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Book Review: Discovery Before Trial

Charles E. Clark
Yale Law School

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Book Reviews

DISCOVERY BEFORE TRIAL. By George Ragland, Jr. Chicago: Callaghan and Company. 1932. pp. x, 406.

IN a forward to this volume Professor Edson R. Sunderland, who can surely speak with authority, says: "It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial. Much of the delay in the preparation of a case, most of the lost effort in the course of the trial, and a large part of the uncertainty in the outcome, result from the want of information on the part of litigants and their counsel as to the real nature of the respective claims and the facts upon which they rest."¹

Here we have in a workmanlike treatise a complete account of this procedural device, which can provide what the formal pleadings were supposed to but did not supply, namely, trustworthy information of the facts complained of by each side. The author, now a member of the Chicago bar, was formerly research associate in the Legal Research Institute of the University of Michigan Law School, and in the course of a two-year investigation visited many jurisdictions to observe the actual operation of this process. He thus is able to set out a thorough examination of the conflicting theories as to the scope and method of discovery, its practical use in various proceedings and against various parties and, finally, a complete summary of the statutory provisions on the subject in the several states, and in England, Ontario, and Quebec.

According to the ancient chancery rule, discovery was permitted only as to matter supporting the mover's own case. It was available merely for defense and not for attack. Under modern practice, still resisted in many places, it should be freely available to ascertain not only the facts of the mover's own case but also those supporting the case of his adversary. The bugaboo that this might stimulate perjury to meet the case thus disclosed is yielding, however, to recognition of the fact that justice will not suffer but may be expedited if each party knows fully beforehand his adversary's testimony. Again the ancient practice limited the method of discovery to the use of written interrogatories, a practice far inferior to the oral examination. Some curious results of attempts at reform have been occasioned by advance in one aspect and not in the other. Thus Massachusetts has undertaken to broaden the scope of discovery while retaining the interrogatory method, while New York has retained the narrow chancery limits as to the scope of the remedy but has introduced the new method of oral examination to the confusion of the practice.

Perhaps the most effective use of discovery occurs when it is supplemented by another modern procedural device—the summary judgment. If discovery is available to ascertain what the facts of the case are, and summary judgment is available for quick disposition of the case after the facts are known, speed and efficiency in litigation result without sacrifice of substantial justice in those cases where the facts indicate a real defense. This the author has well explained in a special chapter on this combination of methods. We are indeed

1. See Professor Sunderland's article in this issue of the *Yale Law Journal*, *Scope and Method of Discovery before Trial* (1933) 42 *YALE L. J.*

indebted to him for a most satisfactory type of law book, one which aims at a single objective, and reaches it with sureness and completeness.

The text seems to have been prepared before it was possible to include the amendment to the Connecticut statute and the new rules thereunder adopted by the Superior Court judges in 1931. These followed the recommendations of the Connecticut Judicial Council in its Second Report (1930), and have been analyzed elsewhere by Professor Sunderland.² Connecticut lawyers may, and perhaps should, be shocked to learn that even after these changes so extensive in form, we have but the restricted type of discovery, limited in scope and available only by the outworn method of written interrogatories.

Yale School of Law.

CHARLES E. CLARK.

THE MODERN CORPORATION AND PRIVATE PROPERTY. By Adolph A. Berle, Jr. and Gardiner C. Means. Chicago: Commerce Clearing House, Inc. 1932. pp. xiii, 396. \$4.50.

Reviewed by Jerome Frank†

THIS book will perhaps rank with Adam Smith's *Wealth of Nations* as the first detailed description in admirably clear terms of the existence of a new economic epoch. For what, in effect, the authors tell us is this: Without our knowing it, we have been passing through a revolution comparable to the so-called industrial revolution¹—analogous to the feudal system—the corporate system of economic government. "Very much more than half of industry" in this country, the authors say, is controlled, directly and indirectly, by 200 corporations which are in turn controlled by "approximately 2,000 individuals out of a population of one hundred and twenty-five million."² Those few men do not rely for their control on ownership of or investment in a major portion of the shares of stock of those few corporations; many of them exercise control with little or no stock or other investment. The owners of the major portion of the shares in these enterprises are almost completely divorced from the power to influence their management. We thought that we had established corporate democracy, but it has vanished or is vanishing. As a consequence of this more or less unobserved shift of power, a tiny fraction of the population, we are told, may before long impose their wills on the corporate entities which dominate the lives of the rest of us who are investors, consumers (customers) and employees. The authors state that this new economic system is not yet complete but is already vastly powerful and that there are indications that it

2. Edson R. Sunderland, *Discovery Before Trial*, January 1933 Bulletin, New Haven County Bar Association, pp. 32-40.

†A review of this book by Nathan Isaacs appeared in 42 YALE L. J. 463. The reviews in this issue by Jerome Frank, Research Associate at the Yale Law School, and Norman L. Meyers of Washington, D. C., complete the series.

1. "A revolution which continued for 150 years and had been in preparation for at least another 150 years may well seem to need a new label," writes Heaton. It was "the outcome of developments which had been under way since at least 1600." See 8 ENCYCLOPEDIA OF SOCIAL SCIENCES 5. The word "revolution" as applied to such changes is more dramatic than accurate.

2. The authors discuss the concentration of industrial as distinguished from non-industrial (banking and agricultural) wealth.