

Julius Byron Levine

Discovery

A Comparison between
English and American
Civil Discovery Law
with Reform Proposals



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DISCOVERY

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American Civil Discovery Law with
Reform Proposals*

JULIUS BYRON LEVINE

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*To my mother Celia G. Levine, my father Lewis Lester
Levine, my sisters Judith S. Brody and Ida-Joyce Levine, my
brothers Robert A. Levine and Frederick E. Levine, my children
Rachel A. Levine and Sarah L. Levine, my wife Susan, my sister-in-law
Tobie G. Levine, and my brother-in-law Morton A. Brody.*

Preface

A book about discovery in Anglo-American civil cases addresses a major inroad in the adversary system of adjudication. A purely adversary system would not compel one party before trial to provide an opposing party with evidence and other information about the case. The law of discovery does just this. Unless discovery is used, surprising evidence would be presented at trial far more frequently; and surprising evidence would mislead the judge or jury all too frequently to the wrong factual decision. Likewise, unless discovery is used, important, at times even decisive, evidence sometimes would not be presented at trial; and compromise settlements would be reached on terms reflecting the litigants' ignorance. In all these ways a purely adversary system obstructs doing justice and finding the truth. By removing the obstruction, discovery enhances the probability that the truth will be found and justice done.

Discovery in civil cases is well entrenched in English and American law. However, the mechanisms and scope of discovery in each country differ. Whether the quality and quantity of Anglo-American discovery are ideal or desirable is the question this book grapples with. The question is a timely one. There has not been a critical study of English discovery of the quality of Wigram's *Points in the Law of Discovery* (2nd edn., London) since 1840. Since the major modifications of American federal discovery in the Federal Rules of Civil Procedure of 1938, there has been a degree of complacency in America with little, if any, re-examination of first principles.

My examination of discovery has been financed in part by the Rhodes Scholarship Trust and the Boston University School of Law under Deans Paul M. Siskind, Austin T. Stickells, Richard E. Speidel, and William Schwartz. I am grateful to them. My appetite for procedural law was whetted by the inspiring teaching of Professor James H. Chadbourn of the Harvard Law School. The late Professor R. N. Cross, then of All Souls College, and Leonard Hoffman, then of University College, guided my study at the University of Oxford of the

English law of discovery. I must add my most sincere thanks to Valorie Mulholland, Sonia Zecher, Jamila Dphrepaulezz, and Sändra Wilfong for their cheerful typing, to my brother Attorney Frederick E. Levine for many helpful contributions, and to the law students who have been my research assistants, Peter Kitson, Jeanne LaFlamme, Philip Hertz, Douglas Kowal, John Boylan, Peter Foulkes, Emily Donovan, Sanford Victor, William Wertheimer, Gerald Heupel, and John Guppy.

When the text or notes do not contain the full citation to cases, books, rules, articles, and the like, the reader will find the full citation in the Table of Cases, Table of Statutes and Rules of Court, or the Bibliography. The major discovery rules of both countries are given in the Appendix.

February 1980
Boston, Massachusetts, U.S.A.

J.B.L.

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