The New Louisiana Statute on Depositions and Discovery

Leon D. Hubert Jr.
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One of the first steps taken by the Louisiana Law Institute, in its project of a revision of the Louisiana Code of Practice of 1870, was the development of a general outline dividing the entire subject of civil procedure into books, titles, and chapters. In Title III of Book II, two chapters were allocated to depositions and discovery. The reporters¹ began the work on this subject in the summer of 1951, having in mind, of course, that the work would ultimately take its place as part of the general code. However, when the Institute learned that there was a movement to introduce in the 1952 Legislature a bill providing for a new deposition and discovery system for Louisiana, it was decided to accelerate the reporters' work on the subject and to change the format of the work so that the product might be a model statute which could be used profitably by anyone who wished to introduce such a bill in the Legislature of 1952.

This was done, and the Legislature adopted without change the Institute's project as Act 202 of 1952. Attention is invited to the fact that this statute has been so drawn that when the revised code is submitted, the statutory sections will simply become articles of the new code, with only such minor technical adjustments as will be necessary to make the work conform with the code scheme.

Before entering into a detailed discussion of the statute, it might be profitable to refresh one's memory as to the history of depositions and discovery, and as to the possible and ultimate functioning of an adequate and fair discovery system.

* Act 202 of 1952. This article is substantially a reproduction of remarks made by the writer at local bar association meetings in Lake Charles, Lafayette, Alexandria and Bogalusa.

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1. Professor Henry George McMahon, School of Law, La. State Univ.; Professor Leon Sarpy, School of Law, Loyola Univ.; and the writer.
The tremendous impetus given to the use of discovery in practice by the adoption of the Federal Rules of Civil Procedure in 1938 usually leaves the impression that the discovery concept is a new thing. The truth is, however, that while discovery was unknown to the common law, it was well established in the Romano-canonical law, which indeed had a comprehensive and organized system. Later, equity developed its own bill of discovery to serve a similar purpose, but this system contained the severe limitation that discovery could only be made of the plaintiff's case and could not be used to compel disclosure of defensive matter. Professor Millar of Northwestern has demonstrated the wide use of discovery for many years in several continental procedural systems. It is manifest error, therefore, to think of discovery as either new or untried. There has always been a need for procedural devices to assist litigants in preparing their cases and to avoid surprises at the trial. The fact system of pleading was widely adopted in this country after 1850, and its use has completely demonstrated its inability to perform properly its intended and theoretical function as a device to inform the litigants of what the case is all about. The common law bill of particulars cannot cure this inadequacy, or take the place of discovery. Consequently, many states adopted a discovery system by statute or developed it by jurisprudence. However, it can be said in all fairness that it was not until the adoption of the federal rules that a really well thought-out and comprehensively organized system of discovery was made available. Prior to the federal rules, discovery was rare even in federal courts because there was no adequate machinery for unearthing facts and paring down issues.

It has been stated that at least seven major advantages result from an adequate discovery system:

1. Witnesses are examined while events are fresh in their minds, and in some instances, before they have been coached;

7. Sunderland, op. cit. supra note 5, at 870.
Opportunities for perjury are reduced by preventing a witness from changing his story at the trial after learning the theory of the adverse party's case;

(3) Suits are often settled or dropped after discovery is obtained where a party finds his case is not as good as he thought;

(4) Issues at the trial are fewer and simpler;

(5) Time of counsel and court is saved, and costs of litigations are frequently lessened;

(6) All relevant facts can be known before trial;

(7) Discovery is obtained, and the testimony preserved for use at the trial.

These things are certainly accomplished by the federal discovery system. In addition the federal rules allow a prospective litigant to take depositions even before he files his suit, and this presumably serves to discourage the filing of unfounded litigation. Moreover, the tabulation does not include such important areas of the federal system as interrogatories to adverse parties, calls for the admission of matters of fact, discovery of documents, and the very important provision for the physical and mental examination of parties.

Compared to all this, it can be said without hesitation that prior to the adoption of Act 202 of 1952, Louisiana had a very poor discovery system. In fact the Louisiana law on depositions was never really intended to serve as a system of discovery, but rather merely as a means of producing testimony at the trial which was not otherwise available. The Code of Practice provisions on interrogatories on facts and articles did provide a limited discovery system, but as will be shown below, it was wholly inadequate.

The shortcomings of the former Louisiana discovery system were laid bare by Mr. Frank S. Craig, Jr., now of the Baton Rouge Bar, in a comment entitled "Discovery Procedure and Its Louisiana Counterparts." Mr. Craig there exposed the following weaknesses of the former Louisiana discovery system:

(1) The system of fact pleading required by the Pleading and Practice Act had a very restrictive effect on discovery in
that it allowed exploration only within a previously charted area and only under a binding fact statement.

(2) The system of "interrogatories on facts and articles" provided by Articles 347-356 of the Louisiana Code of Practice of 1870 was inadequate for the following reasons:

(a) They were limited to the parties themselves;
(b) They also were restricted by the binding fact statements of the pleadings;
(c) The flexibility and effectiveness of cross-examination was lacking.

(3) It was impossible to cross-examine an adverse party in advance of trial if he was a resident of the parish where the suit was pending.\textsuperscript{14} Furthermore, the right of cross-examination of an adverse party was restricted to a suit already pending in court and could not be used in perpetuating testimony as a means of discovery.\textsuperscript{15}

(4) With respect to the discovery of documents, Louisiana had two devices, both of which were severely limited in their use:

(a) The prayer for oyer recognized by Article 175 of the Code of Practice, was restricted to the "document declared upon" and thus was not available to discover miscellaneous documentary evidence which might have been of equal importance.

(b) The subpoena duces tecum recognized by Article 473 of the Code of Practice required that the documents sought should not only be described but also that a statement should be made as to what was intended to be proved thereby; thus this device defeated itself as a discovery device by requiring a statement of the existence and content of the very documents whose existence and content were to be discovered. Moreover, while it was possible to obtain a subpoena duces tecum returnable prior to trial,\textsuperscript{16} the general practice of requiring the documents to be produced only on the trial day defeated any practical discovery utility which might have otherwise existed.

\textsuperscript{14} Harrelson v. New Orleans Roosevelt Corp., 184 La. 551, 166 So. 671 (1936).
\textsuperscript{15} State ex rel. Batt v. Rome, 172 La. 856, 135 So. 610 (1931).
\textsuperscript{16} Succession of Marks, 108 La. 494, 32 So. 401 (1902).
It requires nothing more to show that Louisiana's former discovery system was inadequate. It can even be questioned whether a Louisiana discovery system as such existed at all. On the other hand, it is well known that the federal discovery system was the product of much study and experience of outstanding members of the bench, bar and teaching profession. This fact, coupled with favorable reception which has been accorded the federal rules on discovery since 1938, induced the reporters assigned the work of preparing a depositions and discovery system for Louisiana to turn to Federal Rules of Civil Procedure 26-37.

It will be found that in content, in theory, and in most instances in actual texts, the sections of Act 202 of 1952 closely follow the federal rules. However, it was thought advisable to rearrange, break down, and regroup the federal rules so that they would best fit into a code system. Of course, many mechanical changes were necessary in order to make the federal system, conceived for operation in national courts, conform to a state system. Moreover, as will be seen in the comments to the various sections which follow shortly, some of the policies of the federal rules were rejected or modified and, on the other hand, some long-established and satisfactory Louisiana concepts were added.

No discussion of a modern discovery system can be complete without reference to the age-old bugbear used by opponents of discovery and usually labeled "fishing expedition." That there are dangers of abuse in any discovery system is manifest and has been demonstrated. On the other hand, Act 202 of 1952 contains several devices which should be completely effective in controlling or stopping efforts to harass, blackmail, delay, et cetera. For instance, Section 3762 of the new act makes ample provision for controlling depositions in order to protect a party or witness from annoyance, embarrassment, or expense; and Section 3764 provides for the termination of depositions being taken with such motives. If unjustifiable and unwarranted "fishing expeditions" do take place, it is not because the system is faulty, but rather because the protective devices are not being invoked.\footnote{17. 59 Yale L.J. 117 (1949). \footnote{18. Writing the opinion of the court in Hickman v. Taylor, 329 U.S. 495, 507-508 (1947), Mr. Justice Murphy stated: "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment.}}
Finally, it should be noted that Arizona, Colorado, Florida, New Mexico, and Utah have adopted the federal rules on depositions and discovery almost without change, and that Maryland and Texas have adopted the system in substance. Many other states have adopted discovery systems far superior to the one which formerly existed in Louisiana. 19

Before discussing the new act in detail, a general analysis of its scope, system and content is desirable. It should be noted that it repeals Part III of Chapter 17 of Title 13 of the revised statutes of 1950 20 and substitutes therefor an entirely new Part III. 21 This Part III is in turn divided into six sub-parts. The first sub-part contains all sections which are applicable generally to all depositions, no matter when taken and irrespective of the type of deposition to be taken. The second sub-part deals with the procedures for taking depositions, which vary, depending upon whether they are to be taken prior to filing suit, or after filing suit but before trial, and finally whether they are to be taken after trial and pending appeal. The third sub-part regulates the procedures for taking oral depositions; and the fourth sub-part does the same with respect to taking depositions upon written interrogatories. The fifth sub-part makes provision for a number of miscellaneous discovery devices including interrogatories to parties, discovery of documents, physical and mental examinations, and calls for admissions of facts and genuineness of documents. The last sub-part contains those sections providing sanctions for the enforcement of the act.

The salient features of each section of the new act will now be discussed. Each section will be treated independently and the

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19. See Mehrtens, op. cit. supra note 3, as to Florida; Ragland, Discovery by Deposition, 1950 U. of Ill. L. Forum 161, as to Illinois; 37 Ky. L.J. 388 (1949) as to Kentucky.
text of the section will appear immediately before the comment on it.

It is manifest, of course, that this paper cannot possibly discuss all problems connected with the new act. Such a study would require almost as many chapters as there are pages in this article. The purpose of the article is simply to provide a general procedural analysis of the act. Aid in the solution of particular and minute problems may be found in the mass of jurisprudence collected in the Federal Rules Decisions as well as in the voluminous works of many authors on the subject.

THE TITLE

An Act

To repeal Part III of Chapter 17 of Title 13 of the Louisiana Revised Statutes of 1950, being R.S. 13:3771 through R.S. 13:3785, and to substitute therefor a new Part entitled "Part III. Depositions and Discovery" providing for discovery devices and procedures in civil cases, including the various methods, times and places of taking depositions of parties and of witnesses, the propounding of interrogatories to parties, the production of documents, papers, books and other things, and the medical, physical or mental examination of parties, and prescribing the procedure to be followed in each such case; providing for the use which may be made of such depositions, interrogatories, documents, papers or things, and of the medical examinations, and providing for the probative value thereof and their admissibility in evidence; prescribing civil penalties for the noncompliance of orders issued pursuant to this Act; and repealing certain enumerated laws.

In drawing up the title to this act, careful consideration was given to the constitutional requirements for statutory titles, and it is submitted that the title satisfies all such requirements.

SUB-PART A. GENERAL PROVISIONS APPLICABLE TO DEPOSITIONS AND DISCOVERY

§ 3741. Stipulations regarding the taking of depositions

If the parties so stipulate in writing, depositions may be taken by any person, at any time or place, upon any notice,

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22. Section 16 of Art. III of the La. Constitution of 1921 (as amended) reads as follows: "Every statute enacted by the Legislature shall embrace but one object, and shall have a title indicative of its object."
and in any manner and when so taken may be used like other depositions.

Source: Federal Rule 29.

This section of the new act makes it possible for the parties by stipulation to vary the rules concerning depositions in any way in which they see fit. This was placed first in the new act in order to make it clear that although a very definite set of rules governs depositions and discovery, nevertheless, the parties can by mutual agreement make any variations they desire to save time or expense, or to serve their convenience. The relative position of this article, as the first article of the entire act, stresses the flexibility of the system, which is in keeping with the modern tendency against rigidity in procedural systems.

§ 3742. Place where depositions are to be taken

A witness who is a resident of this state may be required to attend an examination to take his deposition only in the parish in which he resides or is employed or transacts his business in person, or at such other convenient place as may be fixed by order of court. A witness who is a non-resident of this state, but is temporarily in this state, may be required to attend an examination to take his deposition only in the parish where he is served with a subpoena or at such other convenient place as may be fixed by order of court.

Source: Compare Federal Rule 45(d) 2.

This section determines the place where depositions are to be taken. There are many variations in state discovery systems regarding the place of taking depositions. Most of the systems, however, look to the convenience of the witness rather than to that of the litigants. Thus, Nebraska and Kentucky provide that the witness may be summoned only in the county in which he resides, or in which the subpoena is served on him.23 Ohio provides that the witness cannot be compelled to attend outside the county where he resides or is employed or transacts his business in person.24 Massachusetts, on the other hand, provides that a witness may not be summoned for the taking of a deposition more than twenty miles away from his place of abode.25 The former Louisiana law was vague as to the place in which a deposition

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had to be taken, but Article 425 of the Code of Practice indirectly seemed to require that depositions on written interrogatories be taken at the residence of the witness. The new statute definitely fixes the place of taking depositions both as to residents and non-residents temporarily in the state, and in both instances the act seeks to serve the convenience of the witness. Consideration was given to permitting the calling of a witness for a deposition to a place within one hundred miles of his residence in order to make the system conform to that used in subpoenaing witnesses for trials, but this approach was rejected.

§ 3743. Before whom depositions taken

Depositions shall be taken before an officer authorized to administer oaths, who is not an employee or attorney of any of the parties or otherwise interested in the outcome of the case.


The above section is an instance in which the Federal Rule was rejected in part in order to follow the existing Louisiana law. Prior to 1952, R.S. 13:3773 and Article 425 of the Code of Practice allowed a deposition to be taken before any person authorized to administer oaths. Federal Rule 28, in addition, allows the court to appoint anyone to take a deposition, and confers upon such persons, pro tempore, authority to administer oaths. This provision was omitted in Act 202 of 1952. It was believed that the section would be broad enough to cover those situations in Louisiana in which a judge may have power to confer authority pro tempore to administer oaths. This solution also avoids the troublesome problem of whether the legislature can constitutionally authorize the judiciary to confer upon private persons the authority to administer oaths, even for limited purposes or under limited circumstances.

§ 3744. Effect of errors and irregularities in depositions

A. As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

B. As to Disqualification of Officer. An objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as
the disqualification becomes known or could be discovered with reasonable diligence.

C. As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under R.S. 13:3771 through R.S. 13:3773 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross interrogatories and within 3 days after service of the last interrogatories authorized.

D. As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under R.S. 13:3761 through R.S. 13:3773 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Source: Federal Rule 32.

There is here established a system of waiver of errors and irregularities. The section is thus very important, since inaction may constitute a waiver of what would otherwise be an objectionable error. For example, errors or irregularities in the required notice that a deposition is to be taken, must be promptly raised, and otherwise will be waived. So also, the disqualification of the officer before whom the deposition is to be taken must be raised before the deposition begins, or as soon as the disqualification is discovered. However, objections to the competency of a
witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition unless the basis of the objection is such that it could have been cured if it had been raised at the time the deposition was being taken. For example, an objection that a child deponent was not qualified to testify could not be raised after the deposition had been taken, because if such objection had been made while the deposition was being taken, it might have been possible to show that the child, although of tender years, nevertheless possessed sufficient intellectual development to testify. Objections to the manner of taking the deposition or to the forms of the questions and answers are waived unless raised during the taking of the deposition, since the error could have been cured if the objection had been made in time. For example, an objection to a leading question cannot be raised after the deposition is completed, since by making the objection when the question was asked, the error might have been cured. However, it is important to note at this point that, except as otherwise indicated, it is not necessary to make objections to the admissibility, materiality or irrelevancy of the testimony during the taking of the deposition. This matter is dealt with in Section 3746 which specifically reserves the right to make objections to testimony, based on the rules of evidence, to the time when the deposition is offered in evidence at the trial.

§ 3745. Use of depositions

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contracting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party,
may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is at a greater distance than 100 miles from the place of trial or hearing or is outside of this state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of this state, or the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as is originally taken therefor.

Source: Federal Rule 26 (d).

One of the matters considered in drafting this section was whether to preserve the former Louisiana rule that depositions could be used even if the witness involved was available at the time of trial. It was decided, however, to follow strictly the federal rule in this respect, and hence to allow a deposition to be used only when, for one of the reasons tabulated, the witness is not present to testify at the trial. This conclusion was the more readily reached because of the provision of sub-section 3 (e) of Section 3745, which allows the court in exceptional circumstances to permit the use of a deposition even though the deponent is available as a witness.

§ 3746. Objections to admissibility

Subject to the provisions of R.S. 13:3744C, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

Source: Federal Rule 26 (e).

This section specifically reserves the right to make objections based on the rules of evidence to the time when the deposition is introduced in evidence at the trial. Of course, it is subject to Section 3744C, which was discussed above.

§ 3747. Effect of taking or using depositions

A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in R.S. 13:3745(2). At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Source: Federal Rule 26 (f).

One important point in this section is the fact that a party who takes the deposition of a witness does not have to use that deposition ultimately; nor does he thereby adopt the deponent as his witness for any purpose. Of course, if the deposition is ultimately introduced at the trial by a litigant, he then makes the deponent his own witness; but even in this event, he may rebut the deposition, even though it was introduced in evidence by himself.

§ 3748. Depositions to be taken outside Louisiana

If the witness whose deposition is to be taken resides out of this state, the law of the place where the deposition is to be taken shall govern the compulsory process to require the appearance and testimony of witnesses, but otherwise the provisions of this Part shall be applicable to such a deposition.


This last section in Sub-part A of the new statute concerns depositions to be taken outside of Louisiana. It simply states that
insofar as requirements for the appearance and testimony of the witness are concerned the deposition is to be governed by the law of the place where it is to be taken, but that everything else is to be governed by the law of Louisiana. Attention is called to the fact, however, that the uniform foreign deposition act, which has been adopted in Louisiana as R.S. 13:3821, is not affected by Act 202 of 1952 and remains a part of the law.

SUB-PART B. TAKING OF DEPOSITIONS

The new statute recognizes three different situations in which depositions might be needed and provides different procedures as to each. First, a deposition may be desired before any action has been filed and, of course, in anticipation of the filing of such action; second, after the filing of the suit and in preparation for trial; and third, after the trial has taken place and pending an appeal and, of course, in anticipation that a new trial may be granted, in which case the deposition of the witness may become useful.

§ 3751. Depositions before action

A. Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state may file a verified petition in a court in which the anticipated action might be brought. The petition shall be entitled in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought; (2) the subject matter of the expected action and his interest therein; (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it; (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

B. Notice and Service. The petitioner shall thereafter cause to be served a notice upon each person named in the petition as an expected adverse party, together with a copy
of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least fifteen days before the date of hearing the notice shall be served as provided in R.S. 13:3471; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court shall appoint an attorney to represent him, and, in case he is not otherwise represented, shall cross-examine the deponent.

C. Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with this part, and the court may make orders of the character provided in R. S. 13:3782 and R.S. 13:3783. The deposition of an expected adverse party may be taken under the provisions of R.S. 13:3662 and R.S. 13:3663. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

D. Use of Deposition. If a deposition to perpetuate testimony is taken under these rules it may be used in any action involving the same subject matter subsequently brought in any court of this state, in accordance with the provisions of R.S. 13:3745.

Source: Federal Rule 27(a).

It will be noted that the procedure for taking a deposition prior to filing a suit is quite technical as compared with the procedure for depositions pending action. The petition referred to is not itself the application for an order to take a deposition, but is a notice that on a particular date an application will be made. When the application is made the question for the court is whether the allowance of the deposition will prevent a failure or delay of justice. If the deposition is allowed, the standard procedure concerning depositions in general is to be followed; and of course the protective devices established by Sections 3762 and 3764 (to be discussed later) may be invoked. It will be noted that
Subsection C specifically recognizes that discovery of documents is possible in connection with this pre-filing deposition (Section 3782) and that a physical or mental examination may be demanded (Section 3783). A deposition before filing suit may be applied for by either a prospective plaintiff or a prospective defendant. In order to clarify the problem created by *State ex rel. Batt v. Rome* which held that the deposition of an adverse party could not be taken prior to the filing of the suit as under cross-examination, the third sentence of Subsection C of Section 3751 was added. This sentence reads as follows:

“The deposition of an expected adverse party may be taken under the provisions of R.S. 13:3662 and R.S. 13:3663.”

The sections of the revised statute cited in the sentence quoted above are the present Louisiana provisions which allow cross-examination of an adverse party.

It has been held, as to the federal counterpart of this section, that it can be used only as a means to *perpetuate* known evidence and not as a means of *discovery* as to whether the plaintiff has a case or not. Professor James W. Moore of Yale justifies this on the ground that a plaintiff can always file a skeleton complaint on the basis of which he can then use the discovery system available for pending actions, and later amend his original skeleton complaint. This indirect method of accomplishing a desired result is possible, of course, where skeleton pleadings are allowed; but in a state like Louisiana where the facts constituting a cause of action must be stated, it would not be possible. There can be no doubt of the utility of a method of discovery to be used for assistance in framing the petition; or to put it another way, to determine whether any cause of action exists. For example, a person involved in an automobile accident may not have any information as to how the accident happened or as to which of several possible defendants was at fault. He may know only that he was injured. Pre-filing discovery in such cases would be very valuable to him. He could thereby avoid making speculative allegations of acts of negligence and avoid joining faultless defendants. It has been observed that “a liberal attitude toward the prevention of ‘a failure or delay of justice’ might expand this

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remedy to include discovery before pleading. Of course, the possible abuses inherent in such a system are recognized; but it is submitted that the protective orders available under other sections of the act could be used effectively to curb such abuses.

§ 3752. Depositions pending action

A. When Depositions May Be Taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 15 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as for witnesses in trials. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

B. Scope of Examination. Unless otherwise ordered by the court as provided by R.S. 13:3762 or R.S. 13:3764, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the demand or defense of the examining party or to the demand or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

C. Examination and Cross-Examination. Examination and cross-examination of deponents may proceed as permitted at the trial.

Source: Federal Rules 26 (a), (b), and (c).

Probably the most frequent use of Act 202 of 1952 will be

31. Cf., however, Pike and Willis, op. cit. supra note 29, at 1194: “The objection to pre-action discovery on the ground that it will allow ‘fishing out a case’ is not particularly sound; (if a plaintiff has a case he should be aided in fishing it out). . . .”
made with reference to depositions taken after the filing of the suit and pending trial. The procedure to obtain this deposition is governed by Section 3752 and is very simple. No court order is required. The choice of the officer before whom the deposition is to be taken is left to the person seeking to take the deposition. The deponent may be compelled to appear before such officer by the use of the subpoena as for witnesses in trials. Such subpoenas are issued by the court of the deponents' residence, for Section 3792 makes it clear that the witness is under the control of that court.

Subsection B of Section 3752 deals with the scope of the examination in a deposition and it is important to note the breadth of the scope of examination. Particularly, attention is called to the following sentence of this subsection:

"It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

Thus, it will be seen that an examination of a deponent can go much farther afield than if the witness were being examined in court, but of course the admissibility of the deposition or parts thereof at the trial will continue to be governed by the rules of evidence. 32

§ 3753. Depositions after trial

If an appeal has been taken from a judgment or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings. In such case the party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the court. The motion shall show: (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; and (2) the reasons for perpetuating their testimony.

If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make

32. See text of Sec. 3746, supra.
orders of the character provided for in R.S. 13:3782 and R.S. 13:3783 and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in this part for depositions taken in actions pending in the court.

Source: Federal Rule 27 (b).

Except for the fact that a motion and order is required to take a deposition after trial and pending appeal, the procedure governing depositions pending action is applicable to depositions pending appeal.

SUB-PART C. DEPOSITIONS UPON ORAL EXAMINATION

§ 3761. Notice of examination; time and place

A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom notice is served, the court may for cause shown enlarge or shorten the time.

Source: Federal Rule 30 (a).

When a party has the right to take a deposition (either by order, in the case of depositions prior to filing suit or pending appeal; and of right, pending action), he has a choice of two types of depositions. He may proceed either by oral examination or upon written interrogatories. The only requirement for the taking of a deposition upon oral examination is that all adverse parties be notified of the time and place for taking the deposition and the name and address of the deponent. The law does not fix any specified period of time which must elapse between the giving of the notice and the taking of the deposition but requires simply that "reasonable notice" be given. Of course, what is "reasonable" is a variable, but it will be noted that by motion an adverse party can have the date fixed for taking the deposition either advanced or postponed.

§ 3762. Orders for the protection of parties and deponents

After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or
by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents of information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression, or undue expense.

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, expert, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's or expert's mental impressions, conclusions, opinions or theories.

Source: Federal Rule 30(b), and amendment suggested by Federal Committee on Rules of Civil Procedure.

Here is a complete arsenal of defensive weapons against the abuses of the "fishing expedition." In order to stress the importance of this protective device it is perhaps desirable to list the various defensive devices made available by this section. Upon notice and for good cause, a party may obtain an order:

1. Completely terminating the taking of the deposition;
2. Changing the time or place for the taking of the deposition;
3. Changing the type of deposition from oral examination to written interrogatories;
(4) Restricting the matters which shall be inquired into;
(5) Limiting the scope of the examination;
(6) Requiring that the examination shall be held privately;
(7) Requiring that the deposition shall be sealed and opened only by order of court;
(8) Protecting secret processes, developments, or research;
(9) Requiring that the parties simultaneously file documents in sealed envelopes;
(10) Affording protection against annoyance, embarrassment, oppression, or undue expense.

It is submitted that with all these available devices, a party can adequately protect himself against the abuses of the "fishing expedition."

The last paragraph of Section 3762 does not appear in the federal rule from which the majority of this section is taken. It is the so-called "Hickman Amendment," which was recommended for adoption by the Advisory Committee on the Federal Rules of Civil Procedure in June, 1946. This amendment was not adopted by the Supreme Court of the United States, but Professor Moore believes that the failure to adopt it is not significant. The amendment clarifies and broadens the scope and effect of the case of Hickman v. Taylor, which held that discovery could not be made of the "work product" of an attorney without showing "good cause."

The question of whether the deposition of an expert can be taken (as apart from the question of forcing them to produce their documents) has not been settled under the Federal Rules. It has been held that the depositions of an expert could not be taken but there is authority to the contrary. It is submitted that the silence of Act 202 on this subject places the expert in the position of any other witness and that his deposition may be

33. See 4 Moore, Fed. Practice, ¶ 30.01(5) (2 ed. 1950). Prof. Moore states that possibly the Supreme Court, which then had the Hickman case pending before it, did not wish to be embarrassed by adopting an amendment dealing with the very matter before it in the Hickman case.
34. 329 U.S. 495 (1947). In fact the "Hickman amendment" was submitted to the Supreme Court while the Hickman case was still in the lower federal courts. See comment note 33.
taken, but because of the Hickman amendment, he could not be forced to produce his documents.

§ 3763. Record of examination; oath; objections

The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

Source: Federal Rule 30(c).

This section governs the procedure to be followed by the officer conducting the taking of the deposition. It will be observed that any objections made during the taking of the deposition are simply noted and not passed upon by the officer. If a party does not wish to attend the oral deposition, he may send in written interrogatories which must be put to the deponent.

§ 3764. Motion to terminate or limit examination

At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or in which the judgment was originally rendered may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in R.S. 13:3762. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such
order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

Source: Federal Rule 30(d).

This is another defensive device against the abuses of depositions which might develop into "fishing expeditions." All the defensive devices contained in Section 3762 are available even when the deposition has already begun. It will be noted, however, that application to curb a pending deposition must be made to the court in which the principle case is pending. Under Federal Rule 30 (d), from which Section 3764 is taken, an application to curb the scope of a deposition may also be made to the court of the place where the deposition is being taken. This alternative was omitted because it was thought that the judge before whom the main case was pending was better qualified to issue limiting orders than the judge of the place where the deposition was being taken, who would probably know nothing of the main case.

§ 3765. Submission to witness; changes; signing

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or is absent from the parish where the deposition was taken or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record, the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under R.S. 13:3744 the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or part.

Source: Federal Rule 30(e).

This section governs the procedure after the deposition has
been taken, is purely administrative, and presents no particular problems.

§ 3766. Certification and filing by officer; copies; notice of filing

A. The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing, where it shall remain available for inspection.

B. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

C. The party taking the deposition shall give prompt notice of its filing to all other parties.

Source: Federal Rule 30(f).

This is also administrative in nature but it should be noted that the last clause of Subsection A was added and does not appear in Federal Rule 30(f), the source of this section. It was added in order to make it clear that when returned to the court in which the action is pending, depositions become public records available to anyone (unless, of course, the court orders that the deposition shall be sealed under the provisions of Section 3762).

§ 3767. Failure to attend or to serve subpoena; expenses

A. If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

B. If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court
may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Source: Federal Rule 30(g).

This section governs the payment of the expenses of the adverse party in attempting to attend the taking of a deposition which was not in fact taken because of neglect of the party who originally initiated the procedure for taking the deposition. It will be noted that such expenses may include reasonable attorney's fees.

**SUB-PART D. DEPOSITIONS UPON WRITTEN INTERROGATORIES**

§ 3771. Serving interrogatories; notice

A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 5 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition.

Source: Federal Rule 31(a).

§ 3772. Officer to take responses and prepare record; notice of filing

A. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by R.S. 13:3763, 13:3765, and 13:3766 to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

B. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

Source: Federal Rules 31(b) and (c).

§ 3773. Orders for the protection of parties and deponents

After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the
action is pending or in which the judgment was originally rendered, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in R.S. 13:3761 through R.S. 13:3767 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

Source: Federal Rule 31(d).

The system for taking depositions upon written interrogatories is governed by Section 3771, Section 3772, and Section 3773. These sections provide a procedure which is very similar to that which existed in Louisiana prior to the adoption of Act 202 of 1952. Federal Rule 31(a) permits the filing of re-direct and re-cross interrogatories, but this provision was excluded in the Louisiana act.

The administrative handling of the deposition is similar to that which governs the taking of oral depositions; Section 3772 refers back to Sections 3763, 3765, and 3766. Section 3773 makes all the defensive devices of Sections 3761 through 3767 applicable to depositions on written interrogatories.

SUB-PART E. MISCELLANEOUS DISCOVERY DEVICES

§ 3781. Interrogatories to parties

A. Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may accompany the petition or be served after commencement of the action and without leave of court. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days from service thereof unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.
B. Interrogatories may relate to any matters which can be inquired into under R.S. 13:3752B, and the answers may be used to the same extent as provided in R.S. 13:3745 for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, embarrassment, oppression, or undue expense. The provisions of R.S. 13:3762 are applicable for the protection of the party from whom answers to interrogatories are sought under this section.

Source: Federal Rule 33.

This section provides a system of interrogatories to an adverse party and performs the functions of the former Louisiana “interrogatories on facts and articles” provided for in Articles 347-356 of the Code of Practice of 1870. These interrogatories, however, may be filed at any stage of the proceeding. The scope of the interrogatories is as broad as the scope of any deposition, and protective orders are also available. A question might be raised as to the usefulness of this section in view of the fact that the deposition of an adverse party may be taken by written interrogatories. The procedure in Section 3781, however, does not require that the adverse party appear before an officer to answer the interrogatories and hence is cheaper and quicker.

Articles 347-356 of the Louisiana Code of Practice set up a system of “interrogatories on facts and articles” which could be used not merely to obtain answers to questions, but also to obtain the affirmance or denial of facts and of the genuineness of documents. Although Section 3781 does not itself go so far, it is believed that when used with Section 3884 a complete system of “interrogatories on facts and articles” co-extensive with the former Louisiana system is supplied. It was for that reason that Articles 347-356 of the Code of Practice were repealed.

§ 3782. Discovery and production of documents and things for inspection, copying or photographing

Upon motion of any party showing good cause therefor, and subject to the provisions of R.S. 13:3762, the court in
which an action is pending or in which the judgment was originally rendered may:

(1) Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by R.S. 13:3752B and which are in his possession, custody, or control; or

(2) Order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by R.S. 13:3752(B). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Source: Federal Rule 34.

Here is a procedure for the discovery of documents and things for inspection, et cetera, from an adverse party. With respect to this branch of discovery, the scope of inquiry is limited to that which governs all depositions. In addition the same protective orders may be obtained. This section does not permit the discovery of documents in the hands of a third person. Such documents would have to be discovered by calling such third persons as deponents and issuing subpoenas duces tecum for the production of such documents. Of course, Section 3782 makes the Louisiana prayer for oyer obsolete.

§ 3783. Physical and mental examination of parties

Except as otherwise provided by law:

A. Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending or in which the judgment was originally rendered may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and
scope of the examination and the person or persons by whom it is to be made.


(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

C. Right of Party Examined to Other Medical Reports. At the time of making an order to submit to a medical examination under Subsection A of this Section, the court shall upon motion of the party to be examined, order the party seeking such examination to furnish to the party to be examined a report of any examination previously made or medical treatment previously given by any physician employed directly or indirectly by the party seeking the order for a physical or mental examination, and at whose instance or request such medical examination or treatment has previously been conducted. If the party seeking the examination refuses to deliver such report, the court on motion and notice may make an order requiring delivery on such terms as are just; and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial, or make such other order as authorized under Sub-part F of this part.
Source: Federal Rule 35; Utah statute.

This makes it possible to obtain a physical or mental examination of an adverse party, but it may be done only upon motion for good cause shown, and upon order of the court. It should be noted, of course, that no person can be forced to submit to a physical examination, but such refusal may be penalized in accordance with Section 3729B.

Subsection C has been added to the federal source rule. It was taken from the Utah statute, in which it was included "to protect a party who is required to submit to a physical examination theretofore made by a physician controlled by the other party." Although the report required by Subsection C could probably be obtained under Section 3782, it was thought advisable to remove all doubt by the addition of the Utah amendment.

Although Louisiana had no statutory provision in regard to physical examinations of adverse parties, the jurisprudence had developed doctrines which in effect forced a plaintiff at least to submit to physical examination in personal injury suits. However, Section 3783 is far more extensive, and protects the party examined in many respects.

It should be particularly noted that this section was not intended to affect the provisions of the Louisiana Workmen's Compensation Act relative to physical examinations in such cases. To make this certain, the "except" clause was added at the beginning of the Section.

§ 3784. Admission of facts and of genuineness of documents

A. After commencement of an action a party may serve without leave of court upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the

38. See general note to Rule 35 of the Utah Rules of Procedure.
39. Kennedy v. New Orleans Ry. & Light Co., 142 La. 879, 77 So. 777 (1918);
40. See 1 LOUISIANA LAW REVIEW 45, 66-67 (1938).
request, not less than fifteen days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

B. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

Source: Federal Rule 36.

A party is allowed to require his opponent to admit or deny certain facts, or the genuineness of documents. Failure to answer the questionnaire, without showing a reason why it should not be answered, is an admission of the matter inquired into. It will be noted from paragraph B of this section, however, that the effect of the admission is limited to the pending action. This may be subjected to some criticism in that in general it contravenes the usual effect of a judicial confession. Professor Moore justifies it, however, on the ground that it tends to encourage admissions and thus at least expedites the pending litigation. This section together with the provisions for interrogatories to adverse parties contained in Section 3781 accomplishes all the purposes of the former interrogatories on facts and articles contained in Article 347-356 of the Code of Practice.

SUB-PART F. REFUSAL TO MAKE DISCOVERY; CONSEQUENCES

§ 3791. Refusal to answer

If a party or other deponent refuses to answer any ques-
tion propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in which the action is pending or in which the judgment was originally rendered for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under R.S. 13:3771 through R.S. 13:3773 or upon the refusal of a party to answer any interrogatory submitted under R.S. 13:3781, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

Source: Federal Rule 37 (a).

§ 3792. Failure to comply with order

A. Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in which the action is pending or in which the judgment was originally rendered, the refusal may be considered a contempt of that court.

B. Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under R.S. 13:3791 requiring him to answer designated questions, or an order made under R.S. 13:3782 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under R.S. 13:3783 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(1) An order that the matters regarding which the ques-
tions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated demands or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony or from introducing evidence of physical or mental condition;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, the party may be adjudged guilty of contempt except for disobeying an order to submit to a physical or mental examination.

Source: Federal Rule 37(b).

§ 3793. Expenses on refusal to admit

If a party, after being served with a request under R.S. 13:3784 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made. The provisions of Act 326 of the Code of Practice are not affected hereby.

Source: Federal Rule 37(c).

§ 3794. Failure to attend or serve answers

If a party or officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve
answers to interrogatories submitted under R.S. 13:3781, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

Source: Federal Rule 37(d).

This sub-part contains the sanctions of the act. Section 3791 provides the procedure to be followed when a witness refuses to answer. The matter is referred back to the court in which the main action is pending and a decision on the subject is reached. This is somewhat different from the federal rule which in addition allows the court of the place in which the deposition is being taken to rule on whether the refusal to answer is proper or not.

Section 3792 is the general section containing sanctions to enforce the act. Contempt, of course, is one weapon, but other procedural penalties are possible. For example, a refusal to submit to a physical examination may be penalized by an order fixing as established a physical condition as contended for by the adverse party. Defenses may be taken away, pleadings may be stricken, and in some cases the case may be dismissed.

Section 3793 deals with the situation where a party uses Section 3784 in an effort to obtain an admission but instead receives a denial, and subsequently proves that the denial is false. In such case the other party must pay all expenses incurred in proving the truth of the fact denied. The last sentence was added to the federal rule from which this section is taken, because without this last sentence, the section would be a departure from the present Louisiana law in so far as genuineness of a party's signature is concerned.43

Section 3794 provides additional penalties where one of the parties refuses to comply with the act. These penalties include striking of pleadings, dismissal of the suit, and even the entry of a judgment by default.

CONCLUSION

In 1950 the Legislature passed Act 158 (R.S. 13:5151) provid-

43. Art. 326, La. Code of Practice of 1870, provides: "The defendant, whose signature shall have been proved after his having denied the same, shall be barred from every other defense, and judgment shall be given against him without further proceedings."
Prior to the adoption of Act 202 of 1952, it was common knowledge that the pre-trial conference idea was not being used as much as it had been hoped it would be used. It is suggested that one of the reasons for this non-use was that the pre-trial conference procedure had no sanctions. A conference could be called but it could not be made to produce results. It is submitted that the adoption of Act 202 of 1952 will change this situation. When an attorney knows that the facts can be discovered by use of Act 202, he will be much more willing to cut down the expense and time involved in discovery, by admissions at a pre-trial conference. It has been stated that the discovery procedure is the "right arm" of the pre-trial conference, and that full use of the pre-trial procedure is impossible without it. It is hoped that the adoption of Act 202 of 1952 will have the effect of increasing the use and effectiveness of the pre-trial conference. In any case, there can be no doubt that now Louisiana has one of the best and certainly the most modern depositions and discovery systems in the nation. Its proper use is the responsibility of the bench and bar.

44. Re-enacted as La. Act 84 of 1952.
45. Hon. J. Skelly Wright, United States Judge, Eastern District of Louisiana, in an address on March 3, 1952, before the Tulane University Law-Science Program. Published in the April, 1952, issue of The Louisiana Bar.