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Trial and Appellate Practice: Final Examination (January 1959)

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TRIAL AND APPELLATE PRACTICE

FINAL EXAMINATION

JANUARY 1959

DIRECTIONS: Read each questions carefully. Answer completely the issue(s) raised in each question. Your answers should be concise. Do not abbreviate words except when they are abbreviated in a question. IT IS MANDATORY THAT THIS EXAM BE RETURNED WITH YOUR BLUEBOOK.

1. Assume you are attorney for P. P's car is parked legally in front of his home which is about 100 feet from a busy intersection. D1 approaching the intersection runs a stop sign and, in the center of the intersection, collides with a car driven by D2. D2, the evidence will show, was traveling at 45 m.p.h., in a speed zone having a 25 m.p.h. limit. As a result of the collision, D1's car is thrown off course, and crashes into P's car severely damaging it. Prior to trial you, along with the attorneys for D1 and D2 stipulate as to damages. This stipulation is filed in court and by agreement made part of the record. After the jury is selected and sworn to find a true verdict, you make your opening statement, saying, in substance, that you expect the evidence to show that P was without fault in the matter; that the proximate cause of the damage was the negligence of D1 or D2 or both of them jointly, and that you want damages from D1 or D2 or both of them. The attorney for D1 then makes a statement saying only that the accident would not have happened but for the negligence of D2. D2's lawyer then makes a statement saying only that he will prove D1's negligence was the sole cause of the damage. Is there anything you should do prior to calling your witnesses?

2. P obtained judgment against D by default when D failed to answer P's amended complaint within the time allowed. The amendments to P's complaint consisted of striking redundant and repetitious matter and adding an allegation that the claim was brought within the statutory period of limitation. D had answered the original complaint on time. The default judgment ordered the clerk of the court to pay over to P certain sums deposited by D in case judgment should be for P. The Clerk refused to make payment, and P now brings mandamus to compel the Clerk to make payment. Should the court grant the writ of mandamus? Why?

3. P sued D1 and D2, partners, in a single action on a joint partnership note. Summons was served on both, but D2 did not appear and judgment by default was entered against him separately for the full amount of the note. D1, meanwhile, answered. After the default by D2, D1 filed a supplemental answer alleging the default, and prayed that P take nothing as against him. Prior to trial, D1 moved for judgment on the pleadings and his costs. What result? Why?

4. P filed a case in a state court against D alleging injuries suffered in an automobile accident occasioned by the negligence of D. D's answer was a general denial. After the case lingered on the trial docket for six terms, P moved the court for a voluntary non-suit without prejudice, offering to pay P taxable costs for any subsequent appearance for trial. Hearing was held on the motion during which it developed as a fact that D had a suit in Federal Court concerning his contract of insurance coverage on the accident for which suit was brought in the State Court. If you were judge of the State trial court, how would you rule on the motion for voluntary non-suit by P?

5. State X has a statute allowing jury trial in equitable actions--"upon demand in the same manner as a suit at law, and the verdict of such jury on any question of fact shall have the same force and effect in the 'equity court' and in the Supreme Court on appeal as the verdict in an action at law." You represent P in an action against D for a restraining order to prevent D from constructing a dam on D's land which would seriously diminish the flow of water to P's land. P uses the water to irrigate and feed his cattle, and will likely suffer immeasurable harm if the dam is built. D requests trial by jury which the trial judge grants. You object. What is the substance of your argument on appeal, the jury having returned an adverse verdict and the judge having used such verdict as the complete basis for an equally adverse judgment?

6. You are attorney for D in a murder trial. Over your repeated objections, P, the prosecutor, in his opening statement to the jury, referred to a knife, a sawed-off shotgun, and a bottle allegedly containing cyanide, all of which were lying in plain view on the counsel table. The judge overrules your objections but cautions P to discontinue such exhibits and warns the jury that an opening statement is not evidence. During the presentation of P's case, he has an expert testify that the system of the victim of the crime contained cyanide, and a druggist testifies that D bought cyanide in a similar bottle the day of the crime. But the bottle is not put into evidence. The evidence further tended to show that although D actually died of cyanide poisoning, he also suffered knife and shotgun wounds at the hand of D which concurred in causing death. D is convicted and sentenced to death. What will be the basis of your appeal?

7. You are the trial judge in a murder case and have instructed the jury on murder in the first and second degrees and on voluntary manslaughter, firmly believing the evidence to justify these instructions. The penalty for murder first degree is life imprisonment or death by electrocution, for murder second degree it is not less than 10 years confinement in the penitentiary, and for voluntary manslaughter it is not less than four nor more than twenty years confinement in the penitentiary. The jury returns a verdict of voluntary manslaughter, settling the punishment at two years confinement. You send the jury back and further deliberations produce a verdict of murder first degree with penalty of death. The verdict is received and in due course you pronounce judgment in accord with the verdict. Attorney for the defendant has moved for a new trial at the proper time. Is defendant so entitled?

8. P, in accord with local practice, filed a petition in a civil action at law containing 11 separate causes of action and asking for damages on each. To the petition D filed an answer containing a general denial to all counts. After trial the jury returned a verdict generally finding for P on all counts and awarded P general damages. D now moves in arrest of judgment on the ground the petition contained no allegations asking for special damages and that his demurrer to three of the counts should have been sustained. As attorney for D what question underlies your motion for arrest of judgment? Discuss fully.

9. In an action commenced in Federal District Court for wrongful death, P seeks production, prior to trial, by way of interrogatory, of all records and papers showing repairs to D's boiler made after the death of P's intestate (who was killed when D's boiler blew up). D objects, pointing out that Rule 26b (FRCP) permits examination regarding any matter not privileged which is relevant to the subject matter, and that evidence of repairs made subsequent to the blowing up of the boiler would be inadmissible in the trial of the case. As attorney for P, rebut D's argument.

10. You are attorney for D, coal mine company located in western Virginia. P, a visitor to the coal mine, has filed a suit against D, alleging that D negligently maintained the entrance to one of its mine shafts as a result of which P slipped and fell 30 feet down the shaft landing on his head. P's physical injuries appear to be superficial, but he is asking \$100,000 damages because, he claims, the fall unnerved him, and has caused him to become nervous, irritable and non-cooperative in his work. You learn from independent sources that since the accident, P has held and lost three jobs, that his neighbors won't speak to him though once he was the life of the party in the neighborhood, and that his wife has been to see a marriage counselor six times. Otherwise, you learn that P spends all his time on the golf course, but won't enter any locker-room card games because he thinks his friends cheat him at poker, though he used to enjoy such "nineteenth-hole" sessions greatly. Describe fully the step you must take in order to prepare a defense for this suit, and identify the authority by which you proceed.

11. As defense counsel in a larceny case, you object to the following remarks given by the prosecutor in his closing argument. "The evidence that D crawled into the store building through the sewer shows him to be a cold-blooded, dirty, slobbering, thieving rat; the fact that the evidence shows D was apprehended with pornographic pictures on his person shows him to be a depraved, lecherous, dirty, no-good, type of vermin who could crawl under a snake's belly; the fact that the evidence clearly shows D committed the crime charged compels us to put him behind bars and throw the key away, that is, throw the key as far away as the law allows; that the record in this case shows D requested a change of venue three times, showing beyond a shadow of a doubt that D is distrusted and feared by the people in his home country." The trial court overrules your objections. The verdict is guilty, and D is given five of a possible ten-year sentence. What, if any, grounds have you for appeal?

12. You are attorney for D in a case tried before the Circuit for James City County, Virginia. In your case which was tried during a term of court ending December 31, 1958, the court rendered final judgment against you on December 20, 1958. Having done nothing but complain to everyone you know about the adverse judgment, you suddenly discover, on January 11, 1959, a Sunday, that three parts of the judgment are extremely vague and might if taken literally prove prejudicial to your client. Can you do anything about the judgment? Why?

13. Having lost a case in the corporation court for Norfolk City, Va., and having perfected your appeal, you are ready to write your opening brief. What must it contain?

14. Having lost the appeal in question 13, what is necessary to gain a rehearing?

15. You are attorney for P and have secured a judgment in the Circuit Court for Warwick, Va., for \$25,000 damages against D as a result of D's negligence in inflicting injuries on P. D comes to the County Court for James City County, Va., and files for a new trial on the ground that P's evidence included the results of a blood-alcohol test on D. The judge argues that this grounds for a new trial and indicates that it will be granted. You file a motion to quash the motion for a new trial but the judge of the County Court overrules your motion. What do you do now and where do you go to do it?