

CRIMINATING INTERROGATORIES.

and in this case, as in others, it will probably be found that the old maxim will apply, and that the wrong is not without its appropriate remedy.—*Solicitors' Journal*.

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During the last year there has been an unusual number of decisions upon questions concerning the practice which ought to be followed at Judges' Chambers in allowing interrogatories, which are now so much used in obtaining evidence in a cause before it comes to trial. We propose here to examine the state of the law on one branch of this question—viz., the right to administer interrogatories the answer to which may tend to expose the person answering to criminal proceedings, penalties or forfeiture. The cases are by no means in accordance with one another, and it will therefore be necessary to examine the more important decisions which have been given upon this subject.

The power of administering interrogatories was first given to litigants at Common Law, by section 51 of the Common Law Procedure Act, 1854, which enables either plaintiff or defendant, by leave of the court or a judge, to interrogate the opposite party "upon any matter upon which discovery may be sought." This section has been the subject of a great many decisions, but we shall confine ourselves here to the consideration of those cases in which objection has been raised to the administering of interrogatories on the ground that an answer to them might tend to criminate the person interrogated.

One of the first questions which arose on this section with reference to criminating interrogatories was, whether courts of law were bound to follow the principles and practice by which courts of equity were governed in dealing with bills for discovery. The cases of *Bartlett v. Lewis*, (31 L. J. C. P. 238), *Bickford v. Darcy* (14 W. R. 900), and *Pye v. Butterfield* (13 W. R. 178) have now established that the common law courts will not necessarily be governed by the rules which regulate discovery in equity, although they will examine those rules as a guide to assist them in determining their own practice in such cases.

The broad general rule in equity as to criminating interrogatories is, that "no person is compellable to answer any question which has a tendency to expose him to a criminal charge, penalty, or forfeiture;" *United States of America v. McKae* (15 W. R. 1128). This rule is as well known at law as in equity; no witness is bound to criminate himself, and therefore, every witness is privileged from answering any question which has a tendency to criminate him. A witness, however, is not privileged from being asked such a question; he is only privileged from answering it—that is, the objection must come from the witness

himself on his oath. So in equity a defendant, in order to protect himself from answering on the ground, that the discovery of the matters inquired after would tend to expose him to penalties, must state on oath his belief that such would be the case. A submission of the question to the Court is not sufficient (*Daniell's Ch. Pr. 4 ed.*, vol. 1, 521, citing *Scott v. Miller*, 7 W. R. 561).

A party to a cause interrogated at law is clearly not bound to answer criminating questions: *Pye v. Butterfield* (13 W. R. 178), but the question raised on criminating interrogatories has usually been, not whether the party interrogated is bound to answer, but whether the other side is entitled to ask the question, and thus compel the party interrogated to rely on this privilege as a reason for not answering. This point must, of course, be raised when application is made for the necessary leave to administer the interrogatories, at which time the person whom it is proposed to interrogate is always entitled to be heard.

It will be convenient to enumerate shortly the cases on this point in the order of their date. In *May v. Hawkins* (3 W. R. 550, 11 Ex. 210), interrogatories inquiring as to a forfeiture were not allowed. The case was actually decided upon a point of practice, but Parke and Martin, B.B., both expressed an opinion that such interrogatories ought not be allowed. In *Osborn v. The London Dock Company* (3 W. R. 238) the most frequently cited of the earlier cases on this subject, it was held that interrogatories having a tendency to criminate might be administered, and that any objection to them on this ground must be made by way of answer on oath of the person interrogated. Alderson, B., said, "the proceeding is analogous to that of an examination of a witness at a trial. It seems to me that the same rule should be followed." And Parke, B., said, "The plaintiff must be put upon his oath; and when he finds any question pinch him, he must object to it." This case was followed in *Chester v. Wortley* (4 W. R. 325), where interrogatories were allowed in an action of ejectment, although they inquired into matters which might be evidence of a forfeiture. The same principle seems also to have been approved of in *Simpson v. Carter* (6 H. & N. 751); the report of this case is, however, only given very briefly in a note. Up to this time the decisions (*May v. Hawkins* only contains dicta to the contrary) seemed clear as to the practice of allowing criminating interrogatories. In *Tupling v. Ward* (9 W. R. 482) the Court of Exchequer first acted on a different principle. It was an action for libel, and it was admitted that the defendant, whom the plaintiff wished to interrogate, would not have been bound to answer, as the questions inquired as to the writing of the alleged libel. The Court refused, as a matter of general discretion, and without laying down any general rule, to allow the interrogatories, on the ground