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Discovery of Income Tax Returns in the Federal Courts

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tions that when the question does arise, it will be decided in accordance with the minority viewpoint.

Illinois is among the strictest states in the matter of the admissibility of evidence of prior convictions to impeach a defendant who takes the stand in his own behalf.[40] In addition, Illinois is one of the few states in which a distinction is drawn between a defendant as a witness and a non-party witness.[41] Where this degree of definition is attempted, it is not too highly speculative to allow that the courts will be wary of submitting the rights of a defendant-witness (if not a non-party witness, or the party for whom he appears) to the prejudice which might result from admitting in evidence an appealed conviction.

CONCLUSION

It has been observed that of the jurisdictions which have passed on the point, two out of three federal circuits and eight out of ten states will allow evidence of a prior conviction to be used to impeach a witness, even though the conviction relied upon is being appealed at the time of its introduction into evidence. The case for admitting evidence of a prior conviction, to impeach a witness, is not as strong as might appear from a mere statistical tabulation of cases pro and con, as the vast majority of jurisdictions have not yet considered the point.

In summary, the question resolves itself to a simple one. Should the jury hear *all* the facts concerning the credibility of a witness, even at the risk of injecting highly prejudicial matter into the trial? Specifically, if the witness is found, on appeal, to be innocent of the crime convicted of, then the calling party, or the witness himself (if he is the defendant), has been unduly prejudiced by the discrediting of the witness. Hope for the solution of this legal dilemma lies either in the hands of the legislature, or perhaps in a clearly-defined judicial decision from one of the jurisdictions from which there has been no adjudication in this area.

[40] Ill. Rev. Stat. (1955) c. 38, § 587.

[41] See, for example, People v. Roche, 389 Ill. 361, 59 N.E. 2d 866 (1945) and People v. Halkens, 386 Ill. 167, 53 N.E. 2d 923 (1944). On the other hand, People v. Andrae, 295 Ill. 445, 129 N.E. 178 (1920) holds that a prior conviction may be shown, to impeach a witness, though no sentence was imposed. Followed in the spirit of the Viberg case this could lead to the same result.

DISCOVERY OF INCOME TAX RETURNS IN THE FEDERAL COURTS

Among the privileges of an individual, once held most sacrosanct, were those relating to the privacy of his income tax returns. This is no longer true. This so called "immunity" has been steadily reduced for the last thirty-five years.

In a recent decision, which exemplifies the current trend, the United States District Court for the District of Minnesota has concluded that the federal income tax returns of one seeking a tort recovery are subject to discovery by the opposing party to the litigation.[1]

With this case another link has been forged in the chain of decisions and amended regulations which have consistently increased the number of parties entitled to examine once "privileged" individual federal income tax returns,[2] since the original invasion by presidential order in 1921.[3] Presently, the regulations state: "A copy of a return may be furnished to any person who is entitled to inspect such return, upon a written application therefor, and the submission of evidence, satisfactory to the Commissioner, of his right to receive the same."[4] The modern rule may be found in Section 6103 of the 1954 Internal Revenue Code which refers to such returns as "Public Records," but open only upon an order of the President, and under certain rules and regulations approved by him. State officers at the request of the governor of the state may have access to certain corporate returns. State bodies or commissions having been charged with the administration of various state tax laws may have access to all federal income tax returns. All bona fide shareholders of record owning one per cent or more of the outstanding stock of a corporation may have access to that corporation's returns; certain designated Congressional committees may, under given circumstances, have access to certain returns. All these are, of course, in addition to the ruling that one may obtain copies of his own returns upon a proper request to the Commissioner.

These rules are, for the most part, clearly defined. It is only where an individual has access to his own return and is requested, by a party seeking discovery in a lawsuit, to produce such returns that a wealth of litigation may be found. The result has been the liberalization of discovery procedure with regard to federal income tax returns under Section 34 of the Federal Rules of Civil Procedure.[5] Due to the scope of the problem, this

[1] Karlsson v. Wolfson, 18 F.R.D. 474 (D.C. Minn., 1956).

[2] E.g., Worthington v. Scribner, 109 Mass. 487, 488 (1872), "The law holds this information to be among the secrets of state." 8 Wigmore, Evidence § 2377 (3d ed., 1940). Originally, seventeen states made various state tax returns "confidential" or "privileged." Presently only seven states still use such terms. The remainder speak of such returns as "confidential except to proper authorities or by order of a court of competent jurisdiction." Also consult the pocket supp. (1952) where Illinois terms the Retail Occupational Tax Return "confidential," and also says, "The copy of a Federal Estate Tax Return filed with the Attorney General shall be confidential."

[3] St. (Nov. 23, 1921) Income Tax § 257 as reiterated and refined in Executive Order 8320 (Aug. 28, 1939), returns shall be opened upon compliance with the rules promulgated in 26 Code Fed. Regs. §§ 458.50-458.71 (1949) and approved by the President on the same date.

[4] 26 Code Fed. Regs. § 458.205 (1949).

[5] Fed. Rules Civ. Proc. 34.

comment will limit itself to civil actions, as brought in the Federal courts by private parties.

In the most recent case, an action for personal injury, the defendant moved for production of plaintiff's federal income tax returns, and the court ruled that information as to plaintiff's prior earning capacity, as reflected in his income tax return, was of prime importance in determining the extent of the damages suffered as a result of his alleged inability to continue work, so that there was the necessary good cause for discovery: On the privilege question, the court said: ". . . While a federal income tax return is privileged, it is privileged only in so far as unauthorized public scrutiny is concerned."[6] The court then added that whereas the defendants have no right to secure copies of the plaintiff's returns from the Internal Revenue Department, a court can compel a party to himself secure such a copy, and make it available to the moving party under Rule 34.

Rule 34 of the Federal Rules of Civil Procedure is patterned after the "Rules Under the English Judicature Act," former Federal "Equity Rule 58," and various American state statutes authorize a court to order parties in possession or control of documents to produce them, and permit the moving party to inspect and copy them for use at the trial.[7] It reads in part:

> Upon motion of any party showing good cause therefor, and upon notice to all other parties, . . . the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photograph objects or tangible things, not privileged, which constitute or contain evidence pertaining to any of the matters within the scope of the examination . . . and which are in his possession, custody, or control . . . (2) 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.[8]

Most courts construe this rule liberally.[9] The minority is quite small[10] and will be reviewed below under the title "Good Cause." All the courts agree that the rule contemplates an exercise of judgment by the court, not the mere automatic granting of a motion. "The Court's judgment is to be moved by a demonstration by the moving party of its need, for the purposes of the trial, of such discovery of the documents or papers sought,"[11]

[6] Karlsson v. Wolfson, 18 F.R.D. 474, 476 (D.C. Minn., 1956).

[7] 2 Barron and Holtzoff, Federal Practice and Procedure, § 791.

[8] Fed. Rules Civ. Proc. 34.

[9] E.g., June v. Peterson, 155 F. 2d 963 (C.A. 7th., 1946).

[10] E.g., Condry v. Buckeye S.S. Co., 4 F.R.D. 310 (W.D. Pa., 1945). At page 312, the court said this rule is not available for discovery purposes, "but is only a proceeding for the production of designated documents which contain material evidence."

[11] Martin v. Capital Transit Co., 170 F. 2d 811, 812 (App. D.C., 1948).

on the theory that opportunities for factual suppression and surprise at the trial are to be avoided.[12]

On the liberality of construction of Rule 34, the decisions range all the way from "[t]hese rules permit fishing for evidence"[13] to "[t]his rule was not intended to permit a party to engage in a fishing expedition."[14] The majority position is that "[a] subpoena will be effectuated by the court unless it is unreasonable and oppressive, or unless the court, acting on applicable and lawfully consistent executive regulations, concludes that the national interest, or the specific situation as embodied in the record, justifies withholding discovery."[15]

The leading case of *Paramount Film Distributing Corp. v. Ram*[16] lays down four requisites for the issuance of a judicial order to produce documents under Rule 34: (1) good cause and notice to all parties; (2) that the documents be in the possession, custody, or control of the party ordered to produce; (3) that the documents be not privileged; and (4) that the documents constitute or contain evidence relative to the subject matter of the trial. Each of the "requisites" will be discussed in turn.

GOOD CAUSE

In the question of what constitutes good cause, whether pertaining to discovery rules, or to any other question, judicial discretion has inevitably produced conflicting authority. The minority is found mostly among the older cases, which emphasized materiality in the determination of the right to discovery by a moving party. As examples, in *United States v. National City Bank*[17] and *Rosenblum v. Dingfelder*,[18] the courts used identical language—"A party moving for inspection and discovery must show good cause and the materiality and relevancy of the documents to the issues." The District Court of Kentucky, citing these cases, said:

[12] Zimmerman v. Poindexter, 74 F. Supp. 933 (D.C. Hawaii, 1947).

[13] Golden v. Arcadia Mutual Casualty Co., 3 F.R.D. 26 (N.D. Ill., 1942); Monarch Liquor Corp. v. Schenley Distillers Corp., 2 F.R.D. 51 (N.D. N.Y., 1941); Canty v. Great Lakes Transit Corp., 2 F.R.D. 156 (W.D. N.Y., 1941); Hercules Powder Co. v. Rohm and Haas Co., 4 F.R.D. 452 (D.C. Del., 1944); Hirshhorn v. Mine Safety Appliances Co., 8 F.R.D. 11, 21 (W.D. Pa., 1948) where the court said: "The time-honored cry of 'Fishing expedition' [is no defense to a motion under this rule]." Accord: June v. Peterson, supra.

[14] Archer v. Cornillaud, 41 F. Supp. 435, 436 (W.D. Ky., 1941). Accord: Eastern States Corp. v. Eisler, 181 Md. 526, 30 A. 2d 867 (1943).

[15] Zimmerman v. Poindexter, 74 F. Supp. 933, 935 (D.C. Hawaii, 1947); Vendola Corp. v. Hershey Chocolate Corp., 1 F.R.D. 359, 360 (S.D. N.Y., 1940).

[16] 91 F. Supp. 778 (D.C. S.C., 1950).

[17] 40 F. Supp. 99, 101 (S.D. N.Y., 1941).

[18] 2 F.R.D. 309, 310 (S.D. N.Y., 1941). This decision goes on to add that the moving party must show that the documents are necessary to him in the preparation of his case. Accord: Heiner v. North American Coal Corp., 3 F.R.D. 63 (W.D. Pa., 1942).

A party not only must designate specifically the particular books and records that contain the information desired, but must also state facts showing that the information is material to the issue.[19]

The later cases are considerably more liberal, and represent what is now the majority view. The Circuit Court of Appeals for the Seventh Circuit, for example, has said ". . . if the documents called for are reasonably probable to be material in the case, the production and inspection of them should be allowed."[20] In *United States v. Schine Chain Theatres, Inc.*, the court ruled that the justification for a discovery is sufficiently shown if the complaint and supporting evidence indicate that the documents [sought] may relate or be material to the subject matter of the suit"[21] while the view of the District Court of Mississippi was simply that, ". . . this rule is broad and flexible, and there is wide latitude as to what constitutes good cause."[22]

The safest view to follow, however, seems to be the non-committal attude shown in *Zimmerman v. Poindexter*, wherein it was stated: "Opportunities for factual suppression and surprise at the trial should be avoided by the court, if possible, after considering all of the relevant interests legally and prudently to be considered in the specific situation."[23] This holding was reviewed and reinforced by the Appellate Court for the District of Columbia where the court held that orders under the discovery rules are in a large manner discretionary with the trial court, and are founded on the facts.[24]

The only certainty in this field is that "as to what precisely is meant by good cause the cases do not indicate with any degree of certainty."[25] Once decided at the trial level, however, "the Court of Appeals will not disturb the action of the trial court in respect to them, unless the action was im-

[19] Archer v. Cornillaud, 41 F. Supp. 435, 436 (D.C. Ky., 1941). Accord: Gill v. Col-Tex Refining Co., 1 F.R.D. 255 (S.D. Tex., 1940); cf. Courteau v. Interlake S.S. Co., 1 F.R.D. 525, 526 (W.D. Mich., 1941): "A statement by the attorney for a party seeking production of documents, that they constitute relevant and material evidence, is not sufficient to support the motion, the affidavits should disclose facts to enable the court to determine the issue of relevancy."

[20] June v. Peterson, 155 F. 2d 963 (C.A. 7th, 1946).

[21] 2 F.R.D. 425 (W.D. N.Y., 1942); Beler v. Savarona Ship Corp., 26 F. Supp. 599 (E.D. N.Y., 1939): "A party seeking a discovery of documents need not prove their materiality, but need only establish that it is reasonably probable that the documents constitute or contain material evidence."

[22] Leach v. Grief Bros. Cooperage Corp., 2 F.R.D. 444, 446 (D.C. Miss., 1942); cf. United Mercantile Agencies v. Silver Fleet Motor Express, Inc., 1 F.R.D. 709 (D.C. Ky., 1941): "The good cause and materiality necessary to support a motion need not be shown by affidavit if such prerequisites appear on the face of the records."

[23] 74 F. Supp. 933, 935 (D.C. Hawaii, 1947).

[24] Carter v. Baltimore & Ohio R. Co., 152 F. 2d 129 (App. D.C., 1945).

[25] Hickman v. Taylor, 153 F. 2d 212 (C.A. 3d, 1945), aff'd 329 U.S. 495 (1947).

provident, and effected the substantial rights of the parties."[26] An order for discovery under this rule is interlocutory, and not appealable,[27] but is reviewable only on appeal from the final judgment.[28] An appellate court will not issue a writ of prohibition against a trial judge who, in the exercise of his discretion, has granted discovery.[29]

POSSESSION, CUSTODY, AND CONTROL

At least one court has said, "this rule is limited to documents in possession of a party to the action."[30] However, greater weight of authority follows the wording of Rule 34[31] to the effect that a party may be "required to produce documents which are under his control, without [his] having actual possession of them."[32] Further, that the opposing party will have to go to great labor and expense in order to comply with an order for discovery is not grounds for a denial of the motion[33] "unless the hardship would be unreasonable."[34] Nevertheless, it is normally held that the burden and expense of making copies and photographs of such documents should be cast on the moving party.[35]

It has even been held that an attorney may be required to produce documents, not in his own, but in his client's possession, custody or control,

[26] Carter v. Baltimore & Ohio R. Co., 152 F. 2d 129, 131 (App. D.C., 1945).

[27] Apex Hosiery Co. v. Leader, 102 F. 2d 702 (C.A. 3d, 1939); Zalutka v. Metropolitan Life Insurance Co., 108 F. 2d 405 (C.A. 7th, 1939); O'Malley v. Chrysler Corp., 160 F. 2d 35 (C.A. 7th, 1947); cf. Fenton v. Walling, 139 F. 2d 608 (C.A. 9th, 1944); Pennsylvania R. Co. v. Kirkpatrick, 203 F. 2d 149 (C.A. 3d, 1953).

[28] Zalutka v. Metropolitan Life Insurance Co., supra; see, however, Niagara Duplicator Co., Inc. v. Shackleford, 160 F. 2d 25 (App. D.C., 1947) where an appeal was allowed to the Court of Appeals for the District of Columbia under D.C. Code § 17-101 and the order of the District court was reversed for abuse of discretion. Cf. Carter v. Baltimore & Ohio R. Co., supra.

[29] Terminal R. Ass'n. of St. Louis v. Moore, 145 F. 2d 128 (C.A. 8th, 1944); see also Keaton v. Kennamer, 42 F. 2d 814 (C.A. 10th, 1930).

[30] Beegle v. Thompson, 2 F.R.D. 82, 83 (N.D. Ill., 1941): "This rule is limited to documents in possession of a party to the action." Cf. Orange County Theatre, Inc. v. Levy, 26 F. Supp. 416 (S.D. N.Y., 1938); Flynn v. Magraw, 27 F. Supp. 936 (S.D. N.Y., 1939); Welty v. Clute, 2 F.R.D. 429 (W.D. N.Y., 1939).

[31] Fed. Rules Civ. Proc., 34; consult 2 Barron and Holtzoff, Federal Practice and Procedure § 791.

[32] As cited in United Mercantile Agencies v. Silver Fleet Motor Express Co., 1 F.R.D. 709, 712 (D.C. Ky., 1941).

[33] United States v. Schine Chain Theatres, Inc., 2 F.R.D. 425 (W.D. N.Y., 1942).

[34] 2 Barron and Holtzoff, Federal Practice and Procedure § 796.

[35] Niagara Duplicator Co., Inc. v. Shackleford, 160 F. 2d 25 (App. D.C., 1947); see, however, Reeves v. Pennsylvania R. Co., 80 F. Supp. 107, 109 (D.C. Del., 1948): "In view of the fact that obtaining copies of income tax returns may involve expense, the order for production of such copies should include the provision that the expense of such shall be advanced or be borne by the party seeking such production."

and be held responsible to the court for such production under threat of citation for contempt.[36]

That individual federal income tax returns are within the control of a taxpayer, even though he no longer has possession of his own copies, is clearly indicated wherever the question has arisen. In *Reeves v. Pennsylvania R. Co.*, the court said,

> If a party has retained copies of his income tax returns, production thereof can be required under rule "34" of the Federal Rules of Civil Procedure. . . . A party who has not retained copies of his income tax returns can be required to obtain copies of the returns by inspection of such returns in the office of the Collector [now Director] of Internal Revenue, and can be required to produce these copies (Executive Order 8-28-39, Number 8230) and will be entitled to reimbursement by the movent for any expenses thereof.[37]

In the case of *Nola Electric, Inc. v. Reilly*, the court ordered the defendant to apply to the Commissioner of Internal Revenue for copies of such documents and to produce same for inspection and copying, stating that "a party can be compelled to secure such a copy from the Internal Revenue Authorities."[38]

PRIVILEGE

In the *Karlsson* case, as noted earlier, the court said: "While a federal income tax return is privileged, it is privileged only in so far as unauthorized public scrutiny is concerned."[39] This rule is based on the regulations, and is followed in all but a very few decisions. There are however, several courts which persistently cling to the old idea that income tax returns are privileged in private actions. For example, in *O'Connell v. Olson*, it was held that ". . . income tax returns are, in private civil actions, confidential information between the taxpayer and the government, and not open to inspection."[40] The District Court, admitted the contrary authority of the Court of Appeals in the *Reeves*[41] case, but refused to be bound thereby. This court apparently reasoned that since the statute provided for disclosure of such returns only to certain parties, including the taxpayer and his attorney in fact, but not including the federal courts; that until provision is made by federal statute, or by regulation, for the production of these returns on an order of a federal court, such returns should be

[36] Monks v. Hurley, 28 F. Supp. 600 (D.C. Mass., 1939); Bough v. Lee, 26 F. Supp. 1000 (S.D. N.Y., 1939).

[37] 80 F. Supp. 107, 108 (D.C. Del., 1948); Accord: Tollefsen v. Phillips, 16 F.R.D. 348 (D.C. Mass., 1954). Of course all decisions in this vein emanate from the commissioner's original ruling, 26 Code Fed. Regs. § 458.205.

[38] 11 F.R.D. 103, 105 (S.D. N.Y., 1950), cert. denied, 340 U.S. 951 (1951).

[39] Karlsson v. Wolfson, 18 F.R.D. 474, 476 (D.C. Minn., 1956).

[40] 2 U.S.T.C. 9450 (1949). See authorities cited note 2 supra.

[41] Reeves v. Pennsylvania R. Co., 80 F. Supp. 107 (D.C. Del., 1948).

privileged in private civil litigation. The same judge used the *O'Connell* case as his primary authority in deciding *Loew's, Inc. v. Martin*, a case involving similar facts.[42]

In *Maddox v. Wright*,[43] another District Court, relying on the *O'Connell* and *Loew's* cases took the same view, using identical language. Still again, in 1954 the same words were repeated, this time by the District Court of Tennessee where the court added, "By force of statute, income tax returns are confidential communications between taxpayer and government, and are not directly available to third parties."[44] Presumably the court was thinking of a local statute referring to certain state tax returns as "confidential."

These rulings are inexplicably contrary, not only to the vast majority of decisions, but also apparently contrary to the intent of the Regulations. The Code of Federal Regulations expressly provides that the taxpayer, or "any person who is entitled" may obtain copies of a return.[45] The Internal Revenue Code, as quoted earlier in this article, clearly labels the returns "Public Records" open to third parties under certain Presidential rules and regulations, and always to the taxpayer himself.

Once in the hands of the taxpayer, whether as copies originally retained or as copies obtained by him from the Internal Revenue Office in compliance with a court order, few decisions permit these returns a privileged status, but treat them as they would any other documents.

"[Copies of federal] income tax returns in the possession of a party to the action are not privileged," say the courts, "and therefore are subject to production."[46] The District Court of New York agreed:

> Federal Income Tax Returns are not confidential information between a taxpayer and the government, and where a party to an action has retained copies of such returns, he may be required to produce them pursuant to rules providing for discovery of documents by any party.[47]

Following and extending this rule, the *Reeves* case held that: "Where a party has not retained copies of his income tax returns he may be ordered to inspect such returns as were filed, and obtain copies thereof for production in court."[48]

[42] 10 F.R.D. 143 (N.D. Ohio, 1949). Accord: United Motion Picture Co. v. Ealand, 199 F. Supp. 371 (C.A. 6th, 1952).

[43] 1 U.S.T.C. 9355 (1952).

[44] Austin v. Aluminum Co. of America, 15 F.R.D. 490 (D.C. Tenn., 1954).

[45] 26 Code Fed. Regs. (1949), § 458.205, extensively quoted supra.

[46] Connecticut Importing Co. v. Continental Distilling Corp., 1 F.R.D. 190, 192 (D.C. Conn., 1940); Welty v. Clute, 2 F.R.D. 429 (W.D. N.Y., 1939); Fidelity & Casualty Co., Inc. v. Tar Asphalt Trucking Co., Inc., 30 F. Supp. 216 (D.C. N.J., 1939); Dickheiser v. Pennsylvania R. Co., 5 F.R.D. 5 (E.D. Pa., 1945), aff'd 155 F. 2d 266 (1946).

[47] Connecticut Mutual Life Insurance Co. v. Shields, 18 F.R.D. 448 (S.D. N.Y., 1945).

[48] Reeves v. Pennsylvania R. Co., 80 F. Supp. 107, 109 (D.C. Del., 1948).

On the privilege question, the case of *Bough v. Lee*,[49] laid down the rule that a party has the right to a determination by the court on the question of privilege. In refining this rule, the court in the *Nola* case, when ordering the defendant to apply to the Commissioner of Internal Revenue for copies of documents, and to produce such copies for the plaintiff's inspection and copying, said:

> Privileges defeating legitimate objects of discovery should not be extended unless clearly indicated. . . . Income Tax returns are classified as "Public Records" 26 U.S.C.A. §55, but administrative regulations do not allow third parties access to them, but permit inspection by the maker of the return, or his representative, and so are held by most courts not "privileged," and a party can be compelled to secure a copy from the Internal Revenue Authorities.[50]

EVIDENCE RELEVANT TO SUBJECT MATTER

Although most courts have held that it is not permissible, in granting a motion for production of documents under Rule 34, to order a general search and inspection of all records so that the moving party may find what he may want,[51] such documents must be produced on request if a showing of materiality to the subject matter of the trial is sufficiently demonstrated.[52] In fact, "Sanctions may be applied for a failure to produce such documents . . . if it appears that such failure was the result of efforts to obstruct the [action] and thereby impede the true administration of justice."[53]

The Circuit Court of Appeals in *June v. Peterson*[54] held that a lower court's denial of a motion for an order requiring a party to produce such documents would be error where the documents called for are material to the allegations of the moving party.

A typical decision as to materiality may be found in *Garrett v. Faust*, where they were "not reasonably calculated to lead to the discovery of

[49] Bough v. Lee, 26 F. Supp. 1000 (S.D. N.Y., 1939).

[50] Nola Electric, Inc. v. Reilly, 11 F.R.D. 103, 105 (S.D. N.Y., 1950), cert. denied, 340 U.S. 951 (1951). Accord: Paramount Film Distributing Corp. v. Ram, 91 F. Supp. 778, 780 (D.C. S.C., 1950). Motion to produce tally sheets, ticket records and income tax returns would be granted despite privilege. . . . "This rule has been liberally construed to permit inspection of records and thus narrow the issues to be tried, eliminate the element of surprise, and effect speedier and less costly disposition of controversies." Cf. Hickman v. Taylor, 153 F. 2d 213 (C.A. 3d, 1945), aff'd 329 U.S. 495 (1947) where, at page 507 the court said, ". . . discovery rules are to be accorded a broad and liberal treatment . . . copies of tax returns are not privileged."

[51] United States v. American Optical Co., 2 F.R.D. 534 (S.D. N.Y., 1942); Archer v. Cornillaud, 41 F. Supp. 435 (D.C. Ky., 1941); Eastern States Corp. v. Eisler, 181 Md. 526, 30 A. 2d 867 (1943).

[52] Gill v. Col-Tex Refining Co., 1 F.R.D. 255 (S.D. Tex., 1940).

[53] Moinester v. Wilson and Cox Co., Inc., 1 F.R.D. 247 (S.D. N.Y., 1940).

[54] 155 F. 2d 963 (C.A. 7th, 1946).

admissible evidence"[55] on the basic issues of the particular case, and where the defendant has already submitted to the plaintiff other records of his business activities during the period in dispute, and where denial of said production would not unduly prejudice preparation of the plaintiff's case.

Elsewhere, in an action for damages caused by fire and explosion, the defendants were adjudged to be entitled to see the plaintiff's income tax returns to determine the value placed on the destroyed property.[56] Again, in an action to compel defendants to account for dividends unpaid, and stock unissued, plaintiff was entitled to production of personal federal income tax returns made by the trustee of the stock and by said trustee's wife,[57] and in *Connor v. Gilmore*,[58] a widow, in an action for husband's death, was ordered to request a copy of her husband's federal returns from the proper authorities, to be opened to defendant's inspection.

ADDITIONAL PROBLEMS

Among the many additional problems, closely related to this topic, two are worthy of further discussion. The first proposition enlarges, even further, the opportunities of one seeking discovery of such items as the tax returns in question.

Discovery under Rule 34, according to its own context, is subject only to those limitations as are within the scope of an examination under Rule 26 (b).[59] The latter reads in part, "It is not grounds for objection that the [information so discovered] would be inadmissible at the trial if [it] appears reasonably calculated to lead to the discovery of admissible evidence."[60] Federal income tax returns would seem to fall into this category in many situations.

That attorneys may make good use of this unusual opportunity is demonstrated by the liberal treatment shown by the courts. "Admissibility in evidence is not a prerequisite to the right of discovery and inspection under subdivision (b) of this rule."[61] The District Court of New York later amplified its own earlier ruling, saying that the deposition-discovery procedure is intended not only to produce evidence to be used at the trial, but also to secure information that may lead to the production of other rele-

[55] 8 F.R.D. 556, 557 (E.D. Pa., 1949).

[56] Merriman v. Cities Service Gas Co., 11 F.R.D. 584 (W.D. Mo., 1951).

[57] Muller v. Muller, 14 F.R.D. 142 (D.C. Alaska, 1953).

[58] Connor v. Gilmore, 45 Del. 184, 70 A. 2d 262 (1949).

[59] Fed. Rules Civ. Proc., 34.

[60] Fed. Rules Civ. Proc., 26(b).

[61] United States v. 50.34 Acres of Land, 13 F.R.D. 19, 21 (E.D. N.Y., 1952). Accord: Foremost Promotions, Inc. v. Pabst Brewing Co., 15 F.R.D. 128 (N.D. Ill., 1953); see Shawmut Inc. v. American Viscose Corp., 11 F.R.D. 562 (S.D. N.Y., 1951).

vant evidence."[62] Does this exclude Income Tax from otherwise privileged status in the few courts still recognizing them as such. The answer is not clear. However, the old adage about ways to skin a cat seems particularly appropriate here.

Although the New York Court still later stated that "liberal deposition procedure is not to be used as a litigation tactic to harass the other party,"[63] it appears that if counsel is determined to see the other party's tax returns, he has enough ammunition to use one way or another to achieve his ends.

The second question regards the use of the Fifth Amendment as grounds for refusing to comply with an order to produce such returns, as self-incrimination, where the party could face criminal prosecution for some reason disclosed by the returns.

In enumerating the protective benefits of the amendment, one eminent writer said:

> [Such] protection extends not only to accused persons, but to witnesses as well; . . . The enactments apply in all kinds of proceedings where testimony is to be offered, civil as well as criminal, in equity as well as at law, out of court as well as in court. [The party inquired of] . . . may refuse to answer, not only to the crime itself, but also as to any circumstances or any link in the chain of proof from which the crime itself, but also as to any circumstances or any link in the chain of proof from which the crime may be inferred.[64]

This privilege, normally, is limited to criminal matter. "The purpose and effect of this clause are to secure a witness from the danger of a criminal prosecution against him which may be aided by his forced disclosures; not to enable such witness to withhold testimony merely because it might tend to subject him to the results of a civil action."[65]

However, it has been held that the right in question may be invaded by compelling a witness to produce books and papers, rather than oral testimony, which contain matters tending to incriminate him, though some of the authorities have taken a contrary view.[66] The tax returns in question would seem, nevertheless, to be available despite this conflict of opinions, because they fall into the category of records required by law to be kept. Such records, by the great weight of authority ". . . are not protected by

[62] Tobe-Deitschmann Corp. v. United Aircraft Products, 15 F.R.D. 363, 364 (S.D. N.Y,. 1953); Kaiser-Fraser Corp. v. Otis & Co., 11 F.R.D. 50, 54 (S.D. N.Y., 1951).

[63] Armstrong Cork Co. v. Niagara Mohawk Power Corp., 16 F.R.D. 389, 390 (S.D. N.Y., 1954).

[64] 3 Jones, Evidence §§ 884, 885 (4th ed., 1938).

[65] Counselman v. Hitchcock, 142 U.S. 547, 562 (1892); United States v. Brooks, 284 F. 908 (E.D. Mich., 1922).

[66] Commissioner v. Southern Express Co., 160 Ky. 1, 169 S.W. 517 (1914); Accord: Internal Revenue Agent v. Sullivan, 287 F. 138 (W.D. N.Y., 1923); Contra: In Re Strouse, 1 Sawyer (U.S.) 605 (1871).

privilege against self-incrimination, and an individual defendant, notwithstanding his constitutional rights against self incrimination which would [otherwise] excuse him from producing personal records, could be compelled to produce those records which he is required by law to keep."[67] Once again the opportunity to examine such returns has passed another hurdle.

CONCLUSION

Thus it is apparent that individual federal income tax returns are available to a moving party in civil actions, at least in the majority of the federal courts if they can be shown to be germane to the issues at hand, or to be likely to lead to other pertinent information, by use of the deposition-discovery rules.

Even the stumbling blocks of inadmissibility in evidence,[68] and the defense of self-incrimination do not preclude their availability to the attorney who makes intelligent use of these rules.

Clearly, the words "privilege" and "confidential" have lost much of their force with reference to these returns. Individual federal income tax returns can no longer be considered personal to the maker and the Revenue Department. The answer to the question "Are your income tax returns your own?" is most probably "No."

[67] United States v. Jones, 72 F. Supp. 48, 50 (D.C. Miss., 1947); Bowles v. Amato, 60 F. Supp. 361 (D.C. Colo., 1945).

[68] Republic of Italy v. De Angelis, 14 F.R.D. 519, 520 (S.D. N.Y., 1953): "Under rules relative to inspection of documents it is not necessary to establish the admissibility of the documents, but it is sufficient if the documents concern matters generally bearing on the issue and there is a reasonable probability that the documents contain material evidence."

ADMISSIBILITY OF INVOLUNTARY CONFESSIONS CONFIRMED BY SUBSEQUENT FACTS

Confessions, generally, must be voluntary before they are admissible in evidence. Thus statements of an accused person that are induced by threats or promises of benefit are inadmissible as evidence, because such statements are likely to be influenced by these inducements.

It sometimes happens that, by means of an involuntary confession, facts are discovered which are relevant to a case. Evidence of such facts is universally admissible.[1] The question then arises whether the confession or some part of it should also be admitted if it is verified by evidence discovered subsequently.

Before discussing what part, if any, of the confession should be ad-

[1] Wigmore, Evidence § 859 (3rd ed., 1940) (supp., 1955); Wharton, Criminal Evidence § 600 (11th ed., 1935).