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DISCOVERY -- SCOPE OF EXAMINATION --ATTORNEY-CLIENT PRIVILEGE UNDER OHIO AND FEDERAL PROCEDURES

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DISCOVERY — SCOPE OF EXAMINATION — ATTORNEY-CLIENT PRIVILEGE UNDER OHIO AND FEDERAL PROCEDURES—During a deposition arising out of a suit against the Cleveland Transit System for its alleged negligent operation, Hyde, defendant's general manager, was ordered under subpoena duces tecum to produce reports of the defendant company and answer questions disclosing "all the busses (the numbers, and names and addresses of the drivers) from 11:30 P.M. September 25, 1944, to 12:15 A.M., going south on East 152 Street." Hyde and the company attorney who possessed the accident reports refused to produce them or answer questions concerning them, claiming that the reports were within the attorney-client privilege. The deponents were taken into technical custody, and they petitioned for a writ of habeas corpus in the court of appeals for Cuyahoga County.¹ Judgment was for defendant, the court holding the reports privileged and allowing the writ to issue. On appeal, *held*, affirmed. Reports of an accident, including the names and statements of the witnesses, are privileged when turned over to the company's legal department. *In re Hyde*, (Ohio 1948) 79 N.E. (2d) 224.

The scope of discovery in Ohio is confined to the old theory of the equity bill of discovery; it is thus limited to material needed for the preparation of the party's own case.² To eliminate the concealment, delay and fictitious issues fostered by such a procedure, the New Federal Rules require every party to reveal all non-privileged, relevant information under his control,³ thus making available evidence for both claim and defense.⁴ While instruments of discovery similar to those of

¹ While the Ohio cases are in apparent conflict on the question of the correct procedure for testing questions objected to as incompetent or irrelevant during the deposition, they are in agreement that refusal to answer because of a claimed privilege is permitted and the question may be tested by a habeas corpus proceeding. *De Camp v. Archibald*, 50 Ohio St. 618, 35 N.E. 1056 (1893); *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906); *Ex parte Martin*, 141 Ohio St. 87, 47 N.E. (2d) 388 (1943); Ohio Gen. Code (Page, 1926) §§ 12161, 12165.

² *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906); *Mill Co. v. Guaranty Co.*, 11 Ohio C.C. (n.s.) 443, 21 Ohio C.D. 4 (1908); *Ward v. Mutual Trucking Co.*, 1 Ohio Op. (C.P.) 456 (1933).

³ Rule 26(b), 28 U.S. C.A. (Cum. Pamphlet 1948) foll. § 723.

⁴ Melville, "Summary Judgment and Discovery: The Amended Rules Will Add to Their Usefulness," 34 A.B.A.J. 187 (1948); 31 MINN. L. REV. 712 (1947).

the Federal Rules⁵ are provided for in the Ohio statutes,⁶ they are interpreted in a manner which gives little aid to an uninformed party. Under the Federal Rules "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."⁷ Ohio retains the rigorous test of admissibility at trial, and in so doing prevents the discovery of matters peculiarly within the knowledge of the other party as well as immaterial, irrelevant and incompetent subjects, including "hearsay."⁸ Justification for the retention of these burdensome discovery restrictions is made under the shibboleth, "fishing expedition," which has now been discarded by the Supreme Court.⁹ Not only does Ohio restrict the affirmative scope of the discovery procedure, but it extends complete privilege to that which the Federal Rules would either permit to be discovered or leave to the discretion of the trial judge. Under the Federal Rules, the names and addresses of witnesses in an attorney's hands are relevant and not privileged. Nor is the attorney's work in anticipation of litigation necessarily within the attorney-client privilege, for accident reports may be discovered when it is shown that undue prejudice or hardship would result.¹⁰ Ohio, on the other hand, regards reports in the hands of an attorney as within the statutory attorney-client privilege, and this applies to depositions and interrogatories before trial as well as testimony at trial.¹¹ There is some indication that this privilege is allowed only where the attorney-client relationship is the motivating cause of the disclosure¹² and where the communication is connected with the business for which the attorney has been retained.¹³ The Ohio privilege encompasses reports of an accident made by the motorman of a defendant company and sent by him to the company's claim agent and then turned over to the company's lawyer.¹⁴ Similarly, report of an accident by defendant motor company to its insurance company in accordance with the requirement of the insurance policy, and in the possession of the attorney for the defendants, is privileged.¹⁵ The instant case is consistent with the Ohio decisions on the attorney-client privilege, but it perpetuates the "sporting theory"

⁵ Rules 26 to 37, 28 U.S. C.A. (Cum. Pamphlet 1948) foll. § 723.

⁶ Depositions, Ohio Gen. Code (Page, 1926) §§ 11525-34; interrogatories to parties, Ohio Gen. Code (Page, 1926) §§ 11348-50; production of documents, Ohio Gen. Code (Page, 1926) §§ 11551-5; physical and mental examination, *S. S. Kresge Co. v. Trester*, 123 Ohio 383, 175 N.E. 611 (1931); admissions of parties, Ohio

⁷ Rules 26(b), 33 and 34, *id.*

⁸ *Russell v. Railway*, 6 Ohio N.P. (n.s.) 353, 17 Ohio Dec. (N.P.) 435 (1908).

⁹ *Hickman v. Taylor*, 329 U.S. 495 at 507, 67 S.Ct. 385 (1947); *Ex parte Schoepf*, 74 Ohio St. 1 at 15, 77 N.E. 276 (1906); 47 Col. L. Rev. 314 (1947).

¹⁰ *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947).

¹¹ Ohio Gen. Code (Page, 1926) § 11494.

¹² *Smart v. Nova Caesarea Lodge*, 6 Ohio C.C. (n.s.) 15, 17 Ohio C.D. 273 (1904).

¹³ *Ex parte Martin*, 141 Ohio St. 87, 47 N.E. (2d) 388 (1943).

¹⁴ *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906).

¹⁵ *Re Klemann*, 132 Ohio St. 187, 5 N.E. (2d) 492 (1936); 108 A.L.R. 510 (1937).

of justice, against which the Federal Rules were designed.¹⁶ By indirection, however, the Ohio court attempts to approximate what would be the direct result of the Federal Rules, for it suggests that the names and addresses of the operators and the times of the operation of the vehicles of defendant company might properly be obtained by a subpoena of the general company records which contain the desired information, but which are not in the control of the legal department.¹⁷

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¹⁶ Holtzoff, "Instruments of Discovery under Federal Rules of Civil Procedure," 41 MICH. L. REV. 205 (1942).

¹⁷ Principal case at 227.