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FIRST DAY

FIRST SECTION

VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia - June 25-26, 1973

1. Shad Roe instituted an action against John Doe for breach of an oral warranty made in connection with the purchase of a horse by Roe from Doe. For one reason or another the trial of the case was delayed for several years and when the matter finally came to trial Scrivener was called as a witness for the plaintiff.

Scrivener testified that he had heard a discussion between the parties relating to the sale and purchase of the horse at the time the sale was consummated. He further testified that he had been concerned that there might be later litigation regarding the sale so he had gone home immediately and had written down exactly what each party had said. He testified that he could not recall any of the statements of the parties but offered to read the memorandum he had made at the time. The defendant objected to the reading of the memorandum.

How should the Court rule?

2. Roanoke Farm Equipment Company commenced an action in the Circuit Court of Roanoke County, Virginia, against Harold Farmer to recover the purchase of \$475 for an article of farm machinery. The motion for judgment charged that plaintiff had especially designed and manufactured the article of farm machinery at the request of the defendant, and that tender of delivery of said machinery had been made to defendant within ninety days of the date of the oral agreement, which was within the time called for by the agreement. The motion for judgment further charged that defendant had refused to accept delivery. The defendant filed grounds of defense wherein he assigned as his only defense to the action that he had not entered into the alleged oral agreement with plaintiff. At the trial of the action, plaintiff offered evidence to prove the facts alleged in the motion for judgment. Defendant testified that he had not entered into an oral agreement with the plaintiff, as charged in the motion for judgment. Counsel for defendant then asked defendant whether the farm machinery, sought to be delivered to him by plaintiff, was manufactured according to the design alleged by plaintiff to have been called for by the alleged agreement. Counsel for plaintiff objected to the question.

How should the Court rule on the objection?

3. Happy and Content lived together as man and wife in Nevada which recognized this relationship as a valid common law marriage. Happy who died intestate in Nevada was survived by Content. He owned a valuable farm in Virginia.

Is Content entitled to dower in this farm? ^{1/2}

4. William Smith commenced an action in the Circuit Court of Rockbridge County, Virginia, against Bump-a-Long Trucking Company, Inc. and Valley Transportation Company, Inc., to recover damages to a warehouse owned by plaintiff. In the motion for judgment plaintiff charged that each defendant was guilty of negligence in the operation of its vehicle with a result that both vehicles left the highway and ran into the warehouse owned by plaintiff. Bump-a-Long Trucking Company, Inc., after being served with process, promptly filed a counterclaim against plaintiff seeking to recover money claimed to be due it by reason of an alleged breach of contract, and it also filed a cross claim against Valley Transportation Company, Inc., seeking to recover for an alleged breach of contract. Smith and Valley Transportation Company, Inc., respectively, by proper pleadings, each challenged the right of Bump-a-Long Trucking Company, Inc., to prosecute in the pending action the counterclaim and cross claim.

How should the Court rule:

(a) On the counterclaim?

(b) On the cross claim?

5. On the 11th day of May, 1973, Joseph Bailey, a resident of Stafford County, Virginia, commenced an action in the Circuit Court of that County, against William Hampton, a resident of Goochland County, Virginia, to recover damages for personal injuries he sustained as a result of an automobile collision. The motion for judgment alleged that the accident occurred in Nelson County, Virginia, on the 20th day of April, 1973. The motion for judgment, with notice of motion attached, was served upon the defendant in Stafford County, Virginia, on the 16th day of May, 1973. The defendant failed to appear and plead within twenty-one days of the date of the service of process. On June 11, 1973, the defendant appeared by counsel before the Judge of the Circuit Court of Stafford County, after giving timely notice to counsel for plaintiff, and moved the Court for leave to file pleadings in the action. After hearing argument of counsel, the Court entered an order permitting defendant to file pleadings within ten days from the date of said order. Counsel for plaintiff objected to the Court's

ruling in permitting pleadings to be filed. Within the ten day period, defendant filed a plea in abatement challenging the venue, and charging that the action should have been commenced in the Circuit Court of Nelson County or the Circuit Court of Goochland County.

- (a) Did the Court commit error in permitting pleadings to be filed after the expiration of twenty-one days after the date of service of process?
- (b) How should the Court rule on the plea in abatement?

6. John P. Jones purchased four new tires for his 1970 Chevrolet from Roanoke Tire Company, a local retail tire store, on March 10, 1973. On that same date, those four tires were fitted to Jones' car by employees of Roanoke Tire Company. On April 2, 1973, while driving his car with the new tires south on Interstate 81, one of the tires blew out causing Jones to wreck and to be injured. A personal injury action was commenced by Jones, and process was served upon Roanoke Tire Company's Registered Agent on May 1, 1973. On May 10, 1973, counsel for Roanoke Tire Company filed its grounds of defense and a plea of contributory negligence. On May 24, 1973, counsel for Roanoke Tire Company learned for the first time that the tire which allegedly blew out was manufactured by Fireball Tire Company.

May Roanoke Tire Company proceed against Fireball Tire Company in this pending action?

7. John Doe commenced an action in the United States District Court for the Western District of Virginia against Richard Rowe. Rowe employed John Q. Lawyer to represent him. Lawyer examined the plaintiff's complaint and determined that it did not state a cause of action. He further concluded that if a demurrer was overruled, his client should rely upon the defenses of assumption of risk and contributory negligence. Being unfamiliar with Federal Practice and Procedure, and not having the Federal Rules of Civil Procedure in his office, Lawyer called upon his friend, Blackstone Barrister, to ask his advice on how he should plead. In discussing the matter with Barrister, Lawyer stated that it was his opinion that he should file a demurrer to the complaint for the purpose of testing its sufficiency, and that if the demurrer was overruled it would not be necessary to plead assumption of risk and contributory negligence, as these defenses could be raised at

trial by the offer of evidence.

What advice should Barrister give Lawyer with respect to the following:

- (a) Whether he should file a demurrer to the complaint to test its legal sufficiency?
- (b) Whether he can raise the issues of assumption of risk and contributory negligence by tender of proof at the trial of the action?

8. Alexander Mundy was indicted and tried in the Corporation Court for the City of Alexandria on a charge of breaking and entering. During the trial of the case, the Commonwealth offered no evidence to prove that the offense had been committed within the corporate limits of the City of Alexandria.

At the conclusion of the evidence for the Commonwealth, the accused moved the court to strike the evidence on the ground that the evidence was insufficient to identify the accused as the party who had committed the offense. The motion was overruled and exceptions noted.

Rule 3A:17

The accused offered no evidence in his own defense.

The case was submitted to the jury who in due course returned a verdict of guilty and fixed the punishment of the accused at three years in the state penitentiary. The accused thereupon moved to set aside the verdict on the ground that the Commonwealth had failed to establish venue by proving that the offense had been committed within the corporate limits of the City of Alexandria.

Deny - must raise before verdict

How should the Court rule on this motion?

9. Tom Rand is 30 years of age and is the beneficiary of a trust created by the will of his father who died in 1965. The trust res consists of corporate stocks and bonds. Upon the death of the testator, Harold Hoge duly qualified, and has since acted as Trustee, actively managing the trust and its investments. By the terms of the trust, it is to terminate when Tom Rand reaches 35 years of age and he is to then receive all trust assets free of the trust. Rand has just learned that Hoge has breached the trust by selling from the trust res 600 shares of the common stock of General Motors Corporation, and

wrongfully using an unknown part of the proceeds for his own purposes. Rand consults you and asks how he properly may proceed against Hoge to require the latter to make good the loss occasioned by the breach.

How should you advise him?

10. Herbert Trent, a resident of Henrico County, Virginia, comes to your office and tells you there is pending in the Circuit Court of Henrico County a suit for specific performance brought by Albert Jones against John Clay in which Jones prays that Clay be compelled to convey to Jones a tract of 145 acres of land lying in the County; that in his bill Jones has alleged that the suit is brought upon a written contract made between Jones and Clay on May 14, 1973 by which contract Clay agreed to sell the tract to Jones for \$120,000; that he (Trent) has in his possession a written contract executed by him and by Clay on May 10, 1973 by the terms of which Clay agreed to sell the same tract to Trent for the price of \$110,000; that both his and Jones' contracts were duly recorded when made; that he (Trent) is ready, willing and able to pay the agreed price of \$110,000 to Clay on the delivery by Clay of his deed conveying the tract to Trent; and that Trent has so advised Clay, but that Clay has refused to perform his contract with Trent saying he believes he can readily sell the property to others for not less than \$150,000. Trent then asks you what, if anything, can be done by him to fully protect his interests.

What should your advice be?