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V.-C. B.
Jan. 20, 21, 27;
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March 8.

[1881 A. 1233.]

Practice—Interrogatories—Rules of Court, 1875, *Order* XXXI., *rr.* 1—10.

An action was brought by the Attorney-General and a local board to restrain the Defendant from building across a public footpath. The amended statement of claim alleged that at a meeting of the board held after the commencement of the action the Defendant had attended and signed an agreement for settling the action on certain terms, and the Plaintiffs sought to enforce this agreement, or, in the alternative, to restrain interference with the footpath by virtue of their original title. The Defendant, by his defence, denied the existence of any public right of way over the ground. He admitted the signature of the agreement, but alleged that it was obtained by threats and pressure after a long conversation and argument, and without his having it read and explained to him. The Plaintiffs delivered interrogatories as to the existence of a public right of way over the land, and as to what passed in the conversation at the board meeting, and at a conversation between the Defendant and the Plaintiffs' solicitor before that meeting. The Defendant declined to answer those interrogatories, alleging that as to the right of way he was not bound to answer as to a right which he had denied by his pleadings; and that as to the conversations he ought not to be called upon to answer till the Plaintiffs' solicitor had been examined and cross-examined as to the conversation:—

Held, by *Bacon*, V.C., that the Defendant having by the statement of defence denied the existence of the right of way was not bound to answer as to it; and that he was not bound to answer as to the conversations, no discovery being requisite as to facts which the Plaintiffs had the means of establishing:

Held, by the Court of Appeal, that the Defendant was bound to answer as to the existence of the right of way, for that one object of interrogatories is to enable a party to obtain admissions from the other party, and so to relieve himself from the necessity of adducing evidence:—

Held, also, that as the conversations were material on the issue whether the agreement had been unduly obtained, the Defendant must answer as to them; and that it would not be right to allow him to delay answering until he saw what account another person would give of what had taken place.

The right of discovery as existing in the Court of Chancery still exists, except so far as it is modified by the Judicature Acts and the General Orders; and a party still has a right to exhibit interrogatories, not only for the purpose of obtaining from the opposite party information as to material

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facts which are not within his own knowledge and are within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party admissions which will make it unnecessary for him to enter into evidence as to the facts admitted.

THIS was an action by the Attorney-General at the relation of the local board of *Long Eaton*, and by the local board, against *William Gaskill*. The statement of claim alleged that there existed as of right a highway or public footpath over a close called "*Haycroft Close*," within the district of the board. That in June, 1880, a part of the close was laid out for building purposes, and that the owner proposed to form a street crossing the footpath. That *Gaskill* had given notice to the board of his intention to build certain houses in this new street, and had deposited plans of the buildings at their office. That the board had declined to approve of the plans till they were furnished with a block plan shewing the exact position of the footpath. That a block plan was thereupon furnished which shewed that the buildings would interfere with the footpath. That on the 24th of June Mr. *Sheldon*, the surveyor of the board, wrote to the Defendant to say that the board did not object to the buildings if the path was not interfered with. That the Defendant then went on and completed four houses which did not interfere with the path, but afterwards, without any further notice to the board, began to erect three more, one of which wholly obstructed the path. That the surveyor of the board then gave the Defendant notice that so much of his buildings as interfered with the path must be removed; and after some attempts at an arrangement to be effected by a diversion of the footpath, this action was commenced to restrain the Defendant from building so as to interfere with the footpath.

By an amended statement of claim delivered in April, 1881, it was alleged that on the 29th of November, 1880, after the commencement of the action, the Defendant had attended a meeting of the board and offered to undertake not to build on any part of the *Haycroft Close* not already built upon until the path should have been diverted by a competent authority, provided the board agreed not to take in the meantime any proceedings to compel

him to pull down anything he had built. That the board agreed to those terms provided the Defendant paid the costs of the action. That the Defendant objected to this and left the room, but afterwards returned and signed a memorandum embodying the terms agreed upon. The amended statement of claim sought to enforce this memorandum, or in the alternative to restrain interference with the footpath on the original ground.

The Defendant by his statement of defence, denied that there was any public footpath over the close. He also set up the case that the memorandum which he signed on the 29th of November was signed under pressure, and without his having had it properly explained to him. He stated that on the 29th of November the Plaintiffs' solicitor had met him and persuaded him to attend the meeting. That when he was called in the chairman endeavoured by threats and pressure to induce him to agree to pay the Plaintiffs' costs, but that the Defendant refused. That he then left the room, but was afterwards recalled, when a long conversation took place, at the end of which he went away to catch a train, but was recalled by the chairman, who induced him to sign the memorandum for settling the action and paying the Plaintiffs' costs without its being read over or explained to him.

The Plaintiffs delivered interrogatories for the examination of the Defendant, which so far as need be stated were to the following effect: 1. Whether there was not in June, 1880, or at some and what time before the Defendant commenced his building operations, a public footpath over the close? 2. Whether the Defendant had not after the notice given him in June, 1880, proceeded to build so as to obstruct the footpath? 3. Whether the Defendant did not on a certain day call on the Plaintiffs' solicitor and offer to settle the action, and whether the conversation was not to the effect stated in the interrogatory? and the Defendant was further interrogated as to what passed at the board meeting.

The Defendant objected to answer the first and second interrogatories, on the ground that it was an abuse of the process of the Court to ask an admission or denial on oath by the Defendant of matters which were in issue between him and the Plaintiffs and as to which the burden of proof was on the Plaintiffs. He

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objected to answer the interrogatories as to the conversations, on the ground that it was improper to ask him as to a conversation between him and the Plaintiffs' solicitor until the solicitor had been examined and cross examined with reference thereto.

The Plaintiffs took out a summons for the Defendant to put in a further answer, and it came on to be heard before Vice-Chancellor *Bacon* on the 20th of January, 1882.

R. Horton Smith, Q.C., and *Speed*, for the summons :—

The practice is now governed by Order XXXI., rules 1 to 10. The former practice is described in *Wilson* (1). Formerly there were limits to a Plaintiff's right to discovery, and the existing right is still regulated by the old rules: *Anderson* v. *Bank of British Columbia* (2). "A person answering is obliged to answer fully, unless he can make out an exceptional case, viz., that the discovery is sought vexatiously or oppressively, or is discovery which it will be burdensome or injurious to the Defendant to give, and which probably may never be used at all:" *Saull* v. *Browne* (3). Another general rule was laid down in *Attorney-General* v. *Corporation of London* (4), namely, that a Plaintiff is entitled to discovery from the Defendant, not only of that which constitutes the Plaintiff's case, but also for repelling what he anticipates will be the case of the Defendant: *Wigram* on Discovery (5). The principle is further illustrated in *Saunders* v. *Jones* (6); *Lyon* v. *Tweddell* (7).

The facts we seek to establish are, 1. the existence of this public right of way; and 2. that an agreement for a compromise was come to between the Defendant and the board on the 29th of November, 1880. As to these facts we interrogate the Defendant, and we ask him, "Did you not call on a certain day, and were you not told so and so." This he refuses to answer, perhaps relying on the authority of *Johns* v. *James* (8), in which the head-note goes beyond what was really decided. The head-note is right in stating that an interrogatory, whether it was the fact that certain

(1) 2nd Ed. p. 228.
(2) 2 Ch. D. 644.
(3) Law Rep. 9 Ch. 364, 367.
(4) 2 Mac. & G. 247.
(5) 2nd Ed. p. 261.
(6) 7 Ch. D. 435.
(7) 13 Ch. D. 375.
(8) Ibid. 370.

allegations as to a conversation made by the opponent were true, was disallowed by the Court; but wrong in going on to state that an interrogatory, whether it was the fact that allegations as to a conversation made by the interrogating party were true, was disallowed. The Court did not in *Johns* v. *James* (1) do this. It is not competent to an interrogating party to ask, "Have you not told an untruth?" but it is competent to him to ask, "Is not my version of what took place the true one?" *Commissioners of Sewers of the City of London* v. *Glasse* (2).

Marten, Q.C., and *J. G. Wood*, for the Defendant:—

This proceeding is set on foot solely for the sake of costs. The Plaintiffs seek to establish the fact that this is an ancient footpath. The onus of proof is on them. We have denied the fact, by our defence, and to ask us whether we admit it, is purely and simply vexatious.

Then as to the conversation; they know already what we say the effect of it was. Our case is that the Plaintiffs' solicitor said the costs would not exceed £30. They want an answer, not for any purpose of discovery, but with the object of producing evidence at the trial. This they are not entitled to have: *Benbow* v. *Low* (3). In the words of the Master of the Rolls (4), it would be giving a rogue an immense advantage. As to the general scope and purport of a conversation, the interrogating party is entitled to have an answer; but not as to the details: *Eade* v. *Jacobs* (5); *Lyon* v. *Tweddell* (6).

The criticism on the report in *Johns* v. *James* is not sound. The interrogatory in *Johns* v. *James* was in substance our interrogatory, namely, "Have you not given an incorrect version of the conversation, and was not the true substance of it this?" and the Court held that such an inquiry was too much like asking the opponent, "Have you not told an untruth," and disallowed it altogether.

R. Horton Smith, in reply.

(1) 13 Ch. D. 370.
(2) Law Rep. 15 Eq. 302.
(3) 16 Ch. D. 93.
(4) 16 Ch. D. 95.
(5) 3 Ex. D. 335.
(6) 13 Ch. D. 375.

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BACON, V.C. :—

Allowing interrogatories is a matter in the discretion of the Court. It was so under the old practice. The Court never allowed harassing interrogatories on matters of trifling importance.

In this case the first interrogatory is as to the existence of a public highway, such as is alleged in the statement of claim. That is a question of law as to which the Defendant by his answer has already declined to admit the truth of the Plaintiffs' allegation. That was a perfectly good pleading, and being a matter of pleading, no discovery can be asked for as to that. I find there is no evasion, no unreasonable opposition offered to the fair trial of the question raised by the statement of claim, and I accordingly disallow this interrogatory.

Then as to the meeting of the 29th of November, it would be an abuse of the practice of the Court to permit the Plaintiffs to harass the Defendant by insisting upon categorical answers as to facts which the Plaintiffs have abundant means of establishing for themselves and as to which they want no discovery whatever. The allegation of the defence is that the Defendant was required to sign a memorandum under undue pressure and duress. That is what the Defendant has to prove, and when the trial comes we shall see what the evidence amounts to. In the meantime, in my opinion, these interrogatories proceed upon an erroneous notion of the law and practice of the Court. Answers substantially distinct and unevasive to the allegations in the statement of claim have been given by the Defendant in his statement of defence, and the Plaintiffs are, in my opinion, entitled to no further discovery upon these points.

Several cases have been referred to; amongst others some decisions of my own. All I observe upon these cases is this, that the original powers of the Court of Chancery to compel discovery exist in all the force they ever had; but the practice of the Court in obtaining that discovery has undergone most material changes. It is limited by the enactments of the *Common Law Procedure Act*, and by the adoption of that Act by the *Judicature Act*; and further by the discretion which the Court is bound to exercise upon all occasions in deciding whether the interroga-

tories which it is proposed to exhibit are necessary to the ends of justice, and in accordance with the rights of the interrogating party, or are merely a harassing attempt, by reviving an obsolete practice, to impede and obstruct the hearing of the cause, and the decision of the real question between the parties.

I therefore disallow these interrogatories.

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The Plaintiffs appealed. The appeal was heard on the 8th of March, 1882.

R. Horton Smith, Q.C., and *Speed*, for the Appellants, having opened the case, were stopped by the Court.

Marten, Q.C., and *J. G. Wood*, for the Defendant:—

These interrogatories are framed according to the old Chancery practice, which has been altered by the Judicature Acts.

[JESSEL, M.R.:—The old practice prevails except so far as the Act and rules alter it, and what is there in them to prohibit these interrogatories?]

The practice is now governed by Order XXXI., rules 1–10, which allow the objection to be taken that interrogatories are unreasonable, which we say these are. But indeed this is in substance an action of ejectment, and the Plaintiffs have no right to interrogate at all. Supposing that objection got over the first interrogatory is improper. The Defendant has denied by his defence the existence of a public footpath over the land, and the Plaintiffs have no right to interrogate him as to whether the statement in his pleading is true.

[JESSEL, M.R.:—That doctrine is new to me.]

Johns v. *James* (1) supports it. Under the Judicature Acts the object of interrogatories is to obtain discovery of what the Plaintiff does not know, not to obtain evidence to be used at the trial, and the Plaintiff is not entitled to interrogate for the latter purpose: *Benbow* v. *Low* (2). If the decision is against the Defendant in this case, it will sanction a revival of the old practice of interrogating all through a bill.

(1) 13 Ch. D. 370. (2) 16 Ch. D. 93.

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[JESSEL, M.R.:—The 2nd rule of Order XXXI. was inserted in order to put a check on an abuse of the right to interrogate.]

The Plaintiffs have no right to require a discovery on oath as regards matters at issue between the parties, well known to them, and as to which the burden of proof is on the Plaintiffs: *Eade* v. *Jacobs* (1) is against the right of the Plaintiffs to obtain the answers they ask for as to the conversations.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, which, with great deference to that learned Judge, appears to have proceeded upon some misapprehension as to the effect of the Judicature Acts. They do not alter the rules as to discovery, except so far as there are express rules on the subject. Subject to the rules the old practice remains. I must not, by saying that, be supposed to encourage the practice of interrogating to all the statements in the statement of claim, which was a common practice on bills before the passing of the *Judicature Act*. That is an abuse, but there are modes of checking it in the existing orders, and I hope that in a very short time a still more effective check will be provided.

In this case the Attorney-General and a local board are Plaintiffs, and their case is that the Defendant has built a house or houses across a public footway or public highway. They further say that he made an agreement at a meeting of the local board as to settling the action upon certain terms which they seek to enforce, or, in the alternative, to make him pull down the house. By his defence he denies the existence of the alleged public footpath across the close in question, and he also impeaches the agreement. Thereupon the Plaintiffs exhibit interrogatories which are divided into two parts. The first part asks the Defendant whether there is not such a public footpath, and whether this public footpath has not existed for a great number of years, and been used by the public. The second part of the interrogatories relates to the conversation which took place on the 29th of November, 1880. The Defendant admits the signing of the agreement, but he alleges that it was invalid because it was extorted from him by

(1) 3 Ex. D. 335.

pressure or threats, and the object of asking these questions as to the conversation is to shew what the conversation was which took place when the agreement was signed, and that there was no pressure or threat. The questions asked by both these sets of interrogatories are material, and there is no objection on that ground.

The objection taken to the interrogatories as to the right of way is this: it is said that they seek an admission or denial on oath by the Defendant on matters in issue between him and the Plaintiffs as to which the onus of proof is on the Plaintiffs. That is no reason at all. It is because there is the obligation of proof on the Plaintiffs that they ask the question. If the Defendant were to admit the Plaintiffs' title, the Plaintiffs would be relieved of the obligation of proof, and would get judgment at once. But if he does not admit the whole he may admit part of it, and to that extent the Plaintiffs may relieve themselves of the obligation of proof. Recollect what that obligation involves in a case like the present. It involves the calling of a great number of old people to prove the use of this footpath as a public footpath for many years past. It causes great expense and trouble. I am therefore of opinion that the interrogatories as to the right of way must be answered.

As regards the interrogatories relating to the conversation, the Defendant says, I object that these interrogatories are wholly improper in seeking to examine me as to a conversation between me and the Plaintiffs' solicitor before such solicitor has been examined and cross-examined at the trial in reference thereto. That is, he wishes to hear what the Plaintiffs' solicitor will say about it before he states on oath what he recollects about it. The answer is very simple. The solicitor is not a party and he is. The Plaintiffs have a right to get from him his version, to the best of his recollection, of the conversation, and may get such a version as will satisfy them that they need not call the solicitor at all. The Defendant has no right to say I will not state on oath what my version of the matter is, because, if you call the solicitor, he may make some statements more advantageous to me.

If these interrogatories are answered it may possibly happen that the Plaintiffs will find that they have no need to call any

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witnesses. Now, one of the great objects of interrogatories when properly administered has always been to save evidence, that is to diminish the burden of proof which was otherwise on the Plaintiff. Their object is not merely to discover facts which will inform the Plaintiff as to evidence to be obtained, but also to save the expense of proving a part of the case. It seems to me that there is no valid ground for the Defendant declining to answer these interrogatories, and that the summons must be allowed with the usual consequences.

COTTON, L.J. :—

I am of the same opinion, and should think it unnecessary to add anything but for the line of argument which has been taken on the part of the Respondent. It was contended that everything which related to discovery existing in the practice of the Court of Chancery before the *Judicature Act* must be thrown aside as a matter of the past having no application to the present state of things, but that to my mind is a complete mistake. The *Judicature Act* enables every one as of right to interrogate his opponent, putting by Order XXXI., rule 2, certain checks on the exhibiting useless interrogatories. It enables a person who is called upon to answer interrogatories to defend himself from answering in a way in which he could not have done in former days, but the right to discovery remains the same, that is to say, a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. It was said in argument that it is not discovery where the Plaintiff himself already knows the fact, but that is a mere play on the word "discovery." Discovery is not limited to giving the Plaintiff a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on any issue which is raised between him and the Defendant. To say that the pleadings have raised the issues, and that therefore the interrogatories should not be allowed is an entire fallacy. The object of the pleadings is to ascertain what the issues are, the object of interrogatories is not to learn what the issues are, but to see whether the party who interrogates cannot obtain an admission from his opponent which

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will make the burden of proof easier than it otherwise would have been. As regards the interrogatories relative to the right of way they clearly are proper interrogatories. The object is to get from the Defendant in this case an admission of that which no doubt he denied by his defence, but not on oath, viz. a fact supposed to be within his knowledge that there is a right of way, and an admission of it by him must obviously save an enormous amount of expense at the trial.

As regards the conversations, both parties consider that they are material, and the only objection taken to the interrogatories relating to them is that mentioned by the Master of the Rolls. The Defendant seems to think that he has a right to know what the Plaintiffs' solicitor who was present will state before he pledges himself on oath to what his view of the conversation was. In my opinion it would be entirely wrong to let a person who is bound to give discovery wait till he can shape his answers according to what is stated by the witnesses on the other side. A judgment of my own in *Eade* v. *Jacobs* (1) was referred to, but I think it has been somewhat misunderstood. In that case the defence had set up a parol agreement which was said to be material, and what I held was this, that the interrogatories ought to some extent to be limited, so as to ask the Defendant to give discovery of the substance only of the conversation on which he relied as a defence, and that the person interrogated was not bound to set forth the names of the witnesses or the details of the conversations. That was expressed in this passage of the judgment: "I think that the Plaintiff is entitled to a discovery of the facts upon which the Defendant relies to establish his case, but not of the evidence which it is proposed to adduce," and the rest of the judgment, modifying in some slight way the interrogatory, has reference to what I laid down as the principle of the decision.

I may add that nothing I have said must be taken to encourage in any way the going back to the old practice of interrogating as a matter of course to every single allegation in the statement of claim without regard to the question whether it is reasonable or not that discovery should be asked for as to those facts. That is checked by Order XXXI., rule 2, and probably will hereafter be checked in a more efficacious way.

(1) 3 Ex. D. 335, 337.

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LINDLEY, L.J.:—

I am of the same opinion, and will only make one or two additional remarks with reference to the passage in the judgment of the Vice-Chancellor which runs thus: "The original powers of the Court of Chancery to compel discovery exist in all the force that they ever had, but the practice of the Court in obtaining that discovery has undergone most material changes. It is limited by the enactments of the *Common Law Procedure Act*, and by the adoption of that Act by the *Judicature Act*, and further by the discretion which the Court is bound to exercise upon all occasions in deciding whether the interrogatories which it is proposed to exhibit are necessary to the ends of justice, and in accordance with the rights of the interrogating party, or are merely a harassing attempt, by reviving an obsolete practice, to impede and obstruct the hearing of the cause." There appears to me to be a certain amount of forgetfulness in that passage. Under the *Common Law Procedure Act* it was necessary to get leave to deliver interrogatories. The practice as to interrogatories under the *Common Law Procedure Act* is abolished by Order XXXI., except in the case of a corporation, which is provided for by rule 4 of that Order. You can now, both in the Common Law Division and in the Chancery Division, deliver interrogatories without any leave of the Court. No doubt the practice has been changed very much in this respect, that now the statement of defence and the answers to the interrogatories are two different documents, and it would be an abuse of the power of interrogating to require a party to admit on oath that which he has already admitted in his pleadings, and the Courts of the Common Law Division have so far adopted that view as to decline to allow a plaintiff to deliver interrogatories before the statement of defence is put in, because it is possible that the Defendant may admit a great deal of that to which the interrogatories would be addressed. Except as altered by the rules the old practice of the Court of Chancery remains, the theory remains the same, and it is no reason for declining to answer the interrogatories to say that the same information may be got by cross-examination at the trial. The functions of discovery and the functions of cross-examination are totally different. The Plaintiff is entitled now, as he always

was, not only to discovery of facts not in the knowledge of the Plaintiff or of facts which the Defendant knows personally and which the Plaintiff does not know, but he is also entitled to admissions if he can get them, as he very often can, so as to render it unnecessary to adduce evidence.

Now as regards this highway I do not see anything oppressive, wrong, or vexatious, in asking the Defendant whether he will or will not admit on oath that there is such a highway as alleged. It appears to me to be perfectly legitimate to ask him that. As regards the conversations it appears to me to be within the proper use of interrogatories to ask him what, to the best of his belief, took place or was said on the occasions and at the interviews referred to. The extent to which that power of interrogating goes is to be found in the case of *Eade* v. *Jacobs* (1). That decision proceeds upon this, that a party is not to be compelled by means of interrogatories to disclose the evidence which he intends to adduce at the trial. So understood, the case is a guide as to the extent to which the interrogatories about the conversations must be answered; but the Defendant here has declined to answer at all. That cannot be right. It appears to me that the appeal must be allowed, and that further answers must be put in.

Solicitors for Plaintiffs: *Taylor, Hoare, & Taylor.*
Solicitor for Defendant: *F. Needham.*

(1) 3 Ex. D. 335.

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