CHAPTER VI

RESPECTIVE RIGHTS OF PLAINTIFF AND DEFENDANT TO DISCOVERY

Discovery in equity was of more importance to the plaintiff than to the defendant. It was primarily the duty of the defendant to answer the interrogatories which the plaintiff had included in his bill. Less frequently did the defendant seek discovery from the plaintiff. The tendency under modern discovery practice is to make discovery equally available to both plaintiff and defendant. Where the written interrogatory procedure obtains either party may file interrogatories for his opponent to answer. Similarly either party may have an oral examination of his adversary where this form of discovery is employed.

There are, however, certain rules in a few jurisdictions which prevent discovery from being an entirely equal right of both parties. Especially under the New York practice is there an inequality of discovery. The New York rule is that a party can have discovery only as to the issues of which he has the affirmative under the pleadings. Obviously this allows a plaintiff far greater rights to discovery than is allowed the defendant, for the reason that the former usually has the affirmative of most of the issues. Similarly, a defendant is not allowed discovery under a mere denial.

Absence of a provision for examination of representatives of corporate parties may prevent discovery from being equal. While lawyers for a corporate party can examine the adverse party the latter obviously cannot examine the artificial body. This is the situation in New
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Jersey. Even under the ordinary deposition procedure the rights to discovery are not absolutely equal in the event one party is a corporation, for the corporation can examine its adversary as a party while the latter can examine the corporate representatives only as witnesses. The difference is that in one case the answers constitute admissions, while in the other case they may not.

Even in those states in which as a matter of law the rights to discovery are equal the actual use of the procedure is not always so. In most of these states defendants use the procedure much more frequently than do plaintiffs. This, however, is not true in all jurisdictions. In Wisconsin, for example, both plaintiffs and defendants use the procedure widely. In fifty consecutive cases in which discovery had been used in Milwaukee the records showed that both parties were examined in eight cases, the plaintiff alone in thirty, and the defendant alone in twelve. Similarly in Madison both parties were examined in twenty-two out of fifty cases, the plaintiff alone in twelve, and the defendant alone in sixteen. One hundred consecutive cases studied in the Superior Court of Suffolk County, Boston, indicated that under the Massachusetts written interrogatory procedure defendants had filed interrogatories approximately five times to every three times plaintiffs had done so. The special procedure for an oral examination for discovery in New Jersey, however, has been used almost exclusively by defendants. Indeed one lawyer said that he had seen hundreds of examinations and applications for examinations by defendants' lawyers, especially those representing insurance and corporate interests, but that he could remember only two cases wherein lawyers for plaintiffs had sought an examination of the adverse party. In all of the states in which the deposition is used for discovery purposes defendants employ the process much more frequently than do plaintiffs.
The following reasons have been assigned why defendants use discovery more than plaintiffs: (1) The plaintiff generally is less able to afford the expense. (2) There is a tendency upon the part of many plaintiffs’ lawyers to want to get to the jury and to disparage any dissipation of their strength in the form of pre-trial moves. Corporate interests, on the other hand, often are glad to use any expedient to avoid a trial. (3) Whereas much of the business of defendants is concentrated in the larger law firms, with skilled lawyers, the plaintiffs’ business usually is scattered. Often actions are initiated by men with inferior training, and a more thoroughly trained lawyer is not called into the case on the plaintiff’s behalf until immediately before trial. Accordingly, the case, up until the trial stage at least, is handled by men who are either ignorant or careless in their preparation for trial. This explanation is borne out by the fact that some plaintiffs’ lawyers who are careful about their preparation for trial use the process just as frequently as do defendants’ lawyers. But plaintiffs’ lawyers as a whole do not.

It is a mistake to suppose that simply because defendants use the process more widely the procedure favors the defendant and prejudices the plaintiff. Even in states in which plaintiffs’ lawyers make little use of the device, they say that they have no hostility toward the process. Outside of New Jersey, practically no opposition to discovery was found among the several hundred lawyers who were interviewed. A typical response upon the part of the lawyers who specialize in representing plaintiffs in automobile accident litigation was that they welcomed the examination of their client if he had a good case because it enhanced the possibility of an advantageous settlement. In some states which have no provision for the oral examination of parties before trial lawyers for the plaintiff sometimes will grant an
examination of their client as a basis for settlement negotiations. This is testimony to its effectiveness in this regard. Again, many plaintiffs' lawyers said that the process had afforded them a valuable remedy in certain cases. Some stressed the fact that it afforded the outsider a means of preparation for trial which placed him more nearly on an equality with the larger firms which have at their disposal independent means of investigation. Still others said that in cases in which employees of the defendant were witnesses to the accident they had found it desirable to examine such employees just as soon as possible after filing suit, and that often-times these employees at such an early stage of the litigation were more sympathetic to the victim of the accident than they would be after adroit and suggestive questioning by claim agents, fear of loss of their jobs, or merely the lapse of time had dampened their sympathies.

In fairness it should be said that the little prejudice toward discovery which was found in the fourteen jurisdictions which were visited, was confined to lawyers who specialize in representing plaintiffs. In New Jersey these lawyers were uniformly opposed to the procedure, whereas defendants' lawyers favored it. But in other states no such wide-spread prejudice was found. Upon occasion defendants' lawyers said that they supposed some prejudice toward the procedure would be found among plaintiffs' attorneys. They were asked to name particular men whom they supposed entertained such prejudice. Interviews with the latter did not bear out the suppositions. Even those plaintiffs' lawyers who were said to dislike the procedure because of its dealing with so-called fake claims concealed their animosity, if they had such. While many lawyers of all types said that they had in mind specific instances in which the process had been abused, very few were willing to say
that the process as a whole was not a good thing. On
the contrary, the great majority were outspoken in their
praise of the device.

The ideal, of course, is that all procedural devices be
available to both sides equally. The often quoted words
of the Kansas Supreme Court are in point: "It is said
that this permits one to go on a 'fishing expedition' to
ascertain his adversary's testimony. 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."¹ Not only is it important that the oppor-
tunity for discovery be mutually available, but it is like­
wise important that a mutual use of the device be en­
couraged. Missouri has a provision which is unique in
this regard. If one party takes depositions, the other
party can begin taking depositions just as soon as his
adversary has finished without giving formal notice. It
is only required that he make known his desire some­
time during the taking of depositions by the first party.²
This encourages a party to take advantage of the process
whenever his adversary does so, and to this extent it
fosters an equal and a mutual use of discovery.

¹ In re Abeles (1874) 12 Kan. 451.