6382

FINAL EXAM

Procedure II

Fall 1989
Professor Richard E. Flint

The examination consists of two essay questions of equal value. I would suggest that you read the fact patterns very carefully and answer each question fully and concisely. As lawyers make their living not only through their oral skills, but also through their written word, I expect a well written answer. Good luck and happy holidays!

Question No. 1:

Joe "General" Sherman ("Sherman"), a resident of the state of Pennsylvania who had never been in the state of Texas nor had he ever conducted any business in Texas, was driving his white steed (a "Corvette") through Texarkana, Texas late one afternoon after having pillaged ("gotten drunk") in Little Rock, Arkansas, when his stead collided with a vehicle owned by Robert E. Lee, V, ("Lee") and driven by his fiancee, Southern Mist ("Mist"). Sherman immediately floor boarded his steed and headed back to Arkansas with the express intent of never visiting the Lone Star state again. One and a half years later, Lee sued Sherman in a county court-at-law in Texarkana, Texas (which had subject matter jurisdiction over all cause of action where the amount in controversy was less than $50,000.00) seeking to recover property damage for his vehicle. In his petition, he alleged the court had personal jurisdiction over Sherman pursuant to the Texas Long Arm statute and asked that the clerk serve citation on Sherman by serving the chairman of the State Highway and Public Transportation Commission in Austin, Texas. He further alleged that the defendant Sherman had been negligent in driving his vehicle and that such negligence was a proximate cause of the damage to his car in an amount of $25,000.00. He also sought attorneys' fees in the amount of $26,000.00. Although attorneys' fees are not recoverable in this type of action, Lee's lawyer thought that they were. Sherman subsequently received by regular United States mail the citation from the State Highway and Public Transportation Commission's office and threw it in the trash can without reading it or consulting an attorney as to the legal effects of the citation. The sheriff's return indicated that the State Highway and Public Transportation Commission was served on December 1, 1989. Lee took a default judgment against Sherman for $25,000.00 in property damage and $25,000.00 in attorneys' fees on December 16, 1989. The district clerk failed to notify Sherman of the judgment. Sherman was then served a new citation in his resident state in a suit to enforce the judgment filed thirty (31) days later. Sherman hired a lawyer to defend the suit. The lawyer filed an answer stating that the initial

judgment was based on defective pleadings because the petition was vague and ambiguous and subject to special exceptions. While he was defending that lawsuit in Pennsylvania, Sherman hired a Texas lawyer who advised him that he needed to file a "writ of error" in Texas in order to preserve his rights. He instructed the attorney to file the writ of error. While both of these proceedings were pending, Sherman then filed his own lawsuit in district court of Texarkana, Texas against Lee and Mist to recovery for personal injury damages. His petition claimed that Mist had failed to stop at a stop sign and that as a result the collision occurred. He sought a judgment against Lee and Mist, jointly and severally. Both Mist and Sherman filed their answers and defended the suit.

Assume that the statutes, rules, and case law is identical in Texas and Pennsylvania. Please discuss what additional arguments you would make in defense of the lawsuit in Pennsylvania and whether any of such arguments would be successful. Please state whether the writ of error would be successful (and why or why not). In the event that Sherman lost both of the above-referenced suits, what additional legal advice, if any, could you give Sherman? If you were Lee and Mist's lawyers state what defenses you would assert, if any, in the lawsuit being brought against them in the district court of Texarkana, Texas, and whether such would be successful and discuss whether such defenses would be successful.

Question No. 2:

In January 2, 1989, Yankee National Bank ("Bank") regrettably in Lubbock, Texas made four separate loans to Bubba Jackson ("Bubba"), the great-grandson of T. J. "Stonewall" Jackson ("Stonewall"), each in the amount of $1,000.00 and each due with interest and principal on June 1, 1989. Bubba (unlike his brilliant great-grandfather) took the money, went to Las Vegas and lost it. Thus, he was unable to pay the Bank its money back when it made demand. Bubba was a resident of Jackson, Mississippi and other than the transaction described above, his recollection was that he had never in his entire life been in Texas nor had he conducted any business operations in Texas. The Bank hired Dirty Rotten Yankee ("Dirty Rotten") to pursue the litigation against Bubba. Dirty Rotten (whose intelligence level was just below that of a rock) decided to file a lawsuit in Lubbock district court on the first note. His pleadings were proper and the service was made on the Secretary of State who subsequently forwarded the citation to Bubba in Jackson. Bubba hired a Texas lawyer to file a Rule 120(a) motion on his behalf. The Rule 120(a) motion stated that Bubba was not amenable to service because he had never been in the state of Texas and because there were numerous defects in the service. The alleged defects included the fact that a copy of the petition was not attached to the copy of the citation, the date of issuance of the citation was blank, the name of the District Clerk was not on the form, and the citation was directed to the Secretary of State. Dirty

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Rotten having made a large political contribution to the district judge was able to the get the clerk of the court to set the special appearance down for hearing without giving any notice to Bubba 's lawyer. The special appearance was overruled and a default judgment was entered as Bubba's lawyer had failed to file an answer. Shortly upon learning of this disastrous occurrence, Bubba's lawyer filed an injunction suit in another county to stop enforcement of the first judgment as the sheriff was about ready to execute that judgment on a piece of property allegedly owned by Bubba (his aunt had left it to him but had not told him). The court granted the injunction finding that the judgment of the district court in Lubbock was void. At this time, Dirty Rotten filed a second lawsuit in another Texas district court to recover under the second note. The lawyer for Bubba filed an answer that contained only special exceptions to the plaintiff's pleadings and a general denial. He immediately requested a hearing on the special exceptions which the court granted, and without giving the Bank leave to amend, dismissed that lawsuit. Dirty Rotten was now extremely frustrated and decided to file a third lawsuit on the third note. By this time, Bubba had conceded that he was amenable to the jurisdiction of the Texas courts but wanted to be sued in a county other than that in which suit had been filed. The notes required that payments be made in Dallas County as opposed to Lubbock County where the third suit was filed. His attorney then filed an answer which contained only a general denial and various affirmative defenses (I hope you know which ones they should be). Subsequent to that time, he amended his pleadings seeking to assert a Motion to Transfer Venue to Dallas County. That case finally went to trial. During the trial of the lawsuit the Plaintiff sought to introduce evidence that was not contained in his pleadings. Bubba's lawyer did nothing. Then questions (special issues) were proposed by both the plaintiff's lawyer and Bubba's lawyer based on his pleadings. There were no objections to the questions (issues). The jury came back and nailed Bubba to the floor and a judgment was prepared. At this time, Bubba's lawyer objected on the grounds that the judgment did not conform to the plaintiff's pleadings. A fourth lawsuit was then filed by the Bank. Bubba's lawyer answered and filed a counter-claim against the Bank alleging a lender-liability claim (usury) on all four notes. The court after a non-jury trial denied the bank recovery on the note and entered judgment on Bubba's counter-claim.

Discuss all procedural problems generated by this fact situation. Specifically take each lawsuit (all five of them) and discuss in detail (1) the validity of the court's judgment or order; (2) what remedies, if any, are available for the party or parties adversely affected by such action; and (3) what should be the final outcome of each lawsuit.

#1

As a resident of Pennsylvania, Sherman had 4 options when he got the notice of the lawsuit file a 120(a) special appearance, an answer, a motion to quash, or do nothing. Sherman chose to do nothing, which resulted in the default judgment. Upon obtaining the default, Lee's attorney filed a Full Faith + Credit (FF+C) suit in Pennsylvania, seeking enforcement of the Texas Judgment. Because under the facts Texas and Pennsylvania laws are the same, Pennsylvania doesn't have a lot of faith in foreign judgments, and the usual presumptions of validity

are not granted. However, the lawyer in Pennsylvania should have filed a more comprehensive answer. Merely pleading that the petition was subject to special exceptions is not sufficient to avoid enforcement of a foreign judgment. The attorney should have pleaded problems in notice and established that no notice was given. The citation, while correctly directed to the Highway commissioner, was defective as it was not delivered in a manner acceptable under the laws of either state. Citation may be delivered by certified, return-

receipt-requested mail, in person, or by serving the agent or place of business. Here, the commission forwarded the citation by regular mail, and it was therefore improper.

In addition to the manner of service actually used, the pleadings must contain allegations that negate the possibility of personal service. Thus the pleadings should have stated that Sherman was not a resident, had no registered agent, or place of business within the state. Only after such recitals

Service on the Highway commissioner is sufficient to invoke the Sp... is arising out of an occurrence w... statute is appropriate, since it is...

may the Secretary of State (in case of a car accident the Highway commissioner) be served. The attorney in Pennsylvania should use this defect in the pleadings to attack the validity of the judgment, as no personal jurisdiction arose.

Most importantly however, is the fact that the default judgment was taken only 15 days after the service on the Commissioner. Under no account is a default to be taken ~~[illegible]~~ before the first Monday after 20 days of service, date of service excluded, 20th day included. This error, unlike the

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manner of service, goes directly to the power of the court to issue the judgment. A court has no power to issue a default judgment before the aforesaid time period expires. per Sherman had until the first Monday after 20 days from the date of service on the Commissioner (the time period runs from the date of substituted service) to file an answer, special appearance (1208), motion to quash. Any action taken without power by a court is void, and the FF+C suit should be unsuccessful on this basis, especially since Pennsylvania

like Texas, is skeptical of foreign judgments. Sherman will be able to use extrinsic evidence, since he is not bound by the record of a foreign judgment.

Evidence of the lack of notice and the premature judgment will point to the fact that Sherman was a victim of an improper default, and the court is concerned with giving defendants (especially resident defendants) a day in court. Without these arguments, the attorneys answer

aggregately $51,000.00, exceeded the limit of the court by $1000.00. This is true despite the fact that attorney's fees are not recoverable, as it is the original petition to which one looks to determine the amount in controversy. The judgment, which was for $50,000.00, would effectively preserve jurisdiction on collateral attack with respect to the amount in controversy, since a judgment that affirmatively shows jurisdiction will support the action of the court. On direct attack, however, the entire record may be examined.

In addition, the plaintiff cannot waive just part of his requested attorney's fees in order to come within the jurisdictional limits.

On writ of error, the Court of Appeals could find that the district court should have excised the attorney fee claim, since such fees are not recoverable. Such action would have brought the claim within the jurisdictional limit; but the county court at law did not so act.

Most importantly for Shermans W.E,

that the judgment was based on vague and defective pleadings would likely be unsuccessful, since the pleadings gave sufficient notice that the driver was negligent & his negligence caused the damages. While the court may have sustained the special exceptions (it is discretionary), they might also have found enough notice. In addition, such information might have been obtained by discovery.

Sherman appropriately filed a writ of error since the time period for a motion

for new trial (30 days after judgment signed) had passed, and a Writ of Error (W°E) may be filed within 6 months of the signing of the judgment. Sherman was not a party to the first default judgment, and could therefore use a writ of error. The writ of error, a direct attack on the validity of the judgment, can be successful as long as the record does not affirmatively show jurisdiction. Here, the original petition asked for $25,000 property damages and $ 26,000^a attorneys fees. This allegation,

Both of these arguments should succeed as defenses to Sherman's action for personal injury damages.

In addition, Lee and Must could specially except to Sherman's petition, which states no theory of recovery, since they are entitled to know in what capacity they are being sued, but again, they could just as well find this out in discovery.

As for sherman, he could proceed to file a Bill of Review (B.R.) within 4 years of the signing of the judgment. However,

he would have a hard time establishing the elements of the B&R, as he simply threw the citation away. A bill of Review requires a meritorious defense, (the fact that Just ran the stop sign, contributory negligence), and proof that the failure to act was not the result of negligence. (This is a variation of Craddock test, which requires a showing that there was no intentional disregard.) Sherman might be hard pressed to convince a judge that his actions were not negligent. If he could however, the

burden of proof would return to Lee, who would have to prove his case over again.

Sherman would not be barred from using this equitable remedy because he could have used a legal remedy and won, since his notification of the suit came after 20 days, and the judgment was final. This failure to notify him cost Sherman the opportunity to file a regular motion for new trial, and he cannot be held accountable for his failure to file one.

Assuming that the two torts against Sherman have been lost by him and have been prosecuted to a final conclusion, as Lee and Mots lawyer I would claim collateral estoppel against Sherman, since the issues of his negligence, causation and damages have been tried with respect to Lee and Sherman, via the original lawsuit, which was filed within the 2 year tort statute of limitations. This estoppel rests on the fact that the issue were essential to the original judgment, and were between the same parties. Must

will be unable to use Collateral Estoppel as she was not a party to Lee's suit; Lee and Sherman, however, were adverse parties.

After asserting the affirmative defense of ~~Res Judicata~~ Collateral Estoppel, I would also assert that the claim was one that should have been brought as a compulsory counterclaim under TX Rule 97(a), since it arose from the same transaction or occurrence and would properly have been a defense at trial. Failure to bring the claim then should result in a bar to such a claim.

In the first lawsuit, Bubba filed a 120(a) special appearance without an attached answer. (First mistake! Always file the answer with at least a general denial!). In his 120(a) motion, Bubba should have established (or tried to do so) that he lacked the sufficient minimum contacts to support jurisdiction in a TX court. In addition to alleging that he had never been in the state, he should have alleged that the facts that the promissory notes existed and were payable in Dallas county were

insufficient to invoke either the specific or the general jurisdiction of the court.

On these bases, the 120(a) motion would be unsuccessful, as the long arm statute of Texas allows for promissory notes by mail to invoke specific jurisdiction. Additionally, Bubba's attorney attacked the sufficiency of the notice he received in the 120(a). a 120(a) special appearance is for attacking amenability to the court's jurisdiction only, not the procedural aspects of how to do it. Therefore, under TX case

law, the improper use of the 120(a) resulted in an appearance by Bubba, which subjected him to the jurisdiction of the court.

Nevertheless, Bubba's contentions that service was improper have merit. Procedurally the service was inadequate, as it did not contain the copy of the petition, and the date was blank. The fact that the citation was directed to the Secretary of state is relevant depending on the form of the direction. If the citation says to the Secretary of State, then the notice is

insufficient, even as substituted service. As long as the notice says 'to Bubba by serving the Secretary of State', the citation is allowable, since the facts state Bubba's petition was proper and we can assume he included the allegations negating the possibility of personal service.

Had Bubba filed an answer containing such allegations he could have successfully gotten a dismissal, since sufficient notice was not had. However, it would depend on whether the court found the aspects of

the notice that were lacking procedural in nature, if the court considers such defects procedural, presumptions of validity are greater than if the defects go to the power of the court to decide the controversy.

The fact that Dirty Rotten (DR) was able to get the hearing set down on the 120(a) motion without notice to Bubba's attorney will make the judgment (the default) void if the lack of notice affects the power of the court. Here, the lack of notice is fatal since no default judgment can withstand any attack

without proper service to support it.

Bubba's injunction suit, (as long as not filed in Justice Court, which has no injunctive power) is a collateral attack on the default judgment. Bubba could also have filed a (predated) motion for new trial within 30 days of the signing of the default. In this suit Bubba could have alleged that (1) his failure to appear was not intentional due to the misconduct of the clerk, (2) that a meritorious defense existed in the lack of notice, and that (3) the plaintiff would not be prejudiced unfairly.

succeed.

In the suit on the second note, DR should definately bring a motion for new trial, because the court erred in not allowing him time to amend after granting Bubba's special exceptions. In his motion, DR will be able to demonstrate that his failure to amend was not his fault but the courts and that there's a meritorious defense therein. The dismissal, therefore, should be overturned, and a trial should be had. (There is no res judicata issue at

hand since each note is separate)

In the third lawsuit, (on the 3rd note) in which Bubba sought to change venue, his attorney proceeded in the wrong order and the motion to change venue was overruled by virtue of the fact that it was not pleaded first. In TX, the due order of pleadings requires that the 12(a) special appearance come first, and then the motion to transfer venue. They are the only two motions that must be filed in order, but Bubba's attorney neglected to follow this rule, & the motion to change venue was waived

Bubba, having conceded his amenability, was properly within the jurisdiction of the court, as he had appeared. His attorney, however, failed to object to DR's introduction of evidence unsupported by pleadings. Bubba's attorney was within the rules not to object at the introduction of the evidence (if he had, DR could have gotten a Rule 66 trial amendment), this failure was not fatal to his case. However, upon the submission of the issues to the jury, Bubba's lawyer effectively allowed the

issues to be tried by implied consent, since no objections were raised at that time. Therefore, under Rule 67, DR is entitled to amend his pleadings to conform with the issues, since Bubba's lawyer waited too long to object. His objection that the judgment did not conform to the pleadings was proper under Rule 301, which requires that one be supported by the other; however, his failure to object even once to the evidence or issues created the presumption of implied consent, and therefore the objection was useless, and Bubba is without recourse.

In the suit on the 4th note, Barbas's attorneys counter claim of usury on all 4 notes is effective only with respect to the last note, since the issue should have been raised with respect to the other 3 notes at the time those suits were brought, and as a compulsory counterclaim since they were not so raised, they were waived.

With respect to the 4th note, and the counter-claim of lender liability, the bank should have filed an answer. Even

though counter claim defendants are presumed to have filed a general denial, such a denial would be insufficient against a claim of usury. Usury is listed in Rule 93 Verified Denials as a subject to which one must make a sworn denial or it will be consented to as true. A general denial will not suffice to deny usury charges.

If the bank was remiss in filing such a verified denial, then the court properly allowed Batoba to succeed with his counter claim. However, the action of the court

Granting Bubba judgment on all 4 notes was improper, since, as noted, the usury claims with respect to the other 3 notes should have been brought during those suits, as compulsory counterclaims. (Since they arose from the same transaction and could properly have been plead in the other suits.)

The bank therefore has a basis to attack the judgment by motion for new trial or appeal, so as to set aside the portion of the usury claim that

the result of such an attack would likely be favorable to Bubba, since his excuse is a firm one, and the notice he received was inadequate. The policy of the courts is to give everyone at least one shot at a day in court.

The collateral attack in the form of an injunction will succeed only if the judgment below is void. If the court finds the errors in notice only procedural, the judgment will be only erroneous, and the collateral attack to forestall judgment will fail.

Assuming the citation was directed to

"Bubba by serving the Secy of State", (i.e. the name is correct), and the citation was served in the proper manner with a proper return, it still fails since the copy of the petition was not attached, and the purpose of the ~~service~~ citation is notice. Despite the fact that the citation would contain the name of the party bringing suit, and Bubba would therefore have reason to know about the suit on the notes, Courts tend to be formalistic in nature on citation issues. Thus, since the copy of

the petition was missing, the judgment is void, and the collateral attack should succeed. However, The presumption of validity accorded judgments on collateral attack protects the judgment where the record does not affirmatively negate the jurisdiction. (no copy attached to citation, but no extrinsic evidence is allowed in the absence of fraud) Here, the fraud was perpetrated in that the clerk did the bank attorney a favor, on this basis, Bubba should be able to get in the evidence on the lack of a copy of the petition, and the collateral attack should

applies to the first 3 notes. Such an attack showed to be successful for the reasons stated.

Grammatically, the statutes, rules, and case law ARE the same in TX + Pennsylvania rather than is. (+1)