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Edwin F. Woodle

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Discovery Practice in Ohio— Pathway to Progress

By Edwin F. Woodle

INTRODUCTION

THE VAST body of the substantive law, whether embodied in statutory enactments or pronounced by judicial fiat, has at all times had for its avowed purpose the accomplishment of a just and equitable result in every type of controversy and conflict. The great body of the English common law and the maxims of equity which together constitute the foundation of American jurisprudence have never sought less than the accomplishment of justice grounded upon principles of general morality. In the application of those principles, courts of every jurisdiction have been constantly adjured to bear in mind the attainment of a result consonant with the sole and entirely justified purpose of the principles of jurisprudence.

THE AUTHOR (A.B., 1923, Western Reserve, LL.B., 1925, Western Reserve) is a practicing attorney in Cleveland, Ohio. He is Past-President of the Cuyahoga County Bar Association, and former Chairman of the Pre-Trial Practice Committee.

"Office" lawyers, having a sound and general knowledge of the body of the law, may guide and direct their clients' affairs, so skillfully prepare their business and personal documents, and so adroitly manipulate their decisions that they may successfully steer them away from the shoals and quicksands of litigation. But the real glory of the law is or should be, the application of these principles of law and equity to the just and sound determination of controversies by the courts.

The task of the courts in this regard has been made difficult by many considerations, two of which are particularly significant. Within this century, the formulation by legislative bodies and administrative agencies of an imposing — not to say harassing — body of rules and regulations governing every aspect of commercial transactions, and many personal problems as well, has prevented the courts from deciding a large number of controversies upon any other than a dogmatic or arbitrary basis, with no regard for the fitness or justice of the result. The opportunity — nay, the necessity, of deciding so many cases in this manner appears to have engendered in many courts a callousness with respect to the rightness and

the justice of their decisions, so that today this constitutes a marked and most fortunate development in the trend of so-called "judge-made" law. The second consideration, which for many years stood in the way of accomplishing the kind of result in each case which the law does, and should intend, will be found in the perverse and tangled skein of *procedural* law and practice. Surely, it was never the intention of the learned gentlemen who, over the centuries, have announced, re-announced, modified, altered and, on occasion, substantially improved the rules of procedural law, that these rules should ever do anything other than assist the parties to a lawsuit and, in the final analysis, the court or the jury in arriving at that result which, again, it is the object of all jurisprudence to accomplish.

Sadly, history records that in fact the rules of practice and procedure have created so many stumbling blocks and so many pitfalls, so many technical traps and so many paths that lead away from the real subject of controversy, that for many years it has been impossible — and is still impossible — for litigants in an astonishingly large number of cases actually to have their day in court and to secure a just determination of their case upon the merits. Perhaps some justification or excuse, inadequate though it may be, can be found for the creation of such legal pitfalls in the development of the rules of pleading, in defining the jurisdiction of courts, or in acquiescing to the regulations pronounced by the courts themselves for the government of their daily affairs. Perhaps the "quibbling" of lawyers is one of their minor vices and, after all, judges are only lawyers appearing on the superior side of the bench. When one approaches the facet of procedural law with which this article is concerned, however, it is difficult to find any justification or excuse for the shortsighted and inept manner in which the courts — both at law and in equity — have devised and applied principles designated sometimes as legal and sometimes as equitable, and not infrequently with the most obvious shrug of the judicial shoulders and an utter callousness toward the particular result.

It should be a platitude and it is, at least, an observation that receives lip service from the bench, that no proper result can be accomplished in any case unless all of the facts are before the court. Undoubtedly this observation never has been intended to embrace simply those matters which, for want of a better term, the courts refer to as the ultimate facts. The ultimate facts, as every trial lawyer understands, constitute simply the end result of what he is attempting to demonstrate as the truth in the case. When it is said that a case cannot be properly and justly decided unless all of the facts are before the court, it is clearly intended that each of the parties to the lawsuit must be able to present every witness who, by relevant testimony, can shed light upon one or more of the ultimate

factual *issues* in dispute, and all documentary evidence which, properly identified, can serve the same purpose. This being so, one would suppose that in pronouncing and in applying legal and equitable principles in the field of *discovery*, the courts would constantly bear in mind what they themselves have stated to be necessary in order to arrive at the proper determination of a lawsuit. Alas, anyone boldly approaching the subject of discovery and confident that he will find the rules announced and applied consistently with the declared object of litigation is due for a rude awakening. This is particularly true in the great State of Ohio.

An attempt will be made here to undertake a reasonably thorough examination of the law in the field of discovery practice and procedure as it affects the lawyers of the State of Ohio. And, since Ohio lawyers, like those of every other state, are not only privileged but, in many instances, required to practice in the federal courts whose territorial jurisdiction includes the State of Ohio, this examination will be extended to include discovery practice and procedure not only in the state courts, but in the federal courts as well.

Historical Perspective

Webster's multi-volume New International Dictionary defines discovery as the "act, fact, process or instance of discovering as: a) finding out or ascertaining something previously unknown or unrecognized; c) laying open or exposing to view; d) formerly, exploration; investigation;" — and, says Webster, in "Law· in practice, the disclosure by party to an action or proceeding of facts or documents which will afford material evidence in determining the rights of the party asking it."[1] Inadequate as this definition may be in the light of modern discovery practice and procedure, it will be found that many Ohio courts have not yet achieved even the dictionary level of its meaning.

It should be made clear at this point that this discussion of discovery practice and procedure, as it is and as we believe it should be, will not be confined to the type of action, whether statutory and at law, or equitable and commonly referred to as a bill of discovery. The various encyclopedic compendia of the law — American Jurisprudence, Corpus Juris and Corpus Juris Secundum, among others — discuss the subject of discovery in the light of an attempt on the part of one party to a lawsuit to obtain information from the opposite party. The various methods by which this may be accomplished will be discussed. Equally important, however, are the methods of securing necessary or helpful information from a third person who neither is, nor will be, a party to the litigation in connection with which the information is desired.

[1] 2 WEBSTER'S NEW INTERNATIONAL DICTIONARY 745 (2nd ed. 1955).

Available to Ohio lawyers in all courts of the state are many remedies:

(1) the ancient equitable proceeding or bill of discovery;
(2) a parallel statutory proceeding in discovery;
(3) the right to examine witnesses in detail by way of deposition;
(4) the right to cross-examine any other party to pending litigation;
(5) the right to propound to an opposing party written interrogatories whether attached to a pleading or entirely independent thereof;
(6) the right to a physical examination or inspection whenever the results of such an examination or inspection are relevant to an issue before the court;
(7) the right to demand, to receive copies of and to inspect documents in the hands of an opposing party or a third person relevant to the issue in the case.

The problem with which lawyers are currently faced in the courts of Ohio, and the handicaps which exist, result not so much from the absence of procedural rights as from the manner in which the courts of Ohio have interpreted, restricted and restrained the application of those rights. On the other hand, when practicing before the various federal courts situated within the state, there are available to the lawyers of Ohio the very broad and liberal provisions of deposition and discovery procedure embodied in what may no longer be referred to as the "new" federal rules of civil procedure.

In order to understand the situation confronting Ohio lawyers in discovery practice and procedure, to point out some of the errors and fallacies in the thinking of the courts on this subject, and to indicate what needs to be done — by way of legislation if necessary, to accomplish a proper and just result, it is necessary to undertake an historical excursion:

> The common law generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the conduct of his cause.
>
> Hence there was failure of justice at common law, and hence there arose the equitable remedy of bills for discovery, which was made use of simply for the purpose of assisting or supplementing the plaintiff's remedy at common law.[2]

We beseech the patience of the reader to such historical data as may here be included and commend it to his careful attention. It may even, on occasion, be employed with telling effect in arguing for or against a particular attempt to procure a discovery of important facts. Depending

[2] Reynolds v. Burgess Sulphite Fiber Co., 71 N.H. 332, 334, 51 Atl. 1075, 1076 (1902). See also Pidgeon v. Yeager, 23 Ohio Op. 533, 9 Ohio Supp. (N.E. Reporter) 3 (1942).

upon which side of the controversy counsel may find himself, he may emphasize the great weight to be accorded to established principles supported by almost two centuries of practice. Or he may urge that rules standing in the way of a complete discovery of the facts, based upon concepts hoary with age and myopic in outlook have, in recent years through widely accepted reforms, succeeded in changing the entire course of litigation and in investing the trial of lawsuits with a new vigor and a wider vision.

The historical basis for proceedings in discovery cannot, however, be forgotten for the courts, in Ohio at least, will not permit it to be forgotten. The reader will find that among the cases in this field which have been reported within the past fifteen years, many have adopted a modern and liberal approach to the particular problem before the court. Unfortunately they are paralleled by others in which the particular judge relied heavily on statements of principles which now, and rightfully so, are more honored in their breach than in their observance. The tendency of some courts, as indicated, to revert to procedural practices which have been generally shown to be neither justified nor adequate is most unfortunate. Presumably it results in great part from the tenacious hold upon the legal profession maintained by the doctrine of stare decisis. Since a discussion of the merits of that doctrine might call for an article in itself considerably longer than this, it should suffice to point out here that the doctrine has no genuine merit except in limited instances beyond the realm of substantive law. When a rule of procedure or a rule of practice having its origin and foundation solely in judicial pronouncements is, upon further and careful analysis, found to be unsound, inadequate or inappropriate in the light of changing circumstances, or requires interpretation and application in the light of such changing circumstances, neither counsel nor litigant has any right to expect the court to adhere unrelentingly to ancient processes on the basis of stare decisis. When procedural halters and blinders have been created by the court, it is for the court itself in an appropriate case to remove them.

The great epithet of opprobrium which was constantly hurled against attempts at discovery in the early 18th century was a cry of "fishing expedition." The concept that such an excursion was beyond even the pale of equity died hard. And even today the elusive ghosts spawned by that concept rise to plague the lawyers in the courts of Ohio. The principles giving rise to this concept will be found didactically enunciated by no less an authority than the Supreme Court of the United States as late as the year 1911.

> A bill of discovery cannot be used merely for the purpose of enabling the plaintiff in such a bill to pry into the case of his adversary to learn its

> strength or weakness. A discovery sought upon suspicion, surmise or vague guesses is called a "fishing bill" and will be dismissed. Such a bill must seek only evidence which is material to the support of the complainant's own case and prying into the nature of his adversary's case will not be tolerated The plaintiff in equity is entitled only to the discovery of such matters in the knowledge or possession of the defendant in equity as will enable him to make out his own case at law.[3]

BILLS OF DISCOVERY IN EQUITY

There is one Ohio case, *Chapman v. Lee*,[4] which is without question the granddaddy of all reported decisions in the State of Ohio in the field of discovery practice and procedure. This case, decided in 1887, has been subsequently cited and relied upon more than any other in the development of the rules expounding and impinging upon the right to the discovery of facts and of evidence.

There was in that case only a single issue before the Supreme Court of Ohio which, on its face, appears to have little, if any, relationship to the substantive right of a party to the benefits of discovery procedure or to the scope and extent of such discovery. That issue was framed by the supreme court in the following language:

> This court is called upon to determine but one question: Did the Court of Appeals err in dismissing the appeal of Chapman and Tracy? If the parties had the right in the Court of Common Pleas to demand a jury, then the case was not appealable; if they had no such right, then the case was appealable, and the appeal was improperly dismissed.[5]

The facts of the case have a special interest for lawyers. The plaintiffs were attorneys who had entered into a written agreement with one of the defendants in the case to prosecute an action for damages on his account against a railway company, which was also named as a defendant. The agreement provided that the plaintiffs were to be compensated for their services on a contingent basis.

The plaintiffs prosecuted the action against the railway company with due diligence and procured a judgment in excess of $12,000.00, which, however, was subsequently reversed and the case was remanded for a new trial.

Following the remand, counsel for the railway company undertook to negotiate with plaintiffs' client a settlement of the action for damages without the knowledge of the plaintiffs. After the settlement had thus been negotiated, counsel for the railway company produced the settlement agreement in open court, and over the objection of the plaintiffs procured a dismissal of the damage suit.

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[3] Carpenter v. Winn, 221 U.S. 533, 540 (1911).

[4] 45 Ohio St. 356, 13 N.E. 736 (1887).

[5] *Id.* at 362, 363, 13 N.E. at 738.

The railway alleged the amount of the settlement to be $5,000.00. The plaintiffs asserted that in fact the amount was substantially greater than appeared in the written settlement agreement, and that their client and the railway company had conspired to defraud them out of a large part of the fee to which they were entitled under the settlement agreement.

It was asserted that at the time the settlement was made their client was insolvent and remained insolvent and that this circumstance was also known to the railway company. The plaintiffs asserted that they did not know the exact and correct amount of the settlement but that, under the circumstances, they were entitled to a full discovery from the defendants of all of the facts regarding the settlement and the consideration for the same in whatever guise it may have been received. The plaintiffs then alleged that they were entitled to have an accounting of the full amount due them under the contract with the defendant client, and prayed for a judgment for the amount found due.

Upon a consideration of these facts and the allegations of the petition, the supreme court determined that either of the parties to the action had a right to demand a jury, and that the case was therefore not an equity case notwithstanding the prayer for discovery and accounting, as well as for money judgment.

In order to arrive at its decision, the court was required to determine only the nature of the action and "the primary object sought." The court declared that the gist of the action brought by the plaintiff attorneys was a charge of a fraudulent combination between the defendants to deceive the plaintiffs concerning the real terms of the settlement of the pending lawsuit, and the further claim that money which belonged to the plaintiffs had been wrongfully appropirated by the defendants.

Having arrived at a determination of this question, which was, in fact, the sole question before the court, it then proceeded to discuss at considerable length the historical development of suits for discovery and the effect of the rather recently enacted statutory provision. As to this the court declared:

> Suits for discovery were, in equity practice auxiliary proceedings, brought not to obtain any equitable remedy, nor to establish any equitable right, but to aid in maintaining a legal right, and in prosecuting actions pending, or to be brought, in a court of law.
>
> If a party could not succeed without the aid of facts within the personal knowledge of his adversary, he might file his bill, setting forth all the facts within his knowledge and adding interrogatories which the other party was required to answer fully under oath.[6]

The court then pointed out various provisions in the Ohio Code of Civil

[6] *Id.* at 365, 13 N.E. at 740.

Procedure, by virtue of which a plaintiff in a case was said to be afforded "all the aid which a suit for discovery would give." Under these code provisions, the court said, either party could attach to his pleading interrogatories which, so far as pertinent, the other party would be bound to answer, and the answers given could be used by either party as evidence. The court then continued with the following assertion, which has been the source of endless trouble and confusion ever since:

> The doctrine and rules concerning the subject matter of discovery established by courts of equity are *believed* to be still in force and to control the same matters in the new procedure, but the bill of discovery as a separate action, is practically obsolete in this state. (Emphasis added).[7]

This was clearly and purely a gratuitous comment, since no claim had been made by either of the parties that the action then before the court was an independent action in discovery, or a bill of discovery, and the proposition had not even been argued by counsel. Moreover, the statement of the court was further erroneous, in view of the fact that the court overlooked an Ohio statute which had been enacted 30 years earlier, providing in essense by statutory enactment for the filing of an independent bill of discovery.

True enough, the statute did not expressly declare the remedy to be one in equity. In that regard, however, it was not a bit different from the many other statutes enacted in Ohio affording various types of equitable relief or procedure as, for example, those relating to the issuance of injunctions or providing for procedure in ejectment. Nevertheless, this pronouncement, which was not only obiter dicta but without any proper foundation, was carried into the third paragraph of the syllabus of the case, in the following language:

> Adequate means of obtaining discovery from parties to actions at law being afforded by our statute, suits for discovery, as prosecuted in equity before the adoption of the code, are practically obsolete in this state.[8]

It appears from the many decisions citing, relying upon and applying the case of *Chapman v. Lee,* that many trial and appellate courts have been inclined to a strict rather than a liberal application of the rules of discovery practice, in the light of the belief that they were dealing with a legal rather than with an equitable remedy.

The absence of any proper basis for such a belief will be found in an established rule applied by the Supreme Court of the United States in the case of *Carpenter v. Winn,*[9] in which the Court declared that:

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[7] *Id.* at 366, 13 N.E. at 740.

[8] *Id.* at 357, 13 N.E. at 736 (syllabus).

[9] 221 U.S. 533, 539 (1911)

> A court of equity does not lose its jurisdiction to entertain a bill for the discovery of evidence or to enjoin the trial at law until obtained because the powers of the courts of law have been enlarged so as to make the equitable remedy unnecessary in some circumstances.

A further pronouncement and exposition of the correct rule, which was entirely overlooked by the Ohio Supreme Court in the case of *Chapman v. Lee,* but which received the stamp of approval of the Supreme Court of the United States, is to be found in the decision and opinion of the federal court of appeals in the case of *Colgate v. Compagnie Francaise du Telegraphe,*[10] in which that court observed:

> The jurisdiction in equity for discovery originated in the absence of power in courts of law to compel a discovery by their own process, either by means of the oath of a party or by the production of deeds, books and writings in his possession or control. But it does not follow, because the courts of law now have power to extend such relief, that a court of equity should *forego* the exercise of an ancient and well-settled jurisdiction.
>
> For without some positive act, the just inference is that the legislative pleasure is that the jurisdiction shall remain upon its old foundations. Accordingly, it has been frequently held that a court of equity should not refuse to entertain a bill for discovery; although, by the enlargement of the jurisdiction and remedies exercised by courts of law, similar relief could be obtained by the complainant in his action at law. (Emphasis added).

Notwithstanding the dicta in *Chapman v. Lee* to the effect that bills of discovery were obsolete in Ohio, other language in the court's opinion has been seized upon and applied with a more liberal result in many subsequent cases:

> The doctrine and rules concerning the subject matter of discovery established by courts of equity are believed to be still in force and to control the same matters in the new procedure.[11]

Applying this rule seventeen years later, the Court of Common Pleas of Franklin County indicated that "the pertinency of the interrogatories now in question must be determined largely by the equitable rules of practice under the old action of discovery."[12] Subsequently, the Court of Common Pleas of Ashtabula County said: "It therefore becomes important to determine what the rules of practice were, in the use of bills of discovery, and the rights of parties relating thereto."[13] And in 1938, the Court of Appeals of Stark County incorporated in the syllabus of a case which

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[10] 23 Fed. 82, 83-84 (1885). See also Cannon v. McNab, 48 Ala. 99 (1872); Millsaps v. Pfeiffer, 44 Miss. 805 (1870); Shotwell v. Smith, 20 N.J. Eq. 79 (1869).

[11] Graham v. Ohio Telephone & Telegraph Co., 2 Ohio N.P.(n.s.) 612, 613, 15 Ohio Dec. 200, 202 (1904).

[12] *Ibid.*

[13] Russell v. Lake Shore & Michigan Southern Ry., 6 Ohio N.P.(n.s.) 353, 356, 17 Ohio Dec. 435, 438 (1907).

was specifically a petition for discovery, and nothing more, the following rule: "While the right of discovery in equity is superseded by the code provision, the doctrine and rules established by courts of equity are in force and are controlling."[14] As late as 1953, however, a judge of the Common Pleas Court of Franklin County emphasized the statement in *Chapman v. Lee* that the bill of discovery is obsolete in Ohio, and stated somewhat irascibly, "Yet counsel for the plaintiffs draws such a separate action out of the mothballs and attempts to use it without any showing as to the necessity thereof."[15]

Ohio Code Provisions

At this point, it is desirable to ascertain the specific remedies in the field of discovery provided by the Ohio statutes. In 1853, the Fiftieth General Assembly of the State of Ohio enacted the first Ohio Code of Civil Procedure. This was truly a monumental task comprising 165 pages of the volume of Ohio Laws devoted to the work of that General Assembly — a task so well planned and so well executed that a substantial portion of it remains unchanged to this day. It included, however, only two sections in any way relating to discovery procedure. Those were sections 360 and 361 of the original Code of Civil Procedure, and they will be found embodied almost verbatim in the present Revised Code as sections 2317.33 and 2317.35. Only four years later, in 1857, the legislature added those provisions which are now substantially embodied in sections 2317.32, 2317.34 and 2317 48. Such changes as have been made since these statutes were originally enacted one hundred years ago are only minor and grammatical in nature, and there have been no substantive alterations in the interim.

The Ohio statute which at least parallels, if it does not embody entirely, the equitable bill of discovery is Revised Code section 2317.48. Except for one phrase, the language is clear and simple and neither requires nor lends itself to interpretation:

> When a person claiming to have a cause of action or a defense to an action commenced against him, without a discovery of the fact from the adverse party, is unable to file his petition or answer, he may bring an action for discovery; setting forth in his petition the necessity therefor and the ground thereof, with such interrogatories relating to the subject matter of the discovery as are necessary to procure the discovery sought. If such petition is not demurred to, it must be fully and directly answered under oath by the defendant. Upon the final disposition of the action, the costs thereof shall be taxed in such manner as the court deems equitable.

Several points are worthy of emphasis. First, a separate statutory

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[14] Driver v. F. W Woolworth Co., 58 Ohio App. 299, 16 N.E.2d 548 (1938)

[15] Placke v. Washburn, 69 Ohio L. Abs. 565, 568, 126 N.E.2d 610, 612 (1953).

action for discovery may be brought either by one who claims to have a cause of action or by one who is a defendant in an action already filed and pending; second, whatever discovery is sought must be accomplished by means of interrogatories attached to the discovery petition and in no other fashion; third, the information sought to be obtained in an action for discovery must be secured either from one's adversary, as by a defendant in a pending action, or from one's anticipated adversary, if sought by a prospective plaintiff; fourth, the one ambiguous or debatable phrase in the statute is to be found in the words "if such petition is not demurred to."

No cases dealing with this latter language are to be found among the Ohio decisions. In the absence of additional stated statutory grounds for demurrer, it should be assumed that a demurrer to a petition for discovery must be based on one or more of the statutory grounds for demurrers to any other type of action. It will be found hereafter that a similar provision for "demurrer" is included in the statutes relating to interrogatories which may be attached to any pleading in an action. Again, no statutory ground for demurrer to such interrogatories is set forth; and it will be found in practice that what most counsel employ as a ground for demurrer to an interrogatory would normally be embodied in a motion to strike from a pleading on the ground of lack of relevancy or of pertinency. It has been argued by some counsel that a similar basis should be allowed for demurrer in the statutory action for discovery, but it should be noted that we are here dealing with a pleading — namely, a petition. Since definite statutory grounds for demurrer have been stated generally in the code and no others added, there is seemingly no basis for treating a demurrer to a petition for discovery in the same manner as a demurrer to interrogatories. It does not follow, of course, that there may not also be, in addition to the demurrer to the petition itself, as provided by Revised Code 2317.48, a demurrer to all or a portion of the attached interrogatories, as provided by Revised Code section 2309.43.

The lawyers of Ohio give little evidence of resorting to the remedy thus afforded, whether it be regarded as legal or equitable; and few cases dealing with it are to be found among the reported decisions in Ohio. Perhaps the best reason for this is to be found in the frequently insuperable barriers to obtaining any information whatsoever, stemming from the long line of authorities dealing with privileged communications.

Statutory Deficiency — Information In Hands of Third Party

It is appropriate to state at this point that there is a prime defect in the entire system of discovery practice and procedure, a gap in the entire

plan for making all pertinent information available and a deficiency which, in some instances, may have disastrous consequences. It has heretofore been emphasized that one of the essential requirements of a bill of discovery in equity, or a petition for discovery under the provisions of the Ohio Code, is that the action must be brought against one's declared or prospective adversary. Not infrequently, however, occasions arise in which a vital piece of information, which must be known before a lawsuit can be instituted, is within the knowledge of some third party against whom there is no cause of action whatsoever. Should this third party be persistently tight-lipped or very simply inclined to favor the person against whom the information within his knowledge might be used, the unfortunate fact is that neither law nor equity affords any genuine remedy. On occasion, too, the courts themselves appear to lose sight of this fact. An example of such a situation arose in the case of *Stanley v. Martin*,[16] decided in 1909 by the Common Pleas Court of Hamilton County.

The plaintiff sued under a contract to recover from the defendant a stipulated fee of $40.00 per week for a period of seventeen weeks for exhibiting the plaintiff's model submarine boat and appliances at a park. In his petition the plaintiff alleged that the defendant "was acting not only on his own behalf but as the agent and manager of another whose identity was not disclosed to the plaintiff but whose names plaintiff asks leave to add hereto as defendants when ascertained."[17]

The plaintiff annexed to his petition interrogatories the purpose of which was to learn the names of all of the persons or firms for whom the defendant was acting in entering into the contract. A demurrer to these interrogatories was sustained. The court pointed out that the answers sought to be elicited would not disclose any facts "pertinent to the issue." It appeared from the face of the contract that the defendant was acting in the capacity of an agent but the principal was undisclosed and, accordingly, the defendant could be held personally liable. Of course, the principal could also be held liable, when discovered, but the court pointed out the Ohio rule that the principal and agent could not be sued in the same action, and added:

> If, therefore, the information sought by the interrogatories were in the possession of the plaintiff, it would not avail him because he could not join the unknown parties, who would be the principal of the defendant Martin, with Martin as defendant, as this would be joining the principal and the agent in an action on a contract. If the information sought to be brought out by the interrogatories cannot be used to bring in the unknown parties, then the interrogatories are not pertinent to the issue. The avowed

[16] 19 Ohio Dec. 864, 6 Ohio L. Rep. 628 (1909).

[17] *Id.* at 865, 6 Ohio L. Rep. at 628.

> purpose of learning the names of these parties is to make them codefendants of Martin, and this cannot be done because this controversy can be determined without bringing in the unknown parties.[18]

The court then disclosed an erroneous conception of the possible remedy available to the plaintiff by adding:

> If the plaintiff desires to hold these unknown parties on this contract he must first ascertain who they are and whether or not they authorized Martin to execute this contract for them, after which he may be able to bring this action on the contract against them. If the information cannot be learned in any other way, he may bring an action under Revised Code 2317.48 for a discovery, and after the information is obtained he may bring his suit at law on the contract against the discovered parties.[19]

Reading between the lines of such a case, it is perfectly apparent that the plaintiff was not attempting to procure a judgment against the agent Martin, who may well have been judgment proof, but rather to find out the name of the undisclosed principal or principals against whom a judgment might well have been collectable. Faced with this very practical problem the plaintiff found himself entirely baffled by the serious gap in discovery practice and procedure which makes it impossible to secure such information from a third person.[20]

The writer was personally involved in a situation of the type we have been discussing, and succeeded in securing the required information by simply adhering to the old adage that there must be more than one way to skin a cat. A young man employed as an inspector in a large manufacturing plant was seriously injured while engaged in checking the work turned out by a large press, when a portion of the top of the press suddenly broke and a piece weighing approximately ninety pounds fell from a height of ten feet and struck him in the head, rendering him instantly unconscious and resulting in serious skull and brain damage. It appeared that the injured party should, or might, have a valuable claim for damages against the company which manufactured or installed the press. The injured man's employer, however, remained adamant and refused to disclose any information whatsoever concerning the make of the press, the date of its purchase and installation or the name of its manufacturer. In this situation it appeared that the unfortunate injured party might well go without redress other than the small amount of workman's compensation available under Ohio law. It was determined that it was necessary to compel the furnishing of the required information by the only party known to have it available.

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[18] *Id.* at 866, 6 Ohio L. Rep. at 628, 629.

[19] *Id.* at 867, 6 Ohio L. Rep. at 629.

[20] Compare: *In re* Tichy, 161 Ohio St. 204, 118 N.E.2d 128 (1954).

Accordingly, an action for discovery was instituted against the employer and attached to the petition were interrogatories, the answers to which would elicit all of the required information. It is well established law in this state that interrogatories attached to a petition must be answered whether or not the petition is demurrable, and whether or not the court has ruled upon a demurrer. The reason for this rule is obvious, when one considers the fact that there are many cases in which demurrers are erroneously sustained by rulings subsequently reversed. In the meantime sources of information, or information itself, attempted to be procured by interrogatories attached to a petition may be dissipated, lost or destroyed. The law makes no distinction in this regard between a petition which is claimed by a defendant to be demurrable and a petition which the plaintiff himself may realize is in fact demurrable. In any event the procedure instituted on behalf of the injured party in this case was successful and, notwithstanding the interposition of a demurrer to the petition, the defendant was required to respond to the interrogatories. As pointed out with some chagrin by defendant's counsel in the case, the furnishing of the answers to the interrogatories made any further action in the case by either party wholly unnecessary, and a ruling on the demurrer superfluous. Notwithstanding the success of this maneuver in the instance cited, it would, however, be better if the law would recognize the urgent need for a remedy in a situation of this kind and, either by statute or by judicial fiat in equity, afford appropriate relief.[21]

Discovery and Inspection of Objects

We have thus far dealt with the procedures provided preliminary to the filing of a lawsuit or the furnishing of an answer in a pending case where, as the party himself must allege, it is impossible either to file the suit or to prepare and file the answer without first securing the information sought to be obtained.

Probably the most extensive use of discovery practice and procedure, however, is in those processes which are employed by the parties to secure information during the course of pending litigation.

A fairly recent and completely practical use of this remedy of discovery is to be found in the case of *Driver v. The F W Woolworth Company*.[22] In that case the action for discovery was instituted by the defendant, the F. W Woolworth Company, which had been sued for dam-

[21] See Pike and Willis, *The New Federal Deposition Discovery Procedure*, 38 COLUM. L. REV. 1179, 1191 (1938) "When a litigant finds it necessary to discover facts he should not be barred merely by the accident that a person having the information is not a party to the suit."

[22] 58 Ohio App. 299, 16 N.E.2d 548 (1938)

ages allegedly resulting from the use of a certain mascara sold by it to the plaintiff in the original action, and alleged to have resulted in incurable damage and infection to her eyes and skin. The petition of the Woolworth Company alleged that it was unable to file its answer in the damage suit,

> for the reason that the plaintiff is withholding from the defendant evidence which is necessary for the defendant to have before an answer can be filed. The plaintiff has in her possession a portion of a tube of mascara which she alleges she purchased at one of the defendant's stores in the City of Canton. She alleges that this mascara contains poisonous harmful and injurious ingredients. Defendant has demanded that she produce said tube of mascara so that the same may be analyzed by a reputable chemist for the purpose of determining what if any poisonous, harmful and injurious ingredients are in said tube Plaintiff has been advised by her counsel not to permit said tube of mascara to be analyzed and this is being done for the purpose of hindering and preventing the defendant from filing its answer to the petition. Wherefore this defendant prays the court for an order requiring said plaintiff to produce said tube of mascara in court or deliver same to the defendant or have said tube of mascara analyzed by a reputable chemist and furnish the defendant with a copy of said analysis.[23]

The trial court sustained a demurrer to this petition for discovery, but the appellate court reversed and ruled that the petition stated a good cause of action. The appellate court made two interesting points. First it held that the mere sustaining of a demurrer to a petition for discovery constituted a reviewable order, contrary to the general rule which requires the dismissal of a petition before the sustaining of a demurrer can be reviewed by an appellate court. In the next place the court ruled that the defendant was entitled to the information which it sought *before* it could be required to file its answer. It is true that this ruling by the appellate court dealt with a question which was then moot since, upon the sustaining of the demurrer, the plaintiff, as defendant in the damage suit, elected to file its answer in that action. Nevertheless, the court discussed the question thoroughly and arrived at what appears to be a completely logical conclusion. It is a much more general practice today, and has been for many years, for defendants who find themselves in a comparable situation to avail themselves of other equally practical and much more readily obtainable remedies. Common instances include the filing of a motion in the damage suit demanding the right of inspection or the right to examine and to test a particular product or piece of equipment in the possession of the plaintiff, the special properties or infirmities of which constitute the basis for plaintiff's claims.

In the *Woolworth* case counsel for the defendant, the injured party, argued that the tube of mascara was their client's property, that the client

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[23] *Id.* at 300, 301, 16 N.E.2d at 549.

had no funds with which to procure and provide a chemical analysis and that it would be unfair to require the client to be faced with the testimony of plaintiff's specialists. The court rejected this argument and held that "the real issue in this case was whether this article, purchased and used, caused the injury which the plaintiff sustained. That is a question of fact, and the litigants were entitled to have all competent evidence bearing upon that issue."[24] In its opinion, the court cited and relied strongly upon a decision of the Supreme Court of New Hampshire in the case of *Reynolds v. Burgess Sulphite Fiber Co.*,[25] regarding it as the leading case on discovery dealing with the propositions which have been raised in opposition to the right of discovery. The Ohio court was indeed astute in its evaluation of the *Reynolds* case, and this review would fall far short of its mark if a detailed discussion of this decision were omitted.

The New Hampshire case goes one step further than any reported decision in Ohio. There the action for discovery was brought by a plaintiff, an administratrix, who had already filed an action at law for damages, which was pending at the time the action for discovery was instituted. In the wrongful death action it was alleged that the defendant had negligently caused the death of the decedent by furnishing him improper, unsuitable and dangerous machinery for use in his employment. In the action for discovery, the plaintiff sought to inspect the pieces of a broken strap on the connecting rod of an engine, which allegedly caused the decedent's fatal fall. The broken strap was in the defendant's possession, and plaintiff's counsel sought to examine it to prepare their case properly for trial.

The trial court sustained a demurrer to the petition for discovery. This ruling was reversed by the Supreme Court of New Hampshire in a lengthy opinion in which that court declared:

> The infringement of property rights in such cases is justified upon the grounds that it is necessary to the *Administration of justice* As has been seen, the remedy for discovery in aid of actions at law was introduced for the very purpose of securing proper trials therein. To warrant discovery, it is not necessary that there should be absolutely no means of proving plaintiff's case without it. A party may maintain a bill for discovery either because he has no proof or wants it in aid of other proof.
>
> It is evident that expert testimony may be competent upon the issue to be tried, whether it relate to the form of the strap, the manner of its construction or the character of the materials from which it was made. The defendants have ample opportunity to procure such testimony. *Justice requires* that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has

[24] *Id.* at 304, 16 N.E.2d at 550.

[25] 71 N.H. 332, 51 Atl. 1075 (1902)

> confidence. There cannot be a fair trial of a case unless such opportunity is given to the plaintiff. (Emphasis added).[26]

Again the reader is warned that the modern practice is somewhat different than that which was required in the New Hampshire case, but it is extremely important to emphasize that it is only the *procedure* which is different. The rights of the parties to a discovery of information in the custody or under the control of an opposing party are today precisely those which were set forth in the opinion of the New Hampshire court. And what is even more important, the *basis* for the right of discovery in modern practice is precisely that which was set forth in the *Reynolds* decision. Under modern practice, however, if the *theory* of the plaintiff's case or of the defense can be evolved without the necessity of an advance inspection of equipment or of a product around which the action revolves, then the customary procedure at present is to procure such an inspection upon the filing of a motion for that purpose.

An example of the modern practice will be found in the case of *Placke v. Washburn*.[27] That case involved a separate and independent action for discovery at the time when there was pending between the same parties an action for damages for breach of contract. The court sustained a demurrer to the action for discovery, declaring that the plaintiff in that action could have obtained the same information by the use of interrogatories or depositions in the original action. The point of importance, of course, is not the mechanics by which the information could have been obtained in the original action, but the fact that it could have been so obtained.

WRITTEN INTERROGATORIES

Introduction

Leaving aside for the moment the special remedies provided by Ohio statutes for the production and inspection of books, documents and records, or the furnishing of copies of the same, information is secured by parties to pending litigation in one of two ways, either by written interrogatories or by oral depositions.

It is obvious that an oral deposition affords a much more flexible process for securing desired information. Among the many reasons for this is the fact that the person questioned cannot know in advance the specific question he will be called upon to answer, and cannot have the time or opportunity to prepare a studied reply. On responding to written interrogatories he has ample time to study and to prepare his answers

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[26] *Id.* at 335, 339, 51 Atl. at 1077, 1078.

[27] 69 Ohio L. Abs. 565, 126 N.E.2d 610 (1953).

carefully and, in a large number of instances, to phrase his responses so as to make them self-serving. Moreover, counsel in the course of oral depositions may phrase questions according to the answers already received and, frequently, by adroit examination and cross-examination, secure additional information of utmost value.

The phase of this procedure with which we are here most concerned is the scope and the extent of the examination which may be conducted and of the questions which may be propounded, whether written or oral. Generally speaking, the rules and limitations surrounding written interrogatories are somewhat more restrictive than those relating to depositions. The statutes of Ohio which are involved at this point include Revised Code sections 2309.43, 2309.44 and 2309.45:

> A party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issues made in the pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath by the party to whom they are propounded, or if such party is a corporation, by the president, secretary or other officer thereof as the party propounding requires.[28]
>
> When annexed to a petition, the interrogatories provided for by section 2309.43 of the Revised Code shall be answered within the time limited for answer to the petition; when annexed to the answer, within the time limited for a reply; and when annexed to the reply, within the time allowed for an answer. Further time may be allowed in all cases by the court, or a judge thereof in vacation.[29]
>
> Answers to interrogatories may be enforced by an order of dismissal, judgment by default, or by attachment, as the justice of the case requires. On the trial, such answers, so far as they contain competent testimony on the issues made, may be used by either party.[30]

The provisions of the code above quoted will be found in the chapter dealing with pleadings. A further provision, however, will be found in the chapter of the code dealing with evidence:

> At the instance of the adverse party, a party may be examined as if under cross-examination, orally, or by way of deposition, like any other witness, by way of written interrogatories filed in the action or proceeding pertinent to previous pleadings of such party, or by any one or more of such methods.
>
> Unless demurred to or otherwise ordered by the court, each of such written interrogatories shall be plainly and fully answered in writing under oath within thirty days. No party may, without leave of court, file more than one set of interrogatories to be answered by the same witness.
>
> If the party is a corporation, any or all of the officers thereof may be so examined at the instance of the adverse party. The party calling for such examination shall not thereby be concluded but may rebut it by evidence.[31]

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[28] OHIO REV. CODE § 2309.43.

[29] OHIO REV. CODE § 2309.44.

[30] OHIO REV. CODE § 2309.45.

[31] OHIO REV. CODE § 2317.07.

Judicial Limitations

It is at this point that we run into the ancient conception dividing evidence in a lawsuit, whether written or oral, according to the claims of the respective litigants, and holding in effect that one is only entitled to secure evidence which will shed light upon his own claims. Although this doctrine has been repeatedly shown to be wholly fallacious and illogical, some courts still adhere to it directly and vestiges of it will be found attached to many fairly current decisions. As long ago as 1892 the United States District Court for the Northern District of Ohio, interpreting the Ohio statute dealing with interrogatories, declared:

> Notwithstanding plaintiff's statutory right to examine defendant as a witness upon all matters in issue, the court will require defendant to answer interrogatories within proper limits, because evidence thus put in the pleadings is of more advantage to the plaintiff than when contained in depositions.[32]

The lawyers of today will find quite remarkable the decision of the Court of Common Pleas of Ashtabula County in the case of *Russell v. Lakeshore & Michigan Southern Railway*,[33] which contains one of the most thorough discussions of the nature and extent of discovery and interrogatories that will be found in any case reported to this date. The fact that the decision will now appear so strange is a fine example of how, within a span of only two or three decades, courts may completely reverse their point of view on a subject of prime importance to the bar and to all litigants. In that case the defendant's train struck and killed the plaintiff's decedent, who was driving a horse and buggy. The defendant attached to its answer a number of interrogatories inquiring, among other things, concerning the following:

> 1. What acts of care did the plaintiff decedent exercise in approaching the crossing?
> 2. Did the horse driven by decedent approach the crossing on a walk, trot, or run?
> 3. Did the decedent look and listen for approaching trains?
> 4. Did the decedent have full control of her horse at and just previous to driving upon the crossing?[34]

After reviewing the history of discovery procedure, the Ohio statute and statements from various text writers, the court said:

> It is further a well established rule that interrogatories cannot properly be asked except concerning matters pertinent to the pleading to which they are attached. The fundamental rule on this subject is that the plaintiff's right to a discovery does not extend to all facts which may be material to

[32] Slater v. Banwell, 50 Fed. 150 (C.C.N.D. Ohio 1892) (syllabus #2)

[33] 6 Ohio N.P.(n.s.) 353, 17 Ohio Dec. 435 (1907).

[34] *Id.* at 354, 17 Ohio Dec. at 436.

> the issue, but is confined to those which may be material to his own title or cause of action. It does not enable him to pry into defendant's case or find out the evidence upon which that case will be supported.
>
> It may be easily perceived that answers to the inquiries propounded in this case would be very convenient to the defendant, and perhaps beneficial to its interests in learning, in advance of the trial, the position and evidence of the adverse party upon various propositions, yet that desire cannot properly be granted. [35]

The court accordingly granted the motion of the plaintiff to strike all of the interrogatories.

Before the reader arrives at the conclusion that these principles are almost ancient history and the decision of the court almost laughable in the light of established modern practice, it should be recognized that these rigid rules relied upon by the court die hard and adherence to them will be found on the bench today.

Twenty-five years after the decision in the *Russell* case, the court of Common Pleas of Huron County decided the case of *Ward v. Mutual Trucking Company*.[36] It is unnecessary to do more than examine the syllabus of the *Ward* case to learn how strongly the court adhered to the old rules, which at that late date appeared to have been almost forgotten:

> Interrogatories annexed to a pleading by virtue of Revised Code section 2309.43 may be used to aid a party in supporting his own cause but not to help him to destroy the cause of his opponent.
>
> Interrogatories propounded to the plaintiff by the defendant which seek disclosure of evidence to be used by the plaintiff in establishing his damages are improper.[37]

In that case the court again reviewed at great length the history of discovery practice and procedure, citing *Chapman v. Lee*, Pomeroy's Equity Jurisprudence and the ancient Connecticut decision in the case of *Downie v. Nettleton*,[38] cited in 1907 by the Ashtabula trial court. The court even went back to a decision of the Supreme Court of Massachusetts in 1854 in which that court, after expounding at great length on the subject of discovery, confirmed the old rule that it does not extend to a discovery of the manner in which the opponent's case is to be established.[39]

The decision in the *Ward* case was rendered by a trial judge who later found himself presented with the same problem as a member of the appellate bench. Notwithstanding many recent decisions among the reported Ohio cases indicating the adoption of an entirely different point of view and pointing out the fallaciousness of the reasoning of the older

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[35] *Id.* at 359, 360, 17 Ohio Dec. at 440, 441.

[36] 1 Ohio Op. 456, 22 Ohio L. Abs. 636 (1933).

[37] *Ibid.* (syllabus).

[38] 61 Conn. 593, 24 Atl. 977 (1892).

[39] 68 Mass. 558 (1854).

authorities, this judge still adhered to the old rule in a decision rendered in 1938, and successfully persuaded both of his associates on the bench to concur. The syllabus of that case contains the following pronouncement:

> The primary purpose of interrogatories appended to a pleading and required to be answered by an opposing party is to enable the interrogating party to properly plead his cause or defense.[40]

The judge added in his opinion:

> The opinion of the writer in regard to these statutes in their relation to pleading is expressed in *Ward v. Mutual Trucking Company.* From that opinion it is manifest that in my judgment the demurrer to these two interrogatories should also have been sustained, but that was not done. The use of answers to interrogatories as evidence seems to be but incidental to the prime purpose — pleading.[41]

These cases are cited as a prime example of our warning that the old rules die hard and will continue to find supporters upon the bench even today. It is perfectly clear that there is nothing whatsoever in the language of Revised Code section 2309.43 to indicate the purpose which the court attributed to it in the cases just discussed. The real purpose of the statute, which is to enable a party to secure information for whatever value it may be to him in preparing a pleading, in preparing for trial, or as a basis for securing further information, appears not even to have been considered by the court in these cases.

The intransigent judge to whom we have referred will be found still pursuing the same rigid views as late as 1950 notwithstanding the fact that, by that date, a very different and far more liberal point of view was evidenced by the decisions of other courts throughout the state. In both the syllabus and in the opinion written by him in the case of *Sterling v. Hanley Motor Sales, Inc.*,[42] decided by the Court of Appeals of Lucas County, will be found the statement: "The purpose of annexing interrogatories to a pleading is for discovery to enable a pleader to prepare and plead his own case and is not to help him destroy the case of his adversary."

Perhaps the lawyers of the state were partly to blame for the length of time it took to sweep out some of the cobwebs which enmeshed this valuable procedural tool. In 1909 the Common Pleas judge of Wayne County took occasion to observe:

> The propounding of interrogatories in a pleading has not been much resorted to under our modern practice, consequently authorities in this

[40] Schuldt v. Associates Investment Co., 61 Ohio App. 213, 22 N.E.2d 572 (1938) (syllabus #1).

[41] *Id.* at 215, 22 N.E.2d at 573.

[42] 87 Ohio App. 362, 368, 95 N.E.2d 273, 276 (1950)

> state are not numerous, but we think they are sufficiently so to furnish all the law on this subject necessary.[43]

The court in that case was called upon to consider a demurrer to interrogatories which were attached to what, according to the trial judge, "the defendant pleases to call his answer." Apparently the existing light on the subject, which the court found to be all that was necessary, was still quite dim, although the judge was probably in agreement with what were then the best minds of his time when he declared that:

> a proceeding under this statute was not a mere fishing expedition, but was intended as a means of discovery, not of his opponent's cause of action or ground of defense, but of his own cause of action or ground of defense.[44]

The court ruled that since the answer of the defendant apparently raised no "issues," it was not proper to attach any interrogatories to that answer, adding:

> This being the true principle upon which the right of discovery depends, how can this court say that any interrogatory is necessary, pertinent or useful to this defendant when the court is not notified as to what the defense is to be?[45]

However, the glimmer of a brighter light was occasionally to be seen even in those relatively early days. The Court of Common Pleas of Franklin County was required to rule upon interrogatories attached to a petition in 1904, and made the following sensible comments:

> The pertinency of the interrogatories now in question must be determined largely by the equitable rules of practice under the old action of discovery.
>
> It is manifest that all interrogatories having for their object a discovery may loosely be called "fishing," and it is therefore no objection to an interrogatory that they require from the defendant information which may be detrimental to the defendant. The real requirement is that the interrogatory itself be pertinent. In other words, where the information sought by the interrogatory will be material or relevant to the relief sought by the petition a demurrer to the same should be over-ruled. Whatever abuse may have grown up under the common law practice with reference to pleadings, it certainly now is well settled that under the code the law does not favor nor encourage technical pitfalls or legal ambuscades.[46]

The language employed by that court in 1904 indicated that the judge was several decades ahead of his day. The same reasoning still may be effectively used a half century later. The chief difference will be in the

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[43] Dye v. Buchwalter, 8 Ohio N.P.(n.s.) 630, 632, 19 Ohio Dec. 791, 793 (1909).
[44] *Id.* at 632, 19 Ohio Dec. at 793.
[45] *Ibid.*
[46] Graham v. Ohio Telephone & Telegraph Co., 2 Ohio N.P.(n.s.) 612, 614, 15 Ohio Dec. 200, 202 (1904).

interpretation of the word "pertinent," since the modern usage will apply this word to interrogatories which relate to either "side" of a lawsuit, no matter which litigant propounds them. That this word is the key to the entire problem in any case involving the application of Revised Code section 2309.43 was recognized in many cases, as by the Superior Court of Cincinnati in 1905.[47]

Referring to the identical predecessor of the section now in effect, the court said: "The only requirement interposed by this section it will be observed is that the interrogatories be pertinent to the issue."[48] The court then added the following interesting and significant statement, which might well be kept in mind on many occasions in modern practice:

> The action being one at law for the recovery of money, under our code, plaintiff is entitled to all the relief to which she would have been entitled under the old bill of discovery.[49]

Again, notwithstanding the views appearing in many cases to the effect that the purpose of the statute was to aid the interrogator in his *pleadings,* we find the Common Pleas Court of Hamilton County declaring as long ago as 1907

> The object of filing interrogatories under our code pleadings is the same as that of a bill of discovery under the old practice, which was for the purpose of permitting the interrogator to compel the opposite party to furnish him *information that,* if pertinent to the issues in the pleadings, *might be used as evidence* in the trial of the case. for as a rule the interrogatories are framed to *secure evidence* and not the material facts upon which the pleading is founded. (Emphasis added).[50]

It appears that at least one judge a half century ago recognized the purpose and the use of this procedural device, the value of which is, even today, just beginning to become apparent to the bar.

Progress Under Modern Cases

Just how valuable the device can be will be found by an examination of a number of recent decisions. Each of these decisions, which sharpens the trial lawyer's working tools, and performs thereby an important service, will be considered here in chronological order.

In 1950 the Court of Common Pleas of Summit County considered carefully a demurrer to thirty-one interrogatories attached to the plaintiff's petition.[51] In this case the court wavers between what the court

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[47] Kleimeyer v. Payne, 16 Ohio Dec. 289, 3 Ohio L. Rep. 386 (1905).

[48] *Ibid.*

[49] *Id.* at 290, 3 Ohio L. Rep. at 387.

[50] Wild v. Cadwalder, 18 Ohio Dec. 565, 566, 5 Ohio L. Rep. 477 (1907).

[51] Leeper v. Nimer, 58 Ohio L. Abs. 500, 94 N.E.2d 286 (1950).

declares to be the established rules and what the court recognizes ought to be the current policy of the law. The difficulty which the judge encounters is noted at the outset of his opinion:

> This subject has always been rather confusing to the courts generally and to this court in particular.
>
> In the court's opinion the words "pertinent to the issue made in the pleadings," [Revised Code 2309.43] do not restrict the scope of the interrogatories to such as will enable plaintiff to properly plead his case on paper before trial.
>
> This method was provided to take the place of the old bill of discovery procedure which was cumbersome and expensive. However, even there the purpose was to enable a party to obtain such facts as might tend to *prove* his case, and not for the sole purpose of enabling him to plead his case properly on paper. (Emphasis added).[52]

At this point the court wavered and was certainly not correct in stating that:

> The authorities agree however that although the interrogatories may be directed toward answers which will aid the party putting them in the preparation of his case proper, they cannot be put so as to elicit from the answering party the nature of his defense.
>
> Nor should an adverse party be compelled to answer interrogatories where the answers are within the knowledge of the interrogator.[53]

It is regretful that this statement also reflects a lack of comprehension of the broad purpose and intent of the discovery statutes in general. It is frequently not sufficient that the interrogator knows or thinks that he knows the answer to a particular question. It may frequently be equally important for the interrogator to learn what his opponent believes to be the answer to that question, or whether his opponent will concede or deny that the answer to the question is what the interrogator believes it to be. In this manner through the device of a written interrogatory, as well as through the device of an oral deposition, a party to a lawsuit may be compelled to go on record in advance of the trial of the case, with respect to any matter of fact or of personal opinion that is pertinent to any of the issues raised by the pleadings.

The court then proceeds to indicate its recognition of the correct modern approach to the subject by declaring:

> In the final analysis the court has a great amount of discretionary power in the matter. After all a lawsuit should not be looked upon as a

[52] *Id.* at 501, 94 N.E.2d at 287. The court also called attention to an article by Byron E. Ford in the OHIO BAR (August 7, 1950) at 419: "The test of an interrogatory is whether it is pertinent to the issue.' Like many words, the word 'pertinent' can be used with some degree of elasticity by the courts. Generally speaking, the phrase means that interrogatories must be directly connected with the subject matter of the action or defense."

[53] *Id.* at 502, 94 N.E.2d at 287, 288.

> game or battle of wits. We should try to get at the *ultimate facts*, or at least those facts which are *not in dispute*, as is the theory in a pre-trial procedure. If we apply a *reasonable* and *liberal* interpretation, *either* side can use this method to advantage. (Emphasis added).[54]

Like the White Knight in "Through the Looking Glass," the judge appears to be constantly getting on and falling off his charger. In the next sentence of the court's opinion, it is difficult to determine whether the judge is on or off his horse at the moment when he states:

> In this court's opinion we should adopt a liberal policy but should not extend it to such an extent as to allow this procedure to take the place of calling the defendant for cross-examination on deposition.[55]

At any rate it is easy to imagine, after an examination of the foregoing comments by the judge, why the court found this subject confusing. It is only fair to add that opinions of the courts in many cases dealing with the subject indicate a somewhat similar, though certainly not as candidly an admitted state of confusion. There is no longer any justification for confused thinking on the subject, and it is high time that the courts cut loose entirely from any reliance upon the once prevalent doctrine that prevented a litigant from "prying into" the "case" of his opponent. After all, it is no invasion of his right of privacy. If a plaintiff has a valid cause of action and is entitled to prevail on the trial of a lawsuit, it is vital to his case not only to present the evidence in support of his petition, but to be prepared to meet the claims and defenses of his opponent. To be properly prepared, he should be informed concerning those claims and defenses in detail in advance of the trial. While it is *impractical* as a matter of practice and procedure to permit written interrogatories *completely* to take the place of oral depositions, there is no reason whatsoever to deny to either party the right to make use of written interrogatories, either to take the place of oral depositions in a substantial measure or to supplement such depositions to an important degree. Certainly there is nothing in the language of the statutes relating to depositions that invests them with a broader purpose or a more liberal scope than should be accorded the statutes regarding written interrogatories.

In 1951 the Court of Common Pleas of Cuyahoga County discussed this question at some length, and considered the right of the defendant to obtain the names and addresses of *witnesses*. After discussing the old equity rules and practice, citing Wigmore's statement that "the opponent cannot be asked to disclose the names of the witnesses to his own case,"[56] the court concluded:

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[54] *Id.* at 502, 94 N.E.2d at 288.
[55] *Ibid.*
[56] WIGMORE, EVIDENCE § 1856 (3rd ed. 1940).

> It would seem that the courts have moved away from the old theory that a lawsuit is a game of wits and that *secrecy* must surround a party's case until the day of trial. In the federal courts the federal rules of civil procedure have recognized the need of getting at the *truth* of controversies at an early stage with a view to clearing the issues and eliminating surprises. It is logical that the state courts should arrive at the same result. After all a lawsuit is a quest for truth; *relevant* matters testified to on deposition will be as true today as at the time of trial. (Emphasis added).[57]

In the same year the Court of Common Pleas of Hamilton County went back to the old rule for which there was certainly no longer any justification, and did so without any citation of authority, saying: "It appears to the court that the interrogatories are not needed by the plaintiff to properly plead their case, nor does it appear that they are pertinent, relevant or proper and for that reason the demurrers to the same are sustained."[58]

Also in 1951, the Common Pleas Court of Geauga County cleared away much of the remaining undergrowth in the case of *Sloan v. S. S. Kresge Co.*[59] The action was a personal injury case. The defendant attached to its answer the following interrogatories, among others:

> 1. What is the name and address of each doctor who attended the plaintiff? How many times and on what dates did each of them so attend her?
> 2. What is the name and address of each hospital at which plaintiff was attended? During what period of time was she confined to such hospital?
> 3. What is the name and address of each of the nurses, if any, by whom the plaintiff was attended, and as to each nurse state whether she was registered or practical and the dates each nurse attended the plaintiff?[60]

In overruling demurrers to each of the interrogatories, the court stated:

> No statutory reason explains why Ohio courts have permitted full latitude in the use of discovery by *deposition,* but have denied the equivalent latitude in the use of discovery by *interrogatory.* Thoughtful and experienced lawyers have pointed out that "interrogatories attached to pleadings afford a simple and inexpensive way of getting information from an adverse party" but point out that their scope has been limited.
>
> This court agrees that the words of [Revised Code section 2309.43] do not and cannot warrant the restrictions placed upon the use of interrogatory power by these prior court decisions. Therefore those decisions will not be followed. Accordingly it is concluded that a party may propound any interrogatory which seeks from his opponent information

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[57] Furman v. Central Park Plaza Corp., 65 Ohio L. Abs. 172, 176, 102 N.E.2d 622, 625 (1951).

[58] Wasserman v. West India Coffee Co., 62 Ohio L. Abs. 190, 195, 97 N.E.2d 429, 432 (1951)

[59] 59 Ohio L. Abs. 420, 97 N.E.2d 238 (1951).

[60] *Id.* at 421, 97 N.E.2d at 239.

> which is *relevant* to the issues of the action, and which information is not privileged. (Emphasis added).[61]

Outside of the successful culmination of litigation in which he is involved, few things are more pleasing and satisfying to a careful and thorough trial lawyer than a judge who, by painstaking and careful analysis and the application of fundamental reasoning, arrives at a logical solution of some troublesome legal problem. The result is even more satisfying when the correct solution of the problem requires the court to disregard a "respectable" line of authorities which have arrived at quite a different conclusion. This is particularly true when the result is reached by a trial court after long and careful study and in disregard of both trial and appellate decisions, which the court refuses to follow because they are lacking in sound reasoning and based upon a fallacious foundation. The *Sloan* case is an outstanding and encouraging example.

This case was cited with approval and followed by the Court of Common Pleas of Cuyahoga County in the following year, 1952, in a case in which the court was called upon to consider interrogatories attached to a plaintiff's petition.[62] In a carefully reasoned opinion the court again pointed out that the word "pertinent" contained the key to all of the problems raised by the demurrer. The court then referred to, and quoted at some length from the *Russell* case, declaring:

> This case was decided by the Common Pleas Court of Ashtabula County forty-five years ago. Apparently however the question here at issue has never been directly passed upon by the Supreme Court of Ohio. In the case of *Chapman v. Lee*, decided in 1887, there is *dicta* to this effect: "The doctrine and rules concerning the subject matter of discovery established by courts of equity, are believed to be still in force and to control the same matters in the new procedure (providing for interrogatories attached to pleadings, depositions)."
>
> With this as a starting point the court in the *Russell* case then proceeds to engraft the rules formerly applicable to bills of discovery upon the asking of interrogatories under the new statute. This court is of the opinion that the decision in the *Russell* case went far beyond the obvious intent of the statute and applied to interrogatories tests neither contemplated nor authorized by the plain, simple language of the law itself. This court sees no reason why at this late date a resort should be had to chancery rules which apply to bills of discovery. [63]

The conclusions reached in this case are in accord with the views previously expressed by this writer in an analysis of the earlier cases on this subject. The opinion in that case was rendered on September 30, 1952 and indicated, as did the opinion in the *Sloan* case, that the question at issue had not been *directly* passed upon by the Supreme Court of Ohio.

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[61] *Id.* at 427, 428, 97 N.E.2d at 243.

[62] Powers v. Ruelbach, 66 Ohio L. Abs. 30, 108 N.E.2d 876 (1952).

[63] *Id.* at 31, 32, 108 N.E.2d at 877, 878.

A few months earlier, however, the Supreme Court of Ohio had made direct reference to the statutes relating to interrogatories:

> The provisions of [Revised Code 2309.43] authorizing a party to annex to his pleadings interrogatories pertinent to the issue made in the pleadings vest in the trial court authority to determine on demurrer to such interrogatories the pertinence thereof and discretion in the enforcement of answers thereto.[64]

Undoubtedly one of the most thorough decisions on this subject was rendered in 1953 by the Court of Common Pleas of Hamilton County in the case of *Dieckbrader v. New York Central R.R.*,[65] in which the court adopts the modern interpretation of the statute:

> (The Statutory sections providing for interrogatories and depositions) were *intended* to obviate the necessity of filing the old chancery bill of discovery and to permit either side in a lawsuit to become *fully acquainted* with the facts pertinent to the issues in possession of other parties to the suit prior to the trial of the case; and thus aid the litigants to more completely prepare their case and thereby accomplish the maximum presentation of the issues at the trial and thus also accomplish substantial justice.

Before passing specifically upon the interrogatories before the court, the judge quotes at some length from the opinion of the United States Supreme Court in *Hickman v. Taylor*,[66] and also quotes in full the federal deposition and discovery rules 26, 33 and 34 of the Federal Rules of Civil Procedure.

The case is one of considerable importance as an example of the type and scope of information which can and should now be obtainable by the use of interrogatories attached to pleadings. It involved a collision between a tractor trailer and a train and the plaintiff was permitted by the court to obtain the following information:

> The name, address and job title of all crew members assigned to the train.
>
> The name and job title of each member of the crew actually on the train at the time of the collision.
>
> Where each member of the crew, by name and job title, was on the train at the time of the collision or within one minute prior thereto.
>
> What each member of the crew, by name and job title, was doing immediately prior to the collision.
>
> The date of all accidents which occurred during the year preceding the date of the accident at the crossing where the accident occurred.
>
> The names and addresses of all persons whose person or property was injured within a period of one year prior to the date of the collision at that crossing and the dates of the injuries to such person or property.

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[64] Collins v. Yellow Cab Co., 157 Ohio St. 311, 105 N.E.2d 395 (1952) (syllabus #1).

[65] 64 Ohio L. Abs. 586, 592, 113 N.E.2d 268, 274 (1953).

[66] 329 U.S. 495 (1947). This leading case is discussed in full at a later point in this article.

> Whether the accident was reported to the Public Service Commission (in this case, of Indiana) and if such report was made, a complete copy of the report.
>
> Whether a report was made to the Interstate Commerce Commission and, if so, a complete copy of that report.

With respect to the interrogatories concerning prior accidents at the crossing within the previous year the court had this to say:

> Evidence of prior similar accidents is admissible for two purposes and two purposes only. One, for the purpose of showing the dangerous character or condition thereof — whether or not a dangerous condition existed; and, two, to show notice to the defendant of such character or condition — to bring home to him notice of the danger or defect which is claimed to have caused the accident.[67]

With respect to the interrogatories concerning the names and addresses of all persons who had suffered personal injury or property damage at the crossing within the previous year, the court said:

> The information contained therein may enable the plaintiff to discover from such persons the character of the accidents in which they were involved, so as to possibly prove the similarity of those accidents to the accident in the case at bar. It is quite true that the names and addresses of the parties involved would not of themselves be admissible in evidence, yet such information could lead to the discovery of admissible evidence; and since interrogatories are used as a substitute for the old discovery proceedings under the authories above stated it is proper to seek such information through interrogatories.[68]

This case affords an outstanding example of the progress that has been made since the decision in the *Russell* case and others of the similar and earlier view which, unfortunately, is still adhered to by some of the courts in this state. The court in the *Dieckbrader* case made a thorough and careful analysis of the statutes and a reasoned appraisal of their purpose. The result is one which ought to be widely followed and applied.

The complete disparity of viewpoints on this subject cannot better be illustrated than by considering a decision rendered in 1954 by the Court of Appeals of Trumbull County.[69] With utter disregard for the numerous more recent decisions expounding the liberal point of view, the court, after lip service to the proposition that interrogatories are to be liberally construed, declares:

> Since the information must both be "pertinent to the issues" and, of course, admissible at the trial, and since the cardinal requirement of the petition, of the answer, and of the reply demands the use of "ordinary and concise language" there appears no reason why a court should not apply

[67] Dieckbrader v. New York Central R.R., 64 Ohio L. Abs. 586, 602, 113 N.E.2d 268, 281 (1953).

[68] *Ibid.*

[69] Eisaman v. Wiemer, 70 Ohio L. Abs. 199, 126 N.E.2d 92 (1954)

> simple brevity to the range of interrogatories. Demurrer to interrogatories was evidently suggested for that purpose therefore an additional requirement should be added. There is no necessity for permitting cross-examination through interrogatories.[70]

Here we find a remarkable and obviously a thoroughly unjustified example of interpretation of a statute which, as indicated in an earlier decision rendered in the same county by another judge, was so clear and unambiguous as to require no interpretation whatsoever. Certainly there is nothing in any of the interrogatory statutes justifying a confinement either of the interrogatories or of the answers to "ordinary and concise language," which is a phrase to be found only in the statutes dealing with the framing of pleadings. It appears therefore that this court has clearly engaged in the proscribed practice of judicial legislation not only by restricting the language of the interrogatories, but also by adding the further interpretive rule which would bar the interrogator from engaging in "cross-examination through interrogatories."

Since this is the latest reported decision dealing with the scope of interrogatories in Ohio, it is apparent that the practicing attorney can easily find authorities to support his position no matter on which side of the controversy he may find himself.

Procedure to Enforce Answers

Having determined, so far as possible, the extent and scope of interrogatories which may be propounded and information which may be secured, the question arises: In what manner may the interrogator enforce the privileges accorded him by the Ohio statutes? What procedure, what weapons may he employ to make certain he receives the information to which he is entitled? In part the answers to these questions are supplied by the language of the Ohio statutes, and in part the answers still remain to be furnished by cases as yet undecided.

In the light of a recent amendment of the Ohio statutes, the procedure depends upon the manner in which the interrogatories are propounded. If they are propounded by annexing them to a pleading, under the provisions of Revised Code section 2309.43, then the furnishing of the answers may be enforced under the provisions of section 2309.45. Assuming that no demurrers have been filed to the interrogatories or that such demurrers as may have been filed have been overruled, so that the party to whom they have been propounded is now required to answer, it is provided by section 2309.45 that: "Answers to interrogatories may be enforced by an order of dismissal, judgment by default, or by attachment, as the justice of the case requires."

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[70] *Id.* at 201, 126 N.E.2d at 93, 94.

The authority vested in the trial court by this statute is a summary power. Within the experience and to the knowledge of the writer, the full authority given the court by this statute has never been exercised. Generally speaking, the threat of its exercise by the court has been sufficient to procure from a recalcitrant party *some* answer to each interrogatory propounded. The real controversy occurs when an answer is furnished which, according to the party propounding the interrogatory, is not a proper answer, while the opposing party takes quite a contrary position. It is evident that, in attempting to resolve a controversy of this nature, a trial court will be very reluctant to exercise the full summary authority conferred upon it by the statute. Thus the result may not infrequently require one or more hearings before the court, frequently highly argumentative, before some compromise solution is reached which may well be unsatisfactory to both parties. However, no other means has been provided for enforcing the furnishing of answers to interrogatories attached to pleadings.

On the other hand, where the interrogatories are not attached to pleadings, but are simply filed in the action with the clerk, and propounded under the provisions of Revised Code section 2317.07, no statutory means or method of enforcing the answers to such interrogatories has been provided. It should be noted that the propounding of interrogatories under section 2317.07 is a privilege of very recent origin which was added to this section of the code in 1953. Whatever means may eventually be found to enforce the privilege granted by this section will have to be created by the courts themselves.

It seems clear, from the absence of any statutory means of enforcement, that the mere failure to answer interrogatories propounded under this statutory section vests in the court no authority to take any action whatsoever. This is particularly true since section 2317.07 is to be found in that chapter of the Revised Code dealing with the subject of evidence whereas the prior section, relating to interrogatories, which has been in effect for many years, is to be found in an entirely different chapter of the code dealing with pleadings. It is also clear that the court may not assume the authority to exercise such a summary power as that required for the dismissal of a lawsuit or the granting of a judgment by default, unless that power is clearly and expressly granted to the court.

It is suggested that an appropriate means of enforcing the furnishing of answers to interrogatories propounded under section 2317.07 would require first the filing of a motion by the interrogator for an order on the part of the court, directing that the party to whom the interrogatories were propounded be required to answer the same. Conceivably, on the hearing of such a motion, the court could consider any objections or

reasons which that party might advance as to why he should not be required to answer any one or more of the interrogatories. If, upon such a motion, the court directs the party to answer, he could then be adjudged in contempt of court for failure to comply with an order of the court, should he then fail to answer the interrogatories as directed. As a practical matter in either event, whether answering to interrogatories attached to a pleading or otherwise, the answers should be filed as a separate document in the cause and not attached to any pleading.[71]

Oddly, the methods of enforcing answers to interrogatories emphasize one more of the advantages to be found in the use of oral depositions in comparison with written interrogatories, where the power of a notary public to commit summarily for contempt, as we shall hereafter find, far exceeds any authority vested in the court itself.

ORAL DEPOSITIONS

Introduction

When we turn to the question of the scope and extent of the examination of an adverse party on oral depositions, we find very few reported decisions in Ohio. Aside from the problem of privileged communications, which will be discussed at some length hereafter, it appears that there is in fact no limitation upon the right to cross-examine an adverse party on oral deposition, other than the obligation to avoid malicious or wilfully oppressive interrogation.

It should be borne in mind at the outset that the right to take a deposition is one thing and that, on the other hand, the right to use it is quite different. The right to take a deposition is an absolute right of either party to a lawsuit. It depends upon no conditions or qualifications whatsoever other than service of summons upon a defendant in the case. Revised Code 2319.06 provides:

> Either party may commence taking testimony by deposition at any time after service upon the defendant.

In taking advantage of the privileges accorded a plaintiff under this statute, it is the practice of some plaintiffs' counsel to file with the clerk of the court, or to leave in the hands of the sheriff, simultaneously with the filing of the petition, a notice to take depositions and a notary's subpoena directed to the defendant for the taking of his deposition as upon cross-examination. From the plaintiff's point of view this practice has the important practical advantage of giving the defendant the least possible time within which to prepare his story or to prepare the defenses

[71] See note 50 *supra.*

of his case before being called upon to give testimony under cross-examination. A further circumstance of vital importance is the fact that, except for some very recent and very limited restrictions imposed by judicial action, the taking of depositions is in no way under the control of the court. Depositions are taken in the manner provided by statute before a notary public, or on occasion, before a master commissioner vested with the same powers as a notary public. The notary public presides over the taking of the deposition not by virtue of any authority conferred upon him by the court, but by virtue of the authority conferred upon him to that end by statute.

The Court of Appeals of Lucas County correctly analyzed and stated the situation, declaring:

> but the taking of depositions by notaries public is governed by statute, and the notary public is not appointed by the court or an officer of the court, nor is he a party to the cause pending in the Common Pleas Court.
>
> The statutes of Ohio hereinbefore referred to give the notary the power, authority and processes of law, independent of the trial court, to take depositions and to punish by proceedings in contempt, a witness who refuses to answer. The notary's powers and processes flow from the statutory law on the subject — not from the court in which a trial is pending. [72]

This case was cited and specifically followed three years later by the Probate Court of Ross County.[73]

Compelling Answers On Oral Deposition

Before considering the scope of permissible examination or cross-examination by way of deposition, it may be appropriate to consider first what may or may not be done to secure answers to questions which a party or a witness refuses to answer or, on the other hand, to forestall or to prevent the furnishing of information which a party, witness or counsel believes to be improper.

Revised Code section 147.07, dealing with the powers and jurisdiction of notaries public, provides in part:

> In taking depositions, he shall have the power which is by law vested in justices of the peace to compel the attendance of witnesses and punish them for refusing to testify.

The Supreme Court of Ohio has recently clarified this section in the case of *In re Frye:*[74]

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[72] State *ex rel.* Bechtel v. McCabe, 60 Ohio App. 233, 235, 239, 20 N.E.2d 381, 382, 384 (1938).

[73] *In re* Estate of Albert Janes, 20 Ohio Op. 403 (1941)

[74] 155 Ohio St. 345, 354, 355, 98 N.E.2d 798, 803 (1951). See also, *Ex parte* Bevan, 126 Ohio St. 126, 184 N.E. 393 (1933).

> Since a commissioner or notary public is not invested with the ultimate authority to pass upon the relevancy, competency or materiality of testimony taken before him on deposition, he may order the witness to answer any question, even though objection is made thereto, subject only to the exclusion of the testimony by the court when offered at the trial.
>
> A witness refuses to answer any question at the risk of commitment for contempt, even though an answer would infringe any personal privilege or right granted by the constitution or statutes of the state. If committed for contempt, the witness is entitled in a habeas corpus proceeding to have the relevancy and competency of the matters inquired about in taking his deposition determined by the court.

This same power is vested in a commissioner appointed to take depositions. In 1943 this question was settled by the Supreme Court of Ohio, which ruled in what is generally referred to as the "second *Martin* case:"[75]

> A commissioner so appointed has no authority to commit a witness for contempt for refusal to answer any question unless, after being ordered by such commissioner to answer, the witness shall *unlawfully* refuse so to do.
>
> A witness who is not a party has no legal right, upon the taking of his deposition, to refuse to answer any question, upon the advice of his attorney, merely because the attorney believes that the testimony sought is irrelevant, incompetent or immaterial.

In pronouncing the foregoing rules, the court expressly overruled portions of two earlier decisions.[76] Since the commissioner does not possess the ultimate authority to determine the relevancy, competency or materiality of testimony taken upon deposition, the court held that the witness must answer any question when the objection is based upon those grounds, subject only to the exclusion of such testimony by the trial court.

Under this and many other Ohio decisions, it is clear that either a party or a witness who is being interrogated by way of deposition has only one method open to him to test the propriety of any question propounded to him, or his right to refuse to answer any question. In the event that a party or witness is committed for contempt by either a notary or commissioner, the only action available to him is the filing of a petition for a writ of habeas corpus. It was observed by the Supreme Court of Ohio in its opinion in the *Frye* case that:

> It must be recognized that this is cumbersome procedure with which to determine the rights and privileges of a witness whose deposition is being taken before a commissioner appointed by a court or before a notary public.[77]

The court then suggested a further method of procedure which, so far

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[75] *In re* Martin, Jr., 141 Ohio St. 87, 47 N.E.2d 388 (1943) (syllabi #3 and #4).

[76] The court overruled paragraph four of the syllabus in *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906), and *In re Martin, Jr.*, 139 Ohio St. 609, 41 N.E.2d 702 (1942).

[77] *In re* Frye, 155 Ohio St. 345, 355, 98 N.E.2d 798, 803 (1951).

as we know, has never been resorted to in this state, and which appears to be of doubtful value and seriously open to question. The court added:

> In cases where the nature and subject matter of the testimony sought by deposition can be anticipated in advance of the taking of the deposition, a witness may protect himself from the enforced disclosure of privileged or harmful matter by an appeal to a court of equity where equitable principles may be applied in determining the specific rights of the witness.[78]

Considerable ingenuity would be required in composing a petition for equitable relief in such a situation, in which the petitioner could only imagine or "anticipate" the questions that he feared might be propounded to him in a prospective deposition.

Request by Notary for "Instructions"

It should be noted here that in a number of the courts of Ohio, undoubtedly and most frequently in Cuyahoga County, a practice has been followed for many years with the tacit approval of the bench and the bar which in fact has no proper legal basis. This practice calls for the filing by the notary public of an application to the court for "instructions" with respect to the competency or propriety of a question or questions which the witness has refused to answer. This practice appears to have originated in 1887 as a result of an opinion by Judge Howard Taft, then a member of the Superior Court of Cincinnati, later to preside over the highest court of the land. In that early case Judge Taft noted:

> The regular and statutory mode of obtaining the opinion of the court on such a state of facts is for the notary to commit the witness for contempt The witness may then make an application to the court for his release . , and in considering the application the court must review and pass upon the ground of commitment.
>
> I am informed however by former members of this court that on the principle that the notary engaged in taking depositions in a case pending in this court is as much an officer of the court as a master or a referee appointed by the court, Notaries have been allowed to consult the court and obtain an opinion as to the relevancy and competency of a question put the witness whose deposition is being taken when the witness refuses to answer.[79]

As pointed out in the more recent decisions previously discussed, and in particular by the Ohio Supreme Court in the *Frye* case, the judge had been misled by his associates concerning the status of the notary public and the power of the court over the notary public. No Ohio authority was cited in support of this practice, but after referring to a decision by

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[78] *Ibid.*

[79] Shaw v. Ohio Edison Installation Co., 9 Ohio Dec. Reprint 809, 17 Week L. Bull. 274 (1887).

the Supreme Court of Wisconsin, Judge Taft added: "This practice seems to be approved, although under the Code there is no such provision."[80]

Beginning with a decision in 1901 by the Court of Common Pleas of Hamilton County in the case of *In re Miller*,[81] the absence of any legal foundation for this practice was noted and its use has been uniformly rejected by the courts. This decision is one of the most careful, thorough and well-reasoned opinions to be found on the general subject of the taking of depositions, the scope of depositions and the power, authority and conduct of notaries public. After noting earlier supreme court decisions holding that a notary has no power to determine whether a question which the witness has refused to answer is relevant, the court discussed the practice invoked by Judge Taft:

> This would be the proper practice were the notary an officer of the court, as the master or referee appointed by the court of chancery was to the latter court. But the notary is not. He is an independent officer, appointed by the governor, has no connection with and is not under the control of the courts, nor would he be bound by the instructions of the court, but could totally disregard them. The only way therefore in which a witness can hope to have his rights established is to go to jail, and then have counsel sue out a writ of habeas corpus, bring his body before the court and have the latter pass upon the propriety of the question.
>
> Such an anomaly in our jurisprudence requires correction.[82]

In the later case of *In re Estate of Albert Janes*,[83] an application was made by a notary public to the Probate Court of Ross County for instructions as to whether or not a witness should be required to answer certain questions. In this connection the court stated:

> Upon reason and authority therefore it seems clearly established that applicant is not an officer of this court, that applicant's power to take depositions and punish for contempt is independent of this court and amply provided for by statute, and no other statutory method having been provided therefore as a consequence it follows that this court is without *jurisdiction* to grant said application. (Emphasis added).[84]

Fifty-five years after the Hamilton County court found that this procedure was "such an anomaly in our jurisprudence (as to require) correction," and for the first and only time within that period of more than a half century, the Cuyahoga County Bar Association, in 1955, prepared and caused to be introduced in the 101st General Assembly of Ohio two bills—one to provide for the scope of testimony which might be taken

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[80] *Ibid.*

[81] 8 Ohio N.P. 142, 11 Ohio Dec. 69 (1901), *aff'd*, 65 Ohio St. 128, 61 N.E. 701 (1901).

[82] *Id.* at 145, 11 Ohio Dec. at 75, 76.

[83] 20 Ohio Op. 403 (1941).

[84] *Id.* at 405.

on deposition and a second to provide a method of enforcement for the taking of testimony upon deposition.[85] It is anticipated that these bills will again be introduced in 1957 in the 102nd General Assembly and that the Legislature will find that they fill a serious gap in existing discovery practice and procedure. If adopted, they will do away with the cumber-

[85] H.B. 785, 101st General Assembly (1955) "Any party and any witness, may be examined upon the taking of a deposition with respect to any matter, not privileged by statute or by the Constitution of Ohio or of the United States, which is relevant to the subject matter of any action or proceeding, or relevant to the claims of any party to such action or proceeding, whether such matter relates to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things known to the person being examined.

"Upon interrogation, in the course, of such deposition, of any witness or party, with respect to the identity and location of any person or persons having knowledge of relevant facts concerning the subject matter of the action or proceeding or the claims of any party to such action or proceeding, such witness or party shall be required to state the identity and the location of such person or persons whenever the identity and location of such person or persons is known to the witness or to the party or to an agent or counsel of such party. Knowledge of any agent, employee or counsel of a corporate party concerning the identity and location of such person or persons shall be regarded as knowledge of the party with respect thereto."

H.B. 784, 101st General Assembly (1955) "A witness or a party to an action or proceeding shall respond to all questions propounded to him upon direct examination and cross-examination.

"In the event a witness or a party fails or refuses, upon advice of counsel, or for any other reason, to respond to a question propounded to him on direct or cross-examination, such witness or party shall thereby be in contempt of the court or administrative board before which the action or proceeding is pending.

"The power to punish a witness or party for such contempt is vested in the notary public or commissioner before whom the examination is being conducted, subject to the limitations upon the authority of the notary public or commissioner imposed by law. Such power, however, shall not be exercised before the expiration of ten days following the hearing at which such contempt takes place.

"Within a period of ten days from the date of a hearing during which a witness or a party is in contempt for failure or refusal to respond to a question or questions propounded to such witness or party, he may be purged of contempt by filing with the court or administrative board before whom the action or proceeding is pending an application for that purpose.

"The court or board may purge the applicant of contempt if it finds, with respect to the question or questions which the applicant has failed or refused to answer:

1) The question is wholly irrelevant and immaterial to the subject matter of the action or proceeding and to the claims of any of the parties to such action or proceeding and does not appear to be reasonably calculated to lead to the discovery of admissible evidence.

2) The information sought to be elicited is privileged by statute or under the Constitution of Ohio or of the United States.

3) The information sought to be elicited relates to secret processes, developments or research which need not be disclosed.

4) The examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the applicant or a party to the action or proceeding.

"Such application shall be heard and determined promptly."

some and clearly anomalous procedure for the protection of witnesses which has been followed for almost a century.

Duty of a Witness

As the law now stands it is the absolute duty of a witness to answer a question propounded to him on a deposition, providing the information sought to be elicited is not privileged. Perhaps the leading case announcing this rule is *DeCamp v. Archibald*,[86] decided by the Supreme Court of Ohio over sixty years ago, in which the rule was announced in the syllabus:

> Where the question propounded involves no question of privilege on the part of the witness it is his duty to answer if ordered by the notary to do so. The question of its competency is a matter for the determination of the court on the trial of the action in which the evidence is taken, and if he refuses to do so he may be committed as a contumacious witness.

The reader may wish to, and should compare this decision with that in the second *Martin* case, and with other more recent decisions. Again, however, let it not be said that those who, by virtue of circumstances, are forced to adopt an opposite view are without support or authority. Those lawyers will prefer to cite and rely upon the case of *Ex parte Jennings*,[87] a decision by the Supreme Court of Ohio rendered in a habeas corpus proceeding, in which the court said in its opinion:

> The language of the section conferring authority upon the officer to punish a witness for refusing to answer "when lawfully ordered" implies that punishment cannot be imposed for every refusal. The law has not invested such officers with arbitrary and omnipotent power to compel a witness to answer all questions however incompetent, irrelevant, immaterial or inadmissible. The refusal to answer such questions is not necessarily a contempt.
>
> We do not suppose that any interest which the witness may have in concealing the facts which the question propounded was designed to elicit would excuse him from answering if the facts were relevant to the issues on trial; nor that the sincerity of his belief that the facts were irrelevant would shield him from imprisonment if the court should be of the opinion that they are relevant. If he refuses to answer upon the ground that the answer is incompetent he does so at his peril. It seems, however, entirely clear that in this case the opinion of the witness as to the irrelevancy of the question is correct.

Perhaps a party or a witness, or counsel for a party or witness refusing to answer a question on deposition may take some comfort from the *Jennings* case. It appears, however, that the comfort may be somewhat cold, since the court has the last guess concerning the relevancy or materiality of the question. The decision in the *Jennings* case was put very

[86] 50 Ohio St. 618, 35 N.E. 1056 (1893) (syllabus #3).
[87] 60 Ohio St. 319, 328, 331, 54 N.E. 262, 263 (1899).

largely upon a question of personal privilege. In this regard, this case has not been expressly overruled. However, it should be noted that many of the specific pronouncements have been subsequently discredited, particularly in the second *Martin* case.

Generally speaking it is extremely difficult, if not impossible, for a court to rule upon the relevancy or materiality of questions propounded during the course of a deposition, if they appear to have even a remote connection with the subject matter of the suit or any of the issues raised. At the time of trial a court may rule upon the question of relevancy or materiality with some degree of assurance, having before it the testimony of all the witnesses or at least some adequate knowledge of what that testimony will be, rather than the testimony of the single witness whose conduct is in question. It is to be hoped that the procedure suggested by the Cuyahoga County Bar Association will relieve the courts of most of these troublesome questions.

In an early decision by a trial court of Hamilton County, which was rendered during the same year in which the Supreme Court issued its opinion in the *Archibald* case, the trial judge arrived at the same conclusion subsequently expressed by the Supreme Court in the *Jennings* case.[88]

> When a witness refuses to answer, the cause of the commitment is a refusal to answer when lawfully ordered. He cannot be lawfully ordered to answer unless the question put to him is pertinent and relevant to the issue in the case. To specify particularly the cause of commitment in such case the order must show that the witness refused to answer a pertinent and relevant question and to do that it should set out facts enough to make it appear on the face of the order that the question asked was pertinent and relevant.

If the observation of the judge in the foregoing case correctly states what is required of a notary public who is committing a witness for contempt for refusal to answer a question, we find the existence of a somewhat vicious round robin, in which it is somewhat difficult to determine who is the victim. It appears from the cases already referred to that a party or witness refuses at his peril to answer a question put to him on a deposition. But what of the notary public who is obliged to commit a witness for contempt for refusal to answer a supposedly pertinent or relevant question when the notary himself has no authority to determine whether the question is pertinent and relevant? Does he not also act at his peril in committing a witness for contempt under such circumstances, leaving himself open to a possible claim of false imprisonment if it should turn out that the commitment was not justified? Such con-

[88] *Ex parte* Woodworth, 6 Ohio Dec. 19, 21 (1893).

siderations make it all the more remarkable that this procedure has existed in Ohio for a century without correction.

In 1942 the Ohio Supreme Court decided the first *Martin* case,[89] in which the court held that it was

> error for the Ohio court in the habeas corpus proceeding to deny a hearing to a witness on the relevancy and competency of the question asked, for refusal to answer which the witness was committed; such denial of a hearing constitutes a denial of remedy by due course of law and violates the witness' constitutional rights.

However, a short time after the decision in the first *Martin* case, the complexion of the court was altered. The opinion in that case was written by Judge Bettman and Judges Turner, Hart and Matthias concurred. Chief Justice Weygandt and Judge Zimmerman dissented. Just one year later, with two new judges on the bench, the decision in the first *Martin* case was reversed, and the court held that a witness had no right to a determination of the relevancy or pertinency of a question in a habeas corpus proceeding. In the second *Martin* case the majority opinion was written by Judge Bell, and this time the Chief Justice and Judge Zimmerman, together with Judge Williams were on the majority. Judges Turner, Hart and Matthias, who had been on the majority in the first *Martin* case, now constituted the dissenting minority. In the second *Martin* case a number of reasons, eminently sound, were advanced in support of the decision. Among them were the following:

> To hold that a witness could decide for himself upon the relevancy of a question against the opinion of the judge presiding or the officer taking the deposition would be subversive of all order in judicial proceedings.
>
> Relevancy relates to the scope of the investigation and therefore is the concern of the parties alone. The recognition of a privilege of this sort would add innumerable opportunities to make a claim of privilege and would thus tend to complicate a trial. The opinion of the witness that the question is irrelevant is entitled to no consideration. If that is his only objection to answering there can be no injury result to him from compelling him to answer. If questions are improperly asked they must be answered subject however to be excluded whenever such testimony shall be offered in any legal proceeding. By such a course the law is magnified and rendered efficient and effectual and the just and lawful rights of all parties fully protected.[90]

The court quoted from a decision of the Supreme Court of Iowa,[91] emphasizing its agreement, with the following observations:

> Even though many of the questions propounded were subject to objection properly interposed, which objections would undoubtedly have been

[89] *In re* Martin, Jr., 139 Ohio St. 609, 41 N.E.2d 702 (1942) (syllabus).

[90] *In re* Martin, Jr., 141 Ohio St. 87, 98, 47 N.E.2d 388, 393 (1943).

[91] Finn v. Winneshiek District Court, 145 Iowa 157, 123 N.W 1066 (1909).

> considered and made effective upon the trial of the case, this was no reason in itself why the witness should not have answered them when before the commissioner. It would be intolerable to hold that a witness whose testimony is being taken by deposition may refuse to answer, have the propriety of the question determined by the court, and upon an adverse ruling bring the case to this court and delay and prolong the trial of the case upon its merits indefinitely.[92]

The court thus concluded in the second *Martin* case that the commissioner properly requested the witness to answer certain questions, and that the witness was guilty of an *unlawful refusal to answer* and was therefore properly committed for contempt.

It should be pointed out, however, that there was a strong dissenting opinion in this case, and that both the first and second *Martin* decisions were rendered by a court divided four-to-three. The specific issue before the court in those cases has not been presented to the supreme court since 1943. Since the court directly reversed its position in the space of one year, it would be impossible to predict what the attitude of a new majority might be at any particular time.[93]

The writer believes the decision in the second *Martin* case to be logical and correct. In order to determine whether a particular question or a series of questions propounded to a witness were relevant or material to the issues in a lawsuit, the parties might well be compelled to produce a great mass of evidence for the sole purpose of convincing the judge in a habeas corpus case as to the relevancy of such questions to the issues in the lawsuit, which had not yet been tried. There is no justification for a prolonged and completely ancillary contest of this nature.

Subpoena Duces Tecum

Not only is a witness obliged to appear and to testify, but he is equally obliged to obey the subpoena of a notary public to bring with him whatever books or records in the possession or custody of the witness may be demanded.

This rule was announced by the supreme court in 1901 in the case of *In re Rauh*.[94] In that case a subjoena was issued to a merchant with whom the defendant in an action had been doing business, and the witness was directed to produce books of his own business disclosing his transactions with the defendant, which the witness refused to do. The court held that the witness could be compelled to produce the records, stating:

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[92] *In re* Martin, Jr., 141 Ohio St. 87, 100, 47 N.E.2d 388, 394 (1943).

[93] See, for example, *In re* Grosswiller, 47 Ohio App. 409, 191 N.E. 910 (1934).

[94] 65 Ohio St. 128, 61 N.E. 701 (1901).

> Whether or not the substance of the deposition is incompetent is to be left to the subsequent determination of the court; as is also the question whether a command to produce books, papers or other thing under the control of the witness relates to such books, writings or other thing as he may be compelled to produce.
>
> If the witness assumes to decide these questions for himself at the time, unless the interrogatory involves a question of privilege, he must do so at his peril. If he should be right in his decision he would lose nothing, if wrong he must suffer the consequences.[95]

It is submitted that this decision also is modified and extended by the decision in the second *Martin* case and that, barring the existence of privilege, a witness *must* produce any documents or records for which a subpoena has been issued.

It should be recalled that the Ohio Supreme Court in the second *Martin* case overruled one of the principles announced by the court in the case of *Ex parte Schoepf*,[96] decided in 1906. In the Schoepf case the supreme court, for the first time, explicitly held that where a question or a document was not pertinent to the issues, or "not material or necessary to make out the case of the party calling for it or is incompetent," the witness could not lawfully be ordered to answer the question or produce the document. This is no longer true as a result of the second *Martin* decision, and it should be recognized that several lower court decisions no longer state the existing law in Ohio.[97]

Three years after its decision in the second *Martin* case, the supreme court decided the case of *In re Bott*.[98] The case is an important one and we place it on the credit side of the ledger in an appraisal of a number of decisions of the Supreme Court of Ohio, to which reference will now be made. The syllabus holds:

> A party to an action may through proper subpoena issued by a notary public compel an adverse party to produce before the notary as evidence specified papers and documents in the adverse party's possession, and if he refuses to produce such papers and documents for no other reason than that his refusal is on advice of counsel, he may, after having been instructed by the notary to produce them, be committed for contempt for such refusal.
>
> An officer of a corporation having in his possession and custody books and papers of such corporation, which are described in a subpoena duces tecum directed to him, must produce such books or papers upon proper demand or be held in contempt for refusal to do so.[99]

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[95] *Id.* at 135, 136, 61 N.E. at 702.

[96] 74 Ohio St. 1, 77 N.E. 276 (1906)

[97] Solanics v. Republic Steel Corp., 5 Ohio Supp. (N.E. Reporter) 152 (1940); Jones v. Goode, 7 Ohio C.C.R. (n.s.) 589 (1906).

[98] 146 Ohio St. 511, 66 N.E.2d 918 (1946). See also, Wilson v. United States, 221 U.S. 361 (1911).

[99] *In re* Bott, 146 Ohio St. 511, 66 N.E.2d 918 (1946) (syllabi #1 and #2).

In that case Bott had been in the employ of The Consumers Home Equipment Company, engaged in the sale of household furnishings and equipment at retail by solicitation from door to door. While he was so employed a competitive company was organized by two other persons, also named with Bott as defendants, who had formerly been employed by Consumers. The plaintiff claimed that its place of business had been burglarized and valuable merchandise stolen, and claimed that this merchandise had been taken by Bott and, subsequently, turned over to the new competitive company, of which Bott became president. A subpoena duces tecum served on Bott required him to produce salesmen's slips and collectors' route cards showing the sales over a specified period. On advice of counsel for the company, of which Bott was president, he declined to produce these records. Following a commitment for contempt, the Court of Appeals of Cuyahoga County granted his petition for a writ of habeas corpus. The plaintiff corporation, although not a party to the habeas corpus proceeding, filed an appeal to the supreme court and a motion to dismiss that appeal was overruled. By a unanimous decision, the ruling of the appellate court was reversed. It should be noted that no claim was made in that case that the documents subpoenaed were incompetent or irrelevant. The court added, however, the following important declaration:

> But the witness has no immunity if the testimony or production of documents does not involve self-incrimination or privileged communication and the objection is merely to the competence or relevancy of the evidence sought.
>
> Corporations are not entitled to all the constitutional immunities and protections in private security which private individuals have in such matters. Hence, an officer of a corporation cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it. In assuming their custody he has accepted the incident obligation to permit inspection.[100]

Considering this question further, we find one of those anomalies in reported Ohio cases — namely, a decision rendered by the Court of Appeals for Hamilton County three years after the decision by the Supreme Court in the *Bott* case, which cannot be reconciled with the Supreme Court decision and appears to be clearly contrary — *In re Deye.*[101]

That was an action against a corporation for an accounting of profits claimed to be due to the owner of a building in which the corporation had installed certain electrical equipment, which it was employing to furnish electricity to other tenants of the building. Deye, who was the president of the defendant company, received a subpoena to produce cer-

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[100] *Id.* at 517, 518, 66 N.E.2d at 921, 922.

[101] *In re* Deye, 85 Ohio App. 302, 88 N.E.2d 60 (1949)

tain books and records relating to the income of the company from the sale of electric current on the premises belonging to the plaintiff. He refused to produce the records for the reason, as stated by the witness, that they related to "privileged business, it is my business in which he has no interest." In its opinion the appellate court declared:

> No more typical case could be presented illustrating the injustice of requiring a corporation to produce, through a subpoena duces tecum issued to an officer, a mass of books and papers wholly irrelevant to any issue that could be presented by the pleadings in existence at the time the subpoena was issued.
>
> While the right of the notary to pass upon matters of relevancy and materiality may be limited, and his obligation to commit mandatory, certainly, when it is made to appear to a court in a habeas corpus proceeding that the books and papers involved have no relevant connection with the issues presented by the pleadings, it would be a travesty on justice if a court should be required to sustain a commitment based upon a refusal to produce that which it, as a court, would be bound to exclude as not being material and relevant evidence.[102]

It is clear that there is no difference in principle between the situation before the court in the *Deye* case and the facts in the *Martin* case. There the court held that a witness has no right to refuse to answer questions put to him because, as he claims, the questions are irrelevant or incompetent. Also, a court, in a habeas corpus proceeding, may not inquire into those claims of the witness under the rationale of the second *Martin* case. It appears to be clearly a difference in degree only, and not a difference in kind or in principle, where the objection of the witness is based upon the alleged irrelevancy or incompetency of a document sought to be produced through him, instead of his oral testimony alone. The court in the *Deye* case concluded its opinion with the following pronouncement:

> In the instant case, the witness having been called as on cross-examination, and being the president of the defendant corporation, had the right to question the relevancy and materiality of the books and papers of the defendant corporation, which he was ordered to produce.[103]

We find in this case a classic example of a situation which so frequently confronts trial counsel, to their dismay. The court has made up its mind as to what, in its opinion, the decision in the case should be. Notwithstanding the decision three years earlier in the *Bott* case, involving also a president of a corporation called on cross-examination to produce books and records of the company, in which the supreme court held that the only ground the officer might rely on for refusal to produce

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[102] *Id.* at 307, 308, 88 N.E.2d at 63.

[103] *Id.* at 309, 88 N.E.2d at 63, 64.

the records was the ground of privilege, the court proceeded to fashion its opinion in complete disregard of an apparently controlling decision.

In a subsequent article, the author will discuss matters of privileged communications relating to discovery practice, and also discovery under the Federal Rules. This evaluation will indicate further impediments which have been erected by the Ohio courts to full and effective use of discovery procedure, and the manner in which all parties may be afforded an equal opportunity to obtain facts pertinent to the lawsuit.