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"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

Comments

PREFERENCE IN BANKRUPTCY—A NEW DEFINITION

For the fifth time since the enactment of the Bankruptcy Act of 1898, Congress has amended Section 60, relating to preferences. The latest amendment came March 18, 1950, and changes only Section 60a, which defines a preference.¹ No attempt will be made to discuss even briefly the nature and significance of the

1. Pub. L. No. 461, App. March 18, 1950; 2 U. S. C. Cong. Service 184 (1950).

first three amendments,² and the fourth,³ which is a part of the Chandler Act, will be dealt with only so far as necessary to furnish a background for comments concerning the amendment of 1950.⁴

The principal controversies arising from Section 60 have centered around the definition of a preference, 60a, and its operation in connection with 60b,⁵ which provides for avoidance of preferences. The chief controversy concerned security transfers as avoidable preferences. More specifically, the problem arose primarily in two types of situations. The first situation was where there was a promise to give security based on present consideration before the four month period prior to bankruptcy, and a delivery of the property within that period. The other problem arose where the security transaction was executed prior to the four month period, but recording or filing was performed within four months of bankruptcy. The immediate question was whether or not delays in delivery, filing, or recording rendered the transfers voidable preferences.

The leading case covering the first situation in *Sexton v. Kessler and Company*,⁶ where the United States Supreme Court held that an agreement to pledge stock made prior to the four month period which was consummated by delivery within four months of bankruptcy was not a voidable preference. The court used the doctrine of "relation back," *i.e.* the agreement was treated as creating an "equitable lien," and the actual delivery related back to the time of the agreement, so as not to constitute a preference within four months of bankruptcy. This decision and others following it⁷ were regarded with dissatisfaction, particularly by those persons interested in the claims of the general creditors.

2. These came in 1903, 32 STAT. 799 (1903), 11 U. S. C. A. § 96 (1927); in 1910, 36 STAT. 842 (1910), 11 U. S. C. A. § 96 (1927); and in 1926, 44 STAT. 666 (1926), 11 U. S. C. A. § 96 (1936).

3. 52 STAT. 869 (1938), 11 U. S. C. A. § 96a (1940).

4. Discussions of the earlier amendments including the Chandler Act will be found in Hanna, *Preferences in Bankruptcy*, 15 U. OF CHI. L. REV. 311 (1948); Hanna, *Some Unsolved Problems Under Section 60a of the Bankruptcy Act*, 43 COL. L. REV. 58 (1943); Mac Lachlan, *Aspects of the Chandler Bill to amend the Bankruptcy Act*, 4 U. OF CHI. L. REV. 369 (1937); Mac Lachlan, *Defining a Preference in Bankruptcy*, 60 HARV. L. REV. 233 (1946).

5. The first two paragraphs of Section 60 as originally enacted in 1898 provided:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

6. 225 U. S. 90, 56 L. ed. 995, 32 Sup. Ct. 657 (1912).

7. Cases similar to *Sexton* case are: *Hurley v. Atchison, T. & S. F. Ry.*, 213 U. S. 126 (1909); *Manufacturers' Finance Co. v. Armstrong*, 78 F. 2d 289

In the case of *Martin v. Commercial National Bank*,⁸ a chattel mortgage was executed more than four months prior to bankruptcy, but was filed within four months of bankruptcy, the mortgagee being fully aware of the insolvency of the mortgagor. The trustee in bankruptcy was not allowed to set aside the security transfer as a voidable preference because the date of filing related back to the execution of the mortgage. Two years earlier, the Supreme Court rendered a similar decision in the case of *Carey v. Donohue*,⁹ involving a real estate mortgage, executed prior to, but not recorded until after the beginning of the four month period.

Thus, in spite of efforts to change the situation,¹⁰ the 1898 act just prior to the Chandler Amendments, as interpreted by the Supreme Court, allowed a transfer, good as against non-lien creditors before bankruptcy, to be perfected before bankruptcy without rendering the transfer a voidable preference, *i.e.* the perfection related back to the time the transfer was made.

Many persons thought that the result of the aforementioned cases destroyed the beneficial purposes of recording statutes, as well as the preference sections of the Bankruptcy Act, in addition to defeating the intent of Congress. However, as has been pointed out, these decisions were not entirely without justification, as it was frequently impractical or impossible to consummate a security transaction at the time the advance was made. The court decisions failed to hold the doctrine of relation back within reasonable bounds.¹¹

It was with the idea that these "secret equitable liens" resulting from the doctrine of relation back should be completely abrogated, that the portion of the Chandler Act of 1938 dealing with Section 60 was framed. Section 60a defined a preference as a transfer of an insolvent debtor's property in payment of an antecedent obligation within four months of petition in bankruptcy and added ". . . a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy . . . it shall be deemed to have been made immediately before bankruptcy."

Thus the trustee in bankruptcy was placed in the position of a hypothetical bona fide purchaser for the purpose of determining when a transfer was perfected. It was thought that the construction of this amendment would destroy the objectionable secret liens, but at the same time would not invalidate recognized

(C. C. A. 1st 1935); *Massachusetts Trust Co. v. Macpherson*, 1 F. 2d 769 (C. C. A. 1st 1924); *Eisenlohr v. Ehrich*, 296 Fed. 816 (C. C. A. 34d 1924).

8. 245 U. S. 513 (1918).

9. 240 U. S. 430 (1916).

10. The principal effort was the 1926 amendment cited in note 2 *supra*.

11. *Hanna, Preferences in Bankruptcy*, 15 U. OF CHI. L. REV. 311, 319 (1948).

security transactions.¹² As it developed in later decisions, the amendment "burned the barn to kill the mouse."¹³

The case of *Corn Exchange Bank v. Klauder*¹⁴ was the first case that dealt directly with the change in 60a as amended by the Chandler Act. It involved an assignment of accounts receivable which was attacked by the trustee in bankruptcy as a voidable preference. The applicable state law was that of Pennsylvania, which followed the rule of *Dearle v. Hall*,¹⁵ providing that as between two assignees the first to give notice to the obligor prevailed. The assignee had not given notice, and the Supreme Court, applying the hypothetical bona fide purchaser test of 60a, declared that the transfer was not perfected, and allowed the trustee to avoid the assignment. This case made it clear that the liberal construction of Section 60a would no longer be employed.

The case of *in re Vardaman*¹⁶ went even further in avoiding an assignment of accounts receivable where the applicable state law followed the so-called Massachusetts rule which is stated in the *Restatement of Contracts*, Section 173.¹⁷ The third judicial circuit reached a result substantially contrary to the *Vardaman* case, although not disagreeing with the *Klauder* holding¹⁸

The decisions in the *Klauder* and *Vardaman* cases caused much concern among lenders, particularly banks, who frequently took assignments of accounts receivable to secure loans. The result of these cases was circumvented by many state legislatures. The statutes took three forms. Several states enacted so-called validation statutes which in effect codified the non-notification rule as between successive assignees, *i.e.* the first assignee in point of time prevailed under the statute despite the fact that he gave no notice to the debtor. Other legislatures passed "book marking" statutes which reached a similar result if the assignor has

12. Glenn, *The Chandler Act and the Trustee in Bankruptcy as a Bona Fide Purchaser*, 25 VA. L. REV. 885 (1939); Mac Lachlan, *Defining a Preference in Bankruptcy*, 60 HARV. L. REV. 233 (1946); Neuhoﬀ, *Assignments of Accounts Receivable as Affected by the Chandler Act*, 34 ILL. L. REV. 538 (1940).

13. Hanna, *Preferences in Bankruptcy*, 15 U. OF CHI. L. REV. 311, 320 (1948).

14. 318 U. S. 434, 87 L. ed 884, 63 Sup. Ct. 679 (1943). This case is discussed at length in Koessler, *Assignment of Accounts Receivable: Confusion of the Present Law, The Impact of the Bankruptcy Act, and the Need for Uniform Legislation*, 33 CALIF. L. REV. 40 (1945); Kupfer and Livingston, *Corn Exchange Bank and Trust Company v. Kessler Revisited: The Aftermath and its Implications*, 32 VA. L. REV. 910 (1946); Comment, 9 Mo. L. REV. 165 (1944).

15. 3 Russ. 1, 38 Eng. Rep. 475 (1828).

16. 52 F. Supp. 562 (E. D. Mo. 1943).

17. This section provides that as between successive bona fide assignees the first in point of time prevails unless the subsequent assignee 1) obtains payment or satisfaction of the obligor's duty, or 2) obtains judgment against the obligor, or 3) obtains a new contract with the obligor by means of a novation, or 4) obtains delivery of a tangible token or writing, surrender of which is required by the obligor's contract for its enforcement. The theory of the *Vardaman* Case seemed to be that the trustee in bankruptcy for purpose of invalidating a preference was in the position of a subsequent bona fide assignee who *could* have prevailed by one of the four above methods thus the first assignment was held invalid as a preference. Unfortunately the case was not appealed.

18. *In Re Rosen*, 157 F. 2d 997 (C. C. A. 3rd 1946).

made appropriate records in keeping his books regarding the first assignment. The third type statute was a recording act which provided that the first assignee prevailed if he properly recorded the assignment.¹⁹ Missouri adopted the latter type by requiring that a general notice of assignment be filed with the office of the Secretary of State.²⁰

However, the decisions continued to cause unrest, because a literal construction of Section 60a, as amended, would possibly invalidate as preferences other heretofore valid security transactions such as trust receipts, factor's liens, conditional sales agreements for resale, and other types of financing where it is contemplated that a bona fide purchaser should take free of the security interest.²¹ Lawyers were faced with the extremely difficult task of advising clients regarding the validity of such security transactions.

This confusion led to a joint meeting of the representatives of the American Bar Association and the National Bankruptcy Conference in 1946, and ultimately in a proposed amendment to Section 60a.²² This proposal, however, was not adopted by Congress.

The fear that led to the 1946 meetings, *i.e.* that a literal application of 60a would invalidate other heretofore recognized security transactions, was realized when a district court held a trust receipt voidable as a preference.²³ It has been suggested that this decision might have given impetus, if any was needed, to pass the present amendment.²⁴

The new Section 60a consists of eight paragraphs, as contrasted with the one paragraph in the Chandler Act. The principal change affected by the amendment results from the abandonment of the hypothetical bona fide purchaser test in determining when a transfer of "property other than real property" is perfected. Such transfer is now perfected when "no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the legal rights of the transferee. . . ." Thus the law tests the perfection of such a transfer against the effect of a lien rather than against the acts of a bona fide purchaser as was done under the Chandler Act.

19. For an excellent discussion of these types of statutes as well as the general problem of assignments of accounts receivable prior to the 1950 amendment see Koessler, *Assignment of Accounts Receivable: Confusion of the Present Law, The Impact of the Bankruptcy Act, and the Need for Uniform Legislation*, 33 CALIF. L. REV. 40 (1945).

20. Mo. Laws 1943, p. 405, discussed at length in Comment, 9 MO. L. REV. 167 (1944).

21. H. R. No. 1293, Aug. 22, 1949. See also materials cited in note 4, *supra*.

22. Discussed in Hanna, *Preference in Bankruptcy*, 15 U. OF CHI. L. REV. (1948); Mac Lachlan, *Defining a Preference in Bankruptcy*, 60 HARV. L. REV. 233 (1946); criticized in Keefe, Kelly, and Lewis, *Sick Sixty: A proposed Revision of Section 60a of the Bankruptcy Act*, 33 CORN. L. Q. 99 (1947); Moore and Tone, *Proposed Bankruptcy Amendments: Improvement or Retrogression?*, 57 YALE L. J. 683, 686-692 (1948).

23. 88 F. Supp. 466 (1949); a similar referee's decision without opinion in December, 1949, invalidated a factor's lien, Kupfer, 123 N. Y. L.J. 1158.

24. Mac Lachlan, *"Preference Redefined,"* 63 HARV. L. REV. 1390 (1950).

This provision would seem to satisfy the objections to the *Klauder* and *Vardaman* cases as well as relieving the doubt as to other security transactions mentioned herein.²⁵ In most states, a lien obtainable in legal or equitable proceedings on a simple contract would take subject to a properly recorded trust receipt, factor's lien, or an assignment of accounts receivable, thus such a security transfer would be perfected so as not to constitute a voidable preference.

In regard to real property, a transfer is perfected when "no subsequent bona fide purchaser from the debtor could create rights in such property superior to the rights of the transferee." Thus the test remains substantially the same as the Chandler Act except that perfection of a transfer is tested against the effect of a purchase rather than against the acts of a purchaser. The retention of a test similar to that propounded in the Chandler Act was thought necessary in the case of real property in view of the number of jurisdictions where little or no protection was afforded to those other than bona fide purchasers.²⁶

Sub paragraph (3) of the amendment states that these tests of perfection shall apply "whether or not" there were creditors or bona fide purchasers. Thus the lien and purchase are hypothetical rather than actual.

Sub paragraph (4) illustrates the type of lien intended²⁷ and then excludes liens given a special priority over other prior liens. The exclusion of liens given a special priority was inserted through fear that liens given by statutes in some jurisdictions to a person injured in an automobile accident and made superior to that of a prior mortgagee, might be used as the hypothetical lien described in the amendment.

The amendment in sub paragraph (5) points out that the hypothetical lien referred to is treated as having been filed, docketed, or recorded, if that be necessary by state law. In the same manner the hypothetical purchase of real property is treated as having been recorded. However, this subparagraph precludes in the hypothesis further action that would perfect the lien or purchase, such as obtaining payment or a novation.²⁸

There was some reluctance to change the hypothetical bona fide purchaser test set forth in the Chandler Act, because it was thought that the door would again be left open to so-called "equitable liens" under the doctrine of *Sexton v. Kessler*. To alleviate this fear, the matter of "equitable liens" was dealt with directly by sub paragraph (6) of the amendment which declares that "the recognition of

25. It should be noted that the use of the Missouri Statute cited in note 20, *supra*, protecting an assignee of accounts receivable if notice is properly filed, is no longer necessary as far as bankruptcy is concerned.

26. Mac Lachlan, "Preference Redefined," 63 HARV. L. REV. 1390 (1950).

27. "A lien obtainable by legal or equitable proceedings upon a simple contract within the meaning of paragraph (2) is a lien arising in ordinary course of such proceedings upon the entry or docketing of a judgment or decree, or upon attachment, garnishment, execution, or like process, whether before, upon, or after judgment or decree and whether before or upon levy. It does not include liens which under applicable law are given a special priority over other liens which are prior in time."

28. Mac Lachlan, "Preference Redefined," 63 HARV. L. REV. 1390 (1950).

equitable liens where available means of perfecting legal liens have not been employed is hereby declared to be contrary to the policy of this act. . . ." The subparagraph continues to state that the security transaction shall not be sufficiently perfected even though it is made for valuable consideration and both parties intend to perfect it.

It seems clear that the type of "equitable lien"²⁹ found in the *Sexton* case could not survive in view of the amendment. What other equitable liens³⁰ are included in this general condemnation is at least questionable, and this portion of the amendment has received some criticism.³¹

The remaining pertinent part of the amendment deals with recording and delivery where the applicable state law requires that there be such in order that a transfer shall prevail over the hypothetical lien or purchase mentioned in the act. The amendment requires that such recording or delivery be completed within the time set by the applicable state law if such time does not exceed twenty-one days. Thus, relation back is allowed to a limited extent *i.e.* twenty-one days unless the applicable state law requires filing or recording in a shorter period.

It is impossible at this time to anticipate the difficulties that will arise from the construction and application of the new amendment. In light of the past controversies concerning Section 60a, it is probably correct to assume that there will be future difficulties. However, it would appear that the present amendment is an improvement in the law, and it is hoped that court interpretation will not prove otherwise.

ROBERT J. VIRDEN

JUDICIAL LIMITATIONS UPON THE FEDERAL AND MISSOURI RULES PERMITTING INTERROGATORIES

Before examining the limitations the courts have put upon the use of interrogatories, it will be helpful to review briefly the status at common law of pre-trial discovery of evidence to be used by the adversary.

Professor Wigmore demonstrated that the argument of "unfair surprise," which, of course, favors liberal pre-trial discovery, involved the consideration of two policies.¹ These are, first, the process of ascertaining the truth at the time

29. As has been pointed out this type of equitable lien is predicated upon a specifically performable agreement to give a lien and doesn't include a blanket coverage of all equitable liens.

30. The term "equitable lien" has no definite and precise meaning in the law. Generally speaking it is a remedial device creating an interest recognized by courts of equity. Such liens arise in many situations and whether part or all types are condemned by the amendment would seem to depend on the interpretation of the words ". . . where available means of perfecting legal liens have not been employed. . . ." Possible difficulties with this section are discussed in the material cited in note 31, *infra*.

31. Hanna, *Preferences as Affected by Section 60c and Section 67b of the Bankruptcy Law*, 25 WASH. L. REV. 1 (1950).

1. WIGMORE, EVIDENCE, § 1845 (3d ed. 1940).

of the trial; and second, the just, efficacious, and expeditious disposition of litigation in general. About the first policy, there were two arguments to be considered. If it could be assumed that the evidence which would cause the surprise would be the truth, the fact that one party was surprised would make no difference. Obtaining knowledge of the evidence before the trial could not alter its truthfulness. If the truth rendered a claim or defense invalid then it should be invalid. However, if it were assumed that the surprising evidence would be either wholly false or give false implications, then finding out about it before the trial would enable the other party to expose the false evidence and reveal the truth or explain away the false implications. Whether or not pre-trial discovery should be allowed depended in part upon the choice of these two assumptions. The early common law chose the first, that the evidence would be true. It is said that this choice was the result of two moral influences prevailing at the time. One was the instinct of sportsmanship, the idea of carrying out the contest on equal and honorable terms. The other was the fear of the possibilities of abuse by an unscrupulous opponent. This danger was always present, and only experience could show whether the harm it threatened would be outweighed by the advantage of faster and cheaper settlement of disputes.

The second policy, disposition of litigation in general, was considered in the light of the objection that the time, expense, and amount of litigation would be reduced considerably by pre-trial discovery. To the attorneys, counselors, judges and officers of the court this would mean a large reduction of fees.² Although this was not an honorable objection, it was, in fact, a powerful silent motive for resistance. The result was that under the early common law there was no pre-trial discovery which would reveal the evidence upon which the opposite party was going to rely.

However, as early as 1709, there began the enactment of a series of statutes to remedy this situation. Generally speaking these statutes fell into two classifications, those affecting criminal cases,³ and those affecting civil cases. The first reform involving the latter class came in England in 1854.⁴ This was followed by a variety of acts throughout most of the United States⁵ only two of which, Rule 33 of the

2. TWISS, *LIFE OF LORD ELDON*, III, 315; CAMPBELL'S *LIVES*, X, 68, says the incumbents under the system gave in perquisites to the Chancellor some eighty-five thousand dollars a year. In 1932 this was reduced to a fixed salary of £10,000.

The Chief Justice of the King's Bench got some eighty thousand a year, according to ARNOULD'S *LIFE OF LORD DENMAN*, I, 185. In 1825 this was reduced to £10,000, and in 1830 to £8,000, in fixed salary.

3. For a discussion of these statutes, see WIGMORE, *EVIDENCE*, § 1855 (3d ed. 1940).

Rules of the Supreme Court, Order XXXI, Rule 1 (1883).

5. *Federal Rules of Civil Procedure*, Rule 33 (1938); *Missouri*, REV. STAT. § 847.85 (1939); *Alabama*, CODE §§ 7764-7772 (1923); *Arizona*, REV. CODE § 4444 (1928); *Arkansas*, POPE'S DIG. §§ 1472-1484 (1937); *California*, CODE CIV. PROC. § 2021 (1872); *Connecticut*, GEN. STAT. §§ 5635-5638 (1930); *Florida*, COMP. GEN. LAWS §§ 4406, 4407 (1927); *Georgia*, CODE, §§ 38-1201-1204 (1933); *Illinois*, REV. STAT. c. 37, § 387 (1937); *Indiana*, STAT. ANN. § 2-1028 (Burns, 1933); *Iowa*, CODE §§ 10953, 11185 (1931); *Kansas*, GEN. STAT. §§ 60-2821 (1935); *Kentucky*,

Federal Rules of Civil Procedure and Section 847.85 of the Revised Statutes of Missouri, 1939, will be discussed here.

I. THE FEDERAL RULE

Rule 33 of the Federal Rules of Civil Procedure provides for the service of written interrogatories upon an adverse party.⁶ Since the effective date of the rule, September 16, 1938, it has been the subject of almost constant litigation. Much room was left for misunderstanding and difference of opinion. The rule caused the district judges all over the country, and to some extent the judges of the circuit

CODE CIV. PROC. §§ 143, 151, 606 (1895); *Louisiana*, CODE OF PR. §§ 347-356 (1900); *Massachusetts*, GEN. LAWS c. 231 § 61 (1920); *Michigan*, COMP. LAWS §§ 13543-13549 (1929); *Mississippi*, CODE, §§ 1549-1551 (1930); *Montana*, REV. CODE §§ 10645, 10652 (1935); *Nevada*, COMP. LAWS §§ 9001, 8967, 8968 (1929); *New Hampshire*, PUB. LAWS c. 337, § 11, c. 336, § 24 (1926); *New Jersey*, REV. STAT. §§ 2:27-165 to 177 (1937); *New Mexico*, STATS. ANN. §§ 45-509 (1929); *New York*, CIV. PRAC. ACT. §§ 288-302 (1920); *North Carolina*, CONSOL. STAT. §§ 899-907 (1919); *North Dakota*, COMP. LAWS §§ 7862-7869 (1913); *Ohio*, GEN. CODE ANN. §§ 11348-11350, 11497, 11555 (1921); *Oklahoma*, STATS. § 270 (1931); *Oregon*, CODE §§ 9-1503, 9-1706 (1930); *Pennsylvania*, STATS. tit. 28 § 5 (Purdon, 1930); *South Carolina*, CODE §§ 675-682 (1932); *South Dakota*, CODE §§ 36.0503-36.0505, 36.0531 (1939); *Tennessee*, CODE §§ 9869-9878 (1932); *Texas*, REV. CIV. STAT. §§ 3752, 3768, 3769 (1925); *Vermont*, PUB. LAWS § 1701 (1933); *Virginia*, CODE §§ 6225, 6226, 6236, 6238 (1919); *Washington*, CODE §§ 1225-1230, 1903, 1906, 1927 (1909); *West Virginia*, CODE c. 57, art. 4, § 1 (1931); *Wisconsin*, STATS. § 325.14 (1937); *Wyoming*, REV. STAT. §§ 89-1705, 89-1734, 89-1045 (1931).

6. "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers of the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

"Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule." *Hickman v. Taylor*, 329 U. S. 495, 91 L. Ed. 451, 67 Sup. Ct. 393 (1947), and other cases, held that *adverse party* means just that. It does not include the attorney or a party that is not adverse.

courts of appeal, endless anxiety and trouble.⁷ It was clear that some change was necessary. On December 27, 1946, the Supreme Court adopted the Advisory Committee's recommendation that Rule 33 be extensively amended. The degree to which the amendment will eliminate the confusion which surrounded the rule is still largely a matter of speculation.⁸

In the case of *Coca-Cola Co. v. Dixie-Cola Laboratories*,⁹ decided before the amendment was adopted, the defendant served 112 interrogatories, containing 225 questions. The questions, answers, and objections filed by the plaintiff filled 82 typewritten pages. Judge Chesnut felt that the rule had been misused in the light of its intended purpose. Therefore, he limited its application to those cases in which "the facts sought are few, formal and isolated." He pointed out that where the number of interrogatories served was "very numerous, as in this case, they tend to become unduly burdensome, oppressive and vexatious to the adverse party and difficult for the court to administer." This has been the most widely cited and approved case that has been decided under Rule 33.¹⁰ Subsequently,

7. Remarks by Senator Pepper, Discovery Procedure Symposium, Before the 1946 Conference of Third United States Circuit Court of Appeals, 5 F.R.D. 403.

8. In passing, it is interesting to note that the Advisory Committee's Report itself is not wholly free from confusion. 5 F.R.D. 339 (1946). Mr. Armstrong, speaking on behalf of the committee, points out that the committee has ended the debate as to whether or not the scope of examination under Rule 26(b), and hence Rule 33, is limited to adducing testimony which could be offered in evidence, by stating that "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." In other words, the exclusory rules of evidence are not a limitation upon the scope of the rule. It has been said that the reason the test of admissibility in evidence is not applicable is because the purpose of the rules of evidence are primarily to safeguard against abuses of the jury system. A Preliminary Treatise on Evidence at the Common Law, cc. IV-VI, pp. 180, 266, 270, 509, James Bradley Thayer (1898), whereas, the committee says that: "The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." However, Mr. Armstrong goes on to say that the majority of the "Committee believes that the term 'privileged' as used in that rule was not designated to include anything more than that embraced within the rule of *testimonial exclusion regarding privileged communications* as developed under the applicable *laws of evidence*, both common-law and statutory." It is evident that the Committee considers that the test of whether or not the exclusory rules of evidence are to be applied to pre-trial discovery is whether or not they wish to restrict or enlarge the class of questions they may be asked. Their position is irrational, it does not preserve the normal ratio between *arsis* and *thesis*. The amendment expressly states that the rules of evidence are not applicable in defining the scope of examination. It is submitted that this portion of the amendment refers to *all* of the definition of that scope, not just part of it. The definition of the scope is contained in one sentence which immediately precedes the amendment. It would be quite anomalous to say that the particular word "privilege" out of the entire sentence was immune to the force of the amendment. What the committee has done is to say that the rules of evidence do not apply to depositions and interrogatories and then it has applied them to privileged communications.

9. 30 F. Supp. 275 (D. Md. 1939).

10. For example, see *Ryan v. Lehigh Valley R.R.*, 5 F.R.D. 399 (S. D. N. Y. 1946); *Hercules Powder Co. v. Rohm & Haas Co.*, 3 F.R.D. 328 (D. Del. 1944); *Ball v. Paramount Pictures*, 4 F.R.D. 194 (W. D. Pa. 1944); *Hartford-Empire*

the amendment to the rule specifically provided that, "The number of interrogatories or of sets of interrogatories to be served is not limited except *as justice requires* to protect the party from annoyance, expense, embarrassment, or oppression." (italics added) It is not entirely clear just what change this language was intended to accomplish. It seems quite certain that if Judge Chesnut were asked whether or not the limitation he applied in the *Dixi-Cola* case was such "as justice requires" he would answer emphatically, yes. It is conceivable that every district court of the United States could construe "as justice requires" differently, and who could say which of them were wrong? Therefore, it is very doubtful that the amendment made any change in the pre-existing judicial limitation on the number of interrogatories that may be served under the Rule.¹¹

Interrogatories calling for answers that would require extensive research, investigation, or compilation of data have given rise to another judicial limitation. It has been held that the interrogated party may not be required to make unreasonable investigations or large expenditures of time and money. Thus in *Porter v. Central Chevrolet, Inc.*,¹² it was stated:

"But that is a far cry from permitting parties to use the instrument of a rule to require another to collate, analyse, audit and state the effect of the contents of documents that the statute requires to be kept in pursuance of the execution of some public policy.

"No authority has been cited to the court, nor would the court be inclined to follow any if cited, that the scope of Rule 33 should be extended to accomplish this end."

The courts that developed this limitation have recognized that businessmen do not keep their books and records with a view of accommodating the adverse party. Nor should a litigant be compelled to make large expenditures of time and money in order that his adversary may be better prepared to deprive him of still more money. Shortly after the *Porter* case was decided, it was reinforced by the adoption of the amendment which specifically said that the adverse party must "furnish such information as is *available*." (italics added) Judge, formerly Dean, Clark's note to the amended Rule comments upon every addition and deletion effected by the amendment except the added words just quoted.¹³ This conspicuous silence

Co. v. Glenshaw Glass Co., Inc., 4 F.R.D. 210 (W. D. Pa. 1943); *United States v. General Motors Corp.*, 2 F.R.D. 528 (N. D. Ill. 1942); *Checker Cab Mfg. Corp. v. Checker Taxi Co.*, 2 F.R.D. 547 (D. Mass. 1942); *Brightwater Paper Co. v. Monadnock Paper Mills*, 2 F.R.D. 547 (D. Mass. 1942); *Chemical Foundation v. Universal-Cyclops S. Corp.*, 1 F.R.D. 533 (W. D. Pa. 1941); *Stewart-Warner Corp. v. Staley*, 2 F.R.D. 199 (W. D. Pa. 1941); *Graver Tank & Mfg. Corp. v. James B. Berry Sons Co.*, 1 F.R.D. 163 (W. D. Pa. 1940); *Byers Theaters v. Murphy*, 1 F.R.D. 286 (W. D. Va. 1940); *New England T. Co. v. Graver Tank & Mfg Corp.*, 1 F.R.D. 411 (D. R.I. 1940).

11. The note to the amendment, *Federal Rules of Civil Procedure with Approved Amendments, Monographs, Advisory Committee Notes, Revised Ed. 1947*, written by Judge Clark, indicates that the burden of proof of "annoyance, expense, embarrassment, or oppression" is upon the party interrogated.

12. 9 FED. RULES SERV. 636 (N. D. Ohio 1946).

13. *Supra*, note 11.

seems to support the contention that these added words were intended merely to put into statutory form what the courts had already said was the law. Reading the amendment in the light of the cases that preceded it, the word "available" should be construed to mean obtainable by the expenditure of a reasonable amount of time and money, taking into account the access the interrogator has to the same information, the fact that the expense of preparing a claim or defense is to be borne by the party asserting it, and the importance of the evidence sought to the main issues of the case. This construction is given weight by the fact that necessary documents, papers, books, accounts, letters, photographs, objects, or tangible things may be obtained for inspection and photographing under Rule 34. If it had been contemplated that Rule 33 could be used to obtain answers requiring extensive investigations and large expenditures of time and money, it would have been superfluous to provide for what amounts to exactly the same thing under Rule 34 "upon motion" and by "showing good cause." The latter rule would never have been utilized because Rule 33 does not even require an affidavit, much less a motion and showing of good cause.

Still another judicial restriction has resulted from what perhaps are the most serious abuses of Rule 33. These have been the attempts to probe into the files of the opposing lawyer. In discharging his duties as an officer of the court it is necessary that a lawyer work with a certain degree of privacy. Experience has shown that to usefully function within the framework of our system of jurisprudence and to protect his client's interest, it is essential that a lawyer assemble the facts, prepare his legal theories, and plan his strategy without undue and needless interference. In order that this might be done the courts have limited inquiries into the adversaries' files. Judicial sentiment has been very strong in favor of this limitation. In *McCarthy v. Palmer*,¹⁴ it was said:

"While the Rules of Civil Procedure were designed to permit liberal examination and discovery, they were not intended to be made the vehicle through which one litigant could make use of his opponent's preparation of his case. To use them in such a manner would penalize the diligent and place a premium on laziness."

The case of *Hickman v. Taylor*¹⁵ deserves special mention in this connection. The tug *J. M. Taylor* sank into the Delaware River as the result of an unusual accident, the cause of which is still unknown. Five of nine crew members were drowned. Three days later the tug owners and the underwriters employed a law firm which included one Fortenbaugh among its members to defend them against potential suits by representatives of the deceased crew members and to sue the B & O Railroad, whose float they were towing, for damages. The four survivors were examined at a public hearing before the United States Steamboat Inspectors. This testimony was recorded and made available to all interested parties. Shortly thereafter Fortenbaugh privately interviewed the survivors and took statements

14. 29 F. Supp. 585 (E.D. N.Y. 1939).

15. 329 U. S. 495, 91 L. Ed. 451, 67 Sup. Ct. 393 (1947).

from them with an eye toward the anticipated litigation. The survivors signed these statements. Fortenbaugh also interviewed other persons believed to have some information relating to the accident and sometimes took notes of what he was told. Representatives of one of the deceased filed suit against the two tug owners and the railroad. The plaintiffs served 39 interrogatories upon the tug owners, the 38th of which read:

“State whether any statements of the members of the crews of the tugs ‘J. M. Taylor’ and ‘Philadelphia’ or of any other vessel were taken in connection with the towing of the car float and the sinking of the tug ‘John M. Taylor.’ Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.”

Supplemental interrogatories asked whether any oral or written statements, records, reports or other memoranda had been made concerning any relevant matter. If so, the nature of them was to be set forth.

The tug owners, through Fortenbaugh, answered all interrogatories except Number 38. They admitted that statements of the survivors had been taken but declined to summarize or set forth the contents on the grounds that the request called for “privileged matter obtained in preparation for litigation” and was “an attempt to obtain indirectly counsel’s private files.”

The district court ordered the tug owners and Fortenbaugh as their counsel and agent to answer Number 38. Upon their refusal, they were jailed for contempt. The Court of Appeals for the Third Circuit reversed the district court and held that the information sought was the “work product of the lawyer” and hence privileged from discovery under the Federal Rules of Civil Procedure. The Supreme Court, affirming the court of appeals, held that the statements taken by counsel were immune to discovery in the absence of a showing of good cause. The court observed that the interrogatories had been served under Rule 33 but the district court’s order had commanded production of the memoranda by Fortenbaugh. (Production of tangibles must be obtained under Rule 34 upon motion and a showing of good cause.) Since Rules 33 and 34 both apply only to the adverse party, and not his attorney, the refusal to obey the order led to the anomalous result of holding the tug owners in contempt for failure to produce that which was in the possession of their counsel and of holding Fortenbaugh in contempt for failure to produce that which he could not be compelled to produce under either Rule 33 or 34.

The circuit court of appeals, realizing that Rules 33 and 34 applied only to adverse parties, and not their attorneys, thought that Rule 26 was the crucial one. In construing that rule they found that the word “privilege” was broad enough to include statements made by ordinary witnesses to the lawyer and was not restricted by the definition given that term in the law of evidence. The Supreme Court disagreed, saying that Rule 33, not 26, was the one applicable. However, they did not base their decision upon this procedural error. They agreed with the interrogator that the statements sought fell outside of the attorney-client privilege and

could not be protected *on that basis*. But they went on to accord them protection by saying:

"Here is simply an attempt, without purported necessity or jurisdiction, to secure written statements, private memoranda, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."

It was pointed out that the interrogator had made no showing of necessity or any indication or claim that denial of production would unduly prejudice the preparation of his case or cause him any hardship.

Although the interrogator and the Supreme Court agreed that Rule 33 was the one involved, the Court expressed an intention to make its opinion go beyond the facts of the case and pass upon the scope of the discovery rules in general. It stated the issue of the case thus, "And the basic question at stake is whether any of those devices (after just mentioning Rules 26, 33, 34, and 45) may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation." *Since the court went beyond the facts of the case with regard to the Federal Rule involved, does that also mean that they went beyond the facts of the case with reference to the materials collected, the party who collected them, and the purpose for which they were collected?*

About the materials collected, the answer is yes. Although only statements and memoranda were involved, the Court, referring to the protection necessary to the trial preparation, said:

"This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, *and countless other tangible and intangible ways . . .*" (italics added)

It would be an endless task to enumerate the various materials that might or might not, or should or should not, fall within the rule of the *Hickman* case. The indefiniteness of the opinion indicates that the Supreme Court intended that the district courts be very liberal in this matter.

Whether the materials to be protected must actually be collected by the lawyer, or whether it is sufficient if they are collected by his agent, or at his direction is also a little hazy. The opinion only specifically refers to the lawyer. However, where a claim agent or investigator works for and is part of the legal department of a corporation, the distinction between his activities and those of the lawyer himself is largely formal and not substantive. It would seem, therefore, that collections by these persons come under that case. Judge Hyde, of the Supreme Court of Missouri, interpreted the *Hickman* case as applying to "parties and their adjustors or investigators."¹⁶

A very good reason for giving the *Hickman* case as broad an application as

16. *State v. Caruthers*, 226 S.W. 2d 711 (Mo. 1950).

possible is this. If the opposing attorney can compel a party to reveal the contents of statements of a witness which that party has taken, then the interrogator will go to that witness, it now being several months later, and take the witness' statement again. In taking this second statement it is very easy to get the witness to make contradictions of the statement he gave several months ago to the interrogated party. This will be done. The interrogator will then have the signed and sworn answer to the interrogatory which says the witness said one thing, and also the witness' signed statement saying just the opposite. At the trial no matter how the witness testifies he may be impeached.

This argument is not the product of the author's imagination. It is the result of the actual experience of one of the best (and busiest) trial lawyers in the Midwest and was told to the author by him.¹⁷

In England this could not happen. The barrister, once he had obtained the answer to the interrogatory setting out the substance of the witness' statement, would not be allowed to take that witness' statement again. Apparently the draftsmen of the Federal Code, while following the English counterpart very closely, overlooked the fact that the American lawyer is not bound by the strict rules that apply to the English barrister. Consequently, in actual practice Rule 33 will be used as an instrument to impeach the most honest witness unless the district courts give the *Hickman* case a very broad application.

The opinion was a little more definite about the purpose for which the collection of materials must be made. It was very broadly stated to be those materials collected ". . . in the course of preparation for *possible* litigation." (italics added) (In the *Hickman* case Fortenbaugh collected the materials before suit had been filed.) This language gives considerable weight to what was said above, *i.e.*, that the work of investigators and claim agents is also protected. The court undoubtedly knew that "preparation for *possible* litigation" is almost always done by these persons.

In discussing the facts to which the *Hickman* case applies, references have been made to the "rule" of that case. An attempt to summarize the law that the case laid down discloses that these references were ill advised. One thing is clear, however. Under the *Hickman* case, the discovery rules (at least 26, 33, 34, and 45) are subject to the judicial limitation that in order to inquire into any of the materials that have been collected by the opposing lawyer, or at his direction, in preparation for *possible* litigation there must be a showing of good cause. If the litigation has already begun, then a fortiori the limitation would apply.

In a concurring opinion Judge Jackson disposed of the interrogator's argument that he was merely trying to prevent the lawsuit from developing into "a battle of wits between counsel" by replying:

"Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits to borrowed from the adversary."

17. Part (a) of the note in 62 HARV. L. REV. 269 (1948) and the cases cited therein should be re-examined in the light of this actual experience.

It is interesting to note that briefs were filed by the United Railroad Workers of America and the National Maritime Union of America, as amici curiae, urging that Fortenbaugh be compelled to answer Number 38. Briefs were filed for the American Bar Association and the Maritime Law Association of the United States, as amici curiae, urging that the objection to Number 38 be sustained.

Both before and after the amendment became effective, the courts have been almost unanimous in holding that interrogatories calling for opinions are objectionable.¹⁸ In almost all of these cases the only reason given in support of this holding is that "interrogatories are designed to elicit facts." However, there are other very cogent reasons which support this limitation. In the first place the Rule 33 provides that the answers shall be given under oath, so it would be a violation of the rule to state as a true fact something which was only an opinion.¹⁹ In addition, there is no provision for qualifying the interrogated party as an expert. Nor is there provision for requiring a statement of the facts upon which an opinion is based. Consequently there is no way to evaluate an opinion if it were given. Moreover, if the facts change, or if new facts are discovered before trial, the opinion might be entirely changed when the case is tried. Or the interrogated party might just honestly change his mind. Furthermore at the time the interrogatory is served, the interrogated party might not have any opinion at all upon the subject. Being forced to form an opinion based upon the facts he then knows he would have to stick by it at the trial or run the risk of being impeached. Circumstances can easily be imagined where, as a practical matter, it would be very damaging if not impossible to explain away an honest and intelligent change of mind. Conceivably it might be very damaging to a litigant's case to disclose the fact which caused him to change his mind, and at the same time the jury would not be entitled to know that fact because it is not relevant to the issues of the case. The reverse of this would be an instance where the change of opinion was based upon an irrelevant fact which would be highly prejudicial against the interrogator's case. This possibility might even give rise to "anticipated" changes of opinion. (The Federal Rules have not changed human nature.)

18. *Snyder v. Atchison, Topeka and Santa Fe Ry.*, 11 FED. RULES SERV. 33.351, Case 1 (W.D. Mo., Jan. 7, 1948); *Klein v. Leader Electric Corp. v. First National Bank of Chicago*, 81 F. Supp. 624, 12 FED. RULES SERV. 414, 33.353, Case 1 (N.D. Ill., Nov. 17, 1948); *Armour Research Foundation of Illinois Institute of Technology v. Brush Development Co.*, 12 FED. RULES SERV. 414, 33.52, Case 1 (N.D. Ohio, March 7, 1949); *Wolf v. United Air Lines, Inc.*, 9 F.R.D. 271, 13 FED. RULES SERV. 614, 33.321, Case 1 (M.D. Pa., July 15, 1949); *General Motors Corp. v. California Research Corp.*, 13 FED. RULES SERV. 614, 33.319, Case 1 (D. Del., October 18, 1949); *Moorman v. Simon*, 10 FED. RULES SERV. 603, 33.316, Case 1 (W.D. Mo., June 16, 1947); *Blanc v. Smith*, 3 F.R.D. 182, 7 FED. RULES SERV. 567, 33.342, Case 1 (S.D. Iowa, Jan. 7, 1943); *Hercules Powder Co. v. Rohm & Haas Co.*, 3 F.R.D. 328, 7 FED. RULES SERV. 569, 33.342, Case 2 (D. Del., Feb. 9, 1944); *Babcock and Wilcox Co. v. North Carolina Pulp Co.*, 25 F. Supp. 596 (D. Del., 1938); *Chandler v. Cutler-Hammer, Inc.*, 31 F. Supp. 453 (E.D. Wis., 1940).

19. *Caskey and Young, Some Limitations upon Rule 33 of the Federal Rules of Civil Procedure*, 28 VA. L. REV. 348, 356 (1942). The authors are both members of the New York and American Bar Associations.

Many of the cases holding that requests for opinions are improper are also authority for the proposition that interrogatories calling for answers that are hearsay are objectionable. This is because the term "opinion" is not used in the same way that it is used in the law of evidence. Instead, it is used so as to include any answer which is not known by the answering party to be a true fact. This, of course, includes hearsay. This is demonstrated by the language of the court in *Hercules Powder Company v. Rohm and Haas Company*,²⁰ where the court referred to hearsay as "opinions." It was said, "The party interrogated need only answer matters of fact *within his knowledge* and that he is not required to express opinions." (italics added)

Objections to hearsay, however, need not rest upon these cases alone. There are square holdings that interrogatories calling for hearsay are objectionable as such.²¹ This limitation also may be sustained upon the ground that since the answers must be given under oath it would be a violation of the Rule 33 to state as a true fact that which is only hearsay.²² It would be an anomalous rule of law which compels a man to swear to the truthfulness of a fact which he could not possibly know to be true. Interrogatories might become an instrument for impeaching the most honest witness.

District court orders applying the Federal Rules are usually interlocutory and non-appealable.²³ A lawyer desiring to have an appellate court pass upon the validity of his objections to interrogatories must risk punishment for contempt, as Fortenbaugh did in the *Hickman* case.

CONCLUSIONS

Interrogatories in the federal courts are subject to the following limitations. (1) The number may be limited "as justice requires to protect the party from annoyance, expense, embarrassment, or oppression." (2) They are objectionable if answering them would require unreasonable investigation or unreasonable expenditure of time or money. (3) *Hickman v. Taylor* held that to inquire into "tangible and intangible" materials that have been collected by the opposing lawyer, or by his client's agent, in preparation for possible or present litigation, there must be a showing of good cause. (4) Answers which are opinions do not have to be given. "Opinions" include anything not known to be a true fact, *i.e.*, hearsay. (5)

20. *Supra*, note 10.

21. *Maryland for use of Montivile v. Pan American Bus Lines*, 1 F.R.D. 213 (1940); *Unlandherm v. Park Contracting Corp.*, 26 F. Supp. 743 (1938); *Henwood v. The Louisiana & Arkansas Ry.*, 7. FED. RULES SERV. 33.31, Case 2 (W.D. Mo., 1944, opinion by Collet); *Aver v. The Hershey Creamery Co.*, 1 F.R.D. 14, 2 FED. RULES SERV. 33.31, Case 2, 53 DEPT. OF JUSTICE BULL. 52 (D. N. J., 1939). For cases holding *contra*, see 2 MOORE'S FEDERAL PRACTICE, R. 26.12, 26.14, 33.02, p. 68, 127 (Supp. 1949).

22. *Supra*, note 19.

23. *Apex Hosiery Co. v. Leader*, 102 F. 2d 702 (C.C.A. 3d., 1939); *R. D. Goldberg Theatre Corp. v. Tri-States Theatre Corp.*, 8 FED. RULES SERV. 671 (D. Neb., 1944); *Pike and Fischer, Discovery Against Federal Administrative Agencies*, 56 HARV. L. REV. 1125, 1132 (1943).

District court orders applying the Federal Rules are interlocutory and non-appealable unless the lawyer risks punishment for contempt.

II. INTERROGATORIES IN MISSOURI

The scope of interrogatories in Missouri is defined by the rules of evidence. In *State ex rel. Williams v. Buzard, Circuit Judge*,²⁴ the Supreme Court of Missouri, *en banc*, all of the judges concurring, held that an interrogatory calling for hearsay need not be answered.²⁵ Judge Hyde, in a very excellent opinion, reviewed the history and development of Federal Rule 33, from which the Missouri rule is derived. He pointed out that the scope of Federal Rule 33 was intended to be co-extensive with the Federal Rule which provides for depositions. The amendment to Rule 33 specifically says so. To follow the pattern of the Federal Rules the scope of interrogatories in Missouri must be no broader than the scope of depositions in Missouri. He then observed that, different from the Federal Rule for depositions, under Missouri practice the scope of depositions is limited by the rules of evidence. Therefore, the scope of interrogatories must also be limited by the rules of evidence.

Upon motion for rehearing it was contended by the interrogator that the opinion was inconsistent. The argument was that although the request for hearsay was held bad, an interrogatory asking a corporation official to give information that he obtained from reports made out by another agent of the corporation was held good.

In overruling the motion the court explained that the knowledge of the corporation, to whom the interrogatories were directed, must necessarily be the knowledge of its agents. The fact that it is obtained by one agent, told to another agent and then passed on to the interrogator by the second agent does not make it hearsay. It is the *corporation's* own knowledge. It was not obtained from outside the corporation.

The *Williams* case has been consistently followed by the subsequent decisions.²⁶

24. 345 Mo. 719, 190 S.W. 2d 907 (1945).

25. The particular question involved was: "Please state the names and addresses of all persons whose names and addresses were taken by any employee of your corporation at the scene of the casualty?"

26. In *State ex rel. Thompson v. Harris, Circuit Judge*, 355 Mo. 176, 195 S.W. 2d. 645, 166 A.L.R. 1425 (1946), the plaintiff sued for personal injuries sustained when he ran his car into defendant's freight train which was blocking a road crossing. Interrogatories requested copies of statements from plaintiff's passengers. The court sustained the objections, saying that the *Williams* case was controlling.

In *State ex rel. Kansas City Public Service Co. v. Cowan, Judge*, 356 Mo. 674, 203 S.W. 2d 407 (1947), the interrogated party contended that asking for the names of persons that the operator listed who were not personally known by him was asking for hearsay and therefore objectionable. The court held that these interrogatories did not call for hearsay because the operator did actually know that he found such person there who gave him a certain name and address. Once again the court affirmed the ruling of the *Williams* case.

In *State ex rel. Miller's Mutual Fire Ins. Ass'n. v. Caruthers*, 226 S.W. 2d 711 (Mo. 1950), the supreme court, *en banc*, held that an interrogatory asking for the names of persons who had been questioned by the insurance company's in-

Hence the Missouri code provision for interrogatories does not enlarge the scope of discovery, it merely provides another possible method of discovery, less formal and less expensive than depositions. It is reversible error for counsel to comment upon the failure of the adverse party to produce witnesses whose names and addresses counsel could have obtained by interrogatory. The case of *Belding v. St. Louis Public Service Co.*,²⁷ was a personal injury action for injuries received while plaintiff was a passenger on defendant's bus. The supreme court reversed the St. Louis Court of Appeals, which had sustained a verdict in favor of the plaintiff. In so doing they overruled the case of *Meyer v. Dawes*.²⁸ In the *Meyer* case it was held *not* to be reversible error for plaintiff's counsel to comment upon the fact that defendant had failed to produce as witnesses anyone of ten or twelve passengers who were on its streetcar at the time of the accident. The basis of the holding was that: "The plaintiff did not know their names or addresses *and it was not within her power to have produced them as witnesses.*" (italics added) Therefore they were not equally available to the plaintiff.

In the *Belding* case Judge Leedy pointed out that the *Meyer* case had been decided prior to the enactment of our new Civil Code. He emphasized the change in the law that has taken place since the adoption of the code by quoting the following language from the *Williams* case:

"All that our opinion means is that plaintiff is entitled to this information, (names of passengers on streetcar) . . ., and should be allowed to get it either from the operator on a deposition or from defendant on interrogatories."

He concluded that since the plaintiff could get the names and addresses of the passengers, they were equally available to plaintiff and defendant, therefore, it was reversible error for plaintiff's counsel to comment upon the fact that the defendant had failed to produce them as witnesses.

This raises an interesting question. Would it be reversible error for plaintiff's counsel to comment upon the failure of defendant to produce as witnesses people who claim to have knowledge of the accident and whose names and addresses the operator had taken, but who were not known by the operator to have knowledge of the accident? Since the plaintiff cannot get the names of these people either by deposition or interrogatory, because it would be hearsay, it would seem that they are not equally available and comment would be allowed. If this is correct, the practical effect would be to remind the jury that none, or at least not all, of the people whose names had been taken by defendant have been called as witnesses. This could be done by commenting upon failure to produce those who were only known by hearsay to have any knowledge of the accident. The effect would be to circumvent the *Belding* case.

investigators was objectionable. The reason, stated by Judge Hyde, was because it called for the names of persons whose connection with the case and knowledge of facts could only have become known to its agents by hearsay. case was relied upon again.

27. 358 Mo. 491, 215 S.W. 2d 506 (1948).

28. 315 Mo. 186, 285 S.W. 986 (1926).

The doctrine of *Hickman v. Taylor*,²⁹ discussed *supra*, has been adopted in Missouri. In *State v. Caruthers*,³⁰ an interrogatory called for intra-company instructions given to agents about the preparation of the case. The court held that it did not have to be answered. Judge Hyde, adopting the doctrine of *Hickman v. Taylor*,³¹ said:

“ . . . , it was not proper to require the disclosure of the thoughts, mental processes and work product of lawyers in the preparation of the defense of a case. We hold that under our Code this principle also applies to such preparation by *parties* and their *adjustors* or *investigators*.”

Interrogatories may not be used in the magistrate courts.³² This is because Section 2 of the Civil Code enumerates the courts whose procedure will be governed by it and neither magistrate courts nor their predecessors, justice of the peace courts, are mentioned. Furthermore, Section 101, Mo. Laws 1945,³³ provides that in the absence of other provisions the magistrate courts will be governed by the usage and practice of the circuit courts “upon the trial” of suits. Interrogatories are not used “upon the trial” of a case. They are used *before* trial.

CONCLUSIONS

(1) In Missouri interrogatories calling for hearsay are objectionable. (2) It is reversible error for counsel to comment upon the adverse party's failure to produce witnesses whose names and addresses he could have obtained by interrogatory. (3) Interrogatories may not be used to obtain the “work product of lawyers” in the preparation of a case. This also applies to preparation by parties, their adjustors or investigators. (4) Interrogatories may not be used in magistrate courts.

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29. *Supra*, note 6.

30. *Supra*, note 26.

31. *Supra*, note 6.

32. *State ex rel. Jensen, Treasurer v. Sestric*, magistrate, 216 S.W. 2d 152 (Mo. App. 1948).

33. P. 795; Mo. REV. STAT. ANN. § 2811.201 (Supp. 1950).