Discovery Examination Before Trial-History, Scope and Practice

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During the first years following the entrance of Wisconsin into the Union of the States, there began the slow evolution of the then common law and equity practice into the present forms and modes. In 1858 the legislature of the state began the codification of the examination of a party to an action by the adversary, extending its scope and revising the manner of procedure. That the benefits of this highly remedial statute are much sought is evidenced by one of the observations made in the course of a recent survey of Milwaukee County Courts. Depositions taken pursuant to it were used in 84 per cent of the trials observed in the period from December 1, 1933 to March 22, 1934. This has been the case since it was first enacted, if one may judge from the number of times in which the court of last resort has passed upon its various phases.

The scope of this article will be strictly confined to a study of the discovery statute, Sections 54 and 55, Chapter 137, of the Revised Statutes, 1858, as amended to its present form, Section 326.12, Wisconsin Statutes, 1935. To do otherwise would serve but to tax the limitations of these short pages, and inject problems interesting but not germane to it. But to do so necessitates pruning to almost skeleton form many legal questions which arise in its application to practical situa-

1 Congestion in the Milwaukee Circuit Court (1935) 9 Wis. L. Rev. 321, 333.
tions. It may be of interest to note that the Wisconsin court has been
called upon to consider and rule upon this section well over one hundred
times from Volume 18 of the Wisconsin reports down to the present.
It has been amended no less than eighteen times by the legislature and
twice by the supreme court, under its rule making power, since it first
appeared among the statutes of this state.

For the sake of convenience and order, the statutory section, in two
forms, appears below.\(^2\) Prior to the year 1907, Section 326.12 (then
Section 4096) consisted of but one paragraph. That year and thereafter
the section was subdivided and numbered; and in 1909 the sections
were denominated as well. In the year 1927 the section was revised pur-
suant to Section 43.08 (2) and re-enacted [c. 523, §49, Wis. Laws
(1927)] in substantially its present form. Therefore, it may be noted
that to the left is a composite statute including the various amendments
adding to and dropping therefrom portions of the original enactment;
and to the right appears Section 326.12, as amended twice, by court
rule, as noted therein. Hereafter no reference will be made to the sec-
tion as it was evolved; for by reference to the citation and then to the
statute its form existing at any one time may be ascertained, if so de-
sired by the reader.

For three score years and more following the enactment of this
statute its first phrase carried the expression of the legislative intent. It
abolished the old bill of discovery and substituted therefor a new
remedy.\(^3\) Both form and substance of the old bill were done away
with; and it was not limited in its application to cases in which the old
bill might have been had.\(^4\) It was not limited to discovery of facts
which could not be proven by other witnesses or evidence.\(^5\) It is in the
nature of a cross-examination\(^6\); and its scope may be as broad as on
cross-examination.\(^7\) The purpose of the statute is to elicit a full and

\(^2\) See Appendix infra.
\(^3\) Whereatt v. Allis, 65 Wis. 639, 27 N.W. 630 (1886) ; Frawley v. Cosgrove, 83
Wis. 441, 53 N.W. 689 (1892) ; Hughes v. C. St. P. M. & O. R. Co., 122 Wis.
258, 99 N.W. 897 (1904) ; State v. Chicago & N. W. Ry. Co., 132 Wis.
345, 112 N.W. 515 (1907) ; Rohleder, guardian ad litem v. Wright, 162 Wis.
580, 156 N.W. 955 (1916) ; Northern Wisconsin Co-operative Tobacco Pool
v. Oleson, 191 Wis. 586, 211 N.W. 923 (1927).

\(^4\) Whereatt v. Allis, 65 Wis. 639, 27 N.W. 630 (1886) ; Frawley v. Cosgrove, 83
Wis. 441, 53 N.W. 689 (1892).

\(^5\) Kelly v. Chicago & N. W. Ry. Co., 60 Wis. 480, 19 N.W. 521 (1884) ; Meier
v. Paulus, 70 Wis. 165, 35 N.W. 301 (1887) ; Richards v. Allis, 82 Wis. 509,
52 N.W. 593 (1892).

\(^6\) Meier v. Paulus, 70 Wis. 165, 35 N.W. 301 (1887) ; Rohleder v. Wright, 162
Wis. 580, 156 N.W. 955 (1916).

\(^7\) Cleveland, Ex'rs. v. Burnham, 60 Wis. 16, 17 N.W. 126, 18 N.W. 190 (1884) ;
Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201, 144 N.W. 272
(1916).

\(^8\) Cleveland, Ex'rs. v. Burnham, 60 Wis. 16, 17 N.W. 126, 18 N.W. 190 (1884) ;
Kelly v. Chicago & N. W. Ry. Co., 60 Wis. 480, 19 N.W. 521 (1884) ; Nichols
v. McGeoch, 78 Wis. 360, 47 N.W. 372 (1890).
complete disclosure of whatever may be relevant to the controversy.\textsuperscript{9}
This is to be ascertained if the pleadings are in, by the issues so made,\textsuperscript{20}
if after complaint is served, by the allegations therein;\textsuperscript{21} or if before
any pleadings are served by the order granting it (under the statute as
it then existed)\textsuperscript{22} or as at present, by the affidavit made therefor.\textsuperscript{13}

Being a remedial enactment it should be liberally construed.\textsuperscript{24} But
it will not be given a construction beyond its evident scope and purpose
so as to confer rights not intended to be conferred by it.\textsuperscript{25} It contem-
plates a broader and more extensive field of investigation than does
Section 269.57, Wisconsin Statutes, 1935, providing for an inspection
of books and records.\textsuperscript{26} The object of its use is the obtaining of evi-
dence by the party taking it from the persons examined.\textsuperscript{27} The proceed-
ings serve to lessen the expense of litigation and remove embarrass-
ments in the way of a bona fide prosecution of legal rights. The party
may find that he has no grounds for relief and may thus avoid ex-
pensive litigation. For this reason its use ought not to be unduly ham-
pered or restricted.\textsuperscript{18} In this respect it has been held that where a
plaintiff has had the benefit of an examination of his adversary he must
be deemed to have come to trial expecting to meet the precise claims
which the proof tended to establish.\textsuperscript{19}

Although the discovery statute abolished the old bill of discovery,
yet it was held that it did not affect the jurisdiction of equity to enter-
tain an action for an accounting; and where a discovery is a necessary
part of the accounting the jurisdiction of equity is unquestionable.\textsuperscript{20}
However, where the complaint alleged on information and belief

\textsuperscript{9}Kelly v. Chicago & N. W. Ry. Co., 60 Wis. 480, 19 N.W. 521 (1884); Meier
v. Paulus, 70 Wis. 165, 35 N.W. 301 (1887); State v. Baetz, et al, 86 Wis. 29,
56 N.W. 329 (1893); Schmidt v. Menasha W. W. Co., 92 Wis. 529, 66 N.W.
695 (1896).

\textsuperscript{10}Kelly v. Chicago & N. W. Ry. Co., 60 Wis. 480, 19 N.W. 521 (1884); Meier
v. Paulus, 70 Wis. 165, 35 N.W. 301 (1887); Nichols v. McGeoch, 78 Wis.
360, 47 N.W. 372 (1890).

\textsuperscript{11}Horlick's Malted Milk Co. v. A. Spiegel Co., 155 Wis. 201, 144 N.W. 272
(1901).

\textsuperscript{12}Kelly v. Chicago & N. W. Ry. Co., 60 Wis. 480, 19 N.W. 521 (1884).

\textsuperscript{13}Schmidt v. Menasha W. W. Co., 92 Wis. 529, 66 N.W. 695 (1896).

\textsuperscript{14}Cleveland, Ex'r. v. Burnham, 60 Wis. 16, 17 N.W. 126, 18 N.W. 190 (1884);
Frawley v. Cosgrove, 83 Wis. 441, 53 N.W. 699 (1892); State v. Baetz, et al,
86 Wis. 29, 56 N.W. 329 (1893); Schmidt v. Menasha W. W. Co., 92 Wis.
529, 66 N.W. 695 (1896); Heckendorn v. Romandka, 138 Wis. 416, 120 N.W.
257 (1909); Sullivan v. Ashland L. P. & St. Ry. Co., 152 Wis. 574, 140 N.W.
316 (1913); Rohleder v. Wright, 162 Wis. 580, 156 N.W. 955 (1916); Singer
Sewing Machine Co. v. Lang, 186 Wis. 530, 203 N.W. 399 (1925).

\textsuperscript{15}Rohleder v. Wright, 162 Wis. 580, 156 N.W. 955 (1920).

\textsuperscript{16}Worthington P. & M. Co. v. Northwestern I. Co., 176 Wis. 35, 186 N.W. 156
(1922).

\textsuperscript{17}Lange v. Heckel, 171 Wis. 29, 176 N.W. 60 (1920).

\textsuperscript{18}Schmidt v. Menasha W. W. Co., 92 Wis. 529, 66 N.W. 695 (1897).

\textsuperscript{19}McNally v. Andrews, 98 Wis. 62, 73 N.W. 315 (1897).

\textsuperscript{20}Schwickerath v. Loben, 48 Wis. 601, 4 N.W. 760 (1879).
that machinery was sold and royalties paid to the defendant without an allegation that the defendant owed anything, it was held that the action was improperly brought for an accounting and that plaintiff ought to have served a summons and made use of an adverse examination to plead.\footnote{Richards v. Allis, 82 Wis. 509, 52 N.W. 593 (1892); But see Oconto County v. Carey, 183 Wis. 420, 198 N.W. 590 (1924) and City of Milwaukee v. Drew, 265 N.W. 683 (Wis., 1936).} In \textit{Meyer v. Gorthwaite}\footnote{Wis. Rev. Stat. (1858) c. 137, §§ 54, 55.} it was held that the right to discovery was abrogated only when in aid of another action and that where grounds for equitable jurisdiction are shown and discovery is necessary therein, it is proper within that action. The statute merely substituted an entirely different procedure and the right remained in the legislature to provide other appropriate means of discovery in proper cases.\footnote{Wis. Rev. Stat. (1858) §§ 2434, 2435 [Now Wis. Stat. (1935) §§ 252.15, 252.16].} The privilege of examining under the statute is one of procedure and not one of substantive law; and the fact that the laws of another state do not provide for such a remedy is not such a ground of hardship, oppression or fraud as will give rise to equity jurisdiction to restrain a suit brought in such other state.\footnote{State v. Chicago & N. W. Ry. Co., 132 Wis. 345, 112 N.W. 515 (1907).}

\textbf{JURISDICTIONAL PROBLEMS AND PROCEDURE}

Following closely upon the enactment of the original statute\footnote{Wisz. Rev. Stat. (1858) c. 137, §§ 54, 55.} the court held that the examination must be taken before an officer therein enumerated.\footnote{Hinchliff v. Hinman, 18 Wis. 139 (*130) (1864).} In \textit{Whereatt v. Allis}\footnote{65 Wis. 639, 27 N.W. 630 (1886).} it was held that while the statute in question allowed the examination before a "judge at chambers," the words were merely indicative and by statute a court commissioner exercised powers co-extensive with the former unless otherwise directed. The court commissioner need not be an officer of the court in which the action is pending—as where the examination is to be had in another county; or where the proceeding is in county court, and examination is to be had before a court commissioner.\footnote{Wisz. Rev. Stat. (1878) §§ 2434, 2435 [Now Wis. Stat. (1935) §§ 252.15, 252.16].}

The statute must be complied with as to the procedure therein contemplated for in \textit{Hinchliff v. Hinman} a deposition attempted to be taken thereunder was not permitted to be used on trial since it was taken before a justice of the peace, an officer not named therein. Where an order (held to take the place of the statutory notice and subpoena)
for appearance which recited that it be served and fees paid within the
time limited by statute was served within such time, but the fees were
withheld until one day too late, it was held that the party need not
attend the hearing. The acceptance of fees and appearance by attorney
for the purpose of objecting did not cure the defect.32

The examination may be had, by the terms of the statute, at various
stages during the progress of an action or proceeding. In Blossom v. Ludington33 it was used for the purpose of obtaining facts in order to
amend the complaint after a demurrer thereto. Where issue was joined
between plaintiff and a garnishee defendant; an examination of the
principal defendant was allowed, though the latter had not answered,
because the answer of the garnishee defendant inured to his benefit
and to all practical purposes it was at issue as to him.34 The presenta-
tion of a claim in county court has been deemed the commencement of
an action and in effect a suit at law but, in any case, if not strictly that,
it falls within the meaning of the term “proceeding” as used in the
statute and an examination of the claimant by the objecting executor
is proper.35 The examination of one defendant by his co-defendant is
contemplated by the statute.36 In Stewart v. Olson37 where plaintiff, on
trial, was allowed to amend his complaint to plead violation of ordi-
nances, the trial court allowed the defendant, as a condition, a further
adverse examination of plaintiff.

In State ex rel. Carpenter v. Mathys respondent was allowed to ex-
amine the relator before the return of a writ of certiorari.38 In Ellinger
v. Equitable Life Assur. Soc.39 an examination of a party seeking re-
lief under the statute providing for inspection of books and records40
was allowed. It was there held that the relief sought was a “proceed-
ing” within the contemplation of the statute and that the word “plead”
as used in the statute included not only the complaint, answer, or reply,
but also extended to a claim urged in the defense of a proceeding in-
stituted by either party in aid of an action or defense to an action and
which proceeding might be put in issue and tried. But an adverse ex-
amination is not in substance and effect a calling of a party as a witness
on a “trial in a court of justice” within the meaning of Section 2020,
Wisconsin Statutes (now Section 220.06), providing for a raising of

33 32 Wis. 212 (1873).
34 Mygatt v. Burton, 74 Wis. 352, 43 N.W. 100 (1889).
35 Frawley v. Cosgrove, 83 Wis. 441, 53 N.W. 689 (1892).
36 Neeves v. Gregory, 86 Wis. 319, 56 N.W. 999 (1893); O'Connor v. Pawling &
Harnischfeger Co., 185 Wis. 226, 201 N.W. 393 (1924).
37 188 Wis. 487, 206 N.W. 909 (1925).
38 116 Wis. 31, 91 N.W. 114 (1902).
39 125 Wis. 643, 104 N.W. 811 (1905).
the bar of secrecy enjoined upon the records of the Banking Commission; the remedy precedes the “trial” as the latter is used. On a petition and order to show cause to revive a judgment of divorce which provided for monthly payments as “a final division and distribution” it was held not to be a final judgment, and was subject to revision and alteration. An examination of the defendant was allowed, the court stating that it would be an extremely technical and narrow construction of the statute to deny its use in aid of such an application. In Bresadola v. Gogebic & Iron Counties R. & L. Co. an examination was denied where its use was attempted in defense of a motion to set aside the service of a summons. The relief which defendant was seeking was there held to be a mere motion in an action and neither an “action” nor a “proceeding” within the statute.

Where sureties are parties to the action, the fact that they do not know the facts as to their principal’s defaults will not prevent their examination as parties. If they are ignorant of the matters in inquiry, the examination will necessarily be brief. The directors of a corporation though not necessary parties to plaintiff’s action to compel delivery of stock were proper parties defendant to enable the plaintiff to obtain a discovery under the statute. In a controversy between an executor and the state over stock issued by relator, the latter was held not to be a party to the controversy and no examination or inspection of its books would be allowed. In Phipps v. Wisconsin Central Ry. Co. that section of the statute allowing an examination of a former employee of a corporation was held unconstitutional since it did not also provide for an examination of a former employee of an individual, thus making an unreasonable classification. The examination of a father, guardian ad litem for an infant plaintiff, was refused by the court in Hohleder v. Wright on the ground that he was merely a nominal party and not an agent of the ward, and that the examination contemplated by the statute was of the real party in interest.

In Neeves v. Gregory, it was held that the examination under the statute may in all cases be conducted upon oral interrogatories whether the examination is to be held within or without the state. The party to be examined had contended that under the wording of the

43 Norris v. Norris, 162 Wis. 356, 156 N.W. 778 (1916).
44 165 Wis. 109, 161 N.W. 362 (1917).
45 State v. Baetz, 86 Wis. 29, 56 N.W. 329 (1893).
46 Wells v. Green Bay & Mississippi Canal Co., 90 Wis. 442, 64 N.W. 69 (1895).
47 State, ex rel. Pabst Brewing Co. v. Carpenter, 129 Wis. 180, 108 N.W. 641 (1906).
48 133 Wis. 153, 113 N.W. 456 (1907).
49 162 Wis. 580, 156 N.W. 955 (1916).
50 86 Wis. 319, 56 N.W. 909 (1893).
statute the examination outside of the state upon commission must be taken in the same manner as provided for the taking of other depositions upon commission. It was there held that the manifest purpose of the statute was to give every reasonable opportunity for a most thorough examination and that it is accomplished most effectively by oral interrogatories. In an action for libel between non-residents of this state both of whom resided in Switzerland, the rule of the preceding case was followed; and the court stated that the provisions regarding the taking of other depositions do not over-ride the provisions of the statute in question and the decisions of the court construing the same.60

In this case accompanying the commission letters rogatory were issued at the same time to compel the attendance and require the submission to the examination by the party to be examined. As to that phase the court states that although in this case such letters may not have been necessary to safeguard the rights of the party examining, yet cases might arise where the issuance of such letters would be essential to the promotion of the ends of justice and therefore it is within the discretion of the trial court to order such letters to be issued.

In George v. Bode51 the plaintiff, a resident of Mississippi, was sought to be examined by the defendant in order for the latter to plead. Upon motion to fix a time and place within this state and to require plaintiff to attend and submit to the examination the court held, affirming the ruling of the lower court that although the party was entitled to the examination, yet, unless the plaintiff could be served personally with the notice and subpoena, the court had no power under the statute to compel his appearance and submission to the examination. The court in so holding overruled the contention of the defendant that the amendment of Chapter 84, Laws of 1909, would have nothing to refer to unless a contrary ruling gave effect to it and held that the provision of Sub-section 652 relating to the personal service of the notice and subpoena, comes under the rule of expresso unius, exclusio alterius. A consideration of the amendment of Chapter 239, Laws of 1919, which added to Sub-section 353 the words "either within or without the state" was left for the future.

In Kentucky Finance Co. v. Paramount Automobile Exchange54 the plaintiff, a non-resident corporation, was by order of the court required to submit to an examination under the amendment just referred to, to be had within this state. Upon his failure to appear, the plaintiff's complaint was stricken and the action dismissed on the ground that the

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50 Hite v. Keene, 137 Wis. 625, 119 N.W. 303 (1909).
51 170 Wis. 411, 175 N.W. 939 (1920).
54 171 Wis. 586, 178 N.W. 9 (1920).
section of the statute was constitutional; that having no county or residence within this state, the party cannot be heard to complain on that ground; and that the provision regarding the service of a notice and subpoena within a county in this state was merely cumulative and not intended to be the exclusive remedy in the case of an examination of a non-resident. Plaintiff made no showing that the orders were arbitrary or oppressive or to require that which was beyond the power or ability of the plaintiff. However, on appeal to the United States Supreme Court it was held that the statute, as applied, was invalid since it denied the equal protection of the law to a non-resident corporation. The provisions of the statute required that a non-resident individual, in order to be examined within the state, be served with a notice and subpoena within the state, thus placing a more onerous burden upon a non-resident corporation. In Gallun v. Hibernia Bank & Trust Co. it was held that a party having first procured an order requiring the production of books and papers under this statute at a place without the state is also entitled to proceed by an examination of an officer within the state where proper service was obtained; the one remedy is not exclusive of the other under this statute even though the officer would be required to produce the identical papers upon both examinations.

The original enactment as amended was held to be vague as to the manner of conducting the examination, and the court had the right to control and direct the procedure where no court rule was set up in order to prevent abuse. In Stewart v. Allen it was held that under the statute the proper procedure for the court commissioner to follow was to certify the questions to the court in which the examination was had and then the court should exercise its discretion and enforce its rulings. It was there stated that the court did not decide as to whether the commissioner should rule out questions which he deemed immaterial or irrelevant. But as it presently exists the statutory procedure provides for a determination of the court rather than of the commissioner. In Kelly v. Chicago & N. W. Ry. Co. it was held that the real issues may not be narrowed, but if they are too indefinite the court may define them and then outline the general scope of inquiry. It is for the lower court to exercise its discretion in the first instance, and

56 182 Wis. 40, 195 N.W. 703 (1923).
57 Wis. REV. STAT. (1858) c. 137, §§ 54, 55.
58 Blossom v. Ludington, 32 Wis. 212 (1873).
59 45 Wis. 158 (1878).
60 State ex rel. Finnegan v. Lincoln Dairy Co., 265 N.W. 202 (Wis. 1936).
61 50 Wis. 480, 19 N.W. 521 (1884).
62 Karel v. Conlan, 135 Wis. 221, 144 N.W. 256 (1913); Ballun v. Hibernia Bank & Trust Co., 182 Wis. 40, 195 N.W. 703 (1923); American Food Products Co. v. American Milling Co., 151 Wis. 385, 138 N.W. 1123 (1912).
where the witness claims privilege on the ground that the answer might
tend to incriminate him such opinion is not conclusive upon the lower
court, but the answer should not be compelled unless it is reasonably
clear it can have no such effect.\textsuperscript{63} Where the questions are held to be
privileged although pertinent to the inquiry from the nature of the
complaint the witness should not be compelled to answer.\textsuperscript{64} But where
the privilege was a qualified one only, and there was an issue for the
jury, examination was allowed.\textsuperscript{65} The right to an adverse examination
of a defendant is dependent upon whether the plaintiff has a cause of
action, and where it appears that no cause of action exists the examina-
tion should be denied.\textsuperscript{66} The nature and purpose of the action must be
determined from the affidavit in support of an adverse examination to
plead and where by the affidavit it affirmatively shows that no cause
of action exists the examination should be suppressed and the action
dismissed on its merits.\textsuperscript{67} The right to the examination under the
statute can be justified only upon the ground that the courts are entitled
to information in aid of proper judicial proceedings; but the statute
goes no further, and where it is apparent that there is no such judicial
proceeding pending the examination should not be allowed. The court
under such circumstances, when the futility of the alleged attempt to
institute a suit is manifest, should not only restrain the examination but
should dismiss the ostensible action.\textsuperscript{68}

The defendant in an affidavit for an adverse examination in order
to prepare his answer, cannot by stating the necessity for the examina-
tion conclude the court as to what is necessary for him to answer. In
such case that question is to be determined from the averments of the
complaint together with any explanation or new matter in the affidavit.
It must appear that the points desired are necessary to enable him to
plead and then the examination is to be limited to matters relevant to
these points; but even then the court may further limit the scope of the
examination to the extent of denying it absolutely. Such action
being discretionary with the trial court, on appeal, the exercise of such
discretion will not be reversed unless clearly shown to have been
abusive.\textsuperscript{69} Or, if for any other reason recognized by rule it would be
improper for the party at that stage to proceed with the examination but
should dismiss the ostensible action.\textsuperscript{70}

\textsuperscript{63} Karel v. Conlan, 155 Wis. 221, 144 N.W. 256 (1913).
\textsuperscript{64} Schultz v. Strauss, 127 Wis. 325, 106 N.W. 1066 (1906).
\textsuperscript{65} Hathaway v. Bruggink, 168 Wis. 390, 170 N.W. 244 (1919).
\textsuperscript{66} Schultz v. Strauss, 127 Wis. 325, 106 N.W. 1066 (1906).
\textsuperscript{67} City of Madison v. Madison Gas & Elec. Co., 129 Wis. 249, 108 N.W. 65
(1906).
\textsuperscript{69} Badger Brass Co. v. Daly, 137 Wis. 601, 119 N.W. 328 (1909).
At an early date, in *State v. Baetz*\textsuperscript{71} it was held that, although the affidavit made for an adverse examination to plead disclosed that plaintiff could frame some kind of complaint, the examination should proceed since the party seeking it has that right in order to make the allegations of the pleading definite and certain. And where the plaintiff does not know facts in detail in order to frame a complaint adapted to the real nature of his case, an examination should be allowed as to the material facts of the case in order to frame a complaint suited to his case and one on which he may safely proceed to trial.\textsuperscript{2} The purpose of the examination is to discover facts and the affidavit need not state facts sufficient to constitute a cause of action; for if the party could do so he could plead and the examination could not be had. The examination may be had even though the plaintiff does not know a cause of action exists, and though the affidavit affirmatively shows that he does not know.\textsuperscript{7} This is so where the facts stated in the affidavit charge that the plaintiff may be entitled to recover, whether the imputations therein are well founded or not. The statements in the affidavit as to the general nature and object of the action were held not to be an election of remedies so as to limit the cause of action after learning the details. After the examination the plaintiff may elect the most complete and efficient remedy.\textsuperscript{4} But the service of an answer by the defendant waived his right to an examination under the statute to plead.\textsuperscript{76}

The purpose of the affidavit is to limit the scope of the examination to facts relevant to the points therein outlined and to enable the court in its discretion to further limit its extent.\textsuperscript{76} The court may limit the examination but cannot deny its use absolutely.\textsuperscript{77} The affidavit need not state that the facts upon which discovery is sought are not within plaintiff's knowledge since that is not a statutory requirement.\textsuperscript{78} If the party seeking the examination has a right to it, it should be allowed without reference to motives. As construed by the court the adversary is given ample protection against unnecessary and improper examina-

\textsuperscript{71} 86 Wis. 29, 56 N.W. 329 (1893).
\textsuperscript{73} Gratz v. Parker, 137 Wis. 104, 118 N.W. 637 (1908); American Food Products Co. v. American Milling Co., 151 Wis. 385, 138 N.W. 1123 (1912); Sullivan v. Ashland L. P. & St. Ry. Co., 152 Wis. 574, 140 N.W. 316 (1913); Singer Sewing Machine Co. v. Lange, 186 Wis. 530, 203 N.W. 399 (1925).
\textsuperscript{74} Heckendorn v. Romadka, 138 Wis. 416, 120 N.W. 257 (1909); Sullivan v. Ashland L. P. & St. Ry. Co., 152 Wis. 574, 140 N.W. 316 (1913).
\textsuperscript{75} Oconto Land Co. v. Mosling, 122 Wis. 440, 100 N.W. 824 (1904).
\textsuperscript{76} Schmidt v. Menasha W. W. Co., 92 Wis. 529, 66 N.W. 695 (1896).
\textsuperscript{77} Schmidt v. Menasha W. W. Co., supra, note 76; Singer Sewing Machine Co. v. Lang, 186 Wis. 530, 203 N.W. 399 (1925); Stott v. Markle, 215 Wis. 528, 255 N.W. 540 (1934).
\textsuperscript{78} Gratz v. Parker, 137 Wis. 104, 118 N.W. 637 (1908).
Where defendants disclaimed any interest in transactions on plaintiff's books with third parties, there could be no abuse if the examination after issue joined was by order limited to that extent. Where defendants disclaimed any interest in transactions on plaintiff's books with third parties, there could be no abuse if the examination after issue joined was by order limited to that extent.80

The counter affidavits in opposition to such an examination are insufficient to defeat the discovery based upon an affidavit made in compliance with the statute.81 But the trial court has the power and duty of determining whether the showing made by the party seeking the examination is sufficient to warrant its allowance,82 since the matter of an examination under the statute is very largely in the discretion of the trial court.83 The court on a motion to suppress an examination to plead, however, cannot try out the question as to whether a cause of action exists between the parties.84

In Phipps v. Wisconsin Central Ry. Co.85 it was held that the statute contemplated but one examination by a party after issue joined (though that one might be of several witnesses), where after examining the attorney, secretary, and chief engineer of the defendant, the plaintiff then noticed an examination of ten others alleged to be employees or former employees of the defendant. It was stated, however, that the right to a further examination in a proper case on account of inadvertence, surprise or excusable neglect undoubtedly existed and should be allowed on application to the court in which the action was pending, on proper notice and showing—a construction which was reasonable and one best calculated to carry out the obvious intent of the legislature.

The subjects of adverse examinations have been practically co-extensive with the kinds of actions which have been brought since it was first enacted. The general rules regarding the taking of the examination and regarding the power of the court to regulate the scope of the subjects upon which discovery may be allowed have been discussed at length. However, it may prove of interest to consider at this point the varied facts and circumstances upon which discovery has been sought, the questions permitted, and the various books, records and documents as to which inspection has been allowed. In Cleveland, Exrs. v. Burnham86 disclosure of the time when the party examined became a stockholder and for what period of time he was such a stockholder was allowed. Questions as to whether the lease under which plaintiff claimed

81 Nichols v. McGeoch, 78 Wis. 360, 47 N.W. 372 (1890).
83 Simon v. deGersdorff, 166 Wis. 170, 164 N.W. 818 (1917).
84 American Food Products Co. v. American Milling Co., 151 Wis. 385, 138 N.W. 1123 (1912).
85 Sullivan v. deGersdorff, 166 Wis. 170, 164 N.W. 818 (1917).
86 American Food Products Co. v. American Milling Co., 151 Wis. 385, 138 N.W. 1123 (1912).
123 Wis. 153, 113 N.W. 456 (1907).
87 60 Wis. 16, 17 N.W. 126, 18 N.W. 190, (1884).
possession was oral or written were held proper since the right to possession was in issue, and the defendant had the right to show by the plaintiff's answer that the latter's possession was unlawful. Although knowing the amount of the deposits upon which the plaintiff claimed defendant had withheld interest, the court required the disclosure of the names of the banks, the length of time the deposits were in the banks, the various rates of interest, the time at which the deposits were made, the amounts of interest received on the deposits, and the proportions of the deposits belonging to various funds of the plaintiff.

In *Schmidt v. Menasha W. W. Co.* plaintiff, suing for the death of her husband caused by the blowing out of a plug resulting in deceased being scalded to death with hot water and steam, was allowed discovery as to construction and the method of using the tank which contained the water, the machinery and apparatus connected with it and its management and control. In *Phipps v. Wisconsin Central Ry. Co.*, in an adverse examination after issue joined, the plaintiff was allowed discovery as to the names of defendant's employees who possessed any knowledge of the accident which was the subject of the action. In *Sullivan v. Ashland L. P. & St. Ry. Co.* discovery was sought and allowed upon the following points: The amount of the stocks and bonds issued and sold by the defendant corporations, the amounts received on such sales, the disposition of the proceeds of the sales, the commissions paid, the names of the stockholders and directors of each of the defendants, the cost of the assets purchased, the cost of improvements and repairs, the specific nature of the assets, their value, and the amount of indebtedness of each of the defendants, and the details as to the organization and set-up of one of the defendants; upon all of which plaintiff, a promoter, by agreement was to receive a definite proportion as his fees.

In *Horlick's Malted Milk Co. v. A. Spiegel Co.* it was held that the question as to the ingredients of plaintiff's product was material, and that defendant had the right to the names and addresses of certain of plaintiff's witnesses. In *Singer Sewing Machine Co. v. Lang*, in an action to restrain defendant from selling plaintiff's machines and for an accounting, plaintiff was allowed discovery as to: the person or persons from whom the machines were obtained, the names and addresses of the person or persons to whom they were sold and the prices paid,

87 Pride v. Weyenberg, 83 Wis. 59, 53 N.W. 29 (1892).
88 State v. Baetz, 86 Wis. 29, 56 N.W. 329 (1893).
89 92 Wis. 529, 66 N.W. 695 (1896).
90 130 Wis. 279, 110 N.W. 207 (1907).
91 152 Wis. 574, 140 N.W. 316 (1913).
92 155 Wis. 201, 144 N.W. 272 (1913).
93 186 Wis. 530, 203 N.W. 399 (1925).
the serial numbers of the machines in defendant's control or under his possession or sold by him, the person or persons from whom and through whom the advertising and other material was obtained, the prices which defendant paid for new machines, the name of the person or persons with whom he was engaged in buying and selling them, and the identity of the person or persons who changed, altered or obliterated the serial numbers on the plaintiff's machines in defendant's possession.

As to books and records, prior to the statutory revision of 1925, the court followed a very liberal rule in this regard. In Nichols v. McGeoch,94 where defendant in his affidavit showed a necessity therefor, he was allowed an inspection of plaintiff's books to prepare his defense. Their production in entirety was required since it was conceivable that that they did contain evidence. The court stated the rule to be that the statute required the production of books and papers, which had any relation to the matters involved in the issues; if they were relevant, they were to be produced in entirety, and for plaintiff to furnish some of them was insufficient. In Knowles v. Rogers95 where plaintiff sought inspection of defendant's books of account, bought and sold cards, telegrams, tickets and correspondence kept by the latter in his business as a broker, the commissioner was held to have correctly required the production of those in Milwaukee (where examination was had) relating to the account of plaintiff with defendant, or to any business dealings between them, directly or indirectly. In Phipps v. Wisconsin Central Ry. Co.96 defendant was required to produce the plans of the bridge upon which the accident in controversy occurred and telegrams and orders sent to the conductor or the train crew of the train which met with the accident.

In Horlick's Malted Milk Co. v. A. Spiegel Co.97 reports of agents of the plaintiff upon which the allegations of the complaint, made on information and belief, was based, were held relevant as indicative of the truth of plaintiff's allegations that sales by defendant were made deceptively, the agents having made the specific purchases. The statute was held also to cover physical objects if relevant, here the containers from which defendant's product was alleged to have been vended and in plaintiff's possession. In NeKoosa-Edwards Paper Co. v. News Publishing Co.98 the plaintiff was required to produce evidence or data with reference to its connection with a manufacturer's association which defendant contended was illegal, the court holding that a corpo-

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94 78 Wis. 360, 47 N.W. 372 (1890).
95 99 Wis. 231, 74 N.W. 813 (1898).
96 130 Wis. 279, 110 N.W. 207 (1907).
97 155 Wis. 201, 144 N.W. 272 (1913).
98 174 Wis. 107, 182 N.W. 919 (1921).
ration was not entitled to claim immunity even though the officer or agent testifying might thereby implicate himself. But where plaintiff brought suit for defamation based upon statements made by the defendant before a grand jury and to the district attorney, upon which plaintiff was indicted, defendant's right to claim privilege was upheld as to questions pertaining to such proceedings, since plaintiff had no cause of action as to them. Even though they were pertinent and material, disclosure could not be compelled.\textsuperscript{99} And where plaintiff, in a labor dispute, sought an injunction, defendant noticed an examination to plead on the following points: concerning the operation and management of the corporation, as to defendant's conspiracy to prevent plaintiff from securing men, the manner in which the acts complained of were performed, whether the defendants had stationed pickets, whether certain allegations of the complaint were not maliciously false and untrue and made pursuant to an employer's conspiracy. They were denied. The court held that as to those points not within defendant's own knowledge, it was not necessary to plead them. The examination was denied.\textsuperscript{100} A similar result was reached in \textit{Ellinger v. Equitable Life Assur. Soc.},\textsuperscript{101} where plaintiff's affidavit disclosed that after having had an inspection of defendant's books, he had all the information necessary to plead.

The sufficiency of the demands of a subpoena \textit{duces tecum} requiring production of certain patents was considered in \textit{Miller Saw Trimming Co. v. Cheshire}\textsuperscript{102} on a motion for new trial. It was held that the description of the papers and records was not specific enough to require the production of the certain papers and records upon which the motion was based; and further, there was no refusal, evasion, deception, trick or artifice practiced in such withholding. Then in \textit{Northern Wisconsin Co-operative Tobacco Pool v. Oleson},\textsuperscript{103} where defendant appealed to the court for an order requiring plaintiff to submit to an examination which he had noticed under the statute, it was held that he sought thereby an inspection of books and records under Section 4183 (now Section 269.57). But the court went on to say that neither remedy authorized an indiscriminate exploration into matters extrinsic to the controversy, and a party may not be granted a roving commission to ransack his adversary's records without limitation. Thus did the court indicate a trend toward conservatism in the regulation of the

\textsuperscript{99} Schultz v. Straus, \textsuperscript{127} Wis. 325, 106 N.W. 1066 (1906); see also State, \textit{ex rel. Schumacher v. Markham}, 162 Wis. 55, 155 N.W. 917 (1929) as to confidential records of banking commission.

\textsuperscript{100} Badger Brass Co. v. Daly, 137 Wis. 601, 119 N.W. 328 (1909).

\textsuperscript{101} 138 Wis. 390, 120 N.W. 235 (1909).

\textsuperscript{102} 177 Wis. 354, 189 N.W. 465 (1922).

\textsuperscript{103} 191 Wis. 586, 211 N.W. 923 (1927).
scope of this remedy. At or about the time of this decision a most significant change occurred in the wording of the discovery statute. As was pointed out early in the article the statute was completely revised by Chapter 523, Laws of 1927. By this enactment Subsection (3), Section 326.12 of the Wisconsin Statutes, 1925, was dropped and no provision was included in the revised statute to require the production of "* * * all papers, books, files, records, things and matters in the possession of such party * * *.”

In the revisor's Notes to this section no mention is made of this change, which may or may not have been of some weight in considering the intention of the legislature. However, the question was answered in Stott v. Markle where plaintiff in an action for false representation and suppression of facts in the sales and purchases of certain securities sought a sweeping examination of defendant's records, papers and documents relating to dealings over a period of years. The court held that the omission just considered occurred by reason of the fact that it was felt that Section 325.01 contained all the provisions necessary to the issuance of a subpoena duces tecum. The effect of this construction was to limit the party examining to "lawful instruments of evidence." The subpoena duces tecum may no longer be used to procure an inspection of the adversary's records and files to determine whether they contain evidence. It must be directed to particular documents, papers, or books required for introduction in evidence; and only when it is made to appear that the party examined has the papers containing matters necessary for plaintiff to know in order to enable him to plead, will it be time to require their production. An inspection of books, records and papers can be justified only under Section 269.57. The court then states that if by order, under the statute last cited, the court may not open an unlimited field for exploration or indiscriminate fishing expedition, then a magistrate by inserting a duces tecum provision in a subpoena cannot do so.

USE OF THE DEPOSITION TAKEN

The obvious purpose in permitting the examination of a party to the action or his or its agent or employee was to make available to the party taking the examination evidence relevant to the controversy. The statements and answers to questions by the party so examined are in the nature of admissions against him and under the rules of evidence are therefore material to the issues. It has been held that such ad-

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104 Wisconsin Annotations (1930).
105 215 Wis. 528, 255 N.W. 540 (1934).
106 Wis. Stat. (1935) § 325.02 (2).
107 Meier v. Paulus, 70 Wis. 165, 35 N.W. 301 (1887); Lange v. Heckel, 171 Wis. 59, 175 N.W. 788 (1920); Leslie v. Knudsen, 205 Wis. 517, 238 N.W. 397 (1931).
missions are independent evidence. However, prior to the enactment of Chapter 246, Laws of 1913, it was held that the adverse examination of one not a party to an action could not be used where the witness was in court, as in the case of *Kreider v. Wisconsin River Paper & Pulp Co.*, where the witness testified that he was merely a local manager of one of defendant's mills and the statute permitted the introduction of the adverse examination of a "general managing agent." The court said that the section in question referred to an agent having general supervision over the affairs of the corporation. The foregoing rule was followed in the case of *Hughes v. Chicago, St. P. M. & O. R. Co.* where it was held that the trial court erred in allowing the plaintiff to read the deposition of a contractor and of an engineer of the defendant where the persons were in court. The court further stated that the cases theretofore decided were merely authority for the proposition that only in the case of depositions of parties to the action could they be used as original evidence although the latter were present in court. In any other case the party to the action was entitled to have the witness examined in open court according to the rule of the common law. In *Anderson v. Chicago Brass Co.* a foreman was held not an "officer" but a mere employee and where present in court his deposition was inadmissible; likewise the deposition of a superintendent where the evidence showed that he was a mere employee. The adverse examination of an officer of the defendant was held to be the examination of a party as affecting its admissibility on trial where the party examined was present in court. The court said that the effort of the legislature to give the right to obtain disclosures in the case of corporations as fully as in the case of individuals would be defeated if the ruling were otherwise. Thus the examination of an officer becomes independent evidence upon the trial of an action against the corporation by which he was employed.

Prior to the enactment of Chapter 246, Laws of 1913, which amendment to Section 326.12 of the Wisconsin Statutes changed the foregoing rule, the deposition of a superintendent and officer of the defendant was held to be that of a principal officer under the testimony there adduced and not that of a mere employee. Likewise in the case of a president, secretary and other officers, for, so far as their testimony was competent, it was admissible though the witnesses were pres-

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109 110 Wis. 645, 86 N.W. 662 (1901).
110 122 Wis. 258, 99 N.W. 897 (1904).
111 127 Wis. 273, 106 N.W. 1077 (1906).
112 Zesch v. Flambeau Paper Co., 134 Wis. 271, 114 N.W. 485 (1908) ; see also Charron v. N. W. Fuel Co., 143 Wis. 437, 128 N.W. 75 (1910).
113 Johnson v. St. Paul & Western Coal Co., 126 Wis. 492, 105 N.W. 1048 (1906).
114 Johnson v. St. Paul & Western Coal Co., 126 Wis. 492, 105 N.W. 1048 (1906).
ent in court.\textsuperscript{215} It was held error to refuse the admission of the deposition of a superintendent.\textsuperscript{216}

In \textit{Leslie v. Knudsen}\textsuperscript{217} it was held that the lower court erred in refusing plaintiff the right to read from the examination of defendant before examining him adversely at the trial, by reason of the fact that such deposition was substantive evidence against him and the statements therein were not limited to their effect in impeaching him as a party or witness. The fact that a party denied the right to read the adverse examination of his opponent, called the latter and examined him on trial, does not cure such error since he has the right, if he wishes to do so, to use the sworn admissions made on the adverse examination. If the defendant then desires to contradict or correct such testimony he should be compelled to do so as a witness in his own behalf and not as a witness of the party who examined him. The same reasons exist for its use at the trial as at the time of taking. The party reading the deposition may after introducing it in evidence rebut the testimony there given as though it were that of a hostile witness.\textsuperscript{218} Upon the cross-examination of an employee whose examination had been taken under the statute he may be confronted with contradictory statements made therein.\textsuperscript{219}

On the trial of an action the statements in the examination introduced in evidence by the adverse party may be explained, contradicted or qualified.\textsuperscript{220} This rule was elaborated upon in \textit{Jacobsen v. Whiteley}\textsuperscript{221} where it was said that anything fairly explanatory of what transpired upon the hearing or what was drawn out on cross-examination was proper rebuttal. The jury may properly consider the circumstances under which the adverse examination was taken as affecting the answers made thereon, and any contradiction between the several answers merely presents a contrary state of evidence, within the province of the jury to decide which is correct.\textsuperscript{222}

A deposition taken upon adverse examination does not become evidence until it has been offered by the party taking it and received by the court. It is then evidence only for the party taking it.\textsuperscript{223} It is not properly in evidence until offered and it does not become a part of the record until then.\textsuperscript{224} Its use is not similar to that of a deposition taken

\textsuperscript{215} J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906).
\textsuperscript{216} Charron v. N.W. Fuel Co., 143 Wis. 437, 128 N.W. 75 (1910).
\textsuperscript{217} 205 Wis. 517, 238 N.W. 397 (1931).
\textsuperscript{218} Meier v. Paulus, 70 Wis. 165, 35 N.W. 301 (1887).
\textsuperscript{219} Jirachek v. T. M. E. R. & L. Co., 139 Wis. 505, 121 N.W. 325 (1909).
\textsuperscript{220} Klauber v. Wright, 52 Wis. 303, 8 N.W. 893 (1881).
\textsuperscript{221} 138 Wis. 434, 120 N.W. 285 (1909).
\textsuperscript{222} Swiegul v. Town of Suamico, 204 Wis. 114, 235 N.W. 548 (1931).
\textsuperscript{223} Maldaner v. Smith, 102 Wis. 30, 78 N.W. 140 (1899).
\textsuperscript{224} Estate of Shinoe-Bollen v. Shinoe, 212 Wis. 481, 250 N.W. 505 (1933).
to be used as evidence on trial. Its admissibility is dependent, as has
been demonstrated, upon the fact that the statements amount to ad-
missions against interest. Thus the deposition may not be used unless
first offered by the party taking it. The express provision of the statute
has been construed by the court in the following cases to fall within
the rule of inclusio unius, exclusio alterius. The court at an early
date and prior to the amendment defining its use intimated that both
parties might use the deposition on trial.

Where the deposition is offered by the party examined, it is his own
evidence and the party who took it may object to its competency and to
his own interrogatories made thereon. The foundation for its use must
first be laid by the party taking it. Thus in cases involving transac-
tions with deceased persons where the door to the admission of testi-
momy is not opened upon the trial by the offer of a deposition contain-
ing such testimony by the party taking it, the party examined as to
such testimony and transactions is barred from offering the incompe-
tent deposition. However, where the party offers the adverse exami-
nation containing testimony as to transactions with a deceased, the
doors is opened as effectually as if the party was examined adversely
on trial as to the same subject matter. Upon the offer of the deposition
without qualification or reservation, the deposition so offered may then
be used by the party examined and the whole subject may be gone
into. As to the party whose deposition has been taken the statements
therein are merely self-serving as originally offered even though made
under oath. Chapter 246, Laws of 1913, in allowing the admission
of an adverse examination of an employee, 'went no farther and did
not affect the rule that the defendant may not offer such examination
when such examination has not first been offered by the party taking
it.'

Subsequent to the introduction of portions of the adverse examina-
tion by the party who has had it taken, the party examined may then
offer other portions such as are relevant and relate to the same subject
and tend to explain what has been read. But the court may not com-

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125 Maldaner v. Smith, 102 Wis. 30, 78 N.W. 140 (1899); Wunderlich v. Palatine
Fire Ins. Co., 104 Wis. 382, 80 N.W. 467 (1899); Estate of Shinoe-Bollen v.
Shinoe, 212 Wis. 481, 250 N.W. 505 (1933); Drexler v. Zohn, 216 Wis. 483,
257 N.W. 675 (1934).
127 Maldaner v. Smith, 102 Wis. 30, 78 N.W. 140 (1899); Lamberson v. Lamb-
ers, 175 Wis. 398, 184 N.W. 708 (1921).
128 Maldaner v. Smith, 102 Wis. 30, 78 N.W. 140 (1899); F. H. Bresler Co. v.
Bauer, Exec., 212 Wis. 386, 248 N.W. 788 (1933); Estate of Shinoe-Bollen v.
Shinoe, 212 Wis. 481, 250 N.W. 505 (1933).
129 Lamberson v. Lamberson, 175 Wis. 398, 184 N.W. 708 (1921).
130 Estate of Shinoe-Bollen v. Shinoe, 212 Wis. 481, 250 N.W. 505 (1933).
131 Thomas v. Lockwood Oil Co., 174 Wis. 486, 182 N.W. 841 (1921).
pel the admission of the entire examination where certain portions were offered by the party taking it. Such party may read the parts that are relevant and relate to a distinct transaction.\textsuperscript{33} But an objection to the admission of the whole of a deposition after the objecting party had offered selected parts thereof, has been held too general, since portions clearly related to and served to qualify and explain the extracts which the objector had introduced, even though other parts were inadmissible.\textsuperscript{34}

In \textit{Thomas v. Lockwood Oil Co.} and \textit{Drexler v. Zohlen}\textsuperscript{35} the question as to whether in the absence of a party or witness either deceased, absent from the state or impossible to produce at the trial, his deposition might be received in evidence under Section 325.31, Wisconsin Statutes, has been touched upon but no ruling has been made. In neither one of the cases was it shown that any facts existed for the application of the provisions of the statute covering such situations. In the latter case the court stated that it may be doubted whether the provisions of that section apply to the examination of a party, but under the evidence it was not shown that the party was deceased nor absent from the state nor that he could not be produced; and in the absence of such showing the adverse examination of a co-defendant of the party offering taken by the plaintiff was refused admission.\textsuperscript{36}

The provisions of the latter section cannot be used in any case where the adverse examination of the deceased party related to a transaction between her and the deceased agent of the plaintiff, where the plaintiff refused to use it on trial so as to keep the door closed.\textsuperscript{37} However, where the examination of the defendant taken under Section 326.12 was offered by the defendant's administratrix it was admitted under Section 325.31.\textsuperscript{38} A deposition used in a former trial has been admitted in evidence on the re-trial of the case.\textsuperscript{39}

It has been held that forged receipts and copies which the defendant was compelled to make upon adverse examination may be used as specimens of genuine handwriting and submitted to experts and to the jury as such.\textsuperscript{40} A garnishee defendant examined under the statute was not bound thereby as by a pleading except for a denial of liability, the remainder being a mere examination into the facts.\textsuperscript{41}

\textsuperscript{33} Wunderlich v. Palatine Fire Ins. Co., 104 Wis. 382, 80 N.W. 467 (1899); Gutzman v. Clancy, 114 Wis. 589, 90 N.W. 1081 (1902).
\textsuperscript{34} Gutzman v. Clancy, 114 Wis. 589, 90 N.W. 1081 (1902).
\textsuperscript{35} 174 Wis. 486, 182 N.W. 841 (1921); 216 Wis. 483, 257 N.W. 675 (1934).
\textsuperscript{36} Drexler v. Zohlen, 216 Wis. 483, 257 N.W. 675 (1934).
\textsuperscript{37} F. H. Bresler Co. v. Bauer, Exec., 212 Wis. 386, 248 N.W. 788 (1933).
\textsuperscript{38} Nelson v. Ziegler, 196 Wis. 426, 220 N.W. 194 (1928).
\textsuperscript{39} Frame v. Attermeier, 147 Wis. 485, 133 N.W. 603 (1911).
\textsuperscript{40} Lappley v. State, 170 Wis. 356, 174 N.W. 913 (1919).
\textsuperscript{41} Klauber v. Wright, 52 Wis. 303, 8 N.W. 893 (1881).
Appeals From the Orders Made in the Course of the Examination

A discussion upon the question of appealability of orders made in connection with the statute in question resolves itself in the first instance into a consideration of the nature of this remedy. As early as 1884, in the case of Cleveland, Exrs. v. Burnham, the court in denying a motion to dismiss an appeal from an order of the lower court directing defendant to answer and granting costs, held that such order was "a final order affecting a substantial right made in a special proceeding," and therefore within Section 274.33 (2) [then Section 3069 (2)]. This rule was followed in a number of cases without further discussion, under facts very similar to the decision above. Then, in Knowles v. Rogers, on an appeal from an order denying defendant's motion to quash and limit his examination, it was held to be not an appealable order under Section 274.33 (3), [then Section 3069 (3), Wisconsin Revised Statutes] neither granting, refusing, continuing or modifying a provisional remedy. This holding was followed in State ex rel. Carpenter v. Mathews where an order denying a motion to limit the subjects of the examination with costs was dismissed as not appealable.

These conflicting rulings as to the nature of this remedy soon were to meet and in Ellinger v. Equitable Life Assur. Soc. the court further complicated a perplexing situation by holding an order refusing and staying an examination under the statute as appealable under both subsections of Section 274.33 (2), (3), [then Section 3069 (2), (3), Wisconsin Revised Statutes]. The fact that here the defendant was seeking to examine the plaintiff as to the latter's right to secure an inspection of books and records of the defendant under Section 269.57, which remedy, itself, was held to be a special proceeding, only served to complicate the question. However, the court had satisfied itself with this decision as is indicated in Phipps v. Wisconsin Central Ry Co. There an appeal from an order requiring the production of certain records was dismissed on the ground that it was not a final order as contemplated by Section 274.33 (3). The remedy was held to be both a special proceeding and a provisional remedy. On a later appeal from this same case orders requiring a witness to answer and

142 60 Wis. 16, 17 N.W. 126, 18 N.W. 190 (1884).
143 Whereatt v. Allis, 65 Wis. 639, 27 N.W. 630 (1886); Pride v. Weyenberg, 83 Wis. 59, 53 N.W. 29, (1892); Schmidt v. Menasha W. W. Co., 92 Wis. 529, 66 N.W. 695 (1896).
144 99 Wis. 231, 74 N.W. 813 (1898).
145 115 Wis. 31, 88 N.W. 908 (1902).
146 125 Wis. 643, 104 N.W. 811 (1905).
147 130 Wis. 279, 110 N.W. 207 (1907).
to submit to an examination and refusing to stay and restrain the taking of depositions of other witnesses were both held to be appealable as continuing a provisional remedy. Then in *Karel v. Conlan* an order adjudging the witness in contempt for refusing to answer was held to be a final order in a special proceeding.

Finally, this question was resolved by the court in *Milwaukee Corrugating Co. v. Flagge.* On a motion to dismiss the appeal from an order denying a motion to suppress an examination under the statute, the right so given a party was held to be a provisional remedy. The previous inconsistent holdings were declared to be illogical and erroneous and specifically disavowed. The examination was held to be a mere incident to an action; and since by statute all remedies are either actions or special proceedings, the examination must be merely a provisional remedy. This case furnishes a landmark in other respects as will be seen shortly. Following the rule of this case were *Mantz v. Schoen and Walter Co.*, which further held that the order refusing to stay and suppress the remedy is not a provisional remedy and not appealable, *State ex rel. Finnegan v. Lincoln Dairy Co.* which reiterated the rule of the *Mantz* case that the whole proceeding is a provisional remedy and orders determining the procedural steps which may properly be taken when the remedy is invoked in a particular case are not the remedy so as to make applicable the provisions of Section 274.33 (3).

Attention may now be turned to the question of what orders in these proceedings have been held appealable. At the outset many of these will be purely historical in view of the conflict heretofore considered and in view of a further uncertainty which existed prior to *Milwaukee Corrugating Co. v. Flagge,* and which has been noted in the prior discussion of that case. As early as *Blossom v. Ludington,* under the original enactment as amended, an order requiring defendant to submit to oral interrogatories was by implication held appealable; likewise was an order refusing to strike defendant’s answer for his failure to attend upon the hearing. But in *Stuart v. Allen* an order sustaining the commissioner’s ruling that a question was irrelevant was held to be in effect a mere ruling on the relevancy and admissibility of certain evidence and neither an intermediate nor final

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149 155 Wis. 221, 144 N.W. 272 (1913).
150 170 Wis. 492, 175 N.W. 777 (1920).
151 Wis. STAT. (1935) §§ 260.02, 260.03.
152 171 Wis. 7, 176 N.W. 70 (1920).
153 265 N.W. 202 (Wis., 1936).
154 170 Wis. 492, 175 N.W. 777 (1920).
155 32 Wis. 212 (1873).
156 Wis. STAT. (1858) c. 137, §§ 54, 55.
158 45 Wis. 158 (1878).
order and hence not appealable. The court intimated, however, that an appeal might lie from a direction to answer by the lower court after certification. An order directing the witness to answer and imposing costs was held to be a final order and within Section 274.33, (2) [then Section 3069 (2), Wisconsin Revised Statutes] in Cleveland, Ex'rs. v. Burnham and without the rule of Stuart v. Allen, supra, since it went further and indemnified the party seeking the examination; likewise an order striking an answer unless witness appeared within time limited, and imposing costs, and an order denying examination and imposing costs. An order denying certain questions as immaterial and irrelevant and imposing costs was held to be within the rule of Cleveland, Ex'rs. v. Burnham.

Orders limiting the scope of the examination after issue joined, holding that an affidavit for examination of defendant was not in compliance with Chapter 321, Laws of 1885, amending Section 4096, Wisconsin Revised Statutes (1878), refusing to allow an inspection of books of account, granting a motion to strike a claim in county court for failure to appear, denying a motion to suppress examination to plead, requiring a nonresident defendant to submit to examination on oral interrogatories, and striking an answer for failure to appear were held to be appealable orders without questioning their effect under Section 274.33, as it then existed. But in Knowles v. Rogers where, as has been noticed, the proceedings were held to be a provisional remedy, an order denying a motion to quash and limit the examination was held not appealable under the statute. Then a similar order denying a motion to limit the subject of an examination and imposing costs, was held not appealable; and the fact that costs were imposed did not change its effect under the statute as it then existed.

In Ellinger v. Equitable Life Assur. Soc. where the proceeding was held both a provisional remedy and a special proceeding, an order denying and staying the examination was held to refuse the remedy and to be a final order and appealable on both grounds. Following this case appeals were allowed from an order reversing the court commis-

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159 60 Wis. 16, 17 N.W. 126, 18 N.W. 190 (1884).
160 Whereatt v. Allis, 65 Wis. 659, 27 N.W. 630 (1886).
162 Pride v. Weyenberg, 83 Wis. 59, 53 N.W. 29 (1892).
164 Mygatt v. Burton, 74 Wis. 352, 43 N.W. 100 (1889).
165 Nichols v. McGeoch, 78 Wis. 360, 47 N.W. 372 (1890).
166 Frawley v. Cosgrove, 83 Wis. 441, 53 N.W. 689 (1892).
167 State v. Baetz, 86 Wis. 29, 56 N.W. 329 (1893).
168 Nees v. Gregory, 86 Wis. 319, 56 N.W. 909 (1893).
169 Rogers v. Fate, 113 Wis. 364, 89 N.W. 186 (1902).
170 Knowles v. Rogers, 99 Wis. 231, 74 N.W. 813 (1898).
171 State, ex rel. Carpenter v. Mathys, 115 Wis. 31, 91 N.W. 114 (1902).
172 125 Wis. 643, 104 N.W. 811 (1905).
sioner’s ruling punishing a witness for contempt for refusal to answer,\textsuperscript{173} an order denying a motion to strike pleadings,\textsuperscript{174} and an order denying a stay of an adverse examination,\textsuperscript{175} without a discussion of their appealability.

In \textit{Phipps v. Wisconsin Central Ry Co.}\textsuperscript{176} on the other hand, on appeal from an order requiring the production of records, it was held to be a mere interlocutory order regulating the manner of procedure and in no sense a final order within Section 274.33 (2) [then Section 3069 (2)] nor did it in a proper sense grant, refuse, continue or modify a provisional remedy, citing the cases so holding, and stating that the rule had been fully settled and was no longer open to doubt. Yet on a second appeal in this case\textsuperscript{177} an order requiring a witness to answer and to submit to an examination and refusing to stay the examination of other witnesses was held appealable under Section 274.33 (3) [then Section 3069 (3)].

In \textit{Pfister v. McGovern}\textsuperscript{178} an appeal was allowed from an order adjudging witnesses in contempt for refusal to answer. From the date of the decision in the \textit{Phipps} case, denying the right to appeal from orders regulating the scope of the examination, until the case of \textit{Neacy v. Thomas}\textsuperscript{179} which reiterated that rule on appeal from orders directing certain answers to be made and sustaining witness' refusal to answer others, the following appeals were allowed without discussion as to the right under the statute. In \textit{Gratz v. Parker}\textsuperscript{180} the appeal was from an order which limited the scope of the examination but did not deny the remedy entirely; in \textit{Hite v. Keene}\textsuperscript{181} it required the submission to the examination; in \textit{Badger Brass Co. v. Daly}\textsuperscript{182} it denied the examination entirely, as it did in \textit{Ellinger v. Equitable Life Assur. Soc.},\textsuperscript{183} and in \textit{Heckendorn v. Romadka}\textsuperscript{184} the appeal was from an order denying the examination of a defendant.

Following the \textit{Neacy} case several appeals were allowed from orders requiring parties to submit to examination to enable the party taking to plead.\textsuperscript{185} In \textit{Karel v. Conlan}\textsuperscript{186} the case next following the decision

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  \item\textsuperscript{173} Schultz v. Strauss, 127 Wis. 325, 106 N.W. 1066 (1906).
  \item\textsuperscript{174} Eastern Ry. of Minn. v. Tuteur, 127 Wis. 382, 105 N.W. 1067 (1906).
  \item\textsuperscript{175} City of Madison v. Madison Gas & Electric Co, 129 Wis. 249 ,108 N.W. 65 (1906).
  \item\textsuperscript{176} 130 Wis. 279, 110 N.W. 207 (1907).
  \item\textsuperscript{177} Phipps v. Wisconsin Central Ry Co., 133 Wis. 153, 113 N.W. 456 (1907).
  \item\textsuperscript{178} 132 Wis. 533, 111 N.W. 1135 (1907).
  \item\textsuperscript{179} 148 Wis. 91, 133 N.W. 580 (1912).
  \item\textsuperscript{180} 137 Wis. 104, 118 N.W. 637 (1908).
  \item\textsuperscript{181} 137 Wis. 625, 119 N.W. 303 (1909).
  \item\textsuperscript{182} 137 Wis. 601, 119 N.W. 328 (1909).
  \item\textsuperscript{183} 138 Wis. 390, 120 N.W. 235 (1909).
  \item\textsuperscript{184} 138 Wis. 416, 120 N.W. 257 (1909).
  \item\textsuperscript{185} American Food Products Co. v. American Milling Co., 151 Wis. 385, 138 N.W. 1123 (1912); Sullivan v. Ashland L. P. & St. Ry. Co., 152 Wis. 574, 140 N.W. 316 (1913).
  \item\textsuperscript{186} 155 Wis. 221, 144 N.W. 266 (1913).
\end{itemize}
in the Neacy case in which the question of appealability was discussed, on appeal from an order of the lower court affirming the ruling of the court commissioner adjudicating the witness in contempt for refusal to answer, the court held the order to be a final order in a special proceeding, nothing further remaining to be done, the guilt and punishment of the witness having been finally adjudicated. The court thus distinguished it from the order in the Neacy case. In Horlicks Malted Milk Co. v. A. Spiegel Co., on plaintiff's witness' appeal from an order punishing him for contempt for refusal to answer, it was held appealable; while defendant's appeal from that part of the order which denied it the right to certain answers was held not appealable. An order which in effect denied any examination at all was held appealable in Kuryer Publishing Co. v. Messmer. Where the court erroneously ordered the examination of a witness or party, appeals were allowed, as in the case of a guardian ad litem privileged testimony, or where the proceeding was one in which the examination could not be had or where there was no proper proceeding in which such examination might be had. Orders striking pleadings have likewise been held appealable.

Finally in Milwaukee Corrugating Co. v. Flagg an order denying a motion to suppress an examination to plead, on a motion to dismiss the appeal, was held not appealable. It was there declared that upon filing the affidavit, the statute gave to the party seeking the examination a right to it independent of any action by the court. In refusing to interfere with that right the court in no way affects it; and to speak of such action as continuing the remedy is to transform a refusal to act into affirmative action. This ruling then has the effect of putting to end a great deal of litigation and simplifying procedure. Thus the court overruled the line of cases commencing with Phipps v. Wisconsin Central Ry. Co. and ending with Sullivan v. Ashland L. P. & St. Ry. Co. In a vigorous dissent, Justice Eschweiler contended that the rule

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187 See also Cousins v. Schroeder, 169 Wis. 438, 172 N.W. 953 (1919); Markham v. Hipke, 169 Wis. 37, 171 N.W. 300 (1907); McKoosa-Edwards Paper Co. v. News Publishing Co., 174 Wis. 107, 182 N.W. 919 (1921); Singer Sewing Machine Co. v. Lang, 186 Wis. 530, 203 N.W. 399 (1925); But see Landman v. Rashman, 195 Wis. 195, 217 N.W. 649 (1928).
188 155 Wis. 201, 144 N.W. 272 (1913).
189 162 Wis. 565, 156 N.W. 948 (1916).
190 Rohleder, guardian ad litem v. Wright, 162 Wis. 580, 156 N.W. 955 (1916).
191 State, ex rel. Schumacher v. Markham, 162 Wis. 55, 155 N.W. 917 (1916).
194 Maloney v. McCormich, 181 Wis. 107, 193 N.W. 966 (1923); Kentucky Finance Co. v. Paramount Auto Exchange, 171 Wis. 586, 178 N.W. 9 (1920).
195 170 Wis. 492, 175 N.W. 777 (1916).
196 133 Wis. 153, 113 N.W. 456 (1907).
197 152 Wis. 574, 140 N.W. 316 (1913).
since the *Phipps* case had been acquiesced in by the legislature; and for the court to thus overthrow such a well established rule would be an usurpation of the functions of that body. Moreover it left one litigant with a right which was denied the other; and the right to protection from unwarranted examinations was fully as important as the right to the examination. However, having become the rule, it found quick observance in *Mantz v. Schoen and Walter Co.*208 The fact that such an order is erroneous does not affect its appealability, for a ruling on the motion is merely an authoritative determination as to what evidence may be elicited upon the examination. Suppressing nothing, it prescribes the field in which the remedy may operate.209 As was pointed out in the dissenting opinion in the *Milwaukee Corrugating* case, orders denying the remedy were thereafter held appealable.210

**Miscellaneous Rulings**

It is discretionary with the trial court as to whether pleadings are to be stricken for refusal to answer.201 In *Maloney v. McCormick*202 the court on appeal refused to consider the constitutionality of Section 4097 (1) [now Section 325.11], where defendant's answer was stricken for refusal to testify on an adverse examination. Defendant's willful failure to furnish data which it was required to produce pursuant to a discovery examination necessary to enable plaintiff to plead does not obviate the bar of Section 289.06 where the proper steps were not taken to enlarge the time for filing the complaint, although the summons was served within time.203 The service of a summons, notice and examination, subpoena and affidavit under the statute were held not to be a compliance with Section 330.19 (5). The affidavit did not state the "place" of the accident even if it were to be held in compliance with the requirement of notice, which rule the court would not follow.204 The appearance of an attorney at the examination on behalf of his client was held not to constitute a general appearance so as to entitle him to notice of application for judgment.205 The officer's charges for taking a deposition were held properly taxable as costs in *Aprin v. Bowman.*206

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189 171 Wis. 7, 176 N.W. 70 (1920).
190 265 N.W. 202 (1936).
202 Eastern Ry. of Minn. v. Tuteur, 172 Wis. 382, 105 N.W. 1067 (1906).
204 Voss v. Tittel, 219 Wis. 175, 262 N.W. 579 (1935).
205 Velte v. Zeh, 188 Wis. 401, 206 N.W. 197 (1925).
206 83 Wis. 54, 53 N.W. 151 (1892).
CONCLUSION

The preceding pages thus review the course of the decisions relating to the discovery statute, which at the present date is far different in form, but, as shown, in effect provides that broad liberal remedy which the legislature of 1858 sought to furnish. Many changes have occurred in the context for the purpose of broadening the relief secured thereby but, in the attempted simplification of the statute by the revision of 1927, the legislature removed therefrom one of the chief sources of facts upon which the party seeking the examination to plead might rely. And in the case of all statutory remedies, search should first be made in the statute itself for authority rather than in the cases interpreting it. In no stronger way could this be impressed than by the action of the court in Stott v. Markle where the court considered the 1927 revision.

In the future it would not be unwise to expect a continual shift and change in the context of the enactment, not only by legislative amendments, as in the past, but by the supreme court under its rule making power. Careful attention should be paid to these changes; but it should not be forgotten that throughout the period of its existence on the statute books of this state, the underlying spirit of the statute was to give to a party a highly beneficent and remedial right to examine his adversary under the conditions therein set forth, as to facts and evidence upon which such party might proceed to trial with knowledge of the circumstances, surrounding his suit.

APPENDIX


(1) Persons Subject Thereto. No action to obtain a discovery under oath, in aid of prosecution or defense of another action shall be allowed but a party to an action may be examined as a witness but the examination of any person for whose immediate benefit any civil action or proceeding is prosecuted or defended or (Supreme Court Order, effective Jan. 1, 1934, 212 Wis. XIV) his or its assignor, officer, agent or employee 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, but the deponent shall not be compelled to disclose anything not relevant to the controversy. (Supreme Court Order effec-
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244], officer† [added, Wis. Laws (1909) c. 84] agent, or employe‡ [added, Wis. Laws (1901) c. 244], or in case a [added, Wis. Laws (1882) c. 194; dropped, Wis. Laws (1909) c. 84] private [added, Wis. Rev. Stat. (1898) § 4096; dropped, Wis. Laws (1909) c. 84; dropped, Wis. Laws (1909) c. 84] corporation be a party [added, Wis. Laws (1882) c. 194; dropped, Wis. Laws (1909) c. 84] in addition to the foregoing [added, Wis. Laws (1901) c. 244; dropped, Wis. Laws (1909) c. 84] the examination of the president; secretary [added, Wis. Laws (1892) c. 194; dropped, Wis. Laws (1909) c. 84] or [added, Wis. Rev. Stat. (1898) § 4096; dropped, Wis. Laws (1909) c. 84] other principal officer [added, Wis. Laws (1882) c. 194; dropped, Wis. Laws (1909) c. 84] or general managing agent [added, Wis. Laws (1882) c. 194; dropped, Wis. Laws (1901) c. 244] of such corporation [added, Wis. Laws (1882) c. 194; dropped, Wis. Laws (1909) c. 84] or of the person who was such president, secretary [added, Wis. Rev. Stat. (1898) § 4096; dropped, Wis. Laws (1909) c. 84], officer† [added, Wis. Rev. Stat. (1898) § 4096], or [added, Wis. Rev. Stat. 1898) § 4096, dropped, Wis. Laws (1909) c. 244] agent† [added, Wis. Rev. Stat. (1898) § 4096], or employe† [added, Wis. Laws (1901) c. 244] at the time of the occurrence of the facts made the subject of the examination† [added, Wis. Rev. Stat. (1898) § 4096], or in case a county, town or village, or city, be a party, the examination of any officer of such county, town, village, or city† [added, Wis. Laws (1909) c. 84] otherwise than as a witness on a trial, may be taken by deposition [added, Wis. Rev. Stat. (1878) § 4096] at the instance of the adverse party*† or of anyone of several adverse parties and for that purpose may be compelled to give testimony in the action, in the same manner and subject to the same rules of examination as any other witness.* [dropped, Wis. Rev. Stat. (1878) § 4096] [Concludes Wis. Rev. Stat. (1858) c. 137, § 54] in any action or proceeding, at any time after the commencement thereof and before judgment† [added, Wis. Rev. Stat. (1878) § 4096] As many such examinations may be had, at different times and places, as there are individuals to be examined; but no individual shall be examined more than once, except as hereinafter otherwise provided† [added, Wis. Laws (1909) c. 84].
Deposition. The examination provided for in the last section [Note Wis. REV. STAT. (1858) c. 137, § 54], may be had either on the trial of the action, or at any time before trial, at the option of the party claiming it, before a judge of the court, or county judge.* [dropped, Wis. REV. STAT. (1878) § 4096] Such deposition shall be taken before a judge at chambers† [added, Wis. REV. STAT. (1878) § 4096] or at† [added, Wis. REV. STAT. (1878) § 4096] court commissioner† [Wis. Laws (1886) c. 138] on a previous notice to† the party to be examined* [dropped, Wis. REV. STAT. (1878) § 4096] and any other adverse party† or their respective attorneys† [added, Wis. REV. STAT. (1878) § 4096] of at least five days* unless for good cause shown, the judge order otherwise.* [dropped, Wis. REV. STAT. (1878) § 4096] or it may be taken without the state† [added, Wis. REV. STAT. (1878) § 4096] upon commission [added, Wis. REV. STAT. (1878) § 4096; dropped, Wis. Laws (1893) c. 141] in the manner provided for taking other depositions.† [added, Wis. REV. STAT. (1878) § 4096] Such portions of any such examination or examinations of any of the persons mentioned as are relevant to the issues in the case may be offered by the party taking any such examination or examinations and shall be received upon the trial of the action or proceeding in which it is taken, notwithstanding the person who was so examined may be present at the trial or proceeding† [added, Wis. Laws (1913) c. 246].

Subpoena. The party* [dropped, Wis. REV. STAT. (1878) § 4096] sought [added, Wis. REV. STAT. (1878) § 4096] to be examined may be compelled to attend in the same manner as other witnesses,* [dropped, Wis. REV. STAT. (1878) § 4096] The attendance of the party to be examined† [added, Wis. REV. STAT. (1878) § 4096], and the production of all papers, books, files, records, things, and matters in the possession of such party, his or its assigns, officers, agents, or employees, relevant to the controversy† [added, Wis. Laws (1907) c. 369], may be compelled upon subpoena and the payment or tender of his fees as a witness† [added, Wis. REV. STAT. (1878) § 4096] or for

Time, Place, Notice; Officers Empowered To Take. 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
§ 4096. And the party so examined or testifying, shall be entitled to demand and receive the same fees for travel and attendance as other witnesses [added, Wis. Laws (1863) c. 32; dropped, Wis. Rev. Stat. (1878) § 4096]. If the party to be examined is a non-resident of this state, the court may upon motion fix the time and place of such examination,‡ [added, Wis. Laws (1909) c. 84], either within or without the state‡ [added, Wis. Laws (1919) c. 239]. He shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition, without service of subpoena‡ [added, Wis. Laws (1909) c. 84].

(4) Rules. [Note: Wis. Laws (1909) c. 269 separated into paragraphs here. Formerly "witness; and such"] Such examination shall be subject to the same rules as that of any other witness, but he shall not be compelled to disclose anything not relevant to the controversy.§ [added, Wis. Rev. Stat. (1878) § 4096].

(5) Notice. On motion and one day's notice of the court or presiding judge thereof in which the action or proceeding is pending may, before the examination is begun by order limit the subjects to which such examination shall extend; but [added, Wis. Rev. Stat. (1878) § 4096; dropped, Wis. Laws (1885) c. 321]. If such examination shall be taken before issue joined, the notice of taking the same shall be accompanied by an affidavit of the party, his agent, or attorney, stating the general nature and object of the action, that discovery is sought to enable the party to plead and the points upon which such discovery is desired, and such examination shall be limited to the discovery of the facts relevant to such affidavits [added, Wis. Rev. Stat. (1885) c. 321; dropped, Wis. Rev. Stat. (1898) § 4096] such points, so stated [added, Wis. Rev. Stat. (1898) § 4096] un-

(4) Discovery Needed To Plead. 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.

(5) Use of Deposition. 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.
less the court or the presiding judge thereof, on motion and one day's notice, shall, before the examination is begun, by order, further limit the subjects to which the examination shall extend; it shall extend to the extent of the complaint, as though the same had been put in issue; but should the defendant desire an examination of the plaintiff, his or its agent, employe, or officer, before issue joined, said defendant shall be entitled to examine said plaintiff after service of the complaint the defendant may examine the plaintiff’s or its agent, employe, or officer, and the plaintiff may examine the defendant, his or its agent, employe or officer, on all points set out in the complaint, as though the same had been put in issue; but such examination shall not preclude the right to another examination after issue joined upon all the issues in the cause, and the party examining shall in all cases be permitted to examine upon oral interrogatories.

(6) Venue. 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.* Such examinations shall not be compelled in any other county than that in which the party to be examined resides†, except as hereinbefore provided†; when such adverse party is not a resident of this state, his testimony may be taken upon commission, in the same manner as provided by law, and by the rules of court, for taking of the testimony of other witnesses upon commission.* [Wis. Rev. Stat. (1858) c. 137, § 56; dropped, Wis. Rev. Stat. (1878) § 4096; provided] However, whenever this state, that whenever [added, Wis. Laws (1899) c. 84; dropped, Wis. Rev. Stat. (1898) § 4096] should the defendant desire an examination of the plaintiff, his or its agent, employe, or officer, before issue joined, said defendant shall be entitled to examine said plaintiff after service of the complaint the defendant may examine the plaintiff’s or its agent, employe, or officer, and the plaintiff may examine the defendant, his or its agent, employe or officer, on all points set out in the complaint, as though the same had been put in issue; but such examination shall not preclude the right to another examination after issue joined upon all the issues in the cause, and the party examining shall in all cases be permitted to examine upon oral interrogatories.

(6) Deposition Following Examination. At the conclusion of the adverse examination the deposition of the witness may be taken without previous notice and before the same officer by any party, and the same may be used in like cases and with like effect as if taken upon notice. (Supreme Court Order, effective Jan. 1, 1934, 212 Wis. XX.)
any added, Wis. Laws (1889) c. 348; dropped, Wis. Laws (1893) c. 141] plaintiff or defendant is a non-resident of this state his deposition may be had under the provisions of this section in† [added, Wis. Laws (1889) c. 348] the [added, Wis. Laws (1889) c. 348; dropped, Wis. Laws (1911) c. 231] any† [added, Wis. Laws (1911) c. 231] county in† [added, Wis. Laws (1889) c. 321] which the action is pending [added, Wis. Laws (1889) c. 321; dropped, Wis. Laws (1911) c. 231] the state† [added, Wis. Laws (1911) c. 231] if he can be personally served with notice and subpoena [added, Wis. Laws (1889) c. 321] in such county [added, Wis. Laws (1889) c. 321; dropped, Wis. Laws (1911) c. 231].

(7) Foreign corporation. In case a foreign corporation is a party the examination of its president, secretary, other principal officer, assignor or agent or employee, or the person who was such, or either of them, at the time of the occurrence of the facts made the subject of the examination, may be had under the provisions of this section in† [added, Wis. Laws (1901) c. 244] any county of† [added, Wis. Laws (1911) c. 231] this state† [added, Wis. Laws (1901) c. 244] in the county in which the action may be pending or in which it was originally brought, if such officer or agent can there be personally served with notice for taking such deposition and a subpoena to attend such examination, [added, Wis. Laws (1901) c. 244; dropped, Wis. Laws (1911) c. 231].

The court may also, upon motion and such terms as may be just, fix a time and place in this state for such examination of any of said persons. Such persons so sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and then and there have with him all papers, books, files, records, things, and matters in the possession of such person by reason of his relation to such corporation, relevant to the controversy. Such person sought to be examined as aforesaid shall attend at such time and place and submit to the examination, and, if required, attend for the purpose of reading and signing such deposition without service of subpoena.† [added, Wis. Laws (1911) c. 231].

(9) Stipulation Waiving Reading and Signing. Whenever a party shall be examined and his deposition taken under the provisions of this section the party taking such examination and the party examined, or their counsel, may stipulate upon the record before the judge or court commissioner before whom the examination is had, that the reading of the deposition to or by the deponent and his signature thereto are waived by consent, and that the deposition may be used with the same force and effect as if read over and signed; and in cases where such stipulation is made the said examination or deposition may be used in the action in which the same is taken and in any other action or proceeding in that or in any other court where it could have been used if read over and signed, with the same force and effect in all respects as if the deponent had read and signed the same.

Wis. Rev. Stat. (1878) § 4096 or court commissioner [added, Wis. Laws (1866) c. 138; dropped, Wis. Rev. Stat. (1878) § 4096] in like manner, and may be read by either party on the trial* [dropped, Wis. Rev. Stat. (1878) § 4096]. It shall in all cases be delivered or transmitted by the officer before whom taken to the clerk of the court, magistrate or other person before whom the action or proceeding is pending securely sealed, and shall remain sealed until opened by the court or clerk thereof or such magistrate or other person† [added, Wis. Laws (1899) c. 29].

(10) Signing; Transmittal. In all cases where the reading and signature shall not be waived as aforesaid, the said deposition shall be read over to or by the deponent and signed by him before the officer before whom the same was taken, and the attendance of the party examined for the purpose of reading and signing said deposition may be compelled in the same manner as his attendance for the purpose of submitting to such examination may be compelled by law† [added, Wis. Laws (1899) c. 29]. [Wis. Laws (1907) c. 369 changed "law, it" to present form] and the examination shall be taken and filed by the judge,* [dropped,