SCOPE AND METHOD OF DISCOVERY BEFORE TRIAL

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Inadequacy of the Pleadings as a Basis for Trial.

IT has been the traditional theory of our law that the pleadings constitute a necessary, and at the same time a sufficient and satisfactory, basis for the trial or hearing of the case. Their function is to set forth the contentions of the parties in such a way as to fully disclose the nature and scope of the controversy.

In the system of pleading employed at common law there were a number of glaring departures from this ideal, such as the rule which permitted affirmative defenses to be shown under general issues without the slightest warning to the plaintiff, and the rule authorizing the use of the vague conclusions of the common counts which gave no intimation of the real issues. But it nevertheless was the general design that every assertion of either party should be met by an admission or denial from the other, so that an inspection of the pleadings would make it possible to ascertain exactly what each party would be required to prove in order to prevail. By confining the trial within the issues raised in the pleadings, the law sought to enable each party to prepare his case with full confidence that he would neither be surprised by unexpected evidence from his adversary nor be burdened with the expense of assembling unnecessary proof. But this highly desirable aim has never been possible of realization, and pleadings have never offered and never can offer a satisfactory basis for the trial. There are two reasons for this.

In the first place, allegations in pleadings are required to deal with facts of a generalized type, known as material or ultimate facts, and not with evidence. How these ultimate facts will be proved at the trial cannot be determined from the pleadings. If proof of one kind were to be offered, certain evidence would be necessary to meet it, whereas to oppose proof of another kind an entirely different line of evidence might be necessary. For example, the allegation of a promise by the defendant might be proved in any one of a dozen different ways—by letters, by telegrams, by oral conversations, through the act of an agent, by ratification; but the defendant can form no idea from the pleading which kind of evidence will be used, and the less the claim rests upon a founda-

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tion of fact, the more difficult will be the task of preparing evidence to meet it.

In the second place, since he is free to claim what he will, a pleader may allege many things that he knows may not or cannot be proved. This may be due either to abundant caution in asserting every possible fact in behalf of his client, or to a more or less definite design, well understood and highly regarded in military circles, of concealing the real point of attack by a show of activity on a wide front. But whatever the motive, the effect is the same. The other party has no way of determining from the pleadings what facts will actually become the subjects of proof and what will be merely ignored at the trial.

The same double uncertainty inheres, for obvious reasons, in the denials which the pleader employs. In the first place, denials are no more concrete than the allegations to which they are directed, and it is therefore impossible to know in advance what sort of evidence will be employed in their support. In the second place, they may or may not be used for the bona fide purpose of contesting the truth of all the allegations denied. Whether general or specific in terms they are likely to present numerous issues which, although material on their face, will be found at the trial to be entirely fictitious. In such a case the party having the burden of proof will be loaded with the useless expense of proving or preparing to prove facts which his adversary has no actual intention of disputing.

Because of these characteristics of pleading, by virtue of which assertions and denials may be set up with no indication either as to the manner in which they will be supported by proof nor even as to which of them will be supported at all, counsel are faced with a disagreeable dilemma in preparing for trial with no guide but the pleadings.

If a lawyer undertakes so to prepare his case as to meet all the possible items of proof which his adversary may bring out at the trial, or to meet all the assertions and denials which his adversary has spread upon the record, much of his effort will inevitably be misdirected and will result only in futile expense. If, on the other hand, he restricts his preparation to such matters as he thinks his adversary will be likely to rely upon, he will run the risk of being a victim of surprise.

Furthermore, from the beginning until the end, the question of settlement is always involved in a litigated case. Indeed, one of the greatest uses of judicial procedure is to bring parties to a point where they will seriously discuss settlement. But the pleadings seldom disclose a basis upon which a settlement can be reached. It is not what a party asserts, but what he can establish by proof,

that determines the strength of his position, and so long as each party is ignorant of what his opponent will be able to prove, their negotiations have nothing substantial to rest upon. Many a case would be settled, to the advantage of the parties and to the relief of the court, if the true situation could be disclosed before the trial begins.

Is there any way of bridging this gap between what is set up in the pleadings and what will come out in evidence? It is of course important to know in advance the nature and extent of your adversary's claims. This knowledge is given by the pleadings. But it is equally important, in preparing your proof, to know what proof your adversary will be able to present in support of his claims and in opposition to yours. This knowledge the pleadings do not give. The allegations and denials in the pleadings point only to the results which the pleader may wish to establish by his proof. They give little or no notice of the nature of that proof. How can one effectively prepare to meet the proof to be offered by his adversary if he has no reliable knowledge as to what that proof will be?

As a contribution toward the solution of this difficulty, the common law, after six or seven centuries of indifference or incompetence, came forward with the feeble and restricted bill of particulars. Through this device it proposed, in a limited class of cases, to prevent surprise at the trial by forcing the pleader to give such additional information as a "reasonable man" would require for the adequate preparation of his defense.

But although the bill of particulars was not strictly considered a part of the pleadings, neither was it strictly considered an exhibit of evidence. It was necessary, as learned judges said, for the bill of particulars to "fairly apprise the opposite party . . . of the nature of the evidence to be offered", but at the same time, as learned judges also said, it was not necessary for the particulars "to disclose the specific evidence upon which a party relies for recovery." [1] The bill of particulars supplemented the pleading with details which the pleading failed to give, but it fell short of a real disclosure of evidence and to that extent it furnished an inadequate basis for preparation for trial.

There was also the ancient practice of profert and oyer, with its counterpart of exhibits in equity, which compelled the pleader to disclose the deeds or other documents upon which his action was founded. But this kind of disclosure, although it was good as far as it went and has been preserved by many modern statutes, is obviously too restricted in scope to offer any general relief to parties who are in doubt as to what they must prepare to meet on the trial.

1. 3 ENCYC. PL. AND PRAC. (1895) 532, 520.

Discovery in Equity

Equity, which ought to have done better, refused even to recognize the problem as a legitimate subject of judicial concern. Bills in equity were, it is true, designed for the purpose of obtaining discovery as well as relief, and bills of discovery were used in aid of actions at law. In bills of both kinds interrogatories were set forth to which the defendant was required to make specific answers. But the discovery which was sought in equity was not of the type now under consideration. It was discovery of evidence which the pleader wished to obtain in support of his own case, not discovery regarding the case which his opponent might put up against him. Such discovery was not sought in order to protect himself from surprise at the trial, nor to enable him to avoid futile preparation to meet anticipated proof which the other party might never present. The discovery provided by equity was nothing but a method by which the pleader obtained admissions from his adversary regarding matters which he himself, and not the adversary, was required to prove.

In answering the various interrogatories set up in the bill, it sometimes happened that the defendant gave incidental information from which the plaintiff could determine what the defendant's evidence would probably be. And the charging part of the bill is said to have been sometimes employed as a sort of fishing device in which the pleader, by way of anticipation, set up defensive matters which he supposed the defendant might rely upon, together with the circumstances by which he himself expected to meet such matters, in the hope that the answer of the defendant regarding these anticipated defenses would disclose something useful regarding the defendant's case.[2] But all of this was outside the purpose of the discovery in which equity was interested. That purpose was to aid a party in assembling his own evidence, not in meeting the evidence of his adversary.

This theory, that discovery should be available only for attack but never for defense, was no inadvertence on the part of the chancery judges. It was the result of a definite purpose, and every effort to extend the scope of the remedy was met by a judicial opposition which never relaxed.

Sir John Wigram, who made the first notable study of Discovery a hundred years ago, stated the case quite clearly. He said:

"If it were now, for the first time, to be determined, whether, in the investigation of disputed facts, truth would best be elicited by allowing each of

2. MITFORD, PLEADINGS IN CHANCERY (5th Am. ed. 1844) 43.

the contending parties to know, before the trial, in what manner, and by what evidence, his adversary proposed to establish his own case; arguments of some weight might *a priori* be adduced in support of the affirmative of this important question. Experience, however, has shown—or (at least) courts of justice in this country act upon the principle—that the possible mischiefs of surprise at the trial are more than counterbalanced by the danger of perjury, which must inevitably be incurred, when either party is permitted, *before* a trial, to know the precise evidence against which he had to contend; and, accordingly by the settled rules of courts of justice in this country (approved as well as acknowledged) each party has thrown upon him the onus of supporting his own case, and meeting that of his adversary, without knowing beforehand by what evidence the case of his adversary is to be established or his own opposed." [3]

This statement throws much light on the chancery attitude toward a broader discovery. It is obvious that Wigram wants to say, and indeed attempts to suggest, that experience has shown the impracticability of extending discovery so as to cover the evidence which one's opponent is to use in his own behalf. But since English courts never had any experience at all in the matter, he is able to go no farther than the assertion that they have not so extended it. The mischiefs of surprise at the trial he admits, but he takes comfort in the reflection that, by enduring those ills, we have escaped the far more serious and sinister dangers of perjury which would overwhelm us if parties were permitted to know what their adversaries were prepared to prove.

Perjury is one of the great bugaboos of the law. Every change in procedure by which the disclosure of the truth has been made easier has raised the spectre of perjury to frighten the profession. It was only in 1851 that Lord Brougham's Act for the first time made the parties to civil actions competent to testify in the higher courts of England.[4] There was great dread of the Act, lest the interest of the parties should prove too powerful an incentive to false swearing. Lord Campbell wrote in his journal on June 19, 1851:

"It [the bill] is opposed, as might be expected, by the lord chancellor. If it passes, it will create a new era in the administration of justice in this country. I support it, and I think it will be carried, although all the common law judges, with one exception, are hostile to it." [5]

But the fear that the temptation to perjury would ruin the value of the testimony of interested parties has so completely vanished that no one would seriously think of restoring the disqualification.

3. WIGRAM ON DISCOVERY (1842) § 347.
4. 14 & 15 VICT. c. 99 (2) (1851).
5. 2 HARDCASTLE'S LIFE OF LORD CAMPBELL (1881) 292.

The exclusion of the testimony of an interested survivor has been based on the fear of perjury. Courts have repeatedly and solemnly declared that where death has closed the lips of one party the law will close the lips of the other, for the tendency to perjury would be so great, were the survivor permitted to speak, that public sentiment would not tolerate the resulting peril to the estates of the dead.[6] But Connecticut,[7] Massachusetts [8] and Rhode Island [9] have all removed the disqualification, and the estates of the dead seem to be in no more danger in those states than elsewhere.

The true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other, where both are present. That task, however, chancery refused to undertake. The possibility of perjury was thought to be enough to condemn any attempt to extend the field of discovery so as to inform the respective parties what they would be called upon to meet at the trial.

If one were critically to examine this legal hobgoblin of perjury he might perhaps find reason to believe that it was not actually so terrifying to the profession as they pretended. It is easy for those who are interested in opposing change to conjure up visions of calamities which the change will precipitate, and to persuade themselves of the reality of the dangers which serve so useful a purpose as a deterrent from the course which they disapprove.

It may well be doubted whether the chancery bar really wanted to liberalize the practice. An acquired technique always develops resistance to change. But it is also to be observed, in the present instance, that the restrictions upon discovery not only produced an enormous amount of lucrative litigation over the application of the rules, which the reported cases abundantly show, but they preserved enough uncertainty in the trial of cases so that a lawyer might always feel confident of having a fighting chance of success no matter what side of any case he might be employed to represent.

6. Harris v. Bank of Jacksonville, 22 Fla. 501, 506-7, 1 So. 140, 143 (1886); Louis v. Easton, 50 Ala. 570 (1873); Owens v. Owens, 14 W. Va. 88, 95 (1878); Karns v. Tanner, 66 Pa. 297, 304-5 (1870).

7. PUB. ACTS (1848) c. 44, which removed the disqualification of witnesses on the ground of interest in the action, was held to permit an interested survivor to testify in an action by or against the decedent's estate. PUB. ACTS (1850) c. 3, undertook to provide a reciprocal protection to the decedent's estate by allowing entries and written memoranda of the decedent to be introduced in evidence. This was later enlarged to include oral declarations. The two statutes are found in CONN. GEN. STAT. (1930) §§ 5582, 5608, and are to be read together. See Rowland v. Philadelphia, M. & B. Rr., 63 Conn. 415, 28 Atl. 102 (1893).

8. MASS. STAT. (1870) c. 393.

9. R. I. GEN. LAWS (1896) c. 244, § 35.

The ancient restrictions upon discovery have met with much criticism in modern times. The need for better information in advance of the trial has been more and more keenly felt as time and expense have become increasingly important economic factors in litigation. Discovery of one's own evidence seldom requires the aid of a court, although a convenient procedure for that purpose ought always to be available in case of need. But information regarding the course which can or will be taken by one's adversary is an almost universal necessity if the merits of the case are to be fully presented, if preparation is to be facilitated, and if the trial is not to be confused and encumbered with useless matters. Unless litigation can be conducted under such reasonably favorable circumstances as to make it a legitimate business risk instead of a lottery, modern business men will decline to use it, and whenever possible will either arbitrate, settle by direct negotiation, or simply charge off the loss. Efforts to modernize discovery have been directed along two lines, namely, enlarging its scope and improving its mechanics.

Scope of Modern Discovery

A wide variation in the scope of discovery is found among American jurisdictions. In some states the ancient chancery tradition has retained so powerful a hold on the profession that discovery has undergone practically no change, and the same restrictions which were enforced by the chancellors a hundred years ago still operate to keep the parties in ignorance of the matters they will be called upon to meet at the trial.

In Connecticut, for example, it was enacted in 1836 that parties in civil actions might on motion obtain such disclosure of facts or documents "as a court of equity might order".[10] In 1889 this was amended to allow discovery of facts or documents "material to the support or defense of the suit",[11] but it was held that this did not enlarge the scope of disclosure, and the equity rule still obtained that a party was entitled to discovery of only such facts as were "necessary to his own title . . . for he is not at liberty to pry into the title of the adverse party".[12] In 1931 the statute was again amended, by permitting the court, on motion of either party, to order disclosure of facts or documents "material to the mover's cause of action or defense".[13] This re-enacts the equity rule in

10. STAT. OF CONN. (1838) p. 76.
11. CONN. PUB. ACTS (1889) c. 22.
12. Downie v. Nettleton, 61 Conn. 593, 595-6, 24 Atl. 977, 978 (1892).
13. CONN. PUB. ACTS (1931) c. 252, § 601a.

substantially the same language as before, and provides no opportunity whatever for a party to obtain information in advance of the trial regarding any of the matters which his adversary may bring up against him.

A few other states have strictly adhered to the narrow chancery rule. These are New Jersey,[14] New York,[15] South Carolina,[16] and Washington.[17] Perhaps Michigan must also be consigned to this group, subject to possible rescue by Supreme Court interpretation.[18]

Since discovery, under this restriction, is of possible advantage to a party only in so far as he alleges affirmative matters in his pleading, parties are offered a strong inducement to set up fictitious matters by way of claim or defense, in order to obtain the privilege of discovery in fields which would otherwise be closed to inquiry. It was a device well known to the astute practitioners at the English chancery bar, and its effect in diverting the pleadings from their proper function of stating the truth is obviously unfortunate.

Many states, on the other hand, have totally abandoned the chancery restrictions upon discovery, and have made it directly and broadly available as a means of ascertaining from the adverse party what evidence he proposes to bring forward. In other words, these states make discovery available not only for attack but for defense —not merely to aid parties in assembling their own proof but to protect them from surprise and to relieve them from taking unnecessary and useless precautions to meet evidence that will never be offered. These states include Alabama,[19] Indiana,[20] Iowa,[21] Kentucky,[22] Louisiana,[23] Massachusetts,[24] Missouri,[25] Nebraska,[26] New Hampshire,[27] Ohio,[28] Texas,[29] and Wisconsin,[30] and the same

14. N. J. COMP. STAT. (1910) p. 4097. Wolters v. Fidelity Trust Co., 65 N. J. L. 130, 46 Atl. 627 (1900).
15. N. Y. C. P. A. (1920) §§ 288-293.
16. See People's Bank v. Helms, 140 S. C. 107, 138 S. E. 622 (1927).
17. WASH. COMP. STAT. (Remington, 1922) § 1226.
18. MICH. CT. RULES (1931) rule 41.
19. ALA. CODE (Michie, 1928) §§ 7764-7773.
20. IND. ANN. STAT. (Burns, 1926) §§ 383, 465, 564-568.
21. IOWA CODE (1931) § 11185.
22. KY. CODES ANN. (Carroll, 1927) §§ 557, 606(8).
23. LA. CODE OF PRAC. ANN. (Dart, 1932) arts. 347-356.
24. MASS. GEN. LAWS (1932) c. 231, §§ 61-67.
25. MO. REV. STAT. (1929) §§ 1753, 1759.
26. NEB. COMP. STAT. (1929) §§ 20-1246, 20-1247.
27. N. H. PUB. LAWS (1926) c. 337, § 1.
28. OHIO GEN. CODE (Page, 1926) §§ 11497, 11526.
29. TEX STAT. (Vernon, 1928) arts. 3738, 3753, 3769.
30. WIS. STAT. (1931) § 326.12.

practice prevails in the Canadian provinces of Ontario[31] and Quebec.[32]

Courts have found no difficulty in dealing with unrestricted discovery, and have expressed satisfaction with its results. "There is no objection that I know why each party should not know the other's case," said Judge Taft, afterwards Chief Justice of the Supreme Court of the United States, sitting as a state judge in Ohio.[33]

When the objection was urged before the Supreme Court of Kansas, that unrestricted discovery would permit one to go on a "fishing expedition" to ascertain his adversary's testimony, the court answered, through Justice David Brewer, afterwards a Justice of the Supreme Court of the United States—"This is an equal right of both parties, and justice will not be apt to suffer if each party knows fully beforehand his adversary's testimony."[34] The Supreme Court of Missouri declared that it was "a very wise provision of the code of procedure . . . [which permitted] . . . a party . . . to search the conscience of his adversary" by means of discovery before trial.[35]

Judge Trippet, applying federal equity rule 58 in the United States District Court in California, said:

"To say that the plaintiff shall not inquire about the facts that may relate to the defense is to construe the rule in plain derogation of its language and purpose. . . The plain object of this rule is to dispose of issues in advance of the trial by compelling the parties to make admissions. . . There is no reason why the parties should wait until the day of trial and then bring in witnesses to prove facts that the parties may be compelled to admit under oath prior to the trial. The truth is always the truth, and telling the truth will not hurt anyone, except in so far as he ought to be hurt."[36]

The Court of Appeals of Kentucky, referring to the statute authorizing unrestricted examination of the opposite party before trial, said:

"It is earnestly insisted that the right given by subsection 8 of section 606, if interpreted according to the contention of appellant, is liable to great abuse; that it will enable the party to find out his opponent's evidence

31. ONT. CONSOL. RULES OF PRAC. (1928) rules 327-347.
32. QUE. CODE OF CIV. PROC. (Curran, 1922) §§ 286-290.
33. Shaw v. Ohio Edison Co., 9 Ohio Dec. 809, 812 (1887).
34. *In re* Abeles, 12 Kan. 451, 453 (1874).
35. Tyson v. Farm & Home Savings & Loan Ass'n, 156 Mo. 588, 594, 57 S. W. 740, 741-742 (1900).
36. Quirk v. Quirk, 259 Fed. 597, 598-599 (1919).

in advance of the trial. As, however, the right is given to each party, they will both be on terms of equality; and as it is to be presumed that neither will offer any evidence other than the exact facts and truth of the case, we do not see how either could be prejudiced." [37]

Judge Woolsey, in the United States District Court for the Southern District of New York, criticizing the federal practice as to discovery, said:

"In view of several illuminating experiences which I have had in cases pending in the English courts, I feel hospitable to every form of interlocutory discovery. . . . The rationale of this attitude is, of course, not only that the court wants to know the truth, but also that it is good for both parties to learn the truth far enough ahead of the trial not only to enable them to prepare for trial, but also to enable them to decide whether or not it may be futile to proceed to trial." [38]

Far from encouraging perjury, unrestricted mutual discovery has been found by experience to be one of the greatest preventives of perjury.[39] The party is examined early, while his memory is fresh, before he has had time to work out a protective scheme of fictitious circumstances, and while it is still comparatively easy to check up on his testimony to ascertain how far it may vary from the truth. Coaching of the witness by counsel in preparation for the discovery examination is much less common than coaching for the trial, so that the testimony is more spontaneous. After the testimony has once been taken, and a copy filed or lodged with examining counsel, it is impossible for it to be changed to bolster up the case. This has been conspicuously demonstrated in Massachusetts, where the narrow chancery rule was formerly in force but was gradually enlarged under both judicial decisions and liberal legislation until discovery before trial has become as broad as examination at the trial itself—an evolution extending through seventy years, from *Wilson v. Webber* [40] in 1854, to *Cutter v. Cooper* [41] in 1920.

Furthermore, discovery which is restricted to the case of the party asking for it, can never serve as a basis for a summary judgment in cases where there is no defense; whereas unrestricted discovery, by disclosing the want of any defense, offers a most satisfactory method of giving the plaintiff a final judgment without

37. Western Union Telegraph Co. v. Williams, 129 Ky. 515, 521, 112 S. W. 651, 653 (1908).

38. Zolla v. Grand Rapids Store Equipment Corp., 46 F. (2d) 319-320 (1931).

39. Ragland's recent field studies in the use of discovery clearly demonstrated this. See RAGLAND, DISCOVERY BEFORE TRIAL (1932) 124-125.

40. 2 Gray 558 (1854).

41. 234 Mass. 307, 125 N. E. 634 (1920).

sending the case to trial. Summary judgments are of immense value to creditors in collecting liquidated claims, since they reduce the time consumed by litigation to a small fraction of that required when cases follow the regular course. England has demonstrated the great advantages of this practice, for her judicial statistics show about four times as many summary judgments rendered as those rendered after the trial of issues.[42] Their use is rapidly growing in American jurisdictions where the practice has been introduced. In New York the applications for summary judgments rose from 174 to 700 per year during the first three years after they were authorized.[43] On March 14, 1932, the New York summary judgment rule was so greatly enlarged in its scope that it will be possible, in the opinion of officers of the court, to increase by fifty per cent the amount of litigation which the same number of judges are able to dispose of.[44] In the city of Detroit 409 summary judgments were rendered in eight months, from August 1, 1930, to March 31, 1931, as compared with 1834 judgments rendered after trial, showing that about 1 case in 5 was disposed of by summary judgment.[45]

By the general use of unrestricted discovery in cases based on liquidated demands, an immediate identification and segregation would be possible of all claims to which there was no valid defense, and this whole group of cases could be at once disposed of without further time, trouble or expense.

Methods of Modern Discovery

It is safe to say that the interrogating part of the equity bill for relief, as well as the entire bill for discovery, has practically disappeared from our system of law.[46] In all but a very few states they have been entirely supplanted by motions or notices for discovery.[47] But the device by which the investigation was prosecuted,

42. CIVIL JUDICIAL STATISTICS FOR ENGLAND AND WALES (1930) 16.

43. Edward R. Finch, address in 49 AM. BAR ASS'N REP. (1924) 588, 593.

44. Address by Presiding Justice Edward R. Finch, Appellate Division, First Department, New York, delivered before the Association of the Bar of the City of New York on May 14, 1932, p. 1.

45. Figures obtained by the Judicial Council of Michigan (unpublished).

46. 1 POMEROY, EQUITY JURISPRUDENCE (3d ed. 1905) §§ 83, 193, 209; DUFFEE, CASES ON EQUITY (1928) 72, n. 10; LANGDELL, EQUITY PLEADING (1877) § 64; VAN ZILE, EQUITY PLEADING AND PRACTICE (1904) § 45.

47. The ancient methods of equity are preserved by statute in Illinois. REV. STAT. (Smith-Hurd, 1931) c. 22, §§ 22-26; Maine, REV. STAT. (1930) c. 91, § 45; MISS. CODE ANN. (1930) § 373. They are doubtless still theoretically available in states which have not abolished the formal distinctions between actions at law and suits in equity.

namely, the written interrogatory, has been somewhat more successful in retaining its reputation of respectability. It is the exclusive method available in about half a dozen states,[48] and is an alternative method in a dozen more.[49]

But a new method, unknown to the chancery practice, has entered the field. This is the oral examination by deposition. It has become permissible in the dozen states last referred to as an alternative to interrogatories, and it has become the exclusive method in about twenty-seven states.[50] It is obvious, therefore, that interrogatories have not been able to withstand the competition of the oral examination.

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48. Delaware, REV. CODE (1915) § 4052; Connecticut, PUB. ACTS (1931) c. 252, § 601a; Illinois, CHICAGO MUNICIPAL COURT ACT (1905) § 32; Louisiana, CODE OF PRAC. ANN. (Dart, 1932) arts. 347-356; Massachusetts, GEN. LAWS (1932) c. 231, §§ 61-67; Texas, STAT. (Vernon, 1928) arts. 3738, 3752, 3769.

49. Alabama, CODE (Michie, 1928) §§ 7764-7773; Arkansas, DIG. STAT. (Crawford & Moses, 1921) § 1248; Florida, COMP. LAWS (1927) §§ 4405-4407; Georgia, CODE ANN. (Michie, 1926) §§ 4543-4554; Indiana, ANN. STAT. (Burns, 1926) §§ 564-568, 383; Iowa, CODE (1931) § 11185; Kentucky, CODE ANN. (Carroll, 1927) §§ 557, 606(8), 140-143; Maine, REV. STAT. (1930) c. 121, § 4; Mississippi, CODE ANN. (1930) § 1538; New Jersey, COMP. STAT. (1910) p. 4097, 4098 (as amended, LAWS (1924) c. 93, p. 193); Tennessee, CODE (Williams, 1932) §§ 9868-9878, 9806; Virginia, CODE ANN. (Michie, 1930) §§ 6225, 6236; Washington, COMP. STAT. (Remington, 1922) §§ 1225-1230, Sup. Ct. rule 18 (150 Wash. xxxvii, 1929); Wisconsin, STAT. (1929) c. 326, § 12; Wyoming, COMP. STAT. ANN. (1920) §§ 5689-5691, 5831-5832.

50. Arizona, CODE (Struckmeyer, 1928) § 4444; California, CODE OF CIV. PROC. (Deering, 1931) § 2021; Colorado, CODE CIV. PROC. (Deering, 1923) § 376; Idaho, COMP. STAT. (1919) § 8006; Kansas, REV. STAT. ANN. (1923) §§ 2819-2821 (but see *In re* Davis, 38 Kan. 408, 16 Pac. 790 (1888), limiting the rule of *In re* Abeles, *supra* note 34, which had allowed this statute to be liberally used for discovery before trial); Maryland, ANN. CODE (Bagby, 1924) art. 35, § 21; Michigan, CT. RULES (1931) rule 41; Minnesota, STAT. (Mason, 1927) § 9820; Missouri, REV. STAT. (1929) §§ 1753, 1759; Montana, REV. CODE (Choate, 1921) § 10645; Nebraska, COMP. STAT. (1929) §§ 20-1246, 20-1247 (liberally construed in Dogge v. State, 21 Nebr. 272, 31 N. W. 929 (1887)); Nevada, COMP. LAWS (Hillyer, 1929) § 9001; New Hampshire, PUB. LAWS (1926) c. 337, § 1; New Mexico, STAT. ANN. (Courtright, 1929) c. 45, § 101; New York, CIV. PRAC. ACT (1920) §§ 288-293, 295-296; North Carolina, CODE ANN. (Michie, 1931) §§ 899-907; North Dakota, COMP. LAWS ANN. (1913) §§ 7862-7870; Ohio, CODE Throckmorton, 1930) §§ 11497, 11526; Oklahoma, COMP. STAT. ANN. (Bunn, 1921) §§ 612, 613 (narrowly constructed in Guinan v. Readdy, 79 Okl. 111, 191 Pac. 602 (1920)); Oregon, CODE ANN. (1930) c. 9, § 1503; Pennsylvania, STAT. ANN. (Purdon, 1930) tit. 28, § 5 (narrowly construed in International Coal M. Co. v. Pa. Rr. Co., 214 Pa. St. 469, 63 Atl. 880 (1906)); Rhode Island, GEN. LAWS (1923) c. 342, § 22; South Carolina, CODE OF LAWS (1932) §§ 690-698, as amended, LAWS (1923) c. 122; South Dakota, COMP. LAWS (1929) §§ 2713-2716; Utah, COMP. LAWS (1917) § 7178; Vermont, GEN. LAWS (1917) § 1910; West Virginia, CODE (1931) c. 57, art. 4, § 1.

In actual effectiveness interrogatories are far inferior to the oral examination. Their defects are quite obvious. In the first place, they give the party to whom they are addressed more time to study their effect, which furnishes a better opportunity to frame protective answers which conceal or evade. In the next place, as a means of forcing a specific, detailed and thorough disclosure from a reluctant party, there is a tendency for the interrogatories to grow in number, complexity and variety of form, so as to call for as many aspects of the proof as possible, with the result that they often become difficult to administer. Cases have been reported where more than two thousand interrogatories were employed.[51] To meet this sort of abuse, the questions must either be authorized by court order or there must be an arbitrary limit to their number, both of which methods of dealing with the matter are unsatisfactory.

But there is a third and much more serious weakness in the use of written interrogatories. To draw up a series of questions and present them all at once to be answered, is far less searching than to present questions one at a time, framing each succeeding question on the basis of prior answers given. Answers usually suggest lines of further inquiry, which often lead to the most important disclosures. This is, of course, the chief reason for the effectiveness of oral cross-examination. By submitting a complete set of interrogatories, prepared in advance, the party seeking discovery entirely loses this enormous advantage in eliciting the truth.

Bentham long ago pointed out this inherent defect in what he called epistolary interrogation. He says:

"Within the path marked out by this string [of questions] the operations . . . are confined; so that if from the respondent on any occasion an answer happens to come out which has not been foreseen . . . and not having been foreseen . . . cannot have had a correspondent interrogatory deduced from it, . . . the benefit deducible . . . from the oral mode, is . . . lost." [52]

To illustrate his point he presents the well known case from the Apocryphal Scriptures, of Susanna and the Elders,[53] paraphrasing and analysing it as follows:

"Defendant Susanna committed adultery with a man in that garden, said the two mendacious elders. Under what tree? said defendant's counsel, Daniel. Being examined apart,—Under a mastic tree, answered the one;

51. 1 REPORT, MASS. JUD. COUNCIL (1925) 42.
52. 2 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827) 152.
53. APOCRYPHA, HISTORY OF SUSANNA, verses 51-61.

under a holme tree, answered the other. Under what tree it was committed, or whether under any, supposing it was committed, was nothing to the purpose; nor, had a string of interrogatories been drawn up by Susanna's counsel, was it much to be expected that by the draughtsman the circumstances of the tree should have been thought of, nor consequently that anything would have been said about it in the interrogatories. Had even the first answer been forseen, and an opposite interrogatory grounded on it, the foresight would hardly have extended so far as the second; of the second, still less likely so far as a third; and so on." [54]

It is further to be observed that this method, while hampering the examiner in effectively directing and pursuing his investigation, also offers special aid to the deponent in concealing his case. This results from the circumstance that he is informed in advance exactly how far the inquiry is to go, what facts the interrogator knows about, as evidenced by his questions, and what facts he is ignorant of, as evidenced by his silence.

In view of these limitations upon the effectiveness of written interrogatories, it is evident that they are not well adapted for the purpose of a general examination. It is only when the facts sought are few, formal and isolated, that this method can be satisfactorily employed. So long as the discovery is restricted to the case of the examiner, and he is not permitted to inquire into the case of his adversary, the facts sought by discovery will usually be few, formal and isolated, and written interrogatories will perhaps serve reasonably well. For a small task a feeble instrument may suffice. But if discovery is to involve a thorough inquiry into the vital and highly controversial phases of the case, resort must be had to an oral examination. It is apparent that the two aspects of the problem of discovery, namely its scope and its methods, are intimately connected. One depends to a considerable degree upon the other, and both should be dealt with together.

Massachusetts undertook to broaden the scope of discovery while retaining the ancient interrogatory method, with a resulting discrepancy between the authorized extent of the investigation and the capacity of the machinery for doing the work. New York retained the narrow limits of equity, but introduced the new method of oral examination, as a result of which the effectiveness of the method constantly outruns the limits placed upon its use, causing an enormous amount of technical litigation over the application of the rules.[55] Connecticut has at least maintained a proper correlation

54. 2 BENTHAM, *op. cit. supra* note 52, at 153.

55. To compel litigants to observe the limitations on the scope of the questions, the New York practice requires the party to set forth in his notice of deposition the matters upon which he desires to examine his adversary, and the

between scope and method, for it has changed neither. And this is true in a number of other states, either generally or in so far as interrogatories are in fact used.[56]

But it is also possible to preserve that correlation by changing both, authorizing a discovery as broad in its scope as the trial itself, and providing the same method of examination which is employed in trial practice. This is the solution which has been found for the problem in a group of jurisdictions of which Wisconsin is the most conspicuous example.[57] Discovery has by this means become a widely used system of pre-trial procedure which has profoundly affected the administration of justice.

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latter is allowed to contest the propriety of any of these matters by a motion to vacate the notice, specifying in such motion the grounds relied upon and supporting it by affidavits. N. Y. C. P. A. (Clevinger, 1932) § 281; RULES, 124. This permits interlocutory litigation to an almost unlimited extent in determining the propriety of proposed subjects of examination.

56. New Jersey belongs in this group. See Wolters v. Fidelity Trust Co., 65 N. J. L. 130, 46 Atl. 627 (1900); Watkins v. Cope, 84 N. J. L. 143, 86 Atl. 545 (1913); Neske v. Burns, 8 N. J. Misc. 160, 149 Atl. 761 (1930). So, also South Carolina. See People's Bank v. Helms, 140 S. C. 107, 138 S. E. 622 (1927); U. S. Tire Co. v. Keystone Tire Sales Co., 153 S. C. 56, 150 S. E. 347 (1929). The same is true of Washington. See Hill v. Hill, 126 Wash. 560, 561, 219 Pac. 18 (1923); Kelly-Springfield Tire Co. v. Lotta Miles Tire Co., 139 Wash. 159, 245 Pac. 921 (1926).

57. Other jurisdictions belonging in this group include Indiana, Kentucky, Missouri, Nebraska, New Hampshire, Ohio, Ontario and Quebec. See RAGLAND, *op. cit. supra* note 39, at 124 *et seq.*