

1971

Civil Procedure (B): Final Examination (January 9, 1971)

William & Mary Law School

Repository Citation

William & Mary Law School, "Civil Procedure (B): Final Examination (January 9, 1971)" (1971). *Faculty Exams: 1944-1973*. 247.
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Final Examination

CIVIL PROCEDURE (B) - January 9, 1971 - 3 Hours - Prof. T. A. Collins

1. Read the following questions carefully and answer the points raised by them.
2. There are 360 points in the examination, twice the 180 minutes of the examination. Allocate time in general accordingly.
3. Concentrate on questions of procedure; do not be concerned with substantive issues.
4. Facts are intended to be complete, unless the question suggests additional possible facts to be considered in answering. However, if you feel you need more facts to fully answer the question, state those facts and use them. Good Luck.

1. (20 points)

Solsburg Cement Company operates a cement plant valued at \$2,000,000 in Chester, Illinois a city of 1700. The plant employs 125 people, and is the only industry located in this farm market community. The plant discharges pollutants onto Force's land (as well as under that of his neighbors) causing damages of \$3,000 annually for the last two years. It would cost \$42,500 to install equipment to stop the pollution. What remedy should Force seek and the court grant? Why is it superior to other possible remedies.

2. (35 points)

A is a franchisee of International Dairy Stores Inc. As such, A brought suit against International for breach of contract. Thereafter, B, C, D, E, F, G and H, also franchisees of International sought to join in a suit against International. All alleged that International had provided them ice cream which failed to meet the requirements of the State Department of Health. The contracts were identical in terms, which included a clause guaranteeing pure ice cream, except as to the percentages of gross income that were to be paid International, which varied in all contracts. A, B, and C had entered into the contracts after regional conference between International and potential franchisees; the remainder negotiated their contracts separately. The Department of Health of the Commonwealth of Virginia, in which all eight franchisees are located, seeks to intervene as a plaintiff for damages to the public from International under the specific provisions of the Virginia Pure Food and Drug Act which the plaintiff franchisees alleges violated and to invalidate

the contracts under provisions of the Act permitting the Department of Health to protect public interest. International attempts to implead Beneta Dairy Farms Inc., who supplied all ice cream to International which was distributed to the eight plaintiffs.

Under the federal rules, who besides A and International are proper parties to A's law suit? Why?

3. (45 points)

In a code pleading state, plaintiff Rose Dennis was injured when she fell down the stairs in a rooming house owned by Carl Keiser in which she resided. She filed proceedings the pertinent part of which follows:

3. Plaintiff was proceeding up the stairs of the Keiser rooming house of which she was a tenant. The stairs were unlighted, no banisters were provided, safety treads were not on the stairs, and as a result of the willful failure of the defendant to maintain safety devices upon and about the aforesaid stairs plaintiff fell, causing grave injury to herself.
4. Plaintiff was proceeding up the stairs of the Keiser rooming house of which she was a tenant. The stairs were in a state of disrepair, the banister broken, and the stairs were unlighted, as a result of which failure to maintain the aforesaid stairs by defendant, the plaintiff fell causing grave injury to herself.

Plaintiff testified to all of the foregoing; however, defendant's janitor, after denying the foregoing, admitted leaving cleaning materials on the stairs. The plaintiff was then permitted to reopen her case and plaintiff testified to the effect that she tripped over such material after first stumbling on the stairs. The judge directed a verdict for plaintiff on the specific grounds of the defendant's negligence in leaving the cleaning material upon the stairs. Several problems are raised by the pleadings and the decision. What are they and how would they be resolved? Consider all possible errors, and rulings, even though any one of them might be depositive of the entire case.

4. (50 points)

Sam Wolfson was severely injured by a trip gun while trespassing upon the farm of George L. Thompson outside of Cory Creek, Nebraska

where Wolfson resided. Wolfson suffered damages of \$8,000.00 in medical expenses, \$7,000.00 in loss of earnings, and sought \$5,000 for pain and suffering. Thompson was a resident of Kansas. Under the common law of Nebraska and Kansas any person who maintained a tripped gun is liable for injuries to a trespasser; Thompson had installed the tripped gun. Unknown to Thompson's and Wolfson's attorneys, neither of whom had a criminal practice, an obscure provision of the criminal code of Nebraska relieved a person of all criminal liability, and arguably due to ambiguities civil liability as well, for any defense of his property against trespassers whatsoever. Plaintiff sues in Federal court, and pleaded in pertinent part as follows:

2. On August 14, 1970 at about 3:30 p.m. on a farm known as the George L. Thompson farm outside Cory Creek, Nebraska, plaintiff was injured by a tripped gun unlawfully maintained by George L. Thompson.
3. Plaintiff sustained special damages of \$20,000.00 and demands judgement of \$20,000.00 special damages and \$20,000.00 punitive damages.

On the basis of an ingenious memorandum of law calling into question the common law both of Nebraska and Kansas, defendant moved to dismiss because cause of action was not stated and also moved to make more specific. Both motions were overruled. At pretrial conference the only theory advanced was the common law one; defendant as well denied the facts again presented his memorandum. The case went to trial under a pretrial order which stipulated that Nebraska law governed, that the only issues were whether or not one who maintained a tripped gun was liable under the common law of Nebraska, whether in fact such a tripped gun was maintained by Thompson, and the amount of damages.

After the first day of trial, the defendant Thompson's attorney attended the cocktail party given by his legal fraternities local alumni for law students from the area home for winter holidays. There he overheard Daniel Fitzgerald, a prominent criminal and civil liberties attorney, who was somewhat in his cups, holding forth that any of the students to whom he was speaking could unless he was a total dolt, overturn term as unconstitutional the new legislation permitting any protection of property, particularly in civil aspects.

The next day George L. Thompson's attorney sought to amend his pleadings in the pretrial stipulation to add the defense of the statute. The judge refused, holding him bound by his pleadings and pretrial stipulation. The court on trial found for Wolfson and awarded him \$20,000.00 special damages and \$5,000 in punitive damages.

Thompson appeals all motions denied. What result and why? How should the Federal Rule 54(C) providing "every final judgement shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party is not demanded such relief in his pleadings" affect the case. Do not omit other factors that may be involved, if any. Would there be a different result if at the pretrial conference it had been stipulated the tripped gun was placed by George L. Thompson's farm manager, for whose conduct George L. Thompson would be liable, but ~~at trial over~~ objection, George L. Thompson proved it was not one of the 10 tripped guns placed by the manager but rather one set by a neighbor? What if plaintiff did not object to this testimony?

5. (50 points)

You are appointed executive secretary of the Commission of Judicial Reform in a state where judges of courts of general jurisdiction and appellate court judges are selected by partisan ballot for four year terms. Your first duty is to appraise the present system of selection and tenure of judges, to present and analyze alternate possible systems, and make suggestions for a new selection process, term of tenure, or justify retention of the present one. The Commission is interested in whether there should be a different system applied to trial court judges and appellate court judges. The special importance to the Commission is the effect upon the total process of adjudication that means a selection of judges and their tenure may have. Prepare an appropriate memorandum.

6. (60 points)

Robert Higgin, a resident of Norfolk, Virginia, purchased a toy electric stove manufactured by McGovern Products Company for his daughter Carol. She was subsequently injured severely by an overheated oven in the stove. Present at the time that Carol was injured was Higgin, his wife, and Carol's sister Myra. Higgin now

sues McGovern, a corporation incorporated in Delaware with its main business offices in Philadelphia, as next friend for his daughter Carol in the federal district court for the Eastern District of Virginia on negligence and warranty theories. The jurisdictional amount of \$10,000.00 was met by evidence of treatment required for Carol by the Higgin family physician, an orthopedic surgeon, and a plastic surgeon. In addition to these physicians, in preparation for trial, a dermatologist and a psychiatrist were consulted as to the long term impact upon Carol to assist in determining the amount that should be sought in recovery for future pain and suffering by her.

Immediately after the accident, defendant McGovern's insurance carriers local adjuster took statements from Mr. and Mrs. Higgin, their daughter's Carol and Myra, and the manager of the store in which the toy stove was purchased. In addition, McGovern's sales manager took a statement immediately after the accident from one Chester, an electronic technician in the Navy who was plaintiff's next-door neighbor at the time of the injury to Carol, but has been transferred subsequently to the Great Lakes Naval Training Center, north of Chicago, Illinois. Plaintiff's daughter Myra, in a statement to plaintiff's attorney, indicated she had confided to Chester that she was fearful of hazards in toys and then left Chester in the garage with the stove for some time, and upon return was assured by Chester there was no problem involved with the stove.

In addition to this civil litigation, the President, Sales Manager and Director of toy production at McGovern are under indictment for violation of criminal provisions of a recently enacted statute establishing standards for safety in toy manufacture. The stove on which Carol was injured is of the type that figures primarily in this indictment.

- A. Under the federal rules of civil procedure, pursuant to sound trial strategy, in what ways and from whom may plaintiff arguably seek discovery, what objection might the defendant make to the discovery so sought, and how would the court rule upon the objection.

- B. Under the federal rules of civil procedure, pursuant to sound trial strategy, in what ways may the defendant arguably seek discovery, what objections might the plaintiff make to them, and how would the court rule upon the objections.
- C. How best could either party seek appellate review of any such ruling. Discuss all options.

7. (100 points)

Brady Development Company, a New York corporation, contracted with Borehead Construction Corporation, a Pennsylvania corporation, to construct a multi-unit apartment complex in Baltimore, Maryland. Borehead was chosen because no Baltimore firm was willing to undertake the project insomuch as a construction boom in the city fully occupied them. The contract provided that payments were to be made to Borehead upon completion of each 75 unit section. In addition section 17(J) of the contract provided: the construction company (Borehead) shall construct the apartments so that they are sound-proofed to the level of semi-luxury apartments in this area.

Numerous complaints from tenants concerning noise in the complex's completed sections A and B were made to Brady, and several tenants moved out in disregard of their leases. Brady notified Borehead that Borehead was in breach of the contract because the deficiencies in sound insulation, demanded rectification of previously constructed buildings, and construction in accord with the contract for the remaining sections. Brady also informed Borehead that it intended to withhold payment for section C, which was completed, until the foregoing was done.

Borehead denied breach, and demanded payment for his completed work, which Brady refused. Borehead thereon ceased work, including work on sections D, E, and F, which were partially completed, and subject to severe damage in the fall rainy season, two months hence, unless at least five weeks work was completed thereon. On August 4, after ten days of fruitless negotiations following Borehead's termination of work, Brady filed suit seeking (a) a temporary restraining order, ordering Borehead to resume work because of possible irreparable harm to it and (b) continued specific performance of the construction contract because of the impending irreparable harm to Brady, an equitable remedy and (c) damages in the amount of \$100,000.00 because of the faulty construction to date. Borehead

resisted all orders, and counter claimed for damages for breach of contract in failing to pay for its completed construction in the sum of \$637,000.00.

The case, being tried in the federal district court, was assigned to Chief Judge Gerald McQuire, a jurist known both for his legal acumen and devotion to the arts. In addition, not known to the plaintiff Brady at the time of the trial's beginning, Judge McQuire was the godfather of his nephew, Isaac Eisenstein III, who had been disowned by his father because of his political activities and social conduct, including the operation of the People's, Soldier's and Worker's Coffee House in a dilapidated building adjacent to Fort Knox, Kentucky, upon a tract of land which Brady had purchased to construct an industrial park whose tenants would in large part be concerned with the application and development of electronic devices to be employed in armored military operations. Brady was trying to evict the People's, Soldier's and Worker's Coffee House and Isaac in turn had written a scathing denunciation of Brady as an example of the pervasive evil of the military industrial complex extending even into real estate development, stating emphatically that as well, Brady's architectural design generally considered esthetically dubious and technically unsound. The article was published in the Louisville Free Press, and subsequently praised by a weekly national news magazine as an example of the best of underground journalism. Judge McQuire, who subscribed to the national news magazine, had scanned the article when Isaac's father had shown it to him in one of the judge's unsuccessful periodic attempts to reconcile the father and son. The court denied the temporary restraining order on August 17, Borehead demanded a jury trial on all issues, which Brady resisted, the judge ruled in Borehead's favor. By stipulation of the parties the matter went to trial on August 30. The judge ruled that as a matter of law, considering (in the judge's words) "the widespread, indeed general, knowledge of modern apartment building have walls akin to rice paper" Borehead had complied with the plain meaning of the contract's clause and that the only question for the jury was damages on Borehead's counter claim, then recessed for lunch.

During lunch Brady's attorney was informed of the activities of the judge's nephew, and the judge's interest in reconciling the nephew and his father. In addition, council was informed that the judge had himself in a letter to Isaac, provided the information upon which Isaac's critique of Brady on esthetic and technical grounds was based (an allegation which in fact was totally false). After the end of the luncheon recess, plaintiff's counsel petitioned the judge to recuse himself, including all the foregoing facts, including the allegation that the judge had advised the nephew on the esthetic and technical portions of the article. The petition, hastily drawn, stated that the judge had contravened all judicial ethics by not disqualifying himself on his motion. The judge refused the petition, noted the partial accuracy of the petition, and then angrily asserted that the petition unjustly and unethically impuned his integrity, and was in sum a tissue of lies whose substance was analogous to the quality of the walls in Brady's previous construction projects. The judge held the plaintiff's counsel in contempt for filing the false petition, fined him \$10,000.00 and sentenced him to 30 days in jail.

The jury, limited to the issue of damages, found for plaintiff on his counter claim \$637,000.00

Limiting yourself to procedural questions, what issues of the law are raised by the above situation. Discuss fully how they would be resolved by the trial court. How might either party attain appellate review of any of them, including the issues upon which the above indicates the trial court ruled, on an interlocutory basis. Indicate how the appellate court would resolve these matters when it reviewed them.