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PRACTICE AND PROCEDURE-SCOPE OF COURT RULES ALLOWING DISCOVERY

PRACTICE AND PROCEDURE—SCOPE OF COURT RULES ALLOWING DISCOVERY—The declaration alleged that plaintiff's intestate, a tenant of the defendant, sustained fatal injuries from a fall on the grounds of the apartment house, caused by defendant's negligence with respect to the care of the premises. The action was begun one day before the statute of limitations would have run. Defendant gave notice that under Court Rule 41[1] she would examine the plaintiff as to the particulars of the event which constituted the cause of action. Plaintiff filed a motion to set aside this order, alleging that defendant's rights under the above rule were limited to discovery as to affirmative defenses only. *Held*, that the scope of the rules includes the right to examination as to the specific claims of the plaintiff, as well as to affirmative defenses. *Vincent v. Van Blooys*, 263 Mich. 312, 248 N. W. 633 (1933).

Plaintiff, injured in an automobile accident, alleged that the defendant, a foreign corporation, owned the car negligently driven by its employee Baum, and that Baum was employed to drive the car. The answer denied ownership of the car, and that Baum was defendant's employee, or was driving it in the performance of any duty. After the pleadings were in, under Court Rule 40 the plaintiff filed an order directing the defendants to produce any policies of

[1] Michigan Court Rules, Revision of 1931: "Any party to an action or suit may cause to be taken by deposition according to the practice regulating the taking of deposition, at any time after action commenced and before trial, the testimony of any other party, or any person who has verified a pleading of another party, which is material and necessary in the prosecution or defense of the action or suit." The Rule

insurance it had on the car and any correspondence between defendant and the insurance company.[2] The order was resisted on the ground, *inter alia*, that plaintiff had available other remedies to the same end, like *subpoena duces tecum*. *Held*, the plaintiff will not be required to resort to *subpoena duces tecum* where it appears that discovery under Rule 40 is more convenient. *Layton v. Cregan & Mallory Co., Inc.*, 263 Mich. 30, 248 N. W. 539 (1933).

Court Rule 41 was copied from the New York Civil Practice Act[3] with some misgiving that it would be so interpreted as to confine discovery to interrogation regarding the examining party's case only.[4] This had been the interpretation of the several Appellate Divisions in New York,[5] except that in tort cases some Departments had been more liberal and had permitted a so-called general examination.[6] If thus restricted, discovery, now generally ancillary to law actions,[7] is no broader than its ancestor, the bill of discovery, which was confined to examination as to the examining party's case only.[8] The instant case, however, resolves any doubts on this matter, and frees discovery in Michigan from the fetters and restrictions of the ancient bill of discovery. That the court would make discovery available as a means of ascertaining from the adverse party what evidence he proposes to bring forth had been indicated somewhat in previous decisions. In *Fisher v. Smith*[9] the court held that plaintiff might examine the defendant, after action commenced by summons, for the purpose of enabling the plaintiff to frame a declaration. In *Nestle v. Fleming*[10] the court held that the defendant in an action for seduction might have discovery where the declaration set up three different days on which the alleged offense occurred, on the theory that fairness demanded that the exact date, if known, should be disclosed. Implicit in these decisions is the fact that adequate

is the same in number, but the text has been changed somewhat in the Revision effective July 15, 1933.

[2] Michigan Court Rules, Revision of 1931: "Application may be made by petition to any court of record in term time, or to the judge thereof in vacation, to compel the production and discovery of books, papers and documents relating to the merits of any action or suit pending in such court, or of any defense to such action or suit, in the following cases: . . . (d) After issue joined in any action, either party may be compelled to produce and discover all such books, papers and documents as may be necessary to enable the party applying for such discovery to prepare for trial of the cause." The rule is the same in number in the Revision effective July 15, 1933.

[3] 4 Law of N. Y. (1920), Civ. Prac. Act, secs. 288-293.

[4] Sunderland, "Scope and Method of Discovery Before Trial," 42 YALE L. J. 863 at 870 (1933).

[5] Ganni v. Stallman, 200 App. Div. 485, 193 N. Y. S. 97 (1922); Fromm v. Grisman, 197 N. Y. S. 156 (1922); Schmitt v. Baptist Temple, 234 N. Y. S. 888 (1929).

[6] Combes v. Maas, 209 App. Div. 330, 204 N. Y. S. 440 (1924); Schonhous v. Weiner, 138 Misc. 759, 246 N. Y. S. 73 (1930).

[7] The statutes are set out in RAGLAND, DISCOVERY BEFORE TRIAL 267-391 (1932).

[8] WIGRAM, DISCOVERY, sec. 347 (1842); 42 YALE L. J. 863 at 866 (1933).

[9] 259 Mich. 279, 243 N. W. 4 (1932).

[10] 262 Mich. 417, 247 N. W. 709 (1933).

preparation for trial is possible only if there is some means of learning what the adverse party proposes to do at the trial. As a corollary, only if unrestricted can discovery serve as a basis for a summary judgment, the importance of and resort to which are steadily increasing.[11] The court's liberal attitude with respect to discovery is further shown in the decision in the instant case of *Vincent v. Van Blooys* where, as to ordering discovery of documents before trial, convenience is happily made the criterion. Previous decisions of the court required that the party seeking discovery to prepare for trial show that the same end could not be achieved by *subpoena duces tecum*;[12] though the contrary was of necessity true where the party sought discovery of documents to answer a pleading.[13] It is to be hoped that special circumstances in the second case showing the great convenience of discovery, namely, defendant's being a foreign corporation, will not be taken to be an essential qualification of the convenience rule as laid down. Having apparently fully considered the implications of restricted and unrestricted discovery, the court seems inclined to make discovery an effective device in the furtherance of justice.

M. W.

[11] Sunderland, "Scope and Method of Discovery Before Trial," 42 YALE L. J. 863 at 872 (1933).

[12] Cummer v. Kent Circuit Judge, 38 Mich. 351 (1878); Preston Nat. Bank v. Wayne Circuit Judge, 137 Mich. 152, 100 N. W. 393 (1904); Ashley v. Calhoun Circuit Judge, 138 Mich. 44, 100 N. W. 1005 (1904); Gemsa v. Dorner, 256 Mich. 195, 239 N. W. 332 (1931).

[13] Smith v. Wayne Circuit Judge, 158 Mich. 588, 123 N. W. 34 (1909).