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FINAL EXAMINATION
TRIAL AND APPELLATE PRACTICE
First Semester 1970-71

Bolling R. Powell, Jr.

QUESTION I:

A railroad fireman was seriously injured when an engine in which he was riding jumped the track. Alleging that his injuries were due to respondent's negligence, he brought this action for damages under the Federal Employers Liability Act (45 US C Section 51 et. seq.) in an Ohio Court of Common Pleas. Under FELA the plaintiff could have brought his suit either in a United States District Court or in the Ohio Court of Common Pleas. FELA also accorded plaintiff the right of jury trial, which he demanded.

Respondent's defenses were (1) A denial of negligence, and (2) A written document signed by plaintiff purporting to release the defendant in full for \$924.63.

In his testimony plaintiff admitted that he had signed several receipts for payment made him in connection with his injuries but denied that he had made a full and complete settlement of all his claims. He contended that the purported release was void because he had signed it relying on respondent's deliberately false statement that the document was nothing more than a mere receipt for back wages.

Under Ohio procedure factual issue as to fraud in the execution of this release was a matter to be tried by the trial judge rather than by the jury. Under Ohio law factual issues as to negligence were triable by jury.

Following the Ohio law as to procedure the trial judge, after both parties had introduced considerable evidence and rested, submitted the issue of negligence and damages to the jury which returned a verdict in favor of the plaintiff awarding him \$25,000. The trial judge then adjudicated the factual issues as to fraud in the execution of the release without a jury and found that the plaintiff had been "guilty of supine negligence" in failing to read the release (it being established that the plaintiff could read and write), and accordingly held that the facts did not "sustain either in law or equity the allegations of fraud by clear, unequivocal and convincing evidence." Thereupon the trial judge entered judgment for the defendant notwithstanding the verdict of the jury.

The Ohio Supreme Court, one judge dissenting, sustained the action of the trial judge holding that: (1) Ohio, not federal law, governed; (2) under Ohio law the plaintiff a man of ordinary intelligence who could read, was bound by the release even though he had been induced to sign it by the deliberately false statement that it was only a receipt for back wages; and (3) under controlling Ohio procedure factual issues as to fraud in the execution of this release were properly decided by the judge rather than by the jury.

The Supreme Court of the United States granted certiorari. What issue or issues are presented? How should the Supreme Court of the United States rule thereon and for what reasons?

QUESTION II:

Petitioner, United States Army Sergeant, while on an evening pass in August 1965 from his Army post in Hawaii and in civilian attire, broke into a hotel room, assaulted a girl, and attempted rape. Following his arrest, Honolulu police, on learning that petitioner was in the Armed Forces, delivered him to the Military Police. After interrogation, petitioner confessed. He was charged with attempted rape, housebreaking and assault with attempted rape in violation of Art. 80, 130;134 of the Uniform Code of Military Justice, tried by Court Martial, convicted on all counts and sentenced. His conviction was affirmed by the Army Board of Review and thereafter by the United States Court of Military Appeals.

Petitioner later filed petition for writ of habeas corpus in a United States District Court claiming that the court-martial was without jurisdiction to try him for these offenses. The District Court denied relief and the Court of Appeals affirmed. Certiorari was granted by the United States Supreme Court.

What issue or issues are presented and how should the Supreme Court rule and for what reasons?

QUESTION III:

Mrs. Sally Franconi instituted suit in the United States District Court for the Western District of Texas against the Southern Pacific Co. for personal injuries sustained when the automobile she was driving was struck by Southern Pacific Co.'s locomotive at a crossing in Richmond, Cal. on the night of February 20, 1942.

The record discloses that two of the jurors on the panel presented to the plaintiff were employees of the defendant, Southern Pacific Co. A timely chal-

lenge for cause was made by the plaintiff grounded upon this employment relationship. On examination by the court these two jurors stated that the fact that they were employed by Southern Pacific Co. would not in any way affect their consideration of the case; that they would fully abide by their oaths as jurors and render an impartial and objective verdict based wholly on the evidence introduced during the course of the trial. The court thereupon denied plaintiff's challenge for cause of these two jurors holding that they were not disqualified by reason of their employment by defendant, Southern Pacific Co.

These two jurors were then peremptorily challenged by the plaintiff who, in the course of selecting the jury, exhausted all of her peremptory challenges.

The trial proceeded, and resulted in a verdict and judgment for the defendant.

Upon motion for a new trial filed by plaintiff, she alleged and offered to prove that, among the jurors who tried the case, there were others that were objectionable to her and upon whom she would have used her peremptory challenges if the court had not forced her to use them on the two employees of the defendant Southern Pacific Co.

In opposing this motion for a new trial the defendant Southern Pacific Co. argued that the trial court was not in error in refusing to dismiss the two jurors who were employed by Southern Pacific Co., and, that even if this action of the trial court was erroneous, no harm resulted to the plaintiff for the reason that the two challenged jurors did not sit upon the trial and that plaintiff did not attempt to challenge any of the remaining jurors who tried the case.

The District Court denied plaintiff's motion for a new trial and plaintiff appealed, assigning as error the District Court's failure to sustain plaintiff's challenge for cause of the two employees of Southern Pacific Co. and the failure of District Court to grant a new trial on the grounds stated.

How should the United States Court of Appeals for the Fifth Circuit rule upon the issue or issues presented and for what reasons?

QUESTION IV:

This is an appeal from a judgment on a directed verdict in favor of the appellee, Mrs. Pearl Mesta, for \$10,000 in her suit to recover that sum on a policy of insurance indemnifying her against theft of jewelry and other specified chattels. The defendant denied that the plaintiff had been robbed and demanded a jury trial.

At the trial Mrs. Mesta was the only witness who appeared to testify. In her testimony Mrs. Mesta stated that she lived in a modest thirty room house in the embassy section of Washington, D.C.; that on Thursday, August 7, 1969 at about 5 o'clock in the afternoon, as she was about to leave for a cocktail party at the French Embassy, she answered the front door bell to her home, it being the domestic help's day off; that when she opened the door she was confronted with a man with a scarf over his face pointing a large pistol at her; that the man told her to hand over all jewelry she was wearing, which she did; that the man turned and ran and she slammed the door, immediately telephoning the police, reporting the robbery; that the police arrived shortly thereafter, questioned her at length and inspected the premises for clues; that no one was ever arrested for the robbery; that she reported the robbery to the defendant insurance company later that same day and their representative called the following morning and prepared a proof of claim itemizing each item of jewelry taken, which she signed; that three months later, on her birthday, upon returning home from a birthday party given in her honor by the Ambassador from Luxemburg she found an unmarked envelope laying between the screen door and the entrance door to her home which contained all of the stolen jewelry except her diamond engagement ring which had been appraised by the insurance company at \$10,000 when the policy was issued. She could give no description of the robber except that he was a medium size man wearing a cap pulled well down over his forehead and wearing gloves. She testified that the scarf he wore covered his face from the lower part of his eyes down and that the cap covered his face from his eyebrows upward, leaving only his eyes visible. She testified that his eyes appeared to be black or dark brown and that his hair appeared to be black or dark brown. She stated that he had a swarthy complexion.

The plaintiff's testimony was the only evidence offered at trial. The defendant offered no witnesses and no documentary evidence of any kind.

The plaintiff moved for a directed verdict when the defendant stated it had no evidence to introduce and rested.

The trial court granted plaintiff's motion for directed verdict ruling that plaintiff's evidence was uncontradicted and conclusive and, hence, that there was ^{NO} question of fact to be submitted to the jury. The trial court entered judgment for the plaintiff in the amount of \$10,000. The defendant noted his objections and exceptions in a timely manner to this ruling of the trial court.

The defendant insurance company appealed to the United States Court of Appeals for District of Columbia assigning as error the District Court's ruling granting plaintiff's motion for a directed verdict.

What issue or issues are presented and how should the Court of Appeals rule thereon? State your reasons.

QUESTION V:

On the night of January 17, 1967 an unmasked man committed a robbery in a liquor store operated by Louie Pizitz in New York City.

Immediately after the robbery Mr. Pizitz notified the police, who arrived shortly thereafter to investigate the robbery and search for clues. At that time Mr. Pizitz described the robber as being about six feet tall and thin with gray eyes and a swarthy complexion who was wearing a large hat, a dark turtle neck sweater and blue jean trousers, and who spoke with a foreign accent.

Mr. Pizitz was taken to five police lineups within two weeks after the robbery but was unable to identify any one in the lineups as the robber of his liquor store.

The defendant was indicted for the robbery of this liquor store on other circumstantial evidence obtained by the District Attorney. He plead not guilty.

At the trial of the defendant which occurred some eleven months after the robbery, Mr. Pizitz readily identified the defendant as the robber of his store. Counsel for the defendant introduced police records and the testimony of police officers establishing that the defendant was in three of the lineups Mr. Pizitz had viewed within two weeks after the robbery.

Other than the identification by Mr. Pizitz at the trial there were no other eye witnesses to the robbery identifying the defendant as the robber. However, there was uncontradicted and overwhelming circumstantial evidence of guilt.

During his final summation to the jury the prosecuting attorney assured the jury that Mr. Pizitz had "recognized" the defendant in the lineup and, that, although "he didn't pick him out" there was good reason for this, adding:

"I will be more than happy to tell you...why after this trial is over."

Counsel for the defendant promptly objected to and moved for a new trial. The trial court censured the prosecuting attorney for making this improper remark and instructed the jury that there was no basis for it in the evidence and should be disregarded by the jury in arriving at their verdict. The trial court, however, denied the motion for a new trial. The prosecuting attorney

was guilty of no other improprieties or improper remarks in his final summation.

The jury returned a verdict against the defendant of guilty of robbery in the first degree and the defendant was sentenced. The defendant appealed assigning as error the refusal of the trial court to grant a new trial because of the remark made by the prosecuting attorney in his final summation.

What issue or issues are presented and how should the Court of Appeals rule thereon? State your reasons.

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