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## DISCOVERY BY INTERROGATORIES

DANIEL H. ORTMEYER\*

Section 351 of the Code of Civil Procedure of 1881,<sup>1</sup> provides that either party may propound interrogatories, to be filed with the pleadings, relevant to the matter in controversy, and require the opposite party to answer the same under oath.

That remedial process of discovery by interrogatories and the legislation governing the production and inspection of writings and the oral examination under oath of an adverse party are statutory regulations of and substitutes for the remedial process of equity jurisprudence known as a bill of discovery under oath in aid of an action at law or a suit in equity or the defense thereof.

Article 17 of the Indiana Constitution<sup>2</sup> provides that the constitution, if adopted, shall take effect on the first day of November, 1851.

Section 20 of Article 7 of the Indiana Constitution<sup>3</sup> provides that the General Assembly at its first session after the adoption of the constitution shall provide for the appointment of three commissioners, whose duty it shall be to revise, simplify and abridge the rules, practice, pleadings and forms of the courts of justice. And they shall provide for abolishing the *distinct forms of action at law* now in use and that justice shall be administered in a uniform mode of pleading, without distinction between law and equity.

The constitution did not require that any of the remedial processes of equity jurisprudence be abolished, but it did require that the distinct forms of actions at law then in use be abolished and that justice be administered in a uniform mode of pleading, without distinction between law and equity. The purpose was to do away with the distinct forms of actions at law because of their inflexibility and to preserve and follow the practices of equity because of their flexibility. There was no intent to curtail equity processes, but the intent was to make equity processes available at law.

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\* See p. 544 for biographical note.

<sup>1</sup> Acts 1881, page 240, now Burns 1926, Sec. 383.

<sup>2</sup> Now Burns 1926, Sec. 242.

<sup>3</sup> Now Burns 1926, Sec. 187.

The act approved June 18, 1852,<sup>4</sup> was entitled,

“An act to revise, simplify and abridge the rules, practice, pleadings and forms in civil cases in the courts of this state—to abolish distinct forms of actions at law and to provide for the administration of justice in a uniform mode of pleading and practice, without distinction between law and equity.”

Section 1 of that act of 1852 abolished the distinction between actions at law and suits in equity and the forms of all such actions and suits theretofore existing and provided that thereafter there shall be but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action. The act consisted of 803 separate sections and the General Assembly, by that act, attempted to provide a complete code of civil procedure.

The act approved April 7, 1881,<sup>5</sup> consisted of 867 separate sections and the General Assembly, by that act, attempted to provide a complete code of civil procedure. The act of 1881 superseded the act of 1852, re-enacting most of its provisions, and is the basis of our present code of civil procedure.

Section 294 of the code of civil procedure of 1852 provided that no action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, except in the manner prescribed by that chapter.

Discovery under oath in aid of an action at law or the defense thereof or in aid of a suit in equity or the defense thereof was a much favored remedy of equity jurisprudence.

A bill of discovery was a proceeding for the discovery of facts resting in the knowledge of the adverse party, seeking no relief in consequence of the discovery, but seeking the discovery in aid of some other proceeding either at law or in equity already pending or about to be brought, in aid of which the discovery was necessary.

A bill of discovery and for relief was a proceeding for the discovery and relief in the same suit and withdrew the whole case from the legal forum and brought it for decision before a court of equity, the discovery being merely incidental to the relief sought.

The same principles governed discovery under oath whether it was invoked in aid of issues involved in an equity suit or in aid of issues involved in an action at law.

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<sup>4</sup> Revised Statutes of 1852, Volume 2, page 27.

<sup>5</sup> Acts 1881, page 240; Burns 1926, Sec. 256 *et seq.* The act was entitled “An Act Concerning Proceedings in Civil Cases”.

In decisions of the Indiana Supreme Court preceding the adoption of the present constitution the rules governing the remedial process of discovery under oath were recognized and applied.

The defendant in his answer to a bill of discovery was required to set forth his defense to each claim asserted in the bill, omitting mere statements of evidence and avoiding general denials, but specifically admitting, denying or explaining the facts. The answer was required to be sworn to, unless answer under oath was waived, and when sworn to constituted not only an admission as to the facts stated in the answer, but evidence against the plaintiff. An answer in chancery was to be taken as true, unless disproved by two witnesses or by one witness and corroborating circumstances.<sup>6</sup>

As heretofore stated, section 294 of the code of civil procedure of 1852 provided that no action to obtain discovery under oath, in aid of the prosecution or defense of another action, shall be allowed, except in the manner prescribed by that chapter.

The General Assembly, by the act of 1852, expressly abolished the remedial process of equity jurisprudence known as a bill of discovery under oath in aid of an action at law or a suit in equity or the defense thereof, except as such process was regulated by that act. That remedial process of equity jurisprudence was not completely abolished, but was abolished only to the extent that a substituted procedure was prescribed by that act. The substituted procedure for discovery prescribed by that act consisted of the following:

- (1) Production and inspection of writings.
- (2) Examination of adverse parties.
- (3) Interrogatories to be filed with the pleadings.

The civil code of procedure of 1881 substantially re-enacted the provisions of the 1852 code as to the remedies for discovery.

It is thus apparent that our statutory remedies for discovery are merely regulations of the remedial process of equity for discovery. In an opinion of the Indiana Supreme Court at the May Term, 1855, it appears that the defendant filed an insufficient answer to the complaint and with his answer propounded certain interrogatories, to which interrogatories the plaintiff excepted on the ground that the answer was insufficient as a

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<sup>6</sup> *Green v. Vardiman*, 2 Blkf. 324; *McCormick v. Malin*, 5 Blkf. 509; *Barbee v. Inman*, 5 Blkf. 439; *Pierce v. Gates*, 7 Blkf. 162; *Williams v. Wann*, 8 Blkf. 477; *Tomlinson v. Lindley*, 2 Ind. 569.

matter of law. The trial court sustained the exception to the interrogatories and the Supreme Court said:<sup>7</sup>

"From what has been said it follows that the defendant had no right to the *discovery sought by his interrogatories.*"

Furthermore, our statutory remedies for discovery are not only merely regulations of the remedial process of equity for discovery, but the remedial process of equity for discovery is in full force and effect except as regulated by the statutes.

Equity jurisprudence in its fullness is in force in the State of Indiana except as curtailed by the constitution and statutes. The statute in reference to the joinder of causes of action merely affects procedure, combines common law and equity practice and authorizes forms of action that previously were not maintainable in the separate courts. It does not purport to cut off any primary or remedial rights in equity then existing. The intentment is that the legislature did nothing in derogation thereof.<sup>8</sup>

In an application for a temporary injunction the plaintiff is entitled to a discovery from the defendant upon setting out the facts upon information and belief, and if the defendant after opportunity given fails to deny the same the court may grant the injunction.<sup>9</sup>

The proceedings created by the statutes governing the recount of ballots and voting machines is not an independent judicial proceeding, but is a special proceeding for the discovery of evidence in aid of one who desires to contest with another the title to an office.<sup>10</sup>

Again, Section 802 of the act of 1852 provided that the laws and usages of this state relative to pleadings and practice in civil actions and proceedings, not inconsistent therewith and as far as the same operated in aid thereof or to supply any omitted case, were continued in force. By virtue of that section the laws and usages relative to discovery under oath, not inconsistent with the code and as far as the same operated in aid thereof or to supply any omitted case, were continued in force.

The fact that the laws and usages relative to discovery under

<sup>7</sup> *Lamson v. Falls*, 6 Ind. 309, 312.

<sup>8</sup> *Wild v. Noblesville*, 153 Ind. 5, 8; *Union Trust v. Curtis*, 182 Ind. 61, 68.

<sup>9</sup> *Spurgeon v. Rhodes*, 167 Ind. 1, 8.

<sup>10</sup> *Jordan v. Peacock*, 84 Ind. App. 86, 89.

oath, not inconsistent with the code and as far as the same operated in aid thereof or to supply any omitted case, were continued in force is of the first importance as an aid in determining the rights of the parties in the matter of interrogatories filed with pleadings, that being a part of the statutory regulation of and substitution for the remedial process of equity of discovery under oath.

The code of civil procedure provides that pleadings sworn to by either party in any case shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party than those not sworn to, except as herein or otherwise by law provided.<sup>11</sup> Thus was abolished the old equity rule that an answer under oath has the effect of proof in favor of the answering party.

The divorce act provides that the defendant shall answer the petition under oath, if required so to do by the petitioner, but no decree shall be rendered on default without proof, nor shall any admissions made in such answer be used as evidence in any other case against the defendant, nor shall the denial under oath by the defendant of the facts alleged in the petition render necessary any other or further proof by the complainant than would have been necessary if such denial had not been under oath.<sup>12</sup>

Interrogatories are not proper in a divorce action because of the statute which permits the party to require the defendant to answer the petition under oath.<sup>13</sup>

The provisions of the civil code abolishing the effect of an answer under oath, the provisions of the divorce act expressly retaining the answer under oath, the decision in *Barr v. Barr*,<sup>14</sup> that interrogatories are not proper in a divorce action because an answer under oath may be required, Sec. 294 of the code of 1852 abolishing the action to obtain discovery under oath, except in the manner prescribed by the code, and the statutes providing for the production and inspection of writings, the examination of adverse parties and permitting interrogatories to be filed with pleadings clearly disclose that the remedy of requiring answers to interrogatories filed with pleadings is the code substitute for the answer under oath to a bill of discovery.

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<sup>11</sup> Burns 1926, Sec. 384.

<sup>12</sup> Burns 1926, Sec. 1101.

<sup>13</sup> *Barr v. Barr*, 31 Ind. 240.

<sup>14</sup> 31 Ind. 240.

The statute governing interrogatories filed with pleadings provides that the interrogatories shall be filed with the pleadings, but the statute is not so construed, for it is held that interrogatories may be filed at any time before the issues are closed or the right to file pleadings has terminated; and that the code does not mean to restrict the right to file interrogatories to the time of filing any specific pleading.<sup>15</sup> However, until a defendant has pleaded he cannot obtain an order that plaintiff answer interrogatories.<sup>16</sup> Interrogatories filed to elicit evidence in support of a paragraph of an insufficient answer should be struck out.<sup>17</sup> Where a plaintiff has no cause of action he has no right to compel answers to interrogatories.<sup>18</sup>

The statute provides that all interrogatories must be answered positively and without evasion. If an answer is not relevant or is evasive or contains improper matter, it is subject to a motion to strike and to require a proper answer, all of which must precede the trial.

If the interrogatories are not relevant or it is not proper to answer them for any reason, the party should move the court to reject them before the trial. Failing to present the question at the proper time and answering the interrogatories, he cannot afterwards complain when they are introduced in evidence.<sup>19</sup> The action of the trial court upon a motion to reject interrogatories filed with a pleading in the cause is not ground for a new trial, but must be assigned as a separate error.<sup>20</sup>

On appeal a party can rely only on objections to interrogatories made in the trial court.<sup>21</sup> Where the court erroneously refuses to require interrogatories to be sufficiently answered and the party inquired of testifies fully as to the facts at the trial, the error may be cured.<sup>22</sup>

The statute provides that the answers to the interrogatories may be used on the trial or not, at the option of the party

<sup>15</sup> *Paul v. Baltimore*, 33 Ind. App. 157, 170; *Sherman v. Hogland*, 73 Ind. 472, 474; *Reed v. Spayde*, 56 Ind. 394.

<sup>16</sup> *Wheeler v. Reitz*, 92 Ind. 379, 380.

<sup>17</sup> *Lamson v. Falls*, 6 Ind. 309; *Lung v. Sims*, 14 Ind. 467.

<sup>18</sup> *Van Walters v. Board*, 132 Ind. 567, 572.

<sup>19</sup> *Combs v. Union*, 146 Ind. 688, 693; *Cincinnati v. Howard*, 124 Ind. 280, 283.

<sup>20</sup> *Reed v. Spayde*, 56 Ind. 394; *Cates v. Thayer*, 93 Ind. 156.

<sup>21</sup> *Baltimore v. Berdon*, 195 Ind. 265, 276.

<sup>22</sup> *Alesworth v. Brown*, 31 Ind. 270; *Smith v. McDonald*, 3 Ind. App. 49, 50.

requiring it.<sup>23</sup> But the answer to an interrogatory is not binding on the party who propounds the interrogatory and he may introduce the answer and then contradict it by other evidence.<sup>24</sup>

The statute provides that the answering party may set forth in his answers all relevant matter in avoidance, but an admission in the answer to an interrogatory is not conclusive against the party making it and he may contradict it by other evidence.<sup>25</sup>

A party is not required in answering interrogatories to confine himself to a simple and unexplained negative or affirmative response to the question, but he may give such explanation as is necessary to a full and fair understanding of the matter.<sup>26</sup>

A party cannot be required to answer an interrogatory the answer to which will incriminate him.<sup>27</sup>

The statute provides that all interrogatories must be answered within the time limited, positively and without evasion, and the court may enforce the answer by attachment or otherwise. Another statute,<sup>28</sup> provides that the court shall compel the parties to file their respective pleadings and answers to interrogatories at such time as the court shall deem just, in no case allowing unreasonable delay. Another section,<sup>29</sup> provides that if from any cause either party shall fail to plead or make up issues within the time prescribed the court shall forthwith enter judgment as upon default, unless for good cause shown further time be given for pleading. Under those statutes, where a party fails to comply with the order of court directing him to file answers to interrogatories, the court has authority to strike out his pleadings and enter judgment against him as by default.<sup>30</sup>

The code,<sup>31</sup> provides that an answer or other pleading shall be rejected as sham, either when it plainly appears upon the face thereof to be false in fact and intended merely for delay or when shown to be so by the answers of the party to special

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<sup>23</sup> Answers to interrogatories may be used as evidence at the trial: *Baltimore v. Berdon*, 195 Ind. 265, 272.

<sup>24</sup> *Cracker v. Agenbrood*, 122 Ind. 585, 587.

<sup>25</sup> *National v. Elliott*, 60 Ind. App. 112, 116.

<sup>26</sup> *Railsback v. Koons*, 18 Ind. 274.

<sup>27</sup> *French v. Venneman*, 14 Ind. 282.

<sup>28</sup> Burns 1926, Sec. 423.

<sup>29</sup> Burns 1926, Sec. 429.

<sup>30</sup> *Houser v. Laughlin*, 55 Ind. App. 563, 573.

<sup>31</sup> Burns 1926, Sec. 409.



written interrogatories propounded to him to ascertain whether the pleading is false.

Interrogatories may be propounded with a purpose to elicit answers on which to strike out a pleading of the opposite party as sham.<sup>32</sup>

Where answers to interrogatories support every material allegation of the complaint the court may strike out an answer of general denial and render judgment on the interrogatories.<sup>33</sup>

The statute provides that corporations, through their proper officers or agents, shall be required to answer interrogatories as natural persons. Where interrogatories are addressed to a corporation, it may select and it is its duty to select, in answering the interrogatories, an agent who is familiar with the facts.<sup>34</sup>

It is not a sufficient reason for a corporation to refuse to answer a cross bill against it for discovery that its officers and employees are made competent witnesses for either party by the federal statutes, such testimony not being the exact equivalent of a discovery by the corporation itself.<sup>35</sup>

The statute provides that the interrogatories shall be relevant to the matter in controversy. Interrogatories filed with pleadings are permitted to enable a party to better prepare his case for trial or adapt his pleadings to the facts of the case.<sup>36</sup> Interrogatories may be propounded with a purpose to use the answers on the trial of the matter in controversy to which they relate.<sup>37</sup>

Interrogatories must be pertinent to the issues and aid the inquiring party in adapting his pleadings to the facts in the case.<sup>38</sup> They may be propounded when the matter in controversy is presented by an answer in abatement.<sup>39</sup>

<sup>32</sup> *Paul v. Baltimore*, 33 Ind. App. 157, 170; *Tilden v. Louisville*, 157 Ind. 532, 533; *Close v. Pittsburgh*, 150 Ind. 560; *Moyer v. Brand*, 102 Ind. 301, 303; *Lowe v. Thompson*, 86 Ind. 503, 506; *Hollander v. Fletcher*, 62 Ind. App. 149, 152; *Pittsburgh Ry. v. Frazee*, 150 Ind. 576, 578.

<sup>33</sup> *Jones v. State, ex rel.*, (Ind.) 163 N. E. 260, 262.

<sup>34</sup> *Cleveland Ry. v. Miller*, 165 Ind. 381, 384; *Louisville Ry. v. Henly*, 88 Ind. 535, 540.

<sup>35</sup> *Indianapolis Gas Co. v. Indianapolis*, 90 Fed. 196; *Continental Bank v. Heilman*, 66 Fed. 184.

<sup>36</sup> *Meyer v. Manhattan*, 144 Ind. 439, 445.

<sup>37</sup> *Paul v. Baltimore*, 33 Ind. App. 157, 170; *Combs v. Union*, 146 Ind. 688, 693; *Tilden v. Louisville*, 157 Ind. 532.

<sup>38</sup> *Eickmeier v. Geddes*, 73 Ind. App. 167, 170.

<sup>39</sup> *Paul v. Baltimore*, 33 Ind. App. 157, 170; *Combs v. Union*, 146 Ind. 688, 692.

It is not error to strike interrogatories that are irrelevant or concern matters about which there is no dispute.<sup>40</sup> A party interrogated can not be required to state conclusions of law, answer hypothetical questions, determine the law upon facts stated or set forth copies of instruments.<sup>41</sup>

Answers to interrogatories are admissions of the party under oath and the rule that parol evidence is not admissible to prove the contents of documents and other writings or other facts shown by the decree of a court or other public record does not apply in all its strictness to the admissions of a party. Such admissions are received as primary evidence.<sup>42</sup>

The remedies of discovery provided by the statutes of Indiana are not available in an action at law or a suit in equity in the federal courts of Indiana. Equity practice in the federal courts is governed by the equity rules adopted by the United States Supreme Court and the Indiana statutes regulating discovery are not available in an equity suit in the federal courts. The federal conformity statutes providing that the practice in actions at law in the federal courts shall conform to the practice in actions at law in the state courts are construed as not adopting the state statutes regulating discovery.<sup>43</sup>

Equity Rule 58 of the United States Supreme Court provides that either party to a suit in equity in the federal courts may file interrogatories in writing for the discovery by the opposite party of facts and documents material to the support or defense of the cause. The decisions of the Federal courts construing that rule are of assistance in determining the rights of the parties under the Indiana statute governing interrogatories filed with pleadings, for Equity Rule No. 58 and the Indiana statute are very similar, except that the discovery of documents in the Indiana practice is regulated by another section of the civil code. In the recent case of *Taylor v. Ford Motor Co.*,<sup>44</sup> the court stated some of the rules applicable in the construction of Equity Rule No. 58.

The plaintiff will not be required to discover the particulars of his own cause of action, where such particulars do not relate

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<sup>40</sup> *Stevens v. Flannagan*, 131 Ind. 122, 130.

<sup>41</sup> *Meyer v. Manhattan*, 144 Ind. 439, 445; *Baltimore v. Berdon*, 195 Ind. 265, 276.

<sup>42</sup> *Combs v. Union*, 146 Ind. 688, 693.

<sup>43</sup> *Tabor v. Indianapolis Journal*, 66 Fed. 423, 424.

<sup>44</sup> 2 Fed. (2d) 473, 477.

to any pleaded defense. Nor will the defendant be compelled to disclose facts material only to his defense. Neither plaintiff nor defendant is entitled to discovery of an inquisitorial character as to the ground of action or defense of the other. The right of discovery as to matters material to the cause of action or defense of the interrogating party will not be defeated by the fact that such matters also involve the ground of the defense or action of the interrogated party. The disclosure of ultimate facts only can be required. To the extent that discovery may be granted as to material matters of fact, it must be limited to inquiry as to the material facts and does not extend to a disclosure of evidence or of facts which merely tend to prove the material facts. The right does not extend to the discovery of the manner in which, or the evidence by which, the case of plaintiff or defendant is to be established. Discovery of the names of witnesses by whom the adversary proposes to prove his case will not be compelled. A party cannot be compelled to discover facts of which the other party had equal knowledge, or equal means of knowledge. An interrogatory filed under the rule should embrace a single question, and should be so framed that it may be clearly seen what the interrogated party is called upon to answer.

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