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Trial and Appellate Practice: Final Examination (First Semester 1972-73)

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QUESTION 1:

Petitioners seek a writ of mandamus in the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioners, defendants below, hereinafter called defendants, seek mandamus to compel the respondent District Court judge to strike the demand for a jury trial upon, and to hear and determine in equity, the claim of the complaint of Harold Lloyd Corporation, plaintiff below, for money damages to it for an infringement by the three defendants of plaintiff's copyright of its photoplay "The Freshman." Defendants contend in support of the Court of Appeals power to issue the writ, that the District Court's order for trial as at common law by jury is beyond its jurisdiction and that by assuming it the court prevents an appeal from any full consideration by the court on the equitable issues.

The complaint, complying with Rule 10(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, sets forth three sets of transactions upon each of which plaintiff has a claim for relief (a) that the three defendants have infringed and that the infringement has destroyed the value of plaintiff's photoplay and injured plaintiff in the amount of $500,000 general and $500,000 special damages, for which it claims money judgment; (b) that defendant Universal Pictures Corporation has appropriated the copyrighted matter and has reproduced it at a profit, for which plaintiff claims an accounting as if defendant were a trustee for plaintiff, and (c) that the latter defendant has infringed and intends to continue to infringe, for which plaintiff claims that defendant should be enjoined from so continuing in the wrongdoing. The destruction of the prints of the infringing photoplay also was demanded. The transaction constituting claim (a) for money damages is set forth as a separate cause of action in the first count of the complaint. The transactions for accounting and injunction and destruction of the prints are in a second count. Plaintiff demanded a jury trial on the first transaction.

The district judge ruled that he would commit the trial of the first cause of action to a jury to be tried as at common law. The judge's return to the order to show cause in the mandamus proceeding also states that simultaneously he will try, without the jury, the second and third causes of action "to the extent practicable."
Rule 8 (a) FRCP provides:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 10 (b) FRCP provides:

(b) Paragraphs; Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

Rule 38 (a), (b), (c) FRCP provides:

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

Rule 42 (b) FRCP provides:

(b) Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

State the question (or questions) presented. How should the Circuit Court of Appeals rule on the petition for writ of mandamus and why?

Question 2:

An action was filed in the Circuit Court of Marion County, Oregon to recover damages for injuries alleged to have been received by plaintiff while a passenger on one of defendant's passenger trains, which was wrecked by the falling of the bridge or trestle-work across the marsh known as "Lake Labish," in Marion County. The trial resulted in a verdict and judgment in favor of plaintiff for the sum of $15,000, from which defendant appeals, assigning as error the action of the court in overruling the defendants challenge for cause of one John Iler, a juror who was
ultimately eliminated from the trial jury by the defendant by a peremptory strike. The voir dire examination revealed the following:

The juror Iler, in his examination in chief by defendant's counsel, said that he did not know the plaintiff. Had heard nothing about this case. Had heard considerable talk about the wreck. Read of it in the newspapers, and heard persons talk about it, who claimed to have looked at and examined the wreck. From what he had heard the persons say who had examined the wreck, and what he saw in the newspapers, he had formed and expressed an opinion as to whether the railroad company was to blame for the wreck. Have that opinion now. Don't know that it is a particularly fixed opinion. It is one that would require some evidence to remove. Could not say how many persons he had heard talk about the wreck, who had examined and looked at it, but supposed, perhaps, a half dozen. They said what they supposed caused the wreck. They were persons whom he had respect for. From what they said and what he read in the newspapers he had formed an opinion as to the cause of the wreck. Had heard the various theories put forth through the newspapers, as to whether the wreck was caused by a defective structure, or by a rail being removed from the track by some evil-disposed person. At the conclusion of his examination by counsel the juror, in response to questions by the court, said that what he had heard about the transaction was not from any of the witnesses in the case, but just from persons who had gone to view the wreck; that no opinion he had formed would influence his judgment in the trial of the case, but he should try the case impartially, according to the law and the evidence; that he could disregard what he had heard about the wreck, and would be governed by the evidence altogether; would not regard what he had heard, as it was only hearsay; would pay no attention to what he had been told, but would simply be guided by the testimony given in the court. The challenge was thereupon overruled by the court, defendant excepting.

State the question (or questions) presented. How the Supreme Court of Oregon should rule on the assignment of error, and why?

Question 3:

Plaintiff, while in the employ of the Simmons Manufacturing Company, suffered an injury to his left eye. Thereafter he commenced an action against said Company to recover damages for the injury sustained. The defendant herein,
Aetna Insurance Company, appeared in that action (which is still pending) for the Simmons Manufacturing Company, in accordance with a contract of indemnity with such Company. As soon as plaintiff recovered from his injury he resumed his employment and continued it until March, 1911, at which time he was discharged.

This second action by plaintiff was brought against the defendant, Aetna Insurance Company, to recover damages alleged to have been sustained by reason of the action of the defendant in procuring the discharge of plaintiff from his employment because of his refusal to settle his personal injury claim in accordance with the terms of the defendant insurance company. The answer denied the material allegations of the complaint.

The evidence tended to show that a short time before the plaintiff was discharged, an agent of the defendant, Aetna Insurance Company, called upon Mr. Vincent, the general manager of the Simmons Manufacturing Company, and suggested to him that the plaintiff be discharged. Following this interview, and on February 28, 1911, the agent of the defendant wrote a letter addressed to "Mr. W. W. Vincent, The Simmons Mfg. Co., Kenosha, Wis." as follows:

"Dear Sir:

Confirming our interview this morning regarding the above-entitled matter, I wish to call your attention to the fact that this injured has brought suit against your company, and the further fact that he is still in your employ. This situation, while it is one which is immaterial to us, and in no way affects us or affects the question of the injured's right to recover, is one which is full of possibilities of trouble to your company for the following reasons: It has the tendency to encourage litigation against your company by your employees for the reason that they feel that they can "take a chance" at obtaining a judgment after they are injured and still lose nothing in the way of being out of employment. It furthermore gives them the opportunity to collect the necessary money with which to fight a lawsuit; in other words, you are furnishing them "sinews of war" with which to fight yourself. While it is true, as you suggested, that the effect of showing that the company considers the matter one which they are fighting as a matter of principle; and that because they are right, the company is not small enough to consider the fact that a man is fighting it a reason for discharging him, still these facts could not under our rules of evidence be shown at the time the matter is tried for the reason that they are irrelevant. We wish merely to call this fact to your attentions, so that you may consider whether it is in accord with your best interests that your employees get the idea that they can undertake to collect damages from you and at the same time remain in your employ, earning money with which to injure you. As for ourselves, as I have stated to you, we are not interested one way or the other. It is entirely immaterial to us, and we make no recommendations one way or the other. We merely submit the matter to your good judgment."

Simmons testified that he was not present at the interview with the defendant's agent; that he never saw the letter until a short time before the trial; that he knew nothing of the request made by the defendant; and that he
ordered the plaintiff discharged on his own motion, and not because of any action
taken by the defendant. His evidence was corroborated by the general super-
intendent, Vincent. The conference and correspondence between the representa-
tives of the defendant and the Simmons Manufacturing Company were all with
Vincent, the general superintendent of that company. He testified that they
had nothing whatever to do with the discharge, and in effect that he paid no
attention to the request. He said that such requests, verbal or written were
never called to Simmons' attention, and that the letter suggesting plaintiff's
discharge was written to him personally, and was placed in a file in which he
kept correspondence dealing with matters that came under his charge. He
further testified that he was directed by Simmons to discharge the plaintiff
before the matter came up with the insurance company. He construed the
direction as allowing him some discretion. Personally he thought it bad policy
to discharge employees who had brought suit against the company, so he allowed
Johnson to remain. Later Simmons saw Johnson at work in the shop, and peremptorily
ordered his discharge, and plaintiff was dismissed because of this order.
Simmons testified to substantially the same state of facts, and very definitely
stated that he knew nothing of any request having been made by the defendant for
plaintiff's discharge. His reason for ordering it, as stated by him, was that he
had had some disastrous experiences from retaining men in his employment with
whom he was having a lawsuit, and he had decided to pursue a different policy.
These two witnesses were cross-examined at great length, and there was no
conflict whatever in their testimony. Nor was any other testimony offered by
plaintiff contradicting the testimony of Simmons and Vincent.

At the time both the defendant and the plaintiff rested, a motion for a
directed verdict was made by defendant, which the trial court denied.

The jury answered all of the questions in the special verdict in favor of
the plaintiff, and among other things found that plaintiff's discharge was
proximately caused by the defendant. The jury assessed the plaintiff's com-
andatory damages at $294 and his punitive damages at $5,000.

Defendant moved for judgment n.o.v., which motion was denied. The defen-
dant then appealed to the Supreme Court of Wisconsin, assigning as error the
trial courts denial of its two motions.

State the question (or questions) presented. How should the Supreme Court
of Wisconsin rule on defendant's assignments of error, and why?
Question 4:

This case came to the Supreme Court of the United States upon a writ of certiorari granted to review a judgment of the U. S. Court of Appeals for the District of Columbia that affirmed a conviction of the petitioner of doing business as a pawnbroker and charging more than six per cent interest, without a license, which is forbidden by the Act of Congress of February 4, 1913, c. 26, 37 Stat. 657. 48 App. D.C. 380.

The external facts are not disputed. The defendant had been in business as a pawnbroker in Washington but anticipating the enactment of the present law removed his headquarters to a place in Virginia at the other end of a bridge leading from the city. He continued to use his former building as a storehouse for his pledges but posted notices on his office there that no applications for loans would be received or examination of pledges made there. He did, however, maintain a free automobile service from there to Virginia and offered to intending borrowers the choice of calling upon him in person or sending their application and security by a dime messenger service not belonging to him but established in his Washington building. If the loan was made, in the latter case the money and pawn ticket were brought back and handed to the borrower in Washington. When a loan was paid off the borrower received a redemption certificate, presented it in Washington and got back his pledge. The defendant estimated the number of persons applying to the Washington office for loans or redemption at fifty to seventy-five a day. His Washington clerk, a witness in his behalf, put it at from seventy-five to one hundred.

The foregoing evidence was undisputed: the assignment of error related to the charge of the U. S. District Court Judge to the jury.

The judge said to the jury that the only question for them to determine was whether they believed the concurrent testimony of the witnesses for the Government and the defendant describing the course of business stated above, and as to which there was no dispute. Those facts, he correctly instructed them, constituted an engaging in business in the District of Columbia. This was excepted to and the jury retired. The next day they were recalled to Court and were told that there really was no issue of fact for them to decide; that they were not warranted in capriciously saying that the witnesses for the Government and the defendant were not telling the truth; that the course of dealing constituted a breach of the law; that it was their duty to accept this
were sure he could ride with the sheriff. He saw the sheriff and asked if he could ride to the dance with him, and was advised that he could. He did ride to the dance in the sheriff's automobile. He sat in the back seat, the sheriff and his wife sitting in the front seat. His two friends immediately followed behind the sheriff's automobile in their car. The sheriff was going to this dance for the purpose of preserving order, and, upon arriving thereat, the sheriff went about his official duties. The juror danced once with the sheriff's wife, and, rather early in the evening, returned to Waupaca with his two friends in their automobile. The affiants declared that nothing was said about the case, and that no attempt was made in any way, shape, or manner to influence the juror's judgment, either by the sheriff, or by his wife or by any one else. There was no evidence to the contrary.

The record in the case showed that from the time of the commission of the alleged rape the sheriff and his office staff had been active in procuring evidence to establish defendants guilt, and the sheriff testified as a witness for the State.

Section 3072-m of the Wisconsin Code provided in brief that no new trial shall be granted by the Supreme Court "on the ground of misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure," unless it shall appear that the error complained of has affected the substantial rights of a party seeking reversal.

State the question (or questions) presented. How the court should rule on the motion and why?