process or authority, or any such person as is named in section one of this article, such court, judge or president thereof in vacation may order the clerk of the said court to issue a subpoena duces tecum to compel such production at a time and place to be specified in the order." 189

189 Id. ch. 57, art. 5, secs. 3, 4.
There is the following provision for discovery examinations before trial:

"The adverse examination of a party, his or its assignor, officer, agent or employe, or of the person who was such officer, agent or employe at the time of the occurrence made the subject of the examination, may be taken by deposition at the instance of any adverse party upon oral or written interrogatories in any civil action or proceeding at any time before final determination thereof. Each of said persons may be so examined once and no more, except when examined before issue joined, in which case he may be again examined after issue joined, upon all the issues. If the examination is taken after the complaint is served, but before issue is joined, it may extend to all the allegations of the complaint.

"Except as provided otherwise by this section, such examination may be had within or without the state, and may be instituted and conducted under and pursuant to the laws and rules regulating the taking of other depositions for use in actions or proceedings.

"Such examination, when taken within the state, shall be taken before a judge at chambers or a court commissioner on previous notice to all adverse parties or their respective attorneys of at least five days. If the person to be examined is a nonresident individual who is a party to the action or proceeding, or is a nonresident president, secretary, treasurer or managing agent of a foreign corporation that is a party to the action, the court may upon just terms fix the time and place of such examination, either within or without the state, and such nonresident shall attend at such time and place and submit to the examination, and, if required, attend for the reading and signing of such deposition, without service of subpoenas. Such examination shall not be compelled in any county other than that in which the person examined resides, except when a different county shall be
designated for the examination of a nonresident, and except that any nonresident subject to examination may be examined in any county of this state in which he is personally served with notice and subpoena.

"If discovery is sought, to enable the plaintiff to frame a complaint, the notice of taking the examination shall be accompanied by the affidavit of himself, his attorney or agent, stating the general nature and object of the action or proceeding; that discovery is sought to enable him to plead, and the subjects upon which information is desired; and the examination relative thereto shall be permitted unless the court or presiding judge thereof shall, before the examination is begun, further limit the subjects to which it shall extend, which may be done on one day's notice.

"Such portions of any such deposition as are relevant to the issues may be offered by the party taking the same, and shall be received when so offered upon the trial of action or proceeding in which it is taken, notwithstanding the deponent may be present." 160

The testimony of a witness other than a party may be taken when:

"1. He shall live more than thirty miles from the place of trial or hearing of the action, proceeding or matter in which his testimony is wanted or beyond reach of the subpoena of the court.

"2. When he shall be about to go out of the state, not intending to return in time for the trial or hearing.

"3. When he is so sick, infirm or aged as to make it probable that he will not be able to attend at the trial or hearing.

"4. When he shall be a member of the legislature, if any committee of the same or the house of which he shall be a member, shall be in session, provided he waive his privilege.

"5. When his testimony is material to any motion or other similar proceeding in any court of record, and he shall have refused to make affidavit of the facts, within his knowledge, in reference thereto." 161

Inspection of documents is provided for as follows:

"The court before which an action or proceeding is pending, or a judge thereof, may, in discretion and upon due notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy of any books, papers and documents in his possession or under his control containing evidence relating to the action or proceeding. If compliance with the order be refused, the court may exclude the paper from being given in evidence or punish the party refusing, or both." 162

**Wyoming.**

Written interrogatories are authorized by the following statutes:

"A party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issue made in the pleading, which interrogatories, if not demurred to, shall be plainly and fully answered under oath by the party to whom they are propounded, or if such party is a corporation, by the president, secretary or other officer thereof, as the party propounding requires.

"When annexed to the petition the interrogatories shall be answered within the time limited for answer to the petition; when annexed to the answer they shall be answered within the time limited for a reply; when annexed to the reply they shall be answered within the time allowed for an answer, but further time may be allowed in all cases by the court or a judge thereof in vacation.

"Answers to interrogatories may be enforced by nonsuit, judgment by default or by attachment, as the justice

161 Id. ch. 326, sec. 7.
162 Id. ch. 327, sec. 21.
of the case may require, and on the trial such answers, so far as they contain competent testimony on the issue or issues made, may be used by either party." 168

There is the following provision for depositions:

"The deposition of a witness may be used only in the following cases:

"1. When the witness does not reside in, or is absent from, the county where the action or proceeding is pending, or by change of venue is sent for trial.

"2. When the witness is dead, or, from age, infirmity or imprisonment is unable to attend court.

"3. When the testimony is required upon a motion, or when the oral examination of the witness is not required.

"Either party may commence taking testimony by deposition at any time after service upon the defendant." 164

There are the following provisions for discovery of documentary evidence:

"The court in which an action is pending, may, on motion and on reasonable notice thereof, require the parties to produce books and writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery; if the plaintiff fail to comply with such order to produce books or writings, the court may, on motion, give judgment for the defendant, as in case of nonsuit; and if a defendant fail to comply with such order to produce books or writings, the court, on motion, may give judgment against him by default.

"Either party, or his attorney, may also demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his pos-

164 Id. secs. 5831, 5832.
session, or under his control, containing evidence relating to the merits of the action or defense, which demand shall be in writing, and shall specify the book, paper, or document with sufficient particularity to enable the other party to distinguish it; if compliance with the demand within four days be refused, the court or judge may, on motion, and notice to the adverse party, 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; and on failure to comply with such order, the court may exclude the paper or document from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be; but this section shall not be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness.

"If the party in possession of any such book, paper, writing or document, allege that the same, or any part thereof, is of mere private interest, or of such character that it ought not to be produced, or an inspection or copy thereof allowed or taken, the court may, on motion of either party, direct a private examination thereof by a master; if the master find that such book, paper, writing or document contains matter pertinent to the cause, and proper to be produced, inspected or copied, he shall report the same to the court, or a copy of such part as he finds pertinent to the cause, and proper to be produced, inspected or copied; and the book, paper, writing or document, or part thereof, so reported, shall be admitted in evidence on the trial, unless excluded by the court for proper cause.

"Either party, or his attorney, shall, if required, 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; and if the plaintiff or defendant refuse to furnish the copy required, the party so refusing shall not be permitted to give in evidence at the trial the original, of which a copy has been refused; but this section shall not apply to a paper, a copy of which is filed with a pleading." 165

165 Id. secs. 5855–5858.
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