

## ADVICE TO A YOUNG MAN ABOUT TO EMBARK UPON THE PRACTICE OF LAW, BEING SOME REMARKS UPON CALLING THE ADVERSE PARTY AS FOR CROSS-EXAMINATION

ROBERT W. TUNNELL†

A recent article in the *Journal of the American Bar Association*<sup>1</sup> reminds us forcibly that the law school graduate all too often finds himself bewildered by many practical aspects of what he needs to know to pursue successfully his profession in the arena of actual practice. Scholarship, worthy in itself, is not enough to make a competent and well-rounded practitioner; the legal neophyte needs know as well the means by which his learning may be put to effective use. Probably the time is upon us when law schools are being aroused to this necessity; and there will be a beginning in the teaching of the "know-how" to serve the law and the client. Let us hope so. For then a day may dawn when the ineptitudes of young lawyers cannot, as plainly as now, be observed daily in the Halls of Justice.

I do not mean that experience is not, still, the best teacher; but preparation for experience, by the teaching of as many as possible practical things to forward practice, is certainly sorely needed. It may be noted, of course, that the lack of knowledge of many practical matters is by no means confined to possessors of newly acquired degrees and certificates; many whose shingles are weatherbeaten from long exposure have not yet learned, for example, of the use, or even of the existence, of the very handy tool of which, these ponderous preludes being finished, this article treats.

The statutes herein concerned, relating to examination of the adverse party,<sup>2</sup> and their skillful and thoughtful application

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1. Roberts, *Performance Courses in the Study of Law: A Proposal for Reform of Legal Education*, 36 A.B.A.J. 17 (1950).

2. Without going into the intricacies of who are proper adverse parties within the purview of the statute, for the purpose of this article we will assume that adverse parties are not only those who are adverse upon the record but also those who are adverse in interest. Who are proper parties may depend upon the type of action.

constitute a most potent weapon in the legal arsenal of offense and defense. Those who haven't learned their meaning and use may, when suffering under attack by them, inveigh against them as trickery and even charge a "technicality," a charge so often invoked by the unwary and lazy. But the weapon is neither trickery nor entitled to be called an obscure, unworthy, and improper technicality. Instead it is a salutary, honest, and most proper provision to aid in the cardinal mission of law suits<sup>3</sup>—to bring to light the facts which the law warrants.

Under the common law a party to an action could not compel an opposing party to testify against himself,<sup>4</sup> but under modern codes and the so-called adverse party statutes either party may call his opponent as a witness and examine him, as if under the rules of cross-examination, without being bound by the opponent's testimony.

Under these adverse party statutes, the plaintiff may call the defendant to testify under cross-examination at any time during the plaintiff's case. Thus the plaintiff may elect to call the adverse party to testify under cross-examination even before he puts his own witnesses on the stand for direct examination. Similarly, the defendant may, at any time in the presentation of his case, whether it be at the beginning, the middle, or the end, call the plaintiff to testify as under cross-examination.

The provisions of certain modern adverse party statutes, which are fairly typical, read as follows:

ILL. ANN. STAT. c. 110, §184 (Smith-Hurd 1948).

Examination of parties at instance of adverse party.

Upon the trial of any case any party thereto or any person for whose benefit such action is prosecuted or defended, or the officers, directors, or managing agents of any corporation which is a party to the action, may be examined as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled, in the same manner and subject to the same rules for examination as any other witness, to testify, but the party calling for such examination shall not be concluded thereby but may rebut the testimony thus given by counter testimony.

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3. Illinois Malleable Iron Co. v. Brennen, 174 Ill. App. 38 (1914). Witness called under § 33, Chicago Municipal Court Act; see note 21 *infra*.

4. 8 WIGMORE, EVIDENCE § 2217 (3d ed. 1940).

MO. REV. STAT. ANN. c. 9, art. 3 §1889 (1939).

Adverse party may be compelled to testify.

Any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses: *Provided*, that the party so called to testify may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses.

CAL. CODES Part IV, tit. 3, c. 3, Art VI, § 2055 (Deering 1949). (Calling and examination of adverse party, etc., as on cross-examination: Effect of testimony: Examination by own counsel.)

A party to the record of any civil action or proceeding or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agent of any corporation which is a party to the record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witnesses shall not be bound by his testimony, and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence. Such witness, when so called, may be examined by his own counsel, but only as to the matters testified to on such examination.

MINN. STAT. c. 72, § 9816 (Mason 1927): Examination by Adverse Party.

A Party to the record of any civil action or proceeding, or a person for whose benefit such action or proceeding is prosecuted or defended or the directors, officers, superintendent, or managing agents of any corporation which is a party to the record, may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses. The party calling such adverse witness shall not be bound by his testimony and the testimony given by such witness may be rebutted by the party calling him for such examination by other evidence. Such witness, when so called, may be examined by his own counsel but only as to matters testified to on such examination.

ARIZ. CODE § 21-922 (1939) [Rules Civ. Proc., Rule 43 (b)]:

Scope of examination and cross-examination.

Any witness may be cross-examined on any matter material to the case. A party may interrogate any unwilling or hostile witness by leading questions. A party may call

an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party.

The doctrine behind these statutes is akin, in principle, to the old chancery practice which permitted one to "sift the conscience of his adversary"; and, indeed, these statutes very probably derive from this equity practice. The student will find much of interest in the somewhat different but allied rule of Federal practice.<sup>5</sup> By pursuing the annotations and text book elucidation he can acquaint himself with the precise powers given by these statutes, their application and their limitations; these vary from jurisdiction to jurisdiction. It must always be kept in mind that, even in those jurisdictions in which the statutes are substantially the same verbally, different courts have viewed them in varying lights and have construed them in varying ways. But before using this weapon, or for that matter any weapon, one should understand the basic ground rules. These ground rules may be the rules obtaining generally under the law of the jurisdiction concerned in which the suit is waged, or they may be even more local. For instance, in Missouri, it is entirely true that the statute gives the right to call the adverse party; yet some circuit judges will require counsel to preface his interrogation of the adverse party by the announcement into the record that he desires to examine him under the adverse party statute under the rules of cross-examination. In some jurisdictions, as in Illinois, it seems that such an introductory statement is virtually a universal requirement. Its purpose is to inform all concerned of the proposal and to avoid any confusion as to whether the witness is "your witness" or is to be cross-examined under the statute, as the "adverse party."

This article specifically disavows any intent to exhaust the law on the subject; its purpose is, rather, to suggest a step toward adequate advancement and disclosure of facts in the course of a trial.

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5. FED. R. CIV. P. 43(b).

So consider a simple case in tort. Your client has been injured in an automobile collision; and you are bringing suit against that careless and insured old reprobate, John Doe, who drove the other car. You are convinced the defendant Doe was not observing proper, or any, care as he careened down the highway in reckless disregard of the safety of your client. You want to search his conscience, if any, under the appropriate deposition statute, and before trial learn what he has to say and, if possible, see that justice is not thwarted. So, promptly you take his deposition, putting him on record at an early stage before he, even if a paragon of virtue, has let his recollection be colored by his interest, or if dishonest, before his account has "jelled." Many times in the courtroom a party has suffered intensely by confrontation with what he has said in an earlier, expansive, and less cautious moment. Statistics have never been prepared,<sup>6</sup> but the writer believes that if the number of such occurrences were known and the instances laid end to end, they would reach "from here to a far there and back again."

But if you cannot, or choose not, to take his deposition, you may at the trial use the power conferred by the statute by calling Joe Doe from his chair to the witness stand to disclose what he knows under cross-examination. Many circumstances may make this procedure most desirable.

Let us now assume that your client, as plaintiff, is the widow of a fatally injured automobile passenger who lived only long enough to tell how the defendant's truck came around the corner on two wheels and on the wrong side of the street; and let us further assume that the defendant is the only living witness to the accident. These further assumptions characterize not infrequent occurrences. You then may find it more advantageous to make a prima facie case by calling the defendant to testify under the statute as the adverse party. Indeed, it may be your only hope of making a case; were you to take the defendant's deposition you might merely disclose your lack of witnesses, whereas, by calling him at trial, you may, because he is called suddenly and unexpectedly, truly "sift his conscience."

Or let us say that the defendant, or his insurer, retains you.

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6. So far as we know.

Of course, *now* the defendant is quite innocent, as you can clearly see, and is being assailed and harassed by one whose motivation is greed and perhaps a measure of malice. In this position, as in the earlier one supposed above, you may wish to take the deposition of the plaintiff, or you may find it more desirable and proper to examine the plaintiff at the trial under the adverse party statute. The adverse party weapon has two edges; and its edges should be honed sharp by thorough and painstaking preparation.

The intent of state legislatures in enacting the adverse party statutes was to enable a party to call his adversary and elicit his testimony at the trial, without making him that party's "own witness,"<sup>7</sup> and, so far as possible, to prevent the parties in any legal proceeding from perpetrating fraud and dishonesty.<sup>8</sup> Such a procedure strips the parties of former barriers used for concealing the truth and even shielding falsehood. While counsel is not bound by the cross-examination<sup>9</sup> since he does not call the witness as "his witness,"<sup>10</sup> counsel is however bound by that part of the cross-examination which he accepts for his benefit.<sup>11</sup> To insure against being bound beyond that, it is better practice to state into the record "I am calling the defendant, John Doe, under Section XXX for cross-examination," even though this may not be required by specific rule or accepted practice.

Any plaintiff's lawyer who actively participates in any appreciable number of contested cases many times finds himself initially unable to make a *prima facie* case. It develops that if he knew the possible defenses and the facts within the knowledge of the defendant, he would be in a much better position. He may not want to open up the avenues by taking a pre-trial deposition; he may rather desire to take his adversary by surprise and startle an admission of the truth from

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7. *Combs v. Younge*, 281 Ill. App. 339 (1936); *Waller v. Sloan*, 225 Mich. 600, 196 N.W. 347 (1923); *Horner v. Bell*, 336 Ill. App. 581, 84 N.E.2d 672 (1949).

8. *Cioli v. Kenourgies*, 59 Cal. App. 690, 211 Pac. 838 (1922).

9. *Anthony v. Hobbie*, 25 Cal.2d 814, 155 P.2d 826 (1945); *Lalordo v. Lacy*, 337 Mo. 1097, 88 S.W.2d 353 (1935); *Waller v. Sloan*, 225 Mich. 600, 196 N.W. 347 (1923); *Bushnell v. Yashika Tashiro*, 115 Cal. App. 563, 2 P.2d 550 (1931); *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931); *Crowder v. Nuttall*, 285 Ill. App. 254, 1 N.E.2d 912 (1936); *Luthy & Co. v. Parodis*, 299 Ill. 380, 132 N.E. 556 (1921).

10. *Spencer v. Anderson*, 229 S.W. 226 (Mo.App. 1921); *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931).

11. *Lalordo v. Lacy*, 337 Mo. 1097, 88 S.W.2d 353 (1935).

him. On the other hand, a lawyer may be able to make a prima facie case only through the testimony of the defendant because the essential facts lie solely within his knowledge. He dare not call the defendant as "his own witness," and therefore, he justifiably resorts to the much needed statute here involved. The lawyer cannot and should not be compelled to assume the risk of what the witness may say, as he would if he should call him as his own witness, and thus be bound by his testimony. If the lawyer is reasonably sure that he can obtain the desired results under the adverse party statute, by reason of proper handling of the witness under this cross-examination he may and should do so, usually early in the trial.

A concrete example is presented in the recent Illinois case of *McCarty v. O. H. Yates & Co.*<sup>12</sup> The court in the *McCarty* case stated that in an earlier Illinois case, *Howard v. Amerson*,<sup>13</sup> it had been held that:

an admission by defendant that he is the owner of the automobile which collides with that of plaintiff, while operated by another, makes, prima facie, a case that the driver is defendant's servant, acting within the scope of his employment, and casts upon defendant the obligation of proving the contrary.<sup>14</sup>

In the *McCarty* case, the writer as counsel for plaintiff, was confronted with the necessity of establishing a prima facie case of agency by securing an admission of ownership of the negligently operated vehicle. With this in mind, at the very outset of the plaintiff's case, the defendant (as supposed owner of the vehicle in question and employer of the negligent driver) was called to take the stand for examination under Section 60 of the Illinois Code, which provides for examination of the adverse party. Defendant's counsel, upon being advised of the intended sole purpose of the examination, readily agreed to stipulate into the record that the defendant was the owner of the truck in question. This, under the rule of the earlier *Amerson* case, established for plaintiff a prima facie case that the driver was defendant's servant and was acting within the scope of his employment at the time of the accident, and cast upon the defendant the obligation of proving the contrary.

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12. 294 Ill. App. 474, 14 N.E.2d 254 (1938).

13. 236 Ill. App. 587 (1925).

14. 294 Ill. App. 474, 480, 14 N.E.2d 254, 258 (1938).

Although the admission upon which the prima facie case was based was put into the record by way of stipulation in the *McCarty* case, the same result could have been achieved by use of the Illinois adverse party statute, had the defendant's lawyer not so stipulated.

This particular situation illustrates why counsel may not care to open avenues of investigation in any other manner prior to trial. The value of the statutory privilege of calling the opposing party as for cross-examination is obvious in the situation where counsel would find himself otherwise unable to prove matters sufficiently through his own witnesses to keep the trial judge from directing a verdict. This method also has its values in affording a way of more expeditiously proving signatures, identifying papers and documents, establishing ownership and the like.

There has been some attempt to limit the scope of the cross-examination under the adverse party practice;<sup>15</sup> these limitations are usually discretionary with the court. Broad range is permitted.<sup>16</sup> As a general rule there is nothing in the statutes which limits the cross-examination permitted under these sections. There should not be too much restriction or limitation of the powers found in these statutes because one of the statutory purposes is to give the party calling the witness the opportunity to examine his adversary without the protection which may be afforded by other rules. The courts are interested in saving time and in seeing that all the admissible facts in a trial come to light, and in getting away from technicalities which might prevent their admission otherwise.

Some statutes provide that the adverse party's attorney may examine his client immediately after he has been cross-examined by the calling party; others are silent on the point. Where there is no statutory provision as to the matter a considerable difference of opinion exists throughout the profession as to the proper procedure. Two possibilities are seen: (1) When the adverse party is dismissed by the calling party, the calling

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15. *Illinois Malleable Iron Co. v. Brennen*, 174 Ill. App. 38 (1914). (The reference here was to § 33 of the Chicago Municipal Court Act which is similar to § 60); *State v. Jeffrey*, 188 Minn. 476, 247 N.W. 692 (1933); *In re Brown*, 38 Minn. 112 (1888).

16. *Patrick v. Superior Court*, 139 Cal. App. 1, 33 P.2d 466 (1934); *Little v. Los Angeles Ry. Corp.*, 94 Cal. App. 303, 271 Pac. 134 (1918); *Waller v. Sloan*, 225 Mich. 600, 196 N.W. 347 (1923).

party should proceed immediately to his other evidence; or (2) when so dismissed, the adverse party's counsel should be entitled immediately to examine him but only as to those matters on which he has already been cross-examined. But since the adverse party is called for purposes of cross-examination only it would seem to be most appropriate to dismiss him when the calling party has finished. Thus, the adverse party's counsel may be foreclosed from any examination at this time.<sup>17</sup> He has, of course, the right to call his client to the stand for direct examination when he presents his side of the case, at which time, however, he may again be subject to cross-examination under the regular rules.

Another advantage of which counsel may avail himself is that, after calling the adverse party under the statute, he may lay a foundation for impeachment if necessary; many times if one expects to impeach the adverse party it works to his advantage to call him under the statute and then lay such foundation. This may be more advantageous than to wait until the defendant has placed his client on the stand under direct examination and then to lay a proper foundation for impeachment under regular cross-examination. However, under this rule a foundation is not always necessary as further testimony may contradict that of the adverse party and may not be pure impeachment.

The fact that a party has been called for cross-examination under this section or rule does not mean that one is making the witness a competent witness for all purposes. For instance, should a claimant against an estate be called under the rule, this would not in itself make him a competent witness to testify in his own behalf when otherwise he would be barred by some statutory provision. Defending counsel might call the plaintiff-claimant under the adverse party statute, should he so desire; and I know of no general rule that this examination, if he were called particularly under the statute, and it was so stated in the record, would make him a competent witness for all purposes if other statutes should bar him from testifying. However, in many jurisdictions if a party is incompetent to be

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17. *Horner v. Bell*, 336 Ill. App. 581, 84 N.E.2d 672 (1949); *cf.* *Combs v. Younge*, 281 Ill. App. 339 (1926); *O'Day v. Meyers*, 147 Wis. 549, 133 N.W. 605 (1911); *cf.* *Guse v. Power & Mining Machinery Co.*, 151 Wis. 400, 139 N.W. 195 (1912).

witness for himself concerning transactions with a decedent, and is called as an adverse party, his incompetency is to a limited extent removed, and he may thereafter testify on direct examination as to those matters concerning which he was interrogated. In the case of *Breen v. Breen*<sup>18</sup> the syllabus in 70 N. E. 2d states:

An administrator calling a claimant against the estate for examination under the statute does not make the claimant a competent witness for all purposes and upon all issues, and the court should confine the scope of the subject matter of the claimant's testimony to the matters upon which he was examined by the administrator.<sup>19</sup>

Under the statutory rule as to calling the adverse party the cross-examination is, of course, made up of leading questions and usually a broad range is permitted<sup>20</sup> even though as stated above some courts have attempted to limit or restrict the examiner.

This statute is of tremendous advantage if skillfully used and properly handled. It is a statute of which every lawyer should avail himself at every appropriate opportunity because it gives opportunity to inquire into the adversary's mind early in the trial when probably he is unprepared for such an examination, and it may quickly bring forth some or all of the critical issues involved. The adverse party may feel secure because a pre-trial deposition was not taken and he may for that reason be lulled into a feeling of false security. When the adverse party is called to the stand at the trial he may become bewildered, he may be the first witness the opposite party has called, his lawyer can't help him, he is suddenly alone and afraid, his lawyer may not have had the foresight to warn him that this may happen, he may look imploringly at his lawyer before answering each question, he may wonder why he is called and fear that he will wreck his own case, he may recognize suddenly that he is faced with disclosure of the guilty knowledge which he had counted on concealing—in fact this worry may even make him look and feel as guilty as he is. If

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18. *Breen v. Breen* (In re Brown's Estate), 329 Ill. App. 650, 70 N.E.2d 90 (1947).

19. 70 N.E.2d at 91.

20. *Imperial Water Co. No. 1 v. Imperial Irrigation District*, 62 Cal. App. 286, 217 Pac. 88 (1933); *Tucker v. Reil*, 51 Ariz. 357, 77 P.2d 203 (1938); *Waller v. Sloan*, 225 Mich. 600, 196 N.W. 347 (1923); *Pfefferkon v. Seefield*, 66 Minn. 223, 68 N.W. 1072 (1896).

he can withstand the cross-examination of a skillful lawyer under these conditions, he must be a clever adversary. Then too, the jury has an admiration for a lawyer who braves the lion's den and calls the adverse party. It has a psychological effect on the juror, who, of course, has never heard of this statute. If the plaintiff is the calling party he is then more able to determine how the issues will be met by the defendant and upon what course to proceed. It may be that after the plaintiff has called the defendant under this section he will be better able to determine from the testimony the nature of the defense the defendant is going to make and thereby be given an opportunity early in the trial to prepare himself for hidden defenses even on that short notice; in modern civil practice the tendency is to frown upon hidden defenses.

Suppose John Doe's case is now called for trial; his counsel announce ready. He appears in court ready to make use of the statute involved and is thoroughly versed in the ground rules. His jury is selected, he has made his opening statement and the court and jury know the allegations of fact involved, and what Doe expects to prove. He calls the defendant for cross-examination under the statute, but the defendant is not in court. He needs the defendant to make a prima facie case or to prove matters which he can prove only by the defendant. He feels that he has prepared himself for all emergencies—but this situation he overlooked. He makes a demand on defendant's lawyer to produce the defendant for cross-examination under the adverse party statute but defendant's counsel advises him that the defendant will not be present at the trial. He moves the court for a continuance. Inquiry is made as to whether a subpoena has been served on the defendant and plaintiff's counsel admits that none was served. He is not entitled to a continuance because of the absence of the defendant. He should have subpoenaed the defendant the same as any other witness.<sup>21</sup>

Assume in this same case that the defendant expects to be present to testify in his own behalf but does not appear at the time of presentation of plaintiff's case—or further assume that defendant's counsel hides him during the trial. The plaintiff is certainly entitled to cross-examination under these

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21. See *Cairo Lumber Co., Inc. v. Corwin*, 325 Ill. App. 319, 60 N.E.2d 110 (1945); *Merryman v. Sears*, 50 Ariz. 412, 72 P.2d 943 (1937).

circumstances even though the defendant was not subpoenaed. During the trial of an interesting Illinois case<sup>22</sup> after plaintiff demanded the right to cross-examine the defendant under Section 33,<sup>23</sup> the latter's counsel said that "he was not here bringing witnesses for somebody else." The court called for "the witnesses in defense" and was informed by the attorney for defendant that defendant was not in court but in the hall. Defendant's attorney then said that he would go out and look for him. The court immediately made a finding in favor of plaintiff. The upper court in its opinion said:

We think the trial judge had reason to believe that defendant's counsel was simply trifling in his attempt to hide defendant so as to deprive plaintiff of his right to cross-examine him and then to produce him to testify in defense. Defendant was either present or not present, and as he chose to absent himself from the trial he cannot now complain if the testimony in plaintiff's behalf is not contradicted. The trial judge acted properly and the judgment is affirmed.<sup>24</sup>

If the defendant is in court during the presentation of plaintiff's case the court should be able to order him to take the stand under penalty of being in contempt.

Even if your case is such that you do not wish to cross-examine the adverse party you should know the subject and the ramifications and limitations thereof in order to guard the client who puts himself in your professional care; do not be caught unaware of the uses to which the rule may be put and do not rely on any faulty view of the limitations on cross-examination which might lead you into trouble. Avoid the pitfalls and penalties such as they may be in your jurisdiction by advising your client of the uses to which opposite counsel may put this statute and of the rights of opposite counsel under this rule.

Pre-trial discovery by way of deposition, motions to admit facts, motions to turn over documents, examination of the adverse party and other modern reforms have opened the gateway for speeding up litigation and for bringing before the trier

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22. *Hall v. Small*, 221 Ill. App. 211 (1921).

23. The witness was called under § 33 of the Municipal Court Act of Chicago. (J & A par. 3345). § 33 of the Municipal Court Act of Chicago was used as the pattern for § 60 of the Illinois Code.

24. *Hall v. Small*, 221 Ill. App. 211, 212 (1921).

of facts all the evidential facts involved, rather than a mere part thereof. Many of the old common law rules which placed a barrier and a shield around many parties involved in law suits are, fortunately for justice, now gone and statutes such as these considered represent a step forward in the administration of justice.

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