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PART IV

Adjective Law

CHAPTER 32

Civil Procedure and Practice

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§32.1. Discovery: Bill in equity. Both in actions at law and suits in equity discovery has generally been made by interrogatories and demands for formal admissions. These statutory methods for discovery, however, do not preclude the use of a bill in equity for discovery. In MacPherson v. Boston Edison Co. the Supreme Judicial Court reviewed the use of the equity bill as a means of discovery. The plaintiff, in a bill which sought no equitable relief other than discovery, joined as defendants the Boston Edison Company, the Norumbega Park-Totem Pole Corporation and their respective presidents. The bill alleged the existence of a pending action at law against Edison in which the plaintiff seeks recovery for injuries sustained by the alleged negligent maintenance by Edison of a wire on property owned by Norumbega. In this law action exceptions were taken by the plaintiff to denial of his motion for further answers to interrogatories. The equity bill sought discovery concerning the contract for sale of electricity, insurance, and various matters concerning licenses and permits for maintenance of poles, together with a prayer that his investigators be allowed to enter Norumbega's land for the purpose of making tests and measurements, and taking photographs. The plaintiff further recited that he had exhausted his remedy at law. The defendants' demurrers were sustained and the bill dismissed. On appeal the Court

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§32.1. 1 G.L., c. 231, §§61-67, 89.
2 Id. §69.
reversed, holding that discovery could be granted against Edison as to examination of the poles and wires on Norumbega's land and as to any other information that could have been obtained in a pre-1851 bill for discovery, so long as the information desired could not be obtained under any statutory procedure, i.e. interrogatories, demands for formal admissions, and examination of real estate. Discovery could be had against Norumbega for the limited purpose of allowing the plaintiff on its property to examine the poles and wires. Since in further proceedings some order directed to the corporate presidents might be appropriate in carrying out discovery, the decree dismissing the bill against them was reversed.

Previous cases have held that courts may entertain a bill for discovery when the statutory procedure is inadequate. There was some initial confusion after the passage of the 1851 act but by 1875 the principle that the bill in equity for discovery could be used was indicated in Ahrend v. Odiorne. Later cases confirmed the doctrine. In Owens-Illinois Glass Co. v. Bresnahan, the Court held that discovery by equity bill could be granted as to fragments of a bottle in the possession of the defendant and pointed out that the statutes providing for interrogatories extend only to the discovery of facts and documents and do not apply to the production and examination of ordinary chattels; entertainment of a bill for discovery is a part of general equity jurisdiction which may be exercised so long as there is nothing in the statutes to prevent it.

Thus the granting of discovery by equity bill against Edison in the MacPherson case is fully supported by precedent. The holding also precludes an indirect review in equity of the action of the trial judge in the law action.

In granting discovery against Norumbega for the limited purpose of allowing the plaintiff on its property, however, the Court has added an exception to the general rule that discovery will not be granted

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8 G.L., c. 231, §§61-67, 89, providing for interrogatories, was adopted in 1851.
6 General Laws, c. 153, §9, gives an employee injured on his employer's premises the right to examine the premises.
7 This holding reaffirmed the rule that discovery will lie against officers of a corporation so that a party may have the benefit of an answer under oath, which the corporation cannot give. Post and Co. v. Toledo, Cincinnati, and St. Louis R.R. Co., 144 Mass. 341, 345, 11 N.E. 540, 546, 59 Am. Rep. 86, 90 (1887); Wright v. Dame, 1 Metc. 237, 239 (Mass. 1840); 2 Story, Equity Jurisprudence § 1501 (7th ed. 1857).
8 In Wilson v. Webber, 2 Gray 558, 561 (Mass. 1854), the Court indicated the purpose of the 1851 act was to substitute interrogatories for equity bills for discovery.
9 118 Mass. 261, 269, 19 Am. Rep. 449, 455 (1875). The Court would not treat an equity bill as one for discovery for the reason that the discovery sought could have been had by interrogatories at law.
10 See the cases cited in notes 14 and 17 infra.
12 322 Mass. at 653, 79 N.E.2d at 198, 13 A.L.R.2d at 656.
against one not a party to pending or proposed litigation. In the case of *Post and Co. v. Toledo, Cincinnati, and St. Louis R.R. Co.*\(^{14}\) the Court did allow a bill for discovery against third parties. The bill was granted as to officers of an Ohio corporation, against which corporation the plaintiff had a legal judgment for discovery of the names of the stockholders who, under Ohio law, were personally liable. It was not alleged that the officers were stockholders or future defendants. The Court stated that courts do not compel discovery from persons who are witnesses only,

...but when a plaintiff has a cause of action against persons who are defined ... and the names and residences of these persons are unknown to him, it is not clear that there may not be such a state of facts that a court ought to compel a discovery of the names and residences of these persons from their agents in charge of the property or business, and the decisions recognize that this may sometimes be done.\(^{15}\)

In two subsequent decisions, *Kelly v. Morrison*\(^{16}\) and *American Security and Trust Co. v. Brooks*,\(^{17}\) the Court, however, reaffirmed the doctrine that discovery will not be allowed against third persons. The latter case was based on facts similar to *Post*. The plaintiff executor attempted to obtain from the defendant the names and circumstances of certain debtors of the decedent. The Court refused discovery, saying, "To relax the salutary rule so firmly established and thereby permit bills of discovery...[against third persons]...would...give rise to abuses which it was intended the establishment of the rule would prevent."\(^{18}\) Perhaps the two cases can be distinguished on the ground that in *Post* the corporate officers stood in some relation to the stockholders as their agents or as concerned with their property and business, and no such relation existed in the *American Security Co.* case.

In the *MacPherson* decision granting discovery against Norumbega, the Court could have relied on the "relation" principle mentioned in *Post*,\(^{19}\) since Norumbega does stand in some relation to Edison regarding Edison's business and property. At any rate, the decision does stand as an exception to the sweeping generalization against allowing discovery against third persons as set down in the *American Security Co.* case, the most recent prior case dealing with the subject.

Logically, the rule against granting discovery as to third parties grew out of the nature of the bill, which was to obtain admissions from a party for use as evidence against him. Discovery was not allowed against third parties since an admission by a third party could not be used as evidence against either antagonist and any information pos-


\(^{15}\) 154 Mass. at 548, 11 N.E. at 547, 59 Am. Rep. at 93.


\(^{17}\) 225 Mass. 540, 547, 547, 59 Am. Rep. 86, 91, 95 (1887).
Court upheld the right of commissioners to enter upon the lands of individuals to ascertain certain boundaries for public purposes. The Court stated that though there is a brief interference with the absolute right of the owner, the right of public officials to make such entries will be upheld when the entry is reasonably necessary, temporary and accompanied by no unnecessary damage. The New Hampshire Supreme Court has considered the problem of constitutionality in *Reynolds v. Burgess Sulphite Fibre Co.*[23] This case permitted a bill for discovery of a chattel and held that the slight infringement of property rights involved was not a violation of the constitutional protection against unreasonable searches and seizures. The principle seems to be sound, since it is only unreasonable searches and seizures that are constitutionally prohibited, and in weighing the relative merits of the sanctity of the home and the sanctity of the cause of justice, it seems reasonable that the former should give way to the latter when the entry is reasonable, temporary and accompanied by no unnecessary damage.

The *MacPherson* decision has settled the law concerning the relationship of bills for discovery in equity and the statutory discovery devices. A bill for discovery in equity will now lie only if the statutory procedure is inadequate and only if the subject matter of the bill is such that the ancient chancery practice would have allowed discovery. The above rules, hinted at in prior decisions, have now been precipitated clearly.

20 Fed. R. Civ. P. 34(2) states in part: "Upon motion of any party... the court may (2) order any party to permit entry upon designated land... for the purpose of inspecting, measuring, surveying, or photographing the property..."

21 See 4 Moore, Federal Practice § 34.05 (2d ed. 1950).