

Federal Procedure - Applicability of Discovery Procedure Under Federal Rules to Suits in Which the United States Is a Party

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tainly contrary to proper conceptions of correct control and regulation of the liquor business.

With a decision such as *State v. Grams*, supra, as law, proprietor licensees will find it behooves them to hire only honest, reliable operators who will obey all provisions of the law, in order to protect themselves from prosecution.

JANE O'MELIA.

Federal Procedure—Applicability of Discovery Procedure under Federal Rules to the United States.—In an action by the United States, the General Motors Corporation and others were charged with engaging in conspiracy in restraint of trade and commerce. The defendants answered and filed forty-five interrogatories under Rule 33 of the Rules of Federal Procedure, 28 U.S.C.A. following Sec. 723c, which they asked the government to answer. It was contended by the Government that Rule 33 “substitutes interrogatories for a bill of discovery”; that the United States has never consented to be a defendant in such a bill, or to answer interrogatories; and that the rule substantially changes legal rights. The court *held* that while an action does not lie against a sovereign except by consent and while the United States could not be compelled to make discovery in an action brought for that purpose, still the government in bringing a civil action against an individual may be subjected to the ordinary rules governing procedure in the court in which the suit is brought and that, accordingly, the Government could be required to answer the interrogatories. *United States v. General Motor Corporation*, 2 F.R.D. 528 (N.D. Ill. E.D. 1942).

In the instant case, the court pointed out that although Rule 33 does not specifically include the United States as subject to it, the fact that Rule 37(f) which provides that the payment of attorney's fees imposed for failure to answer interrogatories are not to be imposed on the United States, shows that Rule 33 was meant to apply to the United States. It might further be pointed out that a reading of the Federal Rules as a whole indicates that they were meant generally to apply to the Government as well as any other party to a civil action. Rule 12 specifically extends the time within which the United States may plead to sixty days. Rule 4 makes an exception of the United States in the procedure of service of process on the United States. And most imperative is Rule 81 wherein all the exceptions to the Rules are cited: and nowhere in Rule 81 is the United States exempt from the general application of the Rules. And furthermore, the cases have consistently held that in a civil action the United States takes the same position as any other private suitor. *United States v. National*

City Bank of New York (C.C.A., N.Y., 1936) 83 F. (2d) 236; *Pollen v. Ford Instrument Co.* (United States, Intervener) (D.C. N.Y. E.D., 1939) 26 F. Supp. 583; *In re Construction Material Corp.*, (D.C., D. Del. 1936) 18 F. Supp. 509; *United States v. Standard Oil Co.*, (D.C. S.D. Cal. N.D. 1937) 21 F. Supp. 645.

Some consideration should perhaps be given to the contention of the Government in the instant case to the effect that Rule 33 "substitutes interrogatories for a bill of discovery" and that the United States has never consented to be a defendant in such a bill. Prior to the adoption of the Federal Rules, Equity Rule 58 governed the procedure for obtaining discovery before trial both in suits in equity in which some relief other than discovery was sought, and in suits in equity brought solely for discovery in aid of an action at law. And the practice of the states permitting discovery were not applicable in actions at law in the Federal Courts since it was held that this field was preempted by federal statutes. *Ex parte Fisk* (1855) 113 U.S. 713, 5 S.Ct. 724, 28 L.Ed. 1117; *Carpenter v. Winn*, (1911) 221 U.S. 533, 31 S.Ct. 683, 55 L.Ed. 842. Discovery before trial in an action at law could be obtained by filing a bill in equity for discovery in aid of an action at law. And the party seeking to obtain the discovery had to make the opposing party a defendant to the bill in equity. Here seems to be the basis for the Government's objection to Rule 33 in the instant case. The suit in equity to obtain a discovery was an action separate and distinct from the action at law which such suit was supposed to aid.

Rule 33 embodied for the most part the substance of Equity Rule 58. But under the Federal Rules there are no suits in equity or actions at law as such, but only civil actions. Thus, in a civil action formerly denominated legal or equitable, it is not necessary to institute a separate action for discovery, but either party may obtain discovery before trial either by taking depositions upon oral examination or upon written interrogatories or by serving written interrogatories upon each adverse party. Federal Rules 26 to 33. However, while the new rules render the ancient bill of discovery obsolete for most purposes, still it seems that a bill for discovery would in substance be a proper proceeding under the Federal Rules where the plaintiff cannot without it find out whom he should sue, since the Rules do not provide for discovery before the filing of the complaint. *Pressed Steel Car Co. v. Union Pac. R. Co.*, (S.D. N.Y., 1917) 240 Fed. 135 and 241 Fed. 964; *Arms & Drury, Inc. v. Burg*, (C.A.D.C., 1937) 90 F. 2d 400.

While the court in the instant case makes Rule 33 applicable to the United States, there is no implication that there are no limits to discovery by a party adverse to the United States. In *United States v. Hartmann*, (D.C. E.D. Pa., 1942) 2 F.R.D. 477, the Government brought proceedings for the cancellation of the defendant's naturalization. The

United States claimed that in his oath of allegiance the defendant made representations which were false and fraudulent in that, at the time he took the oath, he did not renounce allegiance to Germany but fraudulently reserved it. The defendant moved for a bill of particulars. The court held that although the office of the bill of particulars is fast becoming obsolete because of the easily available and effective discovery procedure, the motion for the bill of particulars would be granted and the defendant would not be required to resort to the discovery procedure. On this point the court said: "There is of course always the choice between a more definite statement in the complaint and disclosure in discovery proceedings. I can see serious objections to allowing the usual sweeping discovery in a case like the present. I think it much the wiser course to proceed with an amplified statement of the charge, sufficient to give the defendant a fair opportunity to prepare for trial, and with as little searching into government evidence later on as many be possible without doing injustice to the defendant."

ANTHONY J. PALASZ.

Statutes — Filling Vacancy in Office of Governor. — Orland S. Loomis, having been elected governor of Wisconsin by defeating the incumbent Julius P. Heil at the November election in 1942, died after certificate of election had been issued to him but before he had taken the oath of office. Walter S. Goodland was elected lieutenant governor in the same election. An original action for a declaratory judgment was brought in the Supreme Court to determine who was entitled to exercise the powers of the governor during the term for which the deceased had been elected. It was *held* that under the provisions of the Wisconsin Constitution the powers, duties and functions of the office of governor devolved upon the lieutenant governor, and not on the incumbent. *State ex rel. Martin v. Heil, et al.*, 7 N.W. (2d) 375 (Wis. 1942).

In reaching this vital conclusion the Court took into consideration four main question:

- (1) Did the incumbent hold over beyond his two year term of office?
- (2) If the incumbent did hold over was it only until a special election for governor was held?
- (3) If the incumbent did not hold over could he appoint a successor as governor?
- (4) Did the lieutenant governor-elect succeed to the powers and duties of the governor?