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VIRGINIA BOARD OF BAR EXAMINERS
Norfolk, Virginia - February 28, 1984

MAR 13 1984

1. Carter Motor Company, Inc. filed an action at law against Jerry Jenks in the Circuit Court for the City of Bristol for the sum of \$2,750.00 based upon an implied contract for repairs made to Jenks' truck at plaintiff's garage.

Attached to the motion for judgment and also served on Jenks was an affidavit executed by the plaintiff's agent stating the amount of the claim, that the amount is justly due and the time from which plaintiff claims interest. The defendant Jenks filed grounds of defense in which he denied the allegations of the motion for judgment.

On the day of the trial the defendant Jenks appeared with a lawyer and with witnesses and tendered an affidavit in which he swore that the denials contained in his grounds of defense were true. The court permitted defendant to file that affidavit, stating that he was treating it as an amendment to the grounds of defense.

Plaintiff, who had appeared without counsel and without witnesses, asked the court to continue the case. Jenks' lawyer objected to the continuance.

(a) How should the court rule on the plaintiff's motion for a continuance?

(b) Assume that the court had refused to permit the defendant Jenks to file his affidavit; would the plaintiff be entitled to a judgment based solely on the affidavit it had filed?

* * * * *

2. Martin Ransom was stung by a Portuguese man-of-war while swimming at Virginia Beach, and was hospitalized in Norfolk, Virginia, for four days as a result.

Mr. Ransom resided in Lynchburg, Virginia, and was employed in Bedford County, Virginia, as a public school teacher.

When Ransom failed to pay his account at the Norfolk Hospital, mistakenly thinking it was covered by insurance, the hospital's

attorney filed suit against Ransom in the Circuit Court for the City of Norfolk for the sum of \$1,984.00. Process was served on Ransom as he left school in Bedford County, and he immediately consults and employs you to represent him. You file an answer to the suit promptly, and later decide to object to venue in Norfolk. On the 21st day after service of process, you mail a motion objecting to venue to the Circuit Court in Norfolk; the motion is received and filed by the Clerk of the Court on the 23rd day.

Plaintiff's attorney objects to the venue motion on the grounds that venue is proper and that the defendant filed his motion too late.

(a) What is proper venue in this case?

(b) Has the defendant made timely objection to venue?

* * * * *

3. Joe B. Litigate, a Bristol, Tennessee, resident, sued Ramsey Lewis, an Abingdon, Virginia, resident, over an automobile accident occurring in Abingdon, Virginia. The \$15,000.00 action was filed in the United States District Court in Abingdon, Virginia. Process was served on Lewis' ten year old daughter at Lewis' residence.

Upon receiving process from his daughter, Lewis immediately hired an attorney, Horace Pettifogger, to represent him. Within twenty days of service of process, Pettifogger filed a motion to dismiss for failure to state a claim upon which relief can be granted. Thereafter, Litigate properly notified Pettifogger of the time and place for the oral deposition of Lewis.

Pettifogger ignored the notice and failed to notify Lewis of the depositions. Also, without notifying Litigate's counsel, Pettifogger left for Barbados the day of depositions for an excursion at Club Med. At great expense, Litigate, his counsel, and a reporter appeared at the place and time for the depositions.

Litigate's counsel became incensed and moved the Court to order Pettifogger to personally pay the reasonable expenses, including attorney's fees, caused by Lewis' failure to appear. Litigate's counsel further asked the Court for a default judgment because an answer had not been filed within 20 days of service of process. Pettifogger responded with a motion to dismiss for insufficiency of service of process.

(a) Is jurisdiction proper in the United States District Court? Why or why not?

(b) Should Pettifogger be required to personally pay the reasonable expenses, including attorney's fees, caused by Lewis' failure to appear for depositions? Why or why not?

(c) Should default judgment be entered against Lewis due to his failure to file an answer within 20 days of service of process? Why or why not?

(d) Should Lewis' motion to dismiss for insufficiency of service of process be granted? Why or why not?

* * * * *

4. Peter Plainfiff obtained a judgment against your client, Don Defendant, for \$10,000.00 in the Circuit Court of Prince William County. The trial judge entered the final order on January 13, 1984. At the trial certain evidence was admitted which had a material effect on the amount of the judgment. You made all appropriate objections to this evidence.

Plaintiff's counsel has learned that your client owns real estate in Fairfax County.

(a) If your client decides to appeal the evidentiary issue to the Supreme Court of Virginia, what pleadings must you file, where, and by when?

(b) Assuming you properly file the pleadings referred to in (a) above, can Plainfiff nonetheless proceed against the Fairfax County property?

(c) Is there anything that your client can do to stop Plaintiff from proceeding against the Fairfax property, and if so, what?

* * * * *

5. In 1979, Bernard Bramble a resident of Virginia Beach, Virginia obtained a judgment in the Circuit Court of that City against Tom Upshur for \$10,000.00, but was unable to enforce its collection because Tom had no assets. In November of 1983, Bramble learned that Tom's father, Tyrone, died intestate leaving Tom and his two brothers, Tim and Ted, as his sole heirs, with his sole possession consisting of a 1,000 acre farm in Middlesex County, Virginia.

Upon learning of Tyrone's death, Bramble suggested to Tom that he sell his interest in the farm and use a part of the sale proceeds to satisfy Bramble's judgment. Tom told Bramble that he would be glad to sell the farm if he could, but that there was a dispute between himself and his brothers, Tim and Ted, as to their fair shares in the farm.

Bramble then consulted you and inquired whether there was any way in which he could enforce collection of his judgment from the farm in Middlesex County under the facts outlined above.

What remedy is available to Bramble? Describe the actions which must be taken, the parties who must be joined in any legal proceeding to be filed, and the relief which should be requested.

* * * * *

6. Charles Citizen, a resident of Roanoke, Virginia, awoke one morning in February 1983 to the annoying, continuous barking of a stray dog. He donned a coat, rushed out of his front door to chase away the dog and severely cut his foot when he stepped on broken glass which had been left on his front porch as residue of a milk bottle broken in a pre-dawn delivery by Broad Meadows Dairy Company. Citizen subsequently filed an action at law against the dairy company in an appropriate state court seeking damages in the sum of \$25,000 on allegations that the Dairy Company, or its servants, agents or employees had negligently left broken glass on his front porch, as a result of which he was injured. The Dairy Company filed grounds of defense denying liability.

At the trial, the evidence disclosed the following facts. The actual delivery was not made by an employee of the dairy, but was made by a young boy who was riding with the driver, helping him make his delivery. The boy had never been employed or paid by the company. No officer or supervisor of the Dairy had authorized the boy to ride on the truck. To the contrary, all of the drivers were frequently reminded of the company's rule against permitting any rider on any company truck. Notwithstanding the foregoing, the driver gave the boy two dollars a day to help him and had done so three or four times a week for nearly two months. Other boys were, from time to time, similarly employed by other drivers, often boarding the trucks at the dairy garage in full sight of any supervisory personnel who might care to look.

At the conclusion of all the testimony, defendant moved the court to strike the plaintiff's evidence and enter a directed verdict in favor of the defendant on the issue of liability, on the ground that the boy was, as a matter of law, not an employee or servant of the dairy company and his actions did not bind the company. How should the court rule on the motion?

* * * * *

7. Mr. Dodds gave Mrs. Dodds a gold bracelet for her birthday. It was of chain design so that Mrs. Dodds could add to the bracelet a set of small gold charms which she had been accumulating over the years. Mrs. Dodds went to her safe deposit box at the Last National Bank of Farmville, Virginia, to get her charms to put on the bracelet. While at the bank she removed all of the contents of her safe deposit box, selected the charms she wanted and put them in her purse. In the process, she also saw a small tie pin which

had belonged to her father. She laid aside the tie pin while she was collecting the charms and inadvertently left it on a table in the bank vault. As she was leaving the bank, Mrs. Dodds pulled a handkerchief from her purse and one of the charms became entangled in her handkerchief. Unbeknown to her, the charm fell to the floor of the bank lobby and came to rest just inside the front door on the carpet over which customers entered and left the bank.

When Mrs. Dodds returned home, Mr. Dodds told her they were taking an unexpected trip to San Francisco, and the assemblage of the charm bracelet went out of her mind. Three weeks later the Dodds returned and Mrs. Dodds began to assemble the charm bracelet. She then discovered that one charm was missing and she couldn't find the tie pin she intended to give her husband. She had no recollection of where it could be.

Contrary to the bad luck encountered by Mrs. Dodds, John Cold had a stroke of good luck. He went to the Last National Bank to place a stock certificate in his safety deposit box. While there he found a tie pin in the vault, and on the way out of the bank, he found a valuable gold charm. Can John apply the old doctrine of "finders keepers, losers weepers" and retain a) the tie pin, or b) the gold charm against a claim asserted against each item 1) by the bank, and 2) by Mrs. Dodds?

* * * * *

8. Tom Hamilton sold to Alexander Jefferson an unimproved parcel of land in Winchester, Virginia. The sales contract contained the following covenants: 1) within two years from the date of the deed of conveyance, the buyer would construct on the land a building suitable for commercial purposes; 2) for a period of five years from the date of said deed, the buyer would not permit the operation of a bar or permit the sale of alcoholic beverages in the building; and 3) that if the buyer breached the covenant to build, the buyer would reconvey the land to the seller. The sales contract was not recorded. Subsequently, on June 8, 1976, Hamilton conveyed the land to Jefferson by a duly recorded deed containing a covenant that Jefferson would not permit a bar or restaurant to be operated on the premises for a period of five years. The deed was silent as to any obligation to construct any improvements or to reconvey the property.

Jefferson never began construction of the commercial building. In fact, he abandoned his plan and conveyed the land to John Westover. The deed from Jefferson to Westover contained no covenant respecting the construction of any improvement on the land, or any restriction on its use.

Hamilton learned of the conveyance by Jefferson to Westover, and called upon Westover to proceed with the construction of a building suitable for commercial uses. Westover acknowledged that

when he bought the land he knew of Jefferson's agreement with Hamilton, but Westover asserted that his deed from Jefferson contained no restriction and he could use the property as he saw fit. He advised Hamilton that he expected to build a nice restaurant with an attractive bar, which was permitted under the zoning ordinance.

(a) If Westover constructs a building suitable for use as a restaurant, can Hamilton obtain an injunction preventing Westover from using the property as a bar?

(b) If he does not construct the commercial building, can Hamilton force Westover to reconvey the property?

* * * * *

9. Mary and John, residents of Norfolk, were divorced in 1975 and Mary was awarded custody of their two children then 2 and 7 years old. John was required to pay child support and was given reasonable visitation rights. John moved to Arlington where he took a job which required extensive travel. He was fairly prompt with his support payments although his travels accounted for some delays. He did not exercise his visitation rights except sporadically. He did send the children presents at Christmas and on their birthdays.

Mary remarried in 1980 and moved to Roanoke with her children and new husband Sam. Sam and the children became very close and held genuine affection for each other. Believing that it was in the children's best interest and with Sam's consent, Mary in 1982 filed a petition to have the children's last name changed from John's to Sam's. At the hearing Mary testified that it was very awkward and sometimes embarrassing for the children to use a different last name. She also testified that since her remarriage, John's visits with his children were even more infrequent than before. John, upon hearing of the proceeding, appeared and objected. He testified that he loved his children, was maintaining life insurance for their benefit and was current in all support payments. He admitted that he had been a poor visitor of his children but said that since her remarriage Mary had discouraged visitations.

(a) Does John have standing to appear and object?

(b) How should the case be decided and why?

* * * * *

10. James Fox, a resident of Virginia, was justly indebted to four creditors for a total of \$5,000.00 but was unable to meet his obligations to them when due. His last remaining valuable asset was a 1982 automobile worth \$7,500.00 on which he still owed \$1,500.00 at the bank. James made an agreement with his cousin John to sell him the car for \$1,000.00 if John would agree to take over the car

payments at the bank. Shortly after transferring title to the car to John, James, being pressed by his creditors, wrote John a letter in which he tendered a cashier's check for \$1,000.00 and asked John to return the car so he could sell it to pay his creditors.

(a) John comes to you and asks whether his cousin James has a legal right to require him to return the car. How do you respond?

(b) Can any one of the four creditors successfully attack the transfer to John in a Virginia Court?

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