7-24-1979

Virginia Bar Exam, July 1979, Section 1

VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia - July 24, 1979

---

1. Although Tyrone Tyrant was a successful businessman in Charlottesville, some people questioned the manner in which he achieved his success. Among his other enterprises, he owned a newspaper business, which he operated as a sole proprietorship. In January 1978, he hired Sonny Slander as editor of the newspaper.

Nine months after he was hired as editor, Slander published a novel which he had written. The protagonist of this novel was a ruthless tycoon who rose to the top of the business world by using unethical practices.

When he read this novel,Tyrant was incensed. Tyrant filed an action at law for damages against Slander in the Circuit Court for the City of Charlottesville in October, 1978. To his motion for judgment, Tyrant attached as an exhibit a purported written employment contract between Tyrant and Slander. In the first count of the motion for judgment Tyrant alleged that Slander breached a provision of the contract which provided that Slander would take no action which would subject Tyrant to public embarrassment. By the second count Tyrant alleged that readers of the novel would identify Tyrant with the protagonist and thus assume that he, Tyrant, was equally ruthless and unethical. For this reason, according to the allegation, the publication of the book constituted libel by Slander against Tyrant.

Slander filed a motion to require Tyrant to elect to proceed on either (1) his contract count or (2) his tort count. The Court ruled that there was no misjoinder of actions and that Tyrant could proceed on both counts.

By his grounds of defense Slander alleged that he had never signed the purported written contract and that actually what appeared to be his signature thereon was a forgery. In addition, he alleged that his conduct in writing and publishing the novel was protected by a provision of the purported contract stating that Slander was permitted to publish such books, articles and essays as he might desire dealing with such topics as he might desire.

At the trial, Tyrant contended that Slander should not be permitted to present to the jury "the inconsistent and contradictory contentions" that (1) his signature on the contract was a forgery and (2) his conduct was protected by the terms of the contract. The Court ruled that Slander could present evidence on only one of these defenses and required him to elect one.

(a) Did the Court rule correctly in permitting Tyrant to proceed on both the contract count and the tort count?

(b) Did the Court rule correctly in prohibiting Slander from presenting evidence with respect to both the purported forgery and the defense based upon the terms of the written contract?

* * * * *

2. Arnie Gibson, a resident of the City of Charlottesville, purchased a new automobile in December, 1978 from Ralph's, Inc. ("Ralph's"), a Virginia corporation with its only place of business and its registered office located in Newport News. Several weeks after the purchase, Gibson was operating his automobile in the City of Charlottesville. As he rounded a curve, he encountered in his lane of travel an oncoming vehicle driven by Fred Lopez, a resident of the City of Roanoke. Gibson veered to the right to avoid Lopez and applied his brakes. The brakes failed to work, however, and Gibson's vehicle left the right side of the road and struck a tree. He sustained serious personal injuries and his automobile was demolished.

Gibson subsequently instituted an action at law in the Circuit Court of the City of Roanoke against Lopez and Ralph's seeking to recover damages for his accident. His motion alleged that the proximate cause of the accident was the negligence of Lopez and the negligence of Ralph's. The motion also alleged that Ralph's was liable for the accident because it had breached its warranties. By his grounds of defense Lopez denied liability for the accident. Ralph's filed a motion to dismiss for improper venue or in the alternative to transfer the case to a permissible venue, asserting that permissible venue existed only in the Circuit Court of the City of Charlottesville where the cause of action alleging negligence arose or in the Circuit Court of the City of Newport News where the cause of action alleging breach of warranty arose and where Ralph's conducts business and had its registered office and where the goods which were the subject of the breach of warranty action were delivered.

Before the Court ruled on Ralph's motion, Gibson took a nonsuit. Gibson then instituted an action at law against Lopez and Ralph's in the Circuit Court of the City of Charlottesville based on identical allegations. Lopez and Ralph's filed separate motions to dismiss on the ground that the Circuit Court of the City of Charlottesville was precluded from trying the case against them.

(a) If Gibson had not taken a nonsuit, how should the Circuit Court of the City of Roanoke have ruled on Ralph's motion to dismiss or to transfer the case for improper venue?

(b) How should the Circuit Court of the City of Charlottesville rule on the motions of Lopez and Ralph's to dismiss?

* * * * *

3. Defendant was charged with burglary and grand larceny in two separate indictments in the Circuit Court for the City of Norfolk. Both charges arose out of a single set of alleged facts. The Commonwealth elected to try Defendant on the grand larceny charge first.

At the trial the Commonwealth presented evidence that, shortly after midnight on the night of the crime, someone broke the lock on the back door of the occupied residence of Defendant's next door neighbor, entered the residence, and removed from it certain rare coins worth at least $10,000. The Commonwealth's evidence also showed that few people would have known the value of the stolen coins but that Defendant possessed this knowledge; that Defendant had long admired his neighbor's coin collection and knew where it was stored; and that the thief also knew where the coins were stored, since only the storage place of the coins was disturbed during the crime. The Commonwealth also presented evidence that the stolen coins were discovered in an unlocked storage shed behind Defendant's house on the day after the crime.

Defendant pleaded not guilty to the charge of grand larceny and presented, as his sole defense, witnesses who testified that he left Norfolk the day before the alleged theft to attend a week-long convention of collectors of coins in Los Angeles.

The jury found Defendant innocent of grand larceny.

Shortly thereafter, the Commonwealth brought Defendant to trial on the charge of burglary. At the start of the second trial, Defendant moved to quash the indictment on the ground that the double jeopardy provisions of the Virginia and United States Constitutions barred the second prosecution. The Court overruled the motion, to which action Defendant objected and excepted. The same evidence was presented to the jury in the second trial concerning the alibi defense of Defendant. This time the jury found Defendant guilty.

On appeal to the Virginia Supreme Court, Defendant (who had by this time obtained a new lawyer), pressed the double jeopardy point and for the first time urged that the prosecution for burglary should have been barred by the doctrine of collateral estoppel, since the jury in the prosecution for grand larceny had accepted his alibi defense.

(a) How should the Supreme Court rule on the double jeopardy defense?

(b) How should the Supreme Court rule on the collateral estoppel defense?

* * * * *

4. Break N. Enter was arrested in Bedford County on a warrant charging that on December 1, 1978, in Bedford County he (1) "did unlawfully and feloniously break and enter the property of Vic Timm with the intent to commit larceny therein, and with the use of a dangerous weapon, in violation of Section 18.2-91 of the 1950 Code of Virginia, as amended, and (2) did unlawfully and feloniously rob Vic Timm by violence or putting him in fear by threatening in violation of Section 18.2-58 of the 1950 Code of Virginia, as amended."

During Enter's preliminary hearing on December 4, 1978, his attorney made a plea bargain with the Assistant Commonwealth's Attorney who was conducting the case on behalf of the Commonwealth. Thereafter the defense attorney and his client cooperated fully with the Commonwealth. The agreement was that Enter would be found guilty of the misdemeanor of assault and battery and given twelve months in jail, with four months suspended. The other charges would be dropped.

The Assistant Commonwealth's Attorney and the defense attorney advised the Judge of the General District Court of Bedford County of this agreement, and the Judge amended the warrant to read "that on December 1, 1978, Enter did unlawfully assault and batter Vic Timm . . . ." The Judge then noted on the face of the warrant that on the basis of his guilty plea, the defendant had been found guilty of assault and battery and sentenced to serve twelve months in jail with four months suspended.

Following this disposition of the case, there was substantial public outcry about the handling of the matter. Apparently in response to that outcry, the Commonwealth's Attorney submitted to the grand jury an indictment charging that Enter on December 1, 1978, did "unlawfully and feloniously break and enter in the night-time the dwelling house of Vic Timm with intent to commit larceny or other felony therein." Although Enter relied on his plea bargaining agreement with the Commonwealth, the jury found him guilty of burglary and sentenced him to ten years confinement in the penitentiary.

Enter's attorney appealed this conviction to the Supreme Court of Virginia. The only assignment of error involved the validity of the plea bargaining defense which he had properly asserted in the trial court.

How ought the Supreme Court of Virginia to decide the case?

* * * * *

5. Due to your outstanding reputation in the field of Federal Jurisdiction and Procedure and your knowledge of the Securities Exchange Act, Lawyer associates you in what he anticipates will be complex federal securities litigation. His

client, Joe Anxious, a resident of the City of Richmond, purchased certain corporate stock from Tom Easy, a resident of the City of Charlottesville. In connection with the sale Anxious gave Easy a promissory note for $5,000 payable on demand. Shortly after the sale, Anxious obtained information which led him to believe that he had been defrauded in the stock sale. You and Lawyer filed for Anxious a complaint against Easy in the United States District Court for the Western District of Virginia at Charlottesville. The complaint alleged violations of §10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5 promulgated thereunder, and Anxious sought damages in the amount of $16,000 for the alleged fraud. Easy answered the complaint by denying any fraud in the transaction and he filed a counterclaim against Anxious for $5,000, based upon the purchase money note.

You filed a motion to dismiss the counterclaim on the grounds that (a) there was no diversity and a federal question was not involved in the counterclaim and (b) the jurisdictional amount was not involved.

How ought the Court to rule on each of the grounds stated in the motion to dismiss the counterclaim?

* * * * *

6. On April 16, 1975, Ralph Seller and Frank Purchaser entered into a written contract for the sale by Seller to Purchaser of a tract of land located in Russell County, Virginia. On June 16, 1975, the date agreed upon to complete the transaction, Seller refused to accept the purchase price or to execute a deed for the property. On January 2, 1979, Purchaser filed a bill of complaint in the Circuit Court of Russell County, in which he alleged the existence of the contract, Seller's breach by the latter's refusal to complete the transaction, and prayed that the Court decree specific performance of the contract.

In due and proper time after service of process upon him, Seller, through his counsel, attorney Young, filed his answer denying that he was obligated to perform under the contract since it involved real estate and was not under seal. Seller also filed a plea of the Statute of Limitations. Purchaser promptly filed demurrers to Seller's answer and to his plea of the Statute of Limitations.

(a) Is the demurrer a proper pleading with which to challenge the legal sufficiency of the answer?

(b) Is the demurrer a proper pleading with which to challenge the legal sufficiency of the Statute of Limitations?

(c) What other pleading or pleadings, if any, are available

to challenge the answer?

(d) What other pleading or pleadings, if any, are available to challenge the plea of the Statute of Limitations?

* * * * *

7. John Giles and Thomas Bland were the owners of adjacent lands in Craig County. Bland's land adjoined the highway and he constructed a well-paved driveway from his home to the highway. Giles' land was separated from the highway by a stream which ran under the highway near the point where the two properties adjoined.

When Giles decided to construct his home in 1957, he sought and obtained permission from Bland to use his driveway for the purpose of transporting men and materials to his prospective home site. After Giles' home had been completed, he continued to use Bland's driveway as a means of access to the highway.

In November, 1978, Giles erected a concrete plant on the back part of his property and began hauling his product in large, heavily-loaded trucks across Bland's driveway. This caused the pavement on the driveway to break and become full of "potholes." On January 1, 1979, Bland notified Giles in writing that any further use by Giles would be treated as a trespass.

When Giles continued to use the driveway, Bland brought an action at law in the Circuit Court of Craig County against Giles for $10,000 for damages to the driveway caused by Giles' heavily loaded trucks. Giles immediately instituted a suit in equity seeking to enjoin Bland's action at law on the grounds that he had acquired a prescriptive right to use the driveway. Bland demurred to the bill of complaint on the ground that the court could not properly enjoin his action at law.

How should the court rule on the demurrer?

* * * * *

8. John Webster, the owner of Sunnyside Farm in Campbell County, mailed a letter to Jack Pike, a real estate broker in the City of Lynchburg, Virginia, containing the following pertinent language:

> "I am thinking of selling my farm known as 'Sunnyside Farm'. You have been recommended to me as being a highly capable and industrious real estate broker. I, therefore, employ you to find a purchaser of my farm at the price of $75,000."

One week after receipt of Webster's letter, Pike mailed the following letter to Webster:

> "In accordance with your recent letter requesting me to find a purchaser for 'Sunnyside Farm', I wish to advise that I have sold your farm to Thomas Bane for $75,000. A contract of sale duly signed by Mr. Bane is enclosed herewith for your information. I signed your name to the contract by me as your agent and I also signed my name as agent for you. You will note that this contract is very simple and merely provides that you agree to sell and Bane agrees to buy Sunnyside Farm for $75,000, the sale to be consummated within a reasonable time from this date."

On the day before receiving Pike's letter, Webster received an offer of $85,000 for his property. Webster consults you, shows you the two letters and inquires whether he is obligated to convey his property to Bane.

What should you advise?

* * * * *

9. Rojax Corporation is a Virginia corporation with principal offices in James City County, doing business as a lumberyard and supplier of millwork. During 1977 and 1978, one of its busiest customers was Central Construction Co., a general contractor which was aggressively striving to build up the volume of its business. During 1978, Central secured a contract with James City County for construction of a public elementary school, scheduled for completion in August of 1979. It also contracted with the proper officials of the Eighth Baptist Church for the construction of a new church building. The church was also scheduled for completion in the summer of 1979. In addition, in January of 1979, Central commenced construction of a commercial office building, which was expected to be finished in six months. Rojax furnished lumber and millwork for each of the three jobs.

Plagued by rising interest costs, delays caused by unusually heavy rains, and a shortage of masonry products, all three jobs were losing money for Central. In addition, the owners were having their own troubles, and payments to Central were not made on time or in full. This caused Central to withhold payments from Rojax for supplies furnished in February and March of 1979. Matters grew worse until work on all three jobs was terminated prior to completion. Work was stopped on the office building on April 10th, on the school building on April 25th and on the church on May 23rd.

Negotiations among the parties were carried out during May and June without success. Finally, on July 15th, Rojax became convinced that further negotiation was useless and consulted you,

inquiring whether it could then file a memorandum of mechanics lien, and enforce the lien on each of the three jobs. How should you advise Rojax as to (a) the office building, (b) the school, and (c) the church?

* * * * *

10. Beth and Bob Benson were married in Seattle, Washington in 1974. Bob's earnings were less than he and Beth had expected and a great deal of tension developed between the two. They couldn't afford to and didn't have any children and Beth was obliged to take a job as a salesperson, which she grew to dislike heartily. Eventually, their prospects seemed so dim to Beth that she moved out of their home on August 20, 1977, and moved in with a girl-friend who lived in Spokane, Washington. She never saw Bob after she moved out of their home. On March 10, 1979, she moved to Staunton, Virginia where she found employment, rented a small house, and as she put it, settled down for the rest of her life. Shortly thereafter she met a most attractive young man who proposed marriage to her.

Beth contacted Bob Benson, who still lived in Seattle, advising him that she intended to file suit for divorce. He agreed to accept service of process and agreed not to contest her suit for divorce if she would bear the expenses, seek no alimony, and make no allegations of cruelty on his part. On July 15, 1979, she advises you of the foregoing and inquires (a) whether she has grounds for a divorce in Virginia; (b) if so, how soon may suit be commenced and (c) may Bob Benson legally accept service of process? How would you advise her as to each question?

* * * * *