Discovery Procedure and Its Louisiana Counterparts

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exceptions below). Res judicata is stricti juris, and the second suit should not be barred when there is any doubt of the applicability of Article 2286.\textsuperscript{138} The judgment has the authority of the thing adjudged only as to matters put in issue by the pleadings\textsuperscript{139} and actually decided by the court.\textsuperscript{140}

**Exceptional Cases**

In three types of cases, however, the judgment is conclusive not only of the matters raised and decided in the suit, but also of all matters which might have been pleaded therein. This is true only when the first suit was a

1. Petitory action.\textsuperscript{141}
2. Partition action.\textsuperscript{142}
3. Suit for injunction against the execution of a judgment or a sale under executory process.\textsuperscript{143}

(a) But the judgment is not conclusive of grounds for injunction which are matters of public policy (such as the homestead exemption), and which were not urged in the first suit.\textsuperscript{144}

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**CLAUDE O'QUIN**

**DISCOVERY PROCEDURE AND ITS LOUISIANA COUNTERPARTS**

"What is truth?" a Biblical character once asked. Pilate's troubled query summarizes at once the problem and the ideal of every system of law—how to discover the *truth* about the matter presently in controversy. Unfortunately, in the field of procedure, the ideal has been subordinate to the "trial-by-battle" practice in which right is on the side of the heaviest and most skilled legal artillery.\textsuperscript{1} Procedural law has presented the strange anomaly of creating, on the one hand, devices apparently aimed at disclosing the true basis of opposing claims, and yet, on the other carefully

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\textsuperscript{138} See supra, p. 500 and note 42.
\textsuperscript{139} See supra, pp. 500-501 and note 43.
\textsuperscript{140} See supra, p. 505 and note 60.
\textsuperscript{141} See supra, pp. 498 and 512 and note 32.
\textsuperscript{142} See supra, pp. 498-500, 512-513 and note 36. It is believed that *Wells v. Files* (discussed supra, p. 500) carries this rule too far, and will not be followed.
\textsuperscript{143} See supra, pp. 501 and 512 and note 46.
\textsuperscript{144} See supra, pp. 502-503 and 512.
aiding each side in secreting from the other the very information which it purports to reveal.

In the past two decades this traditional conflict has given ground in many jurisdictions to liberalized rules not based on such inherently hostile conceptions. The development of fact-discovery and the actual use of its most modernized versions makes an interesting comparison with Louisiana methods.

**DEVELOPMENT**

It is seldom in a law suit that one party is surprised by the nature of the *claims* of the other party; what he is really interested in discovering prior to trial is the *evidence* which will be used to support these claims, and which he must be prepared to meet on the trial. This is equally true for defenses which are set up. Pleadings have from time immemorial been the accepted basis of notification to the opposite party. Because it is characteristic of pleading that allegations are in a generalized form (ultimate fact as contrasted with evidentiary fact), that the pleader can always claim more than he can prove, and that the denials of the defendant are no more concrete or bona fide than the allegations of the plaintiff, every system of law has made some effort, however restrained, to supplement the knowledge gained from the pleadings by some form of discovery.

The seeds of modern discovery are recognizable in all legal systems, but so stunted by restrictions that they hardly seem consonant with a practical and adequate means of fact-determination. Romano-canonical procedure, which must be credited with the first comprehensive use of the detached interrogatory, utilized the *interrogatio post litiscontestationem*, and its subsequent development, *positiones*, as discovery methods. Positional pro-

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5. For a scholarly treatment of the entire field of discovery, to which this comment is greatly indebted, see Millar, The Mechanics of Fact-Discovery: A Study in Comparative Civil Procedure (1937) 32 Ill. L. Rev. 261, 424.
6. Romano-canonical law also made slight use of the *interrogatio ante litiscontestationem*. According to Millar, the whole topic of preparatory examination was probably in a large measure of purely doctrinal significance. See Millar, supra note 5, at 267.
7. *Positiones*, which supplanted the interrogatories in the early part of the thirteenth century, were, in form, the interrogatories changed to an affirmative statement. What the plaintiff or defendant actually did was to state separately the allegations already contained in his libel, or "cause of
procedure was excellent within its limited field. But restricted as it was to the parties themselves, to a form which required the statement of ultimate facts, and by the necessity for a categorical answer, it did not operate to actually disclose to the interrogator any extensive number of facts which he did not already know. In spite of its limitations, however, Romano-canonical procedure was the real foundation upon which even the most modern discovery methods are based.

Chancery, coming later, did not do even as well. The clumsy combination of the interrogatories with eight other parts in the bill, the failure to keep disclosure apart from defensive allegations in the answer, and the relegation of a defendant seeking discovery from the plaintiff to a cross-bill, all favored concealment of evidence by the parties rather than frank disclosure.

Bills in equity and bills of discovery as an aid to actions at law did little better. While they served to obtain from the opponent admission of facts which the pleader would be required to prove (but already knew), it was only incidentally and accidentally that they disclosed any evidence which would protect the pleader from surprise and from unnecessary preparation for trial. Except in a very limited class of cases, no method of examining witnesses before trial was provided.

As might have been expected, the common law offered little action. These statements were then read to the opponent, who had to answer categorically whether he admitted or denied the allegation. Numerous objections to the positions were open to the opponent. There was some conflict as to the effect of failure to answer, but the rule that failure to answer was affirmation of the positions was finally accepted generally. For a detailed study of Romano-canonical positions, see Millar, supra note 5, at 268.

8. Millar, supra note 5, at 274. Of course, the methods then in use may have been quite adequate for their time.


10. Sunderland, supra note 3, at 866; Millar, supra note 5, at 438, 441.

11. The nine parts were: (1) the address to the court, (2) the introductory description of the parties, (3) the stating part, (4) the allegation of confederacy, (5) the charging party, (6) the jurisdictional statement, (7) the interrogating part, (8) the prayer for relief, (9) the prayer for process. Millar, supra note 5, at 438, n. 266.

12. A cross-bill was in effect a new proceeding. Millar, supra note 5, at 439.

13. Nor was chancery as discriminating as Romano-canonical procedure in dealing with failure to make the required disclosures. There was no distinction made between total and partial failure to answer. In either case, after contempt proceedings had been tried, the bill in its entirety was taken as confessed, instead of the Romano-canonical method of taking the position as confessed only to the extent that the opposite party had failed to make answer. Millar, supra note 5, at 440, n. 277.


15. Simpson, supra note 1, at 190.
in the way of discovery.¹⁶ The feeble bill of particulars¹⁷ fell far short of removing a suit from the category of a game between counsel. It provided no real means for examining the adverse party or for ascertaining the character of testimony to be expected from adverse witnesses.

The last century saw the development in America¹⁸ of statutory procedures for the examination of adverse parties and the taking of depositions in the law action itself. Though the statutes of the different states vary considerably,¹⁹ generally they provide for mutual examination of the opponent before trial, either by oral or written interrogatories,²⁰ for the production of documents or admissions as to genuineness, and for the taking of depositions of absent witnesses. Unfortunately, most states have retained the useless prejudice against a free inquiry into the facts of and by both sides. As a consequence, the procedure of these jurisdictions is cramped by objections to the necessity and scope of disclosures sought, by refusal to allow examination into evidentiary facts, by confining examination to the party's "own case" and by restricting the class of witnesses whose depositions can be taken.²¹

Nor were the federal courts free of this maze of restrictions. In equity, the old chancery practice was followed until the Federal Equity Rules of 1912²² provided for written interrogatories, to be filed at any time after filing of pleadings, addressed to the opposite party, "for the discovery by the opposite party of facts and documents material to the support or defense of the cause." Provision was also made for calling on the opponent to admit the

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16. Simpson, supra note 1, at 190.
17. For a detailed discussion of the use of the bill of particulars, see Clark, Code Pleading (1928) 238, § 54. For a historical background, see Simpson, supra note 1, at 175, n. 8; Van Hook, The Bill of Particulars in Illinois (1925) 19 Ill. L. Rev. 315. The bill of particulars under the codes is confined in much the same way that it is at common law. The adverse party can delay proceedings by objections to the disclosure sought, and the necessity and scope of examination. The tendency of the courts is to confine the procedure rather closely, by refusing to allow examination as to evidentiary facts, or by confining the examination to evidence in support of the examining party's case. See Ragland, Discovery Before Trial (1932) 120-45; Simpson, supra note 1, at 191.
18. No attempt is made in this comment to show the later developments of English procedural law. An excellent brief discussion can be found in Millar, supra note 5, at 442.
19. Ragland, op. cit. supra note 17, at 267-391 (Appendix). See also id. at 25-26; Millar, supra note 5, at 448.
20. Oral examination is definitely preferred over written interrogatories in the various states. See statutes collected in Sunderland, supra note 3, at 874, n. 50.
21. Simpson, supra note 1, at 191; Clark, op. cit. supra note 17, at 23, § 9.
execution or genuineness of any document. However, there was no provision for oral examination of the opponent, and the procedure for taking pre-trial testimony of witnesses could be used in only such restricted circumstances that their value as discovery was slight.23

MODERN DISCOVERY

Reform of this haphazard jumble of discovery devices has proceeded along two general lines of attack: (1) Enlargement of the scope of inquiry so as to permit examination of any person with knowledge material to the cause, including the parties thereto; and (2) improving the mechanics of the discovery processes in order to eliminate the burdensome restrictions of the old systems.24

A mere enumeration of the discovery devices of modern procedure would appear to be simply a repetition of old methods; a detailed study of them will reveal their newly acquired simplicity, scope, and utility.

Depositions25

By one simple but telling stroke, the new Federal Rules of

23. There were four principal depositional devices in the former federal practices:

(1) The deposition de bene esse, taken after issue was joined and without leave of court upon notice to the opposite party. Rev. Stats. §§ 863, 865 (1875), 28 U.S.C. §§ 639-641 (1934). It was only "when the witness lives at a greater distance from the place of trial than 100 miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, before the time of trial, or when he is aged and infirm . . ." that the deposition could be taken. Rev. Stats. § 863 (1875), 28 U.S.C. § 639 (1934).

(2) The deposition dedimus potestatem, taken in "... any case . . . where necessary in order to prevent a failure or delay of justice." In the administration of this rather vague phrase, the courts followed somewhat the same considerations as expressly provided for in the deposition de bene esse. United States v. Cameron, 15 Fed. 794 (C.C.E.D. Mo. 1883); Zych v. American Car & Foundry Co., 127 Fed. 723 (C.C. Mo. 1904).

(3) The deposition taken "... in the mode prescribed by the laws of the State in which the courts are held." Rev. Stats. § 865 (1875), 28 U.S.C. § 643 (1934). This was narrowly construed to mean that only the actual procedure of taking depositions might follow state practice, while the occasions and grounds for taking them must follow the federal practice. National Cash-Register Co. v. Leland, 77 Fed. 242 (C.C. Mass. 1896); Hawks v. Yancey, 2 F. (2d) 471 (N.D. Tex. 1924); Morris & Co. v. Skandinavia Ins. Co., 17 F. (2d) 951 (S.D. Miss. 1927).


25. In the following discussion of modern deposition-discovery practice, this comment has made a somewhat detailed survey of the relevant sections of the new Federal Rules of Civil Procedure, which are illustrative of the most liberal advances in this field. Note will also be taken of any substantial
Civil Procedure have wiped out the entanglements of former practice in regard to depositions. They provide for almost unlimited freedom in the taking of depositions, both oral and written, with restrictions only on their use. The former allows the utmost freedom of discovery; the latter protects the well-established preference for oral testimony over written statements for use in court. To see how this operates in practice, it is necessary to consider:

1. Who may be examined?
2. When may the procedure be used?
3. How will the examination be conducted?
4. What is its scope?
5. Under what circumstances may the deposition be used at the trial?

The provisions of the new Federal Rules that "the testimony of any person whether a party or not" may be taken "for the purpose of discovery or for use as evidence in the action or for both purposes" open wide the gates, and abolish the illogical restrictions formerly imposed on the taking of depositions. As a result, any person, whether a party or not, having information relevant to the case, may be questioned.

Although discovery in America had advanced considerably beyond the chancery practice of having the interrogatories coupled with the pleadings, the modern rules loosen the reins still more in providing for taking depositions as a matter of course after issue is joined, and even before "an answer" is filed by leave of court. The height of liberality, discovery before

difference between the provisions of the new Federal Rules and those of Illinois, which has one of the best state discovery statutes.


27. Rules 26-33. Rule 12(e) provides for a motion for bill of particulars. The purpose of such relief is to obtain only such information as is required by the moving party in order to enable him to plead. It is not intended as an alternative or supplement to the discovery provisions of Rules 26-37, and consequently its use is narrowly limited. Bicknell v. Lloyd-Smith, 25 F. Supp. 657 (E.D. N.Y. 1933); American La France-Foamite Corp. v. American Oil Co., 25 F. Supp. 386 (D.C. Mass. 1938); United States v. Schine Chain Theatres, Inc., 63 Decisions on Federal Rules of Civil Procedure 9 (W.D. N.Y. 1940), and cases cited therein. See Holtzoff, Twelve Months Under the New Rules of Civil Procedure (1939) 85 Congressional Record, Appendix 723.


29. The outline herein is patterned after that employed by Pike and Willis, supra note 1, in their excellent discussion of the new Federal Rules.


31. Rule 30(b) gives the judge of the court in which the action is pending power to prevent abuse of this broad right to take depositions. See Moore and Friedman, Federal Practice Under the New Rules (1938) 2574. This power will undoubtedly not be used to defeat the broad purposes of the discovery processes, however.

32. Rule 26(a).
pleading, is not provided for,\textsuperscript{33} though it might be worked out by throwing up a skeleton pleading, taking the desired depositions, and then amending.\textsuperscript{34}

By providing for the taking of oral,\textsuperscript{35} as well as written\textsuperscript{36} interrogatories, the new Rules take advantage of the recognized superiority of oral over written examination, yet retain the written interrogatories for any needed cases. The constitutional requirement of notice to "every other party" to the action of the time, place and party to be examined, is of course contained in the statute.\textsuperscript{37} At the taking\textsuperscript{38} of oral depositions, objections to questions are noted on the record and evidence taken subject to such objections.\textsuperscript{39}

Perhaps the most troublesome depositions problem has been that of the scope of examination. The taking of depositions developed within the walls of the notorious "fishing expedition" rule—that discovery must relate to the party's own case and cannot be used to "fish" into that of the opponent. In line with the general theory that a complete revelation is desirable, the scope of examination under the new Rule is restricted only by the requirement that the information sought be "relevant to the

\textsuperscript{33} Apparently, Rule 27, providing for perpetuation of testimony was not intended as a discovery device. See remarks of Prof. Edson R. Sunderland, Hon. William D. Mitchell, and Mr. James A. Pike, Proceedings of the American Bar Association Institute on Federal Procedure (1938) 292-3. The absence of any reference to discovery similar to that contained in Rule 26 ("... for the purpose of discovery or for use as evidence in the action or for both purposes.") and the requirement that the petition set out the substance of the testimony expected to be elicited from each witness substantiates this. See Pike and Willis, supra note 1, at 1193.

\textsuperscript{34} However, necessity for an effective means of discovery prior to the filing of pleadings is of little importance under the new Federal Rules compared to that of code-pleading states. The difference lies in the form and effect of the pleading. Under the new Federal Rules (Rules 7-16) pleadings are intended principally as notice to the opposite party of the claim that is presented; under the system of fact-pleading established by the codes of the various states, the party is tied down to the set of facts pleaded. Thus, in one case, discovery is not necessary before the pleadings are filed, because they do not later restrict the scope of the discovery-examination in preparation for trial. On the other hand, the factual basis of the plea is stated, and then discovery is sought on the basis of what is already known. In the latter case, the cart of pleadings is placed squarely before the horse of discovery. See infra, p. 536 for discussion of this problem as applied to Louisiana.

\textsuperscript{35} Pike and Willis, supra note 1, at 1194.

\textsuperscript{36} Rule 30.

\textsuperscript{37} Rule 31.

\textsuperscript{38} Rules 30(a), 31(a).

\textsuperscript{39} Rule 28 provides for persons before whom depositions may be taken. Rule 30(c). Thus, even testimony which is objected to is useful for discovery.

If a witness refuses to answer, however, the relevancy of the question must be determined before he can be forced to do so. Rule 37(a).
subject matter involved in the pending action." The test of relevancy, it has been said, is whether the matter inquired of may possibly be competent at the trial, not whether it will be. This broad referent extends the horizons of permissible examination far beyond what was once possible. How wide a range of examination was contemplated by the framers is shown by the provision for inquiry as to the names of the opponent's witnesses.

The rules as to the use of discovery depositions are of little concern to a study of the discovery process. The usefulness of depositions in this regard lies in taking the evidence, not its introduction at the trial. It is to be noted, however, that taking the testimony of a deponent (who may be a party or not) does not make that person the witness of the interrogator. This is of paramount importance, in that a party may use depositional discovery freed from the handicap of making the deponent his own witness, with the resulting restrictions on impeachment and mode of examination.

**Discovery of Documents**

Documentary evidence is of primary importance in every case. No system of discovery would be complete which did not provide some means for ferreting out the documentary evidence of the opponent for inspection in order to prevent surprise and to allow a proper preparation of the case for trial. The Illinois statute is illustrative of all the best features of modern procedure on this point.

Its provisions are simple. Any party may apply, either before or after issue is joined, for an order directing any other party to

40. Rule 26(b). In one of the first cases to be decided under the new deposition-discovery procedure, Moscowitz, J., said: "Limitations which have been placed upon deposition-taking . . . such as the necessity of having the affirmative upon the issues upon which examination is sought, finds no basis in the new Rules. It will not avail a party to raise the familiar cry of 'fishing expedition.'" (Italics supplied.) Laverett v. Continental Briar Pipe Co., 25 F. Supp. 80, 82 (E.D. N.Y. 1938).

41. Pike and Willis, supra note 1, at 1442.

42. Rule 26(b). " . . . the deponent may be examined regarding . . . the identity and location of persons having knowledge of relevant facts."

43. Rule 26(b) states the conditions under which the depositions may be used.

44. Rule 26(f).

45. While the new Federal Rules contain very liberal and adequate provisions for the discovery of documents, they leave a great deal of discretion to the judge. Consequently, for the purposes of this comment, the more detailed Illinois statute was used as the subject for analysis.

any cause or matter to file a sworn list of all documents, including photographs, books, accounts, letters, and other papers, which are, or which have been in his possession, material to the merits of the matter in question. The party to whom the order is directed shall list the documents in two schedules: (1) All those which he is willing to produce, and the names and addresses of the persons now in control of them; (2) those which he is unwilling to produce, with a statement of the reasons for his objection, and the names and addresses of the parties now in possession.

The documents contained in Schedule 1—those the opponent is willing to produce—may be introduced in evidence without any further proof of genuineness. These documents may, at any time not inconvenient to the party in possession, be inspected and copied. If permission to do so is refused, an order of court enforcing this right may be obtained. The statutory teeth for the enforcement of the order are very sharp.\(^47\)

As to documents in Schedule 2, an order permitting the party seeking discovery to inspect and copy them may be obtained from the court. Refusal to obey by the other party, or by the one in possession at the instigation of that party is followed by serious consequences to the recalcitrant.\(^48\) No document listed in Schedule 2 may be introduced in evidence by the person listing, unless by leave of court.

The possibility of simply failing to list certain documents is, of course, covered also. Any document not listed shall be inadmissible as evidence for the party failing to list. Furthermore, an order may be obtained directing the other party to show cause why certain specified documents which were not listed should not be produced.

This rather simple procedure enables either party to make a blanket call for all material documents; to make easy use of the documents produced; to force production of documents which either are not listed or which the party is not willing to produce; and to tie the opponent down by preventing him from using un-

\(^47\) "... if leave so to do is unreasonably refused by the party listing it or by any other party at the instance of, or by collusion with the party listing it, a motion may be made for an order that the party listing such document shall be non-suited or his complaint dismissed, or that any pleading or part thereof filed by him shall be stricken out and judgment rendered accordingly, or that he may be debarred from any particular claim, defense, recoupment, set-off, counterclaim or replication respecting which discovery is sought, or an order of attachment as for contempt of court may be issued." Ill. Ann. Stats. (Smith-Hurd, 1938) c. 110, § 259.17 (2).

\(^48\) Ill. Ann. Stats. (Smith-Hurd, 1938) c. 110, § 259.17 (3).
listed documents in evidence. Consequently, every document used at the trial will have been previously discovered by the party seeking to do so.

A corollary to the documentary-discovery procedure permits a party to exhibit to his opponent at any time before trial, any paper material to the action with a request for admission of genuineness. If the opponent fails to admit, and the genuineness is later proved, the costs of such proof are taxed against him. Any lawyer who has gone through the arduous task of formally proving the genuineness of all his documentary evidence will appreciate the usefulness of these provisions.

Advantages of Modern Discovery Procedure

There are numerous striking advantages to such a liberalized system of discovery. In the first place, it sweeps overboard the fallacy which has insidiously fastened itself on procedural law for centuries, to the exasperation of many lawyers, and the disgust of laymen who came in contact with it—that justice can best be promoted by allowing each side to hide from the opponent as much of its case as possible. No reasoning could ever disprove the fact that the more completely facts and evidence are aired, the more properly the case can be prepared, the more quickly disposed of and the more equitably decided. Furthermore, that bugaboo of the law, perjury, is dealt a heavy blow by freedom of discovery. It is commonly argued that if one party knows what evidence the other intends to use, there is danger that re-

49. Ill. Ann. Stats. (Smith-Hurd, 1936) c. 110, § 259.18 (1). Provision is also made for calling on the other party to admit certain specific facts, which can be fairly admitted without qualification or explanation as stated in the notice. The penalty for failure to admit is the payment of the costs of proving that fact, if the opponent later proves it.

"... if such production shall be refused by the party listing said documents or by any other party at the instance of or by collusion with the party listing them, a motion may be made for, and the court may enter an order that the party listing such document shall be nonsuited or his complaint dismissed, or that any pleading or part thereof filed by him shall be stricken out and judgment rendered accordingly, or that he may be debarred from maintaining any particular claim, defense, recoupment, set-off or counterclaim or replication respecting which discovery is sought."

50. The new Federal Rules are very similar. See Rules 36, 37(c).

Rule 35 makes provision for physical and mental examination of persons. This discovery device is undoubtedly of great value in numerous cases.

51. "There is no objection that I know why each party should not know the others case," said Judge Taft, afterwards Chief Justice of the United States, while sitting as a state judge in Ohio. Shaw v. Ohio Edison Co., 9 Ohio Dec. 809, 812 (1887).

52. See Ragland, op. cit. supra note 17, at 124-5; Sunderland, supra note 1, at 867-68; Simpson, supra note 1, at 204-5; Pike and Willis, supra note 1, at 1437.
butting evidence may be manufactured to meet it. Instead, however, of encouraging perjury, a liberal system of mutual discovery goes far to prevent it. By the exercise of his right of discovery, a party who has been forced to reveal his claim or defense may tie down his opponent, and the latter's witnesses, to a definite position before any effective "artificial" story can be perfected.

It is well known that canonical law recognized three distinct purposes for its positional procedure: the proper preparation of the suit, the speedier expedition of cases, and the increase in danger of urging an action or defense devoid of legal basis. Modern discovery practice, the direct descendant of this procedure, far surpasses its parent in the accomplishment of these purposes.

The completeness of disclosure afforded by free discovery not only prevents surprise at the trial, but eliminates a considerable amount of wasted effort in preparing for matters which may never come up. Furthermore, while depositions of important witnesses may have been taken principally for the purpose of discovery, this testimony at the same time is available for use at the trial in case the witness is then absent.

Discovery also serves as high-grade oil for speeding up the legal machinery. By eliminating issues, shortening proof, and clarifying the conflict, the speed of actual trial is stepped up considerably. A further very important factor in this regard, is the elimination of non-meritorious cases. Experience has shown that it is difficult to bluff with a pair of legal deuces when all the cards of evidence are up. Once the facts are revealed, a great many cases are settled out of court. A still more lethal weapon for combating the evil of "nuisance value" claims and defenses has been forged by coupling with discovery a procedure for summary judgment, obtainable by either party in any type of action. This new partnership will undoubtedly prove very effective.

While ultra-conservative judges may, in some minor respects, prevent the complete freedom of discovery contemplated by modern rules, there can be no doubt that the broad principles of

53. Pike and Willis, supra note 1, at 1452.
frankness and fairness embodied in them will go far to overcome the effects of the "crude heredity" of procedural law.

LOUISIANA DISCOVERY DEVICES

Louisiana's discovery vehicle has numerous faults in design. The greatest handicap to its progress is, however, not structure, but the restricted area of its operation which results from the present system of fact-pleading. In common with all fact-pleading statutes, the Pleading and Practice Act provides for a statement of so-called ultimate facts on which the suit is based. It was contemplated that this form of pleading would not only give notice of claim to the court and opponent but also frame the issue or "cause of action" involved. The requirements of Louisiana procedure that discovery be made after this binding fact statement and within its restricted scope, is in effect requiring discovery to explore only within a previously charted area.

It is here that modern discovery differs from Louisiana procedure. Pleadings of the new Federal Rules are informal statements of the case, intended principally as notice of claim to the court and opponents. The real work of clarifying the issues and revealing the true bases of the contest is done by the discovery processes, which are not held within a previous fact-statement. Thus, while even under the most modern rules it is generally true that discovery is permitted only after the filing of a petition and service of process, the effect of the pleadings on this subsequent action is entirely different from the restrictive Louisiana practice. It should be remembered that every Louisiana device for discovery is encompassed within this limitation.

56. Clark, op. cit. supra note 17, at 150, § 38.
57. Pleading and Practice Act: La. Act 157 of 1912, § 1, as last amended by La. Act 27 of 1926, § 1 [Dart's Stats. (1939) § 1483]. Prior to the Practice Act of 1912, the general provisions for pleading were found in Arts. 169-176 and Arts. 316-329, Code of Practice of 1870. While these articles are still in force, the form of pleading for which they provided—somewhat similar to that of the new Federal Rules—has been entirely changed by the provisions of the Practice Act.
58. Perpetuation of testimony is possible before institution of suit. Its failure to be an effective discovery device is discussed, infra, p. 540. The petition may be amended at will before issue is joined. Tarver v. Quinn, 149 La. 368, 89 So. 216 (1921); Self v. Great Atlantic & Pacific Tea Co., 178 La. 240, 151 So. 193 (1933), and cases cited therein. But this right may be cut off at any time by the filing of an answer, after which, amendment is only permitted by leave of court, providing the amendment does not change the issues. Art. 419, La. Code of Practice of 1870. Tremont Lumber Co. v. May, 143 La. 389, 78 So. 650 (1918). Consequently, the use of information discovered after pleading by incorporating it in an amended petition is too uncertain for any practical purposes.
59. See supra p. 531 for scope of examination under the new Federal Rules.
60. For exceptions, see Ragland, op. cit. supra note 17, at 54-61.
Depositional Discovery

(a) Interrogatories on Facts and Articles

Both plaintiff and defendant are permitted by Article 347 of the Code of Practice to annex either to their petition or answer written questions known as interrogatories on facts and articles. When the Code of Practice of 1825 was formulated, an interested party was incompetent to testify in his own cause. The interrogatories provided by the Code, being the only possible way to question the opponent, were consequently very valuable. After statutory provision was made for cross-examination of the opponent as a hostile witness, these interrogatories fell into disuse. Recently, however, they have gradually regained favor as one Louisiana approach to modern discovery procedure.

But it is a rather distant approach. In the first place, this device is one of the prisoners within the bars of fact-pleading. Since the questions must be filed along with the petition or answer, they must necessarily be material or relevant to these pleaded facts. Furthermore, the flexibility and effectiveness of oral cross-examination is lacking. While there is provision for answering orally in court, the answers must be categorical, and in response to written questions. It must be noted also that interrogatories on facts and articles are permissible only between the parties.

64. Abat v. Gormley, 3 La. 238 (1832).
(b) Depositions

Were it not for the ever-present shadow of the pleadings, Louisiana's procedure for taking oral depositions\(^7\) would perhaps be adequate as a means of discovery from anyone not a party to the suit. A wide scope of examination in the taking of testimony is, however, the heart of successful discovery, without which it has little life.\(^8\)

A valuable addition to the possible uses of oral examination of parties to the litigation was made in Soule v. West.\(^7\) Through the technique of combining statutes, the court reached the conclusion that a party could orally cross-examine his non-resident opponent as a hostile witness, at any time after service of petition and citation.\(^9\) The rule of this decision affords the defendant a rather effective means of discovery from his adversary before filing his answer; its value to the plaintiff as a pre-trial discovery device is somewhat less, since he has already framed his pleading.

However, in Harrelson v. New Orleans-Roosevelt Corp.,\(^7\) the court balked at extending the rule so as to allow cross-examination of an opponent who was a resident of the parish in which the suit was pending. Had it done so, Louisiana would have a fair substitute for modern discovery-examination of the opposite party.\(^7\) As in Soule v. West,\(^7\) the defendant attempted to use a combination of statutes to show statutory sanction for his action. This device the court summarily rejected on the ground that the statutes did not permit such examination before issue joined.\(^9\)

Prior to that time, reasoned the court, the judge,

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\(^8\) See supra, p. 531. It must be remembered that the new Federal Rules use the same general forms of depositions that were used formerly. The improvement is in the use of these forms.

\(^9\) 180 La. 1092, 158 So. 567 (1935).

\(^7\) La. Act 115 of 1934 [Dart's Stats. (1939) §§ 1995-1995.2] (cross-examination of the opponent); La. Act 143 of 1934 [Dart's Stats. (1939) §§ 1998.1-1998.5] (providing for taking depositions of witnesses who live out of the parish); and La. Rev. Stats. of 1870, § 613 [Dart's Stats. (1939) § 1996.1] (taking of deposition at any time after service of petition and citation) were the statutes construed together in reaching the decision. The court said that Article 359 of the Code of Practice is merely declaratory of the fact that parties are not in a position to proceed with the trial of the case until issue has been joined; it is not in conflict with § 613 of the Revised Statutes of 1870, allowing commissions to take testimony to issue before joinder of issue.

\(^7\) 184 La. 551, 166 So. 671 (1936).

\(^7\) The restricted scope of examination caused by the fact-pleadings, supra, p. 536, would still have prevented the freedom of examination necessary for modern discovery.

\(^7\) 180 La. 1092, 158 So. 567 (1935).

\(^7\) Apparently, defendant based his action on a combination of Act 115 of 1934 (cross-examination of opponent) and Article 351 of the Code of Prac-
not knowing the issues, could not rule on the relevancy of the testimony. 80

Nevertheless, it is possible that discovery from a resident opponent before trial might be sanctioned by a combination of statutes different from that advanced by counsel in the Harrelson case. 81 If the clear statutory authority of these statutes be shown, the fabric of the Harrelson decision would hardly stretch far

80. "But to permit litigants to examine their resident opponents in open court, before the issue is defined, would be to permit the taking of evidence in its final form without advising the trial judge of the issues in the case and placing him in a position to rule on its relevancy and admissibility." Harrelson v. New Orleans-Roosevelt Corp., 184 La. 551, 555, 166 So. 671, 672 (1936).

This reasoning of the court aptly illustrates the results that will be reached when discovery is held within the bounds of the pleadings. In effect, the court is saying that it must be possible when taking the evidence to determine its admissibility, under the pleadings, at the trial. But there is express statutory authority for the proposition that the admissibility of testimony is not to be determined when it is taken, but when it is used at the trial. Section 616 of the Revised Statutes provides that "it shall be the duty of the clerk to take down the question of the party, the answer of the witness, as well as objections made to the same, as a part of the proceedings had, the regularity of which or any part of which objection shall be determined by the court in which the depositions are to be made on the trial of the cause." This is the approach of the new Federal Rules: freedom in taking the depositions; restrictions on use determined only when the evidence is offered at the trial. See supra, p. 530.


It is the impression of many attorneys that §§ 614-622 of the Revised Statutes do not provide for taking depositions of resident witnesses. This seems to be entirely unfounded. Section 615 says that "... said party shall apply to the clerk of the court in which said suit is pending, to take the testimony of his witnesses in writing, and thereupon said clerk shall proceed to take the testimony of such witnesses in writing. ..." (Italics supplied.) § 618 gives the clerk power to force attendance of the witnesses. The only reasonable interpretation of such language is that it contemplates the taking of depositions of persons residing in the parish where the suit is brought, by the clerk of that parish. Nor is such a procedure in conflict with that authorized by Article 430 of the Code of Practice. Lykiardopoulo v. New Orleans & C. R. Light and Power Co., 127 La. 309, 53 So. 575, Ann. Cas. 1912A, 976 (1910). Consequently, it seems that the combination of statutes set out above would be the same as those used in Soule v. West, except that, since the opponent is a resident of the same parish, §§ 614-622 of the Revised Statutes are used instead of Act 143 of 1934.

The question of whether the sections of the Revised Statutes have not been overruled by the subsequent statutes for taking depositions might be raised. The language of the court in Soule v. West in using § 613, and the fact that these statutes are not in conflict with any subsequent provisions for taking depositions seem to prove conclusively that they are still in force.
enough to hide from the court's view a solution which was never contemplated in that case.

The provisions for taking depositions on written interrogatories\(^{82}\) add little of value to Louisiana discovery procedure. Along with other discovery devices, they stand in the universal shadow cast by fact-pleading on the free examination of witnesses. Here, too, as in the field of oral depositions, the problem of using written interrogatories to cross-examine an adversary before trial is unsettled. While a non-resident opponent can be so examined,\(^{83}\) the unsatisfactory doctrine of the Harrelson case throws a doubt on the use of a similar procedure for a resident adversary.

(c) *Perpetuation of Testimony*\(^{84}\)

Unfortunate from the standpoint of discovery was the decision in the case of *State ex rel. Batt v. Rome*.\(^{85}\) There it was held that the right to cross-examine an adversary is confined to suits already pending in court, and cannot be used in perpetuating testimony as a means of discovery.\(^{86}\) Here, indeed, would a contrary decision have given Louisiana a fairly workable system of discovery. By taking a liberal stand, the court could have permitted the use of a discovery device which would be free of the restrictive pleadings\(^{87}\) and would serve as a fair counterpart of modern adversary-discovery. As it is, perpetuation of testimony can be used only in circumstances so limited that its usefulness to discovery is seriously impaired.\(^{88}\)

\(^{82}\) Arts. 424 et seq., La. Code of Practice of 1870.

\(^{83}\) Interstate Rice Milling Co. v. Hibernia Bank & Trust Co., 176 La. 308, 145 So. 548 (1933).

\(^{84}\) Perpetuation of testimony is possible both before and after suit is filed. The former is permitted by Code of Practice Article 440, as amended by Act 112 of 1914; the latter by Articles 138 and 430. It is the former which is of greatest interest in a study of discovery.

\(^{85}\) 172 La. 856, 135 So. 610 (1931).

\(^{86}\) "The title of the act, the use of the words 'parties litigant' in the text, especially in connection with what immediately follows those words ... have led us to the conclusion that the right of cross-examination of an opponent authorized by Act 126 of 1908 may be exercised only after the institution of suit, and then only in the court having jurisdiction thereof." *State ex rel. Batt v. Rome*, 172 La. 856, 890, 135 So. 610, 611 (1931).

\(^{87}\) Because, under Code of Practice Article 440, as amended, the testimony would be taken before suit is filed. A simple amendment to Article 440 providing that the testimony of a prospective opponent could be perpetuated on cross-examination before trial—the procedure which was tried in the Batt case—would add greatly to the effectiveness of this device as a discovery weapon. The requirement that the cause of action be first set forth would still restrain somewhat the scope of examination. Any possible abuse could be easily prevented by reserving discretionary power in the judge to forbid the taking of such testimony in unwarranted cases.

\(^{88}\) Art. 440, La. Code of Practice of 1870, as amended by La. Act 112 of
Discovery of Documents

(a) Prayer for Oyer

A prayer for oyer can be made only of the instrument on which the action is based. Nor is the remedy open to any one but the defendant. It is evident that such a limited device is far from being a counterpart to modern documentary-discovery.

(b) Subpoena duces tecum

There are several reasons why the subpoena duces tecum also fails to measure up to modern discovery standards. The worn-out “fishing expedition” adage is the controlling rule. Before a subpoena will issue, not only must certain particular books or papers be pointed out, but there must likewise be an allegation that all other sources of information have been exhausted. Discovery is virtually outlawed by the further provision that a sworn statement must be made of the facts which will be proved by the documents subpoenaed. This presents the same dilemma to documentary-discovery that the pleadings do to deposition-discovery—the facts to be discovered must be set forth before the right will be granted to discover them.
CONCLUSION

In modern perspective, the winding course which Louisiana discovery took in reaching its present unsatisfactory state is clear. Because mechanical defects in the available devices so limited their operation that they failed to accomplish the task of frankly revealing the issues and bases of suit, fact-pleading was adopted. It was hopefully expected that this system would remedy the prior procedural deficiencies, a job which it has proved inherently incapable of doing. As a result, present Louisiana procedure is not only weighted down with traditional limitations, but also totters under the burden of a broken-down pleading machine that was itself supposed to carry the load of discovery—a situation which judicial decision has done little to rectify. Compared to the modern streamlined processes for frank pre-trial disclosure, Louisiana is still in the "horse-and-buggy" age of discovery.

FRANK S. CRAIG, JR.

sary for a party to submit to examination before trial. Briefly, the rule prohibits a party who has refused to submit to examination from introducing his own evidence as to his physical condition. Kennedy v. New Orleans Ry. & Light Co., 142 La. 879, 77 So. 777 (1918); Crutsinger v. B. F. Avery & Sons, Inc., 146 So. 759 (La. App. 1933), and cases cited therein.