CHAPTER XXVII

ADVANTAGES IN COMBINING DISCOVERY WITH PRESERVATION OF TESTIMONY

A number of American jurisdictions have combined the methods for discovering and preserving testimony into a single deposition procedure. General principles of policy would seem to favor such a combination. It is sound policy to consolidate previously separated devices which are related in their origins and functions. The end of reform is simplification. True reform does not confuse—it integrates, it synthesises, it leads back to first principles. Lawyers are already sufficiently acquainted with the procedure for taking depositions to insure its orderly operation from the start if it is used for purposes of discovery. Use of deposition procedure eliminates the necessity for an elaborate and detailed statutory provision for discovery. Statutory provisions for interlocutory practice should be both concise and simple in order that the occasion for appeals may be reduced and in order that the actual practice may be worked out in accordance with considerations of administrative facility rather than in obedience to pre-arranged technicalities. By making the right to take depositions unconditional liberal means of discovering as well as preserving testimony is provided.

The combination of discovery and preservation of testimony has proved expedient from the standpoint of the detailed incidents of practice which are involved. Practically all of the problems which have arisen in connection with discovery procedure have been more easily solved under the ordinary deposition statutes than under

elaborate statutory provisions dealing with discovery as such.

Discovery is available in all types of actions in states in which a combination of discovery and preservation of testimony has been effected. This is a more salutary rule than the one which obtains in New York, for instance, which limits discovery in certain types of actions. If discovery is abused in certain types of actions, the remedy seems to be in keeping the record of the examination secret rather than in curtailing the right to discovery.

The problem as to the persons from whom discovery should be allowed is easily handled under the ordinary deposition procedure. Such a solution has the several advantages over the elaborate statutory provisions which obtain in New York, Wisconsin and elsewhere. By elimination of complex statutory provisions, the occasion for appeals is lessened. The statute need only provide that depositions may be taken, without further specification. This eliminates the necessity of determining who is a party for purposes of discovery, because depositions of parties and witnesses alike may be taken. It eliminates the several problems as to who is examinable on behalf of a corporation by allowing the examination of any representative as a mere witness, with the question as to the use of the examination against the corporation being reserved for the trial. This is already the direction of development under several of the special discovery statutes. It allows discovery from witnesses as well as from parties. There are sufficient inhibitions upon the use of the process in this regard to prevent its abuse, and yet not enough to prevent its use in a proper case, namely, when an important witness refuses to give a voluntary statement. Finally, such a provision makes discovery equally available to the plaintiff and to the defendant.

The ordinary deposition procedure offers the most expedient solution of the problem as to whether dis-

covery before pleading should be allowed. It usually allows the defendant such discovery as of right, but requires that the plaintiff file some sort of pleading as a guaranty of his *bona fides*. By filing a skeleton pleading, taking depositions, and then amending, the plaintiff in reality obtains discovery before pleading. This process works satisfactorily enough in the states wherein it is employed. It has not been the subject of the numerous appeals which have attended the provisions in New York and Wisconsin which allow examinations for the purpose of enabling a party to plead, yet it accomplishes virtually the same purpose.

A primary requisite to the usefulness of any procedural device is that the lawyers know the details of the procedure. This is true of the particular item of discovery. If elaborate details are provided by statute it takes some time for the bar generally to become acquainted with them. Already most lawyers have an adequate knowledge of the procedural details incident to the taking of depositions. The experience of the states in which this regular deposition procedure has been used for discovery purposes is that the practitioners soon learn to vary certain details and to ignore others in such a fashion as to accommodate the procedure to its new use. This has proved true of the following items which are discussed in preceding chapters of this text: (1) The initiating step: with the allowance of an examination as of right upon the mere service of notice and subpoena, lawyers soon accord the same voluntarily. In contrast, the special New York provision for notice-order procedure has not proved as satisfactory. (2) The place of the examination can be adjusted to the convenience of all parties involved. (3) Lawyers have learned to adapt their own tactics so as to obtain the most effective discovery, and to solve the few problems which arise as to the orderliness of the proceeding.

(4) The procedure is adaptable to differences between the practice in cities and in smaller communities, and between the large and small law offices, as far as the necessity of having the shorthand notes transcribed is concerned. (5) Problems concerning the right of the deponent to make substantial corrections can be solved by practical expedients apart from special statutory regulation. (6) Lawyers have disregarded statutes and rules in regard to filing the deposition and have adapted their practices to their own convenience and to the most effective discovery. Any inadequacies which obtain in regard to any of these items in the practice of an individual lawyer are the subject of education rather than of legislation.

The most feasible solution of the problem of administering discovery examinations has been to allow the examination to be taken down by a mere reporter, who is qualified to take depositions, with all disputes being referred to the trial court. Most of the attempts to provide a different machinery have approximated this practice in their actual operation. Only in Milwaukee, Wisconsin, and in isolated cases in the larger cities of Missouri does a substantially different practice actually obtain. While there are some advantages in having an officer who can decide objections summarily and coerce answers, it is so difficult to obtain officers with sufficient knowledge and experience to exercise these powers intelligently that the chances of abuse outweigh the incidental benefits. Moreover the Missouri experience indicates that such an officer is not needed in the majority of cases. Trial courts can supply most of the benefits incident to the employment of such an officer by granting speedy and expeditious hearings to the disputes which are referred to them. The plan suggested has the following advantages: It uses a machinery already provided by the statutes and does not require special legislation; it is easily adapted to differ-

ences of practice between the large and small city, and between the large and small office; it is the least expensive; it offers the least chance of abuse of parties and witnesses, because each party and witness can safely refuse to answer any question which he deems improper until ordered to answer by the court; it provides for a sufficiently liberal discovery; it allows most of the disputes which arise to be adjusted informally among counsel, without resort to the court. Finally, if such a plan does not work satisfactorily in a particular locality, the Missouri plan appears to be the most feasible remedy, let the court appoint a practicing lawyer to supervise the examination if one of the parties requests it.

The comparative experience of states which try to restrict the examination and of states which allow it to be as broad as at the trial, respectively, indicates that the practical advantages are with the latter plan. The restrictive rules which have been applied by the New York courts have defeated their own ends. On the contrary, an examination before trial, restricted by the rules of evidence only, has proved a deterrent of perjury and an aid of disclosing the truth. It is noteworthy that states which have allowed use of deposition procedure for purposes of discovery before trial have not limited the scope of the inquiry.

Rules of evidence offer sufficient checks upon the scope of the examination. This has proved true in the taking of depositions. When lawyers for the examiner and the examined, respectively, know that answers to questions cannot be compelled without resort to the trial court by the examiner, but that this can be accomplished expeditiously, the following experience obtains: The lawyers adjust the majority of the objections among themselves; the inarticulate rationale of this adjustment is the law of evidence, modified in its application by due regard

for the practicalities of the situation and for the purposes of discovery. Under such a practice objections of privilege are respected forthwith. The liberality which obtains in regard to rules of relevancy is of the lawyers' own making and does little or no harm because irrelevant evidence can be stricken before it gets to the jury.

There are two penalties for unjust refusal to disclose, namely, attachment for contempt and default or nonsuit. The experience with these has been satisfactory. They furnish a sufficient sanction so that it seldom is necessary to actually apply either one, and so that a full disclosure is encouraged. Any dissatisfaction with the penalty provisions of the statutes has been attributable rather to the mode of their enforcement than to the penalties themselves.

The ordinary deposition procedure provides the most satisfactory solution of the problem as to who may use the discovery examination at the trial, and also as to the purpose of its use. The rules under this practice are: Neither party may use the deposition of a mere witness as original evidence unless the deponent is unavailable at the trial, but the taker may use it to contradict the witness. The taker only may use the deposition of an adverse party as evidence of an admission. Either party, regardless of who has taken the deposition, and regardless of whether it is the deposition of a party or of a witness, may use the deposition in the event the deponent is unavailable for oral testimony at the trial. While this plan does not answer categorically that either the taker only may use the examination, or that both parties may use it, it effects a happy compromise by answering that only the taker may use ordinarily, but that the opposite party may also use when he really needs to, namely, when the deponent is unavailable for oral testimony. In this way use both for discovery and for preservation of testimony is made feasible.