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Important amendments to its Rules, effective April 1, 1961, were recently adopted by the Supreme Court of Appeals of Virginia. Perhaps the change of most interest to trial lawyers was the revision of Rule 3:23 relating to Depositions and Discovery in Actions at Law.

The Background

Prior to 1954 there was disagreement as to whether or not depositions for discovery could be taken incident to an action at law in a Virginia court. The promulgation in 1938 of the Federal Rules of Civil Procedure, which permitted the taking of oral depositions of parties and witnesses for pretrial discovery, had created intense interest in the availability of this device in our state courts.

It was contended by some that the set of statutes found in Virginia Code §8-320 through §8-236, providing for interrogatories to (and production of books, etc., by) an adverse party or claimant, comprised all the Virginia law on the subject of pretrial discovery, aside from the ancient bill for discovery in chancery which had been expressly saved by Code §8-327. According to this argument, the deposition statutes found in Code §8-304 *et seq.* were not to be interpreted as encompassing depositions taken for the purpose of pretrial discovery.

On April 23, 1953, the opposite view was ably propounded by Judge Ralph T. Catterall, of the State Corporation Commission, in an address before the Judicial Conference of Virginia in Richmond. At that time he said:

> My own view is that the remedies are cumulative and that a lawyer who wants to get his hands on his oppo-

> nent's evidence before trial has three choices. He can file a bill in equity for discovery in the good old 18th Century manner, or he can use the discovery statutes [Va. Code Ann. §8-320 *et seq.*], which, in the 19th Century, conferred on the law courts concurrent jurisdiction to grant the relief that only the chancellor could previously allow, or he can take depositions.

In 1954 the Supreme Court of Appeals adopted Rule 3:23 which in paragraph (c) provided for the taking of depositions for discovery. The rule made it permissive, not mandatory, for a court in an action at law to permit the taking of a deposition for discovery (limited to subjects named in the court's order) and then only "if satisfied . . . that the moving party should have access to evidence or information subject to the control of the adverse party or of a third person." (Paragraph (b) made an exception as to an adverse party's expert witness.)

At the same time, paragraph (a) of the 1954 rule provided:

> A party may object to the taking of a *deposition under §8-304 or §8-305 of the Code of Virginia* by moving the court promptly after receiving notice of the taking of the depositions, to quash the notice; and the court shall quash the notice unless satisfied that the taking of the deposition is in good faith for the purpose of taking and introducing the testimony of *a witness who may not be able to attend the trial of the case.* (Emphasis added.)

Experience under this 1954 version of Rule 3:23 demonstrated that some of the trial courts in Virginia rarely, if ever, permitted the taking of depositions for discovery. In the first place it may be conjectured that a judge who was not in sympathy with pretrial discovery practice might well have found it difficult to become "satisfied" that one party to a lawsuit "should have access" to his opponent's evidence before trial. Furthermore, some of the trial judges interpreted paragraph (a) of the rule as qualifying and limiting paragraph (c), and hence would refuse to permit the taking of a deposition for discovery unless the moving

party could show that the witness might "not be able to attend the trial of the case."

This confusion was, perhaps, inherent in Rule 3:23 as originally worded. For the reference in paragraph (a) to the taking of "a deposition under §8-304 or §8-305 of the Code of Virginia" was so broad as literally to include the taking of a deposition for discovery, although it is most unlikely that this was the intent of the framers of the rule. (This conjecture may be considered substantiated in some degree by the recent change in the wording of the rule by the Supreme Court of Appeals.)

The core of this difficulty may lie in the confusion of depositions *de bene esse* with depositions for discovery. The device of taking depositions of witnesses has evolved in our law for several distinct purposes. One of them is to obtain before trial the testimony of a witness who probably will not be available to testify *ore tenus* at the trial. Such a deposition, taken to be read at the trial if the witness should be absent, is taken *de bene esse, i.e.,* conditionally or provisionally. A deposition for discovery, on the other hand, is taken not because of the likelihood that the witness will be unable to attend the trial, but because the party taking the deposition seeks to obtain information in advance of the trial which will be helpful to him in preparing and presenting his case, including fore-knowledge of the very testimony that the witness is expected to give at the trial. With this distinction in mind it is obvious that whether or not the witness may be able to attend the trial of the case is entirely immaterial when his deposition is taken for the purpose of discovery.

The 1961 Amendment

In its amendment of Rule 3:23, adopted January 17, 1961, and effective April 1, 1961, the Supreme Court of Appeals made this distinction clear. Paragraph (a) no longer refers to "a deposition under §8-304 or §8-305 of the Code of Virginia" (which would literally include depositions for discovery), but now refers to "a deposition *de bene esse.*" It is, therefore, only when a deposition is sought because of the

likelihood that the witness will not be available to testify at the trial that the trial court, upon motion of the objecting party, shall quash the notice unless satisfied that the witness "may not be able to attend the trial of the case." It now seems abundantly clear that paragraph (a) does not qualify or limit paragraph (c), and that the ability or inability of the witness to be present at the trial has no bearing whatsoever on a court's decision upon a motion to permit the taking of a deposition for discovery.

Further, the newly-effective amendment makes a most significant change with respect to a party's right to take depositions for discovery. Whereas the original rule was permissive, only, and even then conditioned upon the court's being satisfied that the moving party "should have access to evidence or other information subject to the control of the adverse party or of a third person," the amended rule is mandatory in providing that

> the court, if satisfied . . . that the moving party in good faith desires access by way of discovery to evidence, the names and addresses of witnesses, or other information subject to the control of the adverse party or of a third person, *shall* permit the taking of a deposition for discovery, and *shall* enter an order requiring the adverse party or such third person . . . to answer questions relevant to subjects named in the order. . . . (Emphasis added.)

Except for the requirement of a bona fide desire to get his hands on his opponent's evidence before trial, the only express limitation on a party's right to take a discovery deposition (of one not an expert witness employed by the other party) is found in this new, concluding sentence of paragraph (c):

> The court shall deny the motion if it finds that granting the motion would unreasonably delay the case or impose unreasonable hardship or expense on the adverse party.

It is believed that the 1961 revision of Rule 3:23 should go far toward making the practice of pretrial discovery by

deposition a reality in Virginia courts. That there are disadvantages in such a practice cannot be denied. But it is believed that on balance the result will be to further the administration of justice by making litigation less of a game to be played with "aces in the hole" and more of a search for the facts and a determination of the truth. In thus liberalizing its discovery procedure, Virginia is to a degree emulating the discovery devices of the Federal Rules of Civil Procedure which "have achieved wider acceptance in state practice than ony other federal civil rules." *Developments in the Law—Discovery,* 74 Harv. L. Rev. 940 (Mar. 1961).

For the convenience of the reader, Rule 3:23 is set out below with the matter stricken out by the 1961 amendment enclosed in brackets; new matter is printed in italics.

Rule 3:23. Depositions [under Code Sections 8-304 and 8-305] and Discovery *in Actions at Law*

(a) A party may object to the taking of a deposition [under § 8-304 or § 8-305 of the Code of Virginia] *de bene esse* by moving the court, promptly after receiving notice of the taking of the deposition, to quash the notice; and the court shall quash the notice unless satisfied that the taking of the deposition is in good faith for the purpose of taking and introducing the testimony of a witness who may not be able to attend the trial of the case.

(b) The deposition of a witness whose first connection with the case was his employment to give his opinion as an expert may be taken only at the instance of the party who employed him.

(c) On motion of any party, the court, if satisfied by affidavit, testimony, inspection of the pleadings or otherwise that the moving party [should have] *in good faith desires* access *by way of discovery* to evidence, *the names and addresses of witnesses,* or other information subject to the control of the adverse party or of a third person, [may] *shall* permit the taking of a deposition for discovery and [may] *shall* enter

an order requiring the adverse party or such third person to attend at a time and place and before a notary or commissioner named in the order and answer questions relevant to subjects named in the order and to make available for inspection, copying or photographing any writing, chattel or real property described in the order. *The court shall deny the motion if it finds that granting the motion would unreasonably delay the case or impose unreasonable hardship or expense on the adverse party.*

(d) If the pleadings raise an issue as to the mental or physical condition of a party the court, on motion of an adverse party, may order the party to submit to an examination by one or more physicians named in the order and employed by the moving party. A written report of the examination shall be made by the physicians to the court and filed with the clerk before the trial and a copy furnished to each party. The court may in the order fix the time and place for the examination and the time for filing the report and furnishing the copies. The written report shall not be admitted in evidence unless offered by the party who submitted to the examination.