Washington Law Review

Volume 1 | Number 2

10-1-1925

The Scope of Interrogatories in Washington

Thomas Phelps Gost Jr.

THE SCOPE OF INTERROGATORIES IN WASHINGTON.

IT is the purpose of this article to discuss the scope of inquiry allowed by interrogatories propounded under the code in the State of Washington. In order to obtain a comprehensive understanding of this subject, it is necessary to discuss to a certain extent the use of the bill of discovery at common law and trace its development to the use of interrogatories today because the scope of inquiry today is much the same as it was under the old practice.

Under the common law practice, the plaintiff was obliged to make out his case by calling third parties as witnesses, by compelling the production of such documents as were in the custody or under the control of third parties, and by himself producing such documents as were in his own possession and whose execution could be properly proved. No means, however, existed by which the opposite party could be compelled to testify as to matters in dispute, or by which the production of documents in his possession could be enforced.

While the common law rule prevailed and while the inconvenience thereon existed, a different rule grew up in equity. Originally to obtain discovery in an equity court, the action had to be equitable in its nature. It was a part of the machinery of a court of chancery in those cases that a discovery could be compelled. In other words, the defendant, when a bill of discovery was filed in equity, was obliged to answer the allegations of the bill under oath. Originally these bills of discovery in equity also had necessarily to contain a prayer for equitable relief. The practice gradually grew, however, for a bill in equity to be filed not only for discovery and relief but eventually for discovery alone.

Bills of discovery, therefore, finally came to be in their technical sense, bills which were filed for the purpose of assisting one of the parties to a common law action, and which sought no independent relief themselves but aimed solely at arming the complainant with the necessary and proper means for asserting or defending his right or title at law.[1]

The right of the plaintiff in equity to the benefit of the defendant's oath was limited to a discovery of such material facts as related to the

[1] Bispham's PRINCIPLES OF EQUITY, 10th ed., §556-557.

plaintiff's own case and did not extend to a discovery of the manner in which the defendant's case was to be exclusively established or to evidence which related exclusively to the defendant's case.-

Pomeroy states the rule as follows:

> "The fundamental rule on the subject is that the plaintiff's right to discovery does not extend to all of the facts which may be material to the issue, but is confined to the facts which are material to his own title or cause of action. It does not enable him to pry into the defendant's case or find out the evidence by which that case will be supported."[3]

The disadvantages of the old bill of discovery was obvious. It necessitated a separate action in order that one party might arm himself with necessary evidence to bring or defend a principal case at law It was not only cumbersome in procedure but also expensive and so it was natural that in many jurisdictions statutes have been enacted designed to do away with this unnecessary and roundabout method.

The Courts are everywhere agreed in the view that these statutes should be construed to prevent their abuse. The privilege of allowing the examination of an adversary in advance of the trial should not be allowed to become a means of oppression. As under the ancient practice a mere fishing bill was not allowed, so under the statutes the scope of interrogatories is limited to facts material to the interrogating party's own title or cause of action.[4]

Under some of these statutes, literally construed, discovery is obtainable unconditionally However, in the interpretation, it seems generally held that their purpose was merely to extend to all courts the expedient that formerly existed in chancery alone. So generally the common law remains unchanged as to the scope of discovery allowed.[5]

The statutes in the State of Washington covering this subject were enacted by the legislature in 1854 and have come down to the present day practically in their original form. These are found in Remington's Compiled Statutes, §§1225-1230 and 1262.

It is provided.

> "A party to an action or proceeding may be examined as a witness at the instance of the adverse party, or of one of several adverse parties and for that purpose may be compelled

---

WINGRAM ON DISCOVERY, §15.

[3] POMEROY ON EQUITY JURISPRUDENCE, Student's Edition, §201.

[4] JONES ON EVIDENCE, 3rd ed., §1856 A.

[5] WIGMORE ON EVIDENCE, 2nd ed., §707.

in the same manner and subject to the same rules of examination as any other witness to testify at the trial."[6]

This section is cited here only because of the references that the subsequent sections make to it. It should be noted, however, that this section allows the examining of the adverse party. This was not possible at common law.

> "Instead of the examination being had at the trial, as provided by the last section, the plaintiff at the time of filing his complaint or afterwards, and the defendant, at the time of filing his answer or afterwards, may file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party."[7]

It will be noted in regard to this section that the right to propound interrogatories extends to both parties only after they have filed their opening pleadings. Neither can, before filing a pleading, propound interrogatories to the opposing party to ascertain whether a cause of action exists. It should also be noted that this section limits the right of discovery to facts and documents material to the support or defense of the action.

It is further provided.

> "Such interrogatories served in the manner provided by law for the service of summons or by service upon the attorney of the party to be interrogated, and the answer thereto shall be served and filed within twenty days after such service unless for cause shown, a further time be allowed by the court. A private corporation may be interrogated in the same manner as individuals and it shall not be excused for a failure to answer any proper interrogatory unless it shall show that no one in its employ or connected with, or interested in it, can give the desired answer or information."[8]

This is the only section that is not the same now as when enacted originally in 1854 and the change consists solely of the addition of the last sentence concerning the interrogating of a private corporation.

Following sections provide:

> "A party to the action or proceeding, having filed interrogatories to be answered by the adverse party, as prescribed by the last two sections, shall not thereby be precluded from examining such adverse party as a witness at the trial, nor

---

[6] Rem. Comp. Stat., §1225.
[7] Rem. Comp. Stat., §1226.
[8] Rem. Comp. Stat., §1227.

from taking his deposition to be read at the trial."[9] And that "Testimony of a party upon examination at the trial, or by deposition, or upon interrogatories filed, may be rebutted by adverse testimony."[10]

Section 1230 provides:

> "If a party refuses to attend and testify at the trial or to give his deposition, or to answer any interrogatories filed, his complaint answer or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases for a contempt. Provided that the preceding sections shall not be construed so as to compel any person to answer any questions where such answer may tend to criminate himself."[11]

And it is also provided

> "Any court, or judge thereof, in which an action is pending may upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document or paper, in his possession or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court may exclude the book, document or paper, from being given in evidence, or if wanted as evidence by the party applying may direct the jury to presume it to be such as he alleges it to be, and the Court may also punish the party refusing as for contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers, or documents where he is examined as a witness."[12]

The writer's purpose in citing the last section is to point out that all of the foregoing sections were enacted the same year (1854), and that the court in construing these sections has held that it was not the intention of the legislature to furnish a cumulative remedy The court holds further that Section 1226, Rem. Comp. Stat., was to enable a party to discover the existence and whereabouts of documents in order that he might subpoena the person having their custody and have the same produced at trial, or obtain an inspection or copy under the authority of Section 1262.[13]

No attempt will be made in this article to treat the production of documentary evidence under the last mentioned section of the statute.

Tersely stated these statutes give both parties to an action the right

---

[9] Rem. Comp. Stat., §1228.
[10] Rem. Comp. Stat., §1229.
[11] Rem. Comp. Stat., §1230.
[12] Rem. Comp. Stat., §1262.
[13] *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 86 Pac. 1120 (1906).

to propound interrogatories to discover evidence in support of their own case and provide for the striking of the adversary's pleading for failure or refusal to answer the same within the time prescribed.

The case of *Wilson v. Webber*[14] was decided in Massachusetts under a statute very similar to that of Washington covering this subject and furnishes a well reasoned statement of the law. It was an action in tort for breaking and entering the plaintiff's close. The answer was, suit and freehold in the defendant. The defendant filed the following interrogatory pursuant to the statute:

> "Please set forth in detail the title which you have or claim to have, to the close described in your declaration. If you purchased it, state from whom you purchased it. If you acquired title in any other way, state particularly and in detail how you acquired title. Annex to your answer copies of all deeds and other instruments under which you claim to derive any title."

This interrogatory was not answered within the time prescribed. A motion for a nonsuit was denied on the ground that this was an interrogatory that the plaintiff was not bound to answer.

The upper court pointed out in making its decision that the main purpose of these provisions of the statute was to substitute in place of the tedious, expensive and complex process of a bill of discovery, an easy, cheap and simple mode of interrogating an adverse party, as incident to and part of the proceedings in the cause in which the discovery is sought. That it was not intended to make the parties to a cause witnesses, who might at the pleasure of the party interrogating, be made to testify respecting the whole case, but only to give a limited right to obtain evidence from an adverse party in analogy to the well settled rules regulating bills of discovery in the court of chancery in England. The discovery sought must be material to enable the plaintiff in a bill to support or defend a suit.

The court said.

> "Each party is confined to those matters which are material to sustain the case which he sets up by his pleadings; he is to be allowed to obtain, by interrogating his adversary, proofs of his own case, but not those which establish the case set up against him."

The court overruled the exceptions and held that, since the interrogatory propounded to the plaintiff did not seek to discover any fact or document in support of the defendant's title, but only called on the

[14] 2 Gray (Mass.), 558 (1854).

plaintiff to disclose his title and the manner in which it was acquired, it was a question which the defendant had no right to put to the plaintiff and one which the plaintiff was not bound to answer.

In Pomeroy's EQUITY JURISPRUDENCE, is found the following statement:

> "This abridgement of the technical discovery by statute, it should be carefully remembered, does not extend to the discovery, or compelling defendant to make admissions or disclosures by means of pleadings, in suits brought for relief."[15]

The preceding statement is the law in Washington as announced by our Supreme Court in *LeMay v. Baxter*[16] where the court, although conceding that there is no technical bill for discovery in Washington said

> "It does not follow that the defendant may not, by means of the pleading, be compelled to make discovery of facts in an action brought for proper relief."

Continuing in Pomeroy:

> "On the other hand, the principles and doctrines relating to discovery, which have been settled by courts of equity and which determine what facts parties can be compelled to disclose and what documents to produce, and under what circumstances the disclosure or production can be obtained, will still be recognized by the courts and to regulate their action in enforcing the examination of parties and the production of writings by means of more summary statutory proceedings. The abolition or discontinuance of a technical discovery has not abrogated these principles or doctrines."[17]

One interesting change from the common law practice may well be noted. At common law if a party obtaining a discovery, read any portion of the answer in evidence, the whole of it had to be read on demand of the one who made it so that the jury might be possessed of all of his statements and explanations or qualifications of his admissions. Our Supreme Court lays down a different rule in *Allend v. The Spokane Falls & Northern Railroad Company*.[18]

> "Only such portions of the interrogatories and answers as the party procuring them may choose may be given in evidence, where they are complete in themselves and have no connection with the other answers."

The first cardinal principle in relation to the propounding of inter-

---

[15] Section 193.
[16] 11 Wash. 649, 40 Pac. 122 (1895).
[17] Section 199.
[18] 21 Wash. 324, 58 Pac. 244 (1899).

rogatories is that they must seek to discover evidence or facts supporting the cause of action or defense of the person propounding them.[19]

It follows from this that the evidence sought must be relevant and material to the propounding party's own title or cause of action.[20] The court may strike the pleading of a party who fails or refuses to answer interrogatories propounded to him if such interrogatories are material and go to all of the issues of the case.[21]

If the materiality of the interrogatories does not appear it must be proven before a judgment by default for failure to answer can be allowed.[22]

The rule relating to confidential relations and privileged communications is illustrated very well in the case of *Cully v. Northern Pacific Railway Company*.[23] In that case the action was brought for a minor by his guardian *ad litem* against the defendant for personal injuries sustained by the plaintiff through a slide in a gravel pit. Prior to trial under authority of Ballinger's Code §6009,[24] the plaintiff propounded to the defendant company certain written interrogatories all of which the defendant answered except numbers 19 and 20 which were as follows:

> "No. 19. If such report was ever made, who made it and to whom was it made, and what action, if any was ever taken by the company with reference thereto."
>
> "No. 20. Attach to your answers herein all reports regarding the accident and all correspondence with the person or persons reporting said accident with reference thereto."

On motion of counsel these two interrogatories were stricken by the lower court. This is assigned as error. The upper court held that they were properly stricken. The court pointed out that it would be a very dangerous and unjust practice to require the defendant, in this character of cases, to produce all of the correspondence, reports and documents which he may have touching a case at issue, all of which must necessarily be of a strictly confidential character. The court said.

"Assuming that this correspondence disclosed admissions

---

[19] *Brook v. Boyd*, 80 Wash. 213, 141 Pac. 357, Ann. Cas. 1916B 359 (1914) *Saar v. Weeks*, 105 Wash. 628, 178 Pac. 819 (1919) *Fidelity National Bank v. Adams*, 38 Wash. 75, 80 Pac. 284 (1905) *Hill v. Hill*, 126 Wash. 560, 219 Pac. 18 (1923).

[20] *Saar v. Weeks, supra.*

[21] *Lawson v. Black Diamond Coal Mining Co., supra; Capps v. Frederick*, 44 Wash. 38, 86 Pac. 1128 (1906) *Fidelity National Bank v. Adams, supra; Livesly v. O'Brien*, 6 Wash. 553, 34 Pac. 134 (1893).

[22] *Lawson v. Black Diamond Coal Mining Co., supra.*

[23] 35 Wash. 241, 77 Pac. 202 (1904).

[24] Rem. Comp. Stat., §1226.

> of the confidential agents of the defendant against the interests of the defendant, they are not such admissions as would be admissible in evidence. We can conceive of no reason why a different rule should apply in this case than prevails in the case of privileged communications generally. The statute which authorizes the filing of interrogatories for the discovery of facts and documents material to the support, etc., of the action does not contemplate that the plaintiff shall have free access to the defendant's private correspondence and papers, in order that he may not only discover whether facts and documents, material to the issue, existed therein but learn the defendant's line of defense as well."

This case brings out the general rule, that confidential and privileged communications cannot be compelled by interrogatories any more than they could be at a subsequent trial.

The personal privileges of a witness, as for example, against self-incrimination, are good in relation to interrogatories, as they are during the course of any trial.

It is well settled that it is within the discretion of the trial court as to the length of time allowed for the answering of interrogatories if an extension over the statutory time is asked.[25] And that also answers to interrogatories propounded under the code cannot be put in evidence by the party who framed the answer.[26]

In the recent case, *Hill v. Hill*,[27] an appeal was taken from an interlocutory decree of divorce. Before the trial, pursuant to the statute, the appellant propounded certain interrogatories to the respondent. These, in substance, required the plaintiff to state with particularity what evidence she intended to give in support of her complaint. For illustration, in her complaint the plaintiff had alleged a personal assault made upon her by the defendant. Concerning this she was asked to describe the assault, to state what injuries were caused, etc. The court without citing authorities held in line with the general rule that interrogatories by the defendant must call for matters in support of the defense and not for the plaintiff's evidence, that, clearly, the statute sanctions no such interrogatories as these and the judgment was affirmed.

Where interrogatories are not brought up on appeal and the answer has been stricken for failure to answer them, the presumption will be

---

[25] *Fidelity National Bank v. Adams, supra.*

[26] *Moore v. Palmer* 14 Wash. 134, 44 Pac. 142 (1896).

[27] 126 Wash. 560, 219 Pac. 18 (1923).

that the interrogatories extended to all of the issues of the case and that the striking of the answer was correct.[28] Answers to interrogatories are subject to contradiction.[29] And it will be noted that default must be taken for failure to answer interrogatories in order to authorize more than a dismissal of the action.[30]

An important case is that of the appeal of *Lawson v. Black Diamond Coal Mining Company supra,* which was cited with approval in *Hammond Packing Co. v. Arkansas.*[31] In the principal case the complaint alleged that the plaintiff and his assignors rendered and performed service at the special instance and request of the defendant in securing a purchaser for certain coal mines and other properties. That by and through such services, the Pacific Coast Company, a corporation, was induced to purchase the property for one million one hundred thousand dollars. That, the defendant accepted such services and that the reasonable and agreed value of the services so performed was five per cent of the sum for which the property was sold or fifty-five thousand dollars, no part of which had been paid. After the answer was filed, the plaintiff propounded certain interrogatories to the defendant for the discovery of facts and documents material to the support of the action. After a motion to strike these interrogatories was duly overruled answers were filed to them. The plaintiff moved to strike certain of these answers and require the defendant to answer more specifically in certain particulars. This motion was granted on May 18, 1905, but the court fixed no time within which further answers should be made. On October 15, 1905, the plaintiff filed a motion to strike the answer of the defendant and for judgment according to the prayer of the complaint for failure to answer the interrogatories propounded. This motion was granted by the trial court under authority of Ballinger's Code, §6013.[32] The upper court held as to this point that before the court could resort to the harsh method of striking the pleading a time must be fixed within which the adversary must answer.

Certain of the interrogatories inquired as to the stockholders of the defendant corporation. Ordinarily in a personal action against a corporation to recover a money judgment such inquiries are wholly irrelevant. A failure to make discovery as to such facts would scarcely warrant striking the answer. The court said.

"Where a person invokes a harsh remedy of striking a

[28] *Capps v. Frederick, supra.*
[29] *Denny v. Sayward,* 10 Wash. 422, 39 Pac. 119 (1894). Rem. Comp. Stat., §1229.
[30] *Waite v. Wingate,* 4 Wash. 324, 30 Pac. 81 (1892).
[31] 212 U. S. 320, 53 L. Ed. 530 (1909).
[32] Rem. Comp. Stat., §1230.

> pleading and taking judgment by default, he must not only allege but he must prove the materiality of the facts of which discovery is sought, where such materiality does not appear from the interrogatories themselves and no such showing was made in this case."

It might be said in concluding that in addition to Massachusetts, Florida, Alabama, New Jersey and Iowa, have statutes similar to those of Washington. Now York, Wisconsin and Oregon also have provisions in their codes for the examination of the adversary before trial. In all these jurisdictions, the court allow a similar scope of inquiry and are governed by the same rules that were used in the equity courts under the old system of pleading.

Thomas Phelps Gose, Jr

WALLA WALLA, WASHINGTON.