Interrogatories and Depositions in Virginia

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INTERROGATORIES
AND
DEPOSITIONS
IN
VIRGINIA

BY
WILLIAM HAMILTON BRYSON

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA
This book is respectfully dedicated to

AUBREY RUSSELL BOWLES, JR., ESQUIRE,
who as a member of the Judicial Council of Virginia has been greatly instrumental in procedural reform and who has inspired and generously encouraged the writing of this book.
PREFACE

This book is intended to be both a history and a practitioner's manual. By using the table of contents, the table of statutes, and the index, the practicing attorney can turn to the section which is of interest to him. This book was written as a Virginia supplement to Moore's *Federal Practice*; it discusses the traditional practices and the statutes as well as the rules of court.

The reason that there are so many nineteenth century cases cited is that there are very few recent opinions of the Supreme Court of Appeals which discuss interrogatories or depositions. The steady flow of these decisions in the earlier times was reduced to a trickle by the revised statute of jeofails of 1919. After this date it has been necessary to show that any procedural impropriety caused substantial injustice; otherwise the Supreme Court of Appeals will overlook it as harmless error. Therefore, if authority is to be cited for most points, it will have to come from the earlier period. These cases are still good authority; the changes have not been revolutionary except as to scope and use. I have attempted to cite all of the cases on interrogatories. However, as to depositions, there is such an overwhelming quantity that I was forced to select only the better ones.

I would like to take this opportunity to express my deepest gratitude to Professor James H. Chadbourn and Miss Edith Henderson of Harvard Law School and to Professor Calvin Woodard, Professor Neill H. Alford, Jr., Professor Peter C. Manson, and especially Professor T. Munford Boyd of the University of Virginia School of Law for their generous help and encouragement in the researching, writing, and revising of this book.
FOREWORD

Legal historians of the twentieth century will, no doubt, rank the development of discovery proceedings in importance with such procedural developments in the nineteenth as the introduction of code procedure, exemplified in the famous Field Code of New York and the codes of the states which followed it. The rules of civil procedure adopted in 1938 by the Supreme Court of the United States, effective in the entire federal system, provided for discovery procedures far more comprehensive than existing procedures in any state courts. When Virginia adopted Rules of Court governing procedure in trial courts, effective February 1, 1950, no change was made in the limited statutory and traditional equity power with respect to discovery. Subsequently, full scale discovery procedure patterned on the federal rules has been adopted in Virginia.

Whenever such a drastic change occurs in the judiciary of a state, the history of its development is of practical importance as well as of academic interest. It is safe to say that the change would not have been made if a majority of practicing lawyers did not want it so.

The purpose of this book is to give the reader a familiarity with the historical development of the two most commonly used devices of discovery in modern procedure, namely interrogatories and depositions, and to discuss their availability and limitations today. No current book delineates with the scrupulous care of Mr. Bryson the history of the development of these two discovery processes through the centuries. Therefore, the book deserves a place in every legal library. But more than this, the practitioner must be warned that whenever a procedural innovation is made, the history
of the processes which suggested its adoption may need to be examined in close cases calling for interpretation. This book was written in the belief that the history of interrogatories and depositions as developed from the Roman law through the ecclesiastical courts in England and as authorized by laws of the colonies and the states in this country might be helpful from time to time in difficult cases of interpretation of modern adaptations of the laws now in force. The method of treatment adopted by the author, which first traces the historical development of interrogatories and depositions, respectively, and then analyzes modern statutory and decisional application of these discovery devices with abundant references to source materials, is designed to make the book highly practical. The writer of this foreword cannot refrain from the observation that the historical background of any innovation in the law cannot be safely ignored by the practitioner no matter how specific a statute or rule of court may appear to be. Upon this premise the present treatise is written.

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DEPOSITIONS

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y ignored by the prac-
private (Herein Work-Pro-
self-incrimi-
(d) Harassment ....... 53
(g) Availability of Information by
Other Means .......... 53

T. MUNFORD BOYD
Professor of Law
University of Virginia
5. Objections ........................................ 55
   a. Rule 4:8 and § 8-320 ......................... 55
   b. In Chancery .................................... 55
B. Description of an Answer .................. 57
   1. Duty to Answer ............................... 57
   2. Answers Under Oath .......................... 59
   3. Time for Answer ............................... 61
   4. Objections to Answers ....................... 61
      a. Scandal and Impertinence ............... 61
      b. Insufficiency .............................. 62
   5. Sanctions for Refusal to Answer Sufficiently ........................................ 63
   6. Appealability of Discovery Orders ........ 65
   7. Use of the Answer ............................ 65

Part 2. Depositions ................................. 70
   I. HISTORICAL DEVELOPMENT ................. 70
      A. Roman and Canon Law ...................... 70
      B. English Courts of Equity ................. 71
      C. The Courts in Virginia .................... 71
         1. Equity ................................... 71
         2. Depositions De Bene Esse in Equity .... 73
         3. Depositions De Bene Esse at Common Law 75
         4. Depositions In Perpetuam Rei Memoriam ... 77
         5. Rule 3:23 (c) ................................ 79
         6. Rules of Court Part Four .................. 84
         7. Criminal Cases ............................. 85
         8. Miscellaneous Uses ....................... 87

   II. ANALYSIS OF DEPOSITIONS ................ 93
      A. Availability ................................ 93
         1. Priority of Discovery ................. 99
TABLE OF CONTENTS

B. Notice ........................................ 100
C. Commissions .................................. 103
D. Before Whom Taken ......................... 104
E. Formalities: Oath, Caption, Signature,
   Certificate, Return, Filing .................. 108
F. Compulsion to Appear and to Testify ...... 111
G. Method of Examination ...................... 112
   1. Direct Examination ......................... 112
   2. Cross-Examination .......................... 115
   3. Answer and Publication ..................... 117
   4. Re-examination .............................. 117
H. Objections ...................................... 118
   1. Timeliness .................................. 119
      a. At Trial ................................ 119
      b. At the Taking of the Deposition ......... 120
      c. As Soon as Discovered .................... 121
   2. Preservation of Objection ................. 121
   3. Protective Orders ........................... 121
I. Use of Depositions ......................... 122
   1. Against Whom ............................... 122
   2. For Evidence ................................ 124
   3. For Discovery ............................... 127
   4. To Impeach .................................. 128

Conclusion ...................................... 129

Appendix 1 ....................................... 141
Appendix 2 ....................................... 143

Table of Cases ................................. 167
Table of Statutes ............................... 195
Table of Rules ................................. 199
Index ........................................... 203
INTRODUCTION

As of the first of February, 1967, the entire field of discovery in Virginia has been radically changed from what it was before; on this date the substance of the federal rules of discovery 1 became an effective part of the procedure of the state courts. This book is a discussion of the most important parts of this change, i.e., the change in the uses of interrogatories to parties and depositions. I intend not only to go into the most recent developments but also to present an historical sketch of the origin and development of interrogatories and depositions and to discuss the modern use thereof.

The whole area of discovery is much too large to be properly considered here, so this book is limited to these two discovery devices; however, depositions have always been the normal method of taking evidence in equity, so a great deal of space must be devoted to chancery procedure and evidence generally. As will be discussed later on, interrogatories and depositions had their origin in the civil law, but, since the courts of equity were the only ones with this background to have survived in state practice, it is not necessary to discuss their use in the others, such as admiralty, star chamber, etc. It should be remembered that until the twentieth century the interrogatory was the only means of discovery allowed.

This book is divided into two major parts: interrogatories, formerly a matter of pleading, and depositions, formerly evidence, and each part is divided into two subdivisions. In the first and third subdivisions I have traced the historical development from the Roman beginnings through the ecclesiastical courts into English chancery practice attempting to provide some explanation for the now available types inherited from the

English tradition, enacted by statutes, and promulgated by Rules of Court. In the second and fourth subdivisions I have given detailed analyses of the practical problems arising from the use of interrogatories and depositions: their availability, timeliness, scope, objections, answers thereto, use thereof, etc.

It appears to me that too many people today are so enthralled with where we are going that they have lost sight of where we started. It is my opinion that wisdom requires a broad overall view of the universe as well as a detailed technical knowledge thereof; it requires hindsight as well as foresight to understand a trend. Therefore the history of interrogatories and depositions too is a worthwhile endeavor. Moreover, no doctrine is more firmly established in our judicial system than that of stare decisis, and what is stare decisis if not history? History of laws, both case law and statute law, is the major controlling element of our judiciary. The history of legal institutions should be equally important to our legislatures. To know the mistakes of the past is essential to their avoidance in the future: "those who cannot remember the past are condemned to repeat it." It is necessary to the preservation of the triumphs of our ancestors, that they not be foolishly cast aside for some trivial, short-sighted goal.

The new interrogatories and depositions are quite similar in form to those under the old practices; the major advance has been the enlarged scope and use. Out of the old fields comes the new corn. I propose to consider here the old fields as well as the new corn.

Another preliminary matter to be dealt with is terminology. This will not take us far afield because the semantic development of the terms in this field has not,

INTRODUCTION

Fortunately, been very great. Interrogatories are written questions; usually they are found listed seriatim as a set. At first interrogatories were the only form of discovery, and these two terms were used interchangeably. Originally the term interrogation was applied equally to oral and written questions, but the term now is usually restricted to cover only written questions.

Depositions are the sworn answers of witnesses which are taken down in writing. Depositions are taken out of court and are taken for two reasons: for use as evidence or for discovery of information which may be relevant to a lawsuit. The use of depositions for discovery is a part, the most important part, of the great change of 1967. Before this the only forms of discovery available were bills in equity, the very limited depositions under Rule 3:23, which was first adopted in 1954, and interrogatories to parties, which were also greatly restricted in scope.

It will be seen that every change in the use of depositions, no matter how small or in what period, has been in the direction of rendering them more broad, more useful, more available. This is consistent with the policy presently in vogue that the courts should consider as much evidence as possible; if some of it is questionable, then the courts should question it and skim off the dross rather than automatically exclude it. The opposite principle is that, if proposed evidence is likely to be false, then it should not be admitted. The problem is just where to draw the line; what is inherently seriously likely to be false? The current feeling is that, if there is to be error, then it should be on the side of admissibility.

In order to avoid confusion it is necessary to classify and label the different kinds of chancery bills in respect to discovery. We shall refer to the pure bill of

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discovery or bill of discovery as a \textit{pure bill}; such a bill seeks discovery only and does not contain a prayer for relief of any kind. We shall call \textit{mixed bills} those which seek discovery and equitable relief or relief not available at common law; these are the normal bills in equity. \textit{Mixed bills for legal relief} are those bills in chancery for discovery and legal relief; the sole grounds of jurisdiction of chancery in this case is the good faith necessary for discovery for the success of the party in the action at law; if the discovery is the sole means of obtaining the necessary evidence, then chancery will retain jurisdiction of the case and decide the legal issues involved in order to avoid a multiplicity of suits and to avoid unnecessary expense.\textsuperscript{5}

The original purpose of discovery was solely to make it possible for the party seeking it to prove his claim or defence. This was later softened by the inclusion of the concept of being able to do so without unreasonable expense.

Among the more egregious causes of the need for and arise of discovery was the failure of the pleadings to put the opposite party on sufficient notice of just what would be at issue at the actual trial. Thus the opposite party would be surprised with unexpected and unprepared-for arguments and facts. This is known as the sporting theory of justice; however, it seems somewhat unsporting to me, \textit{cf.} using a rapier a foot longer than one's adversary or ambushing and shooting him in the back. General pleading was done by both parties, and they both could have information hidden away of facts which the other party could not possibly know. Thus discovery came to be allowed to find out those facts within the knowledge of the other party which were needed to prove one's case, if they could not be reasonably discovered elsewhere. Thus originally in-

\textsuperscript{5} See \textit{infra} pp. 16, 17, 28-32.
Depositions

As a pure bill; such a bill does not contain a prayer for relief or relief not available under the normal bills in chancery. The relief are those bills in chancery in the case of legal relief; the sole object of discovery in this case is the discovery for the success of the discovery was solely to make enabling the inclusion of evidence, then it was no longer necessary to supply the notice of just notice of just discovery to prove his claim. Such discovery was allowed solely for the discovery of admissible evidence but limited by the refusal to allow a fishing expedition.

6. POMEROY, EQUITY JURISPRUDENCE § 208a (5th ed. 1941) (hereinafter cited as POMEROY, EQ. JuR.); JAMES, CIVIL PROCEDURE 181 (1965) (hereinafter cited as JAMES).