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VIRGINIA BOARD OF BAR EXAMINERS
Richmond, Virginia - February 24, 1981

1. John Doe filed an action at law against Bob Barrister alleging that Doe and Barrister were both residents of Williamsburg, Virginia; that Doe had employed Barrister to prepare the estate tax return for the estate of Doe's father, of whom Doe was the sole beneficiary; that Barrister had failed to list in the tax return certain policies of insurance as a part of the assets of the decedent's estate, even though Barrister had been informed of their existence; and that by reason thereof, Doe was obliged to pay penalties to the Internal Revenue Service in the amount of \$6,000. Doe had first contacted Barrister on June 5, 1977, and the tax return was filed on July 3rd of that year. Doe's suit was instituted against Barrister on June 15, 1980.

Barrister filed his grounds of defense, including a plea of the applicable statute of limitations as an affirmative defense. The parties then engaged in extensive discovery procedures which carried through the fall and winter of 1980. In January of 1981 Doe realized that a specific bequest contained in his father's will could have qualified for a charitable deduction against the estate tax but it had not been so listed in the tax return, by reason of which the estate was obliged to pay \$2,500 more in estate taxes than the law properly required. Doe also found that on September 10, 1977, Barrister had failed to include a small parcel of land in his preparation of a deed conveying to Doe certain real estate which he had purchased. By reason of the foregoing, Doe on January 20, 1981 petitioned the Court for leave (which was granted) to amend his motion for judgment to add two claims: (1) in the amount of \$2,500 for the additional taxes paid by reason of Barrister's failure to prepare the estate tax return properly, and (2) in the sum of \$1,000 for the expenses to which he would be put in obtaining a correction deed to remedy Barrister's error in the deed prepared in September of 1977. Barrister filed a plea of the applicable statute of limitations as to each claim. How should the Court rule on Barrister's plea of the statute of limitations as to (a) the claim for penalties stated in the original complaint, (b) the amended claim relating to additional taxes, and (c) the amended claim relating to the erroneous deed?

* * *

2. Glenda Graceful, an unmarried adult living in Staunton, Virginia, was struck by a car driven by another Staunton resident,

William Wheels, while Glenda was walking across the street in front of her home. Glenda was seriously injured and suffered a partial permanent disability of her right ankle. Some six months after the accident, Graceful filed a Motion for Judgment against Wheels in the Circuit Court of the City of Staunton demanding damages in the amount of \$75,000. Wheels filed his Grounds of Defense denying negligence on his part and affirmatively charging Glenda with contributory negligence.

The case was tried to a jury and at the conclusion of Glenda's evidence, Wheels moved the Court to strike the plaintiff's evidence and enter judgment on behalf of the defendant. This motion was overruled by the trial court. Wheels then put on his evidence, and the parties rested. Counsel then met with the Court to review the tendered jury instructions, and seven instructions were granted by the Court as to which Wheels voiced strenuous objection to two, dictating the grounds of his exceptions into the record. Thereafter, the jury retired and rendered a verdict of \$42,500 for the plaintiff. Judgment was, accordingly, entered on the verdict.

The next day the defendant, Wheels, filed a motion to set aside the verdict as being contrary to law and evidence and based on improper instructions. The plaintiff objected to defendant's motion on two grounds: (a) that the Court had already ruled on the sufficiency of plaintiff's evidence and the instructions and its decision on those aspects of the trial was final; and (b) that the defendant was estopped from any further challenge as to the sufficiency of the evidence as he had chosen to rely on a motion to strike at the conclusion of the plaintiff's evidence.

How should the Court rule on each ground of plaintiff's objections to defendant's motion?

* * *

3. Bob Bundy, a resident of Hopewell, Virginia, made an application for a loan at the Twin Cities Savings and Loan Association, a Virginia corporation, located between Petersburg and Hopewell, Virginia. Included in the settlement papers was a form, required by the federal Truth in Lending Act, 15 U.S.C. Section 1601, under which the borrower was required to indicate whether he desired \$15,000 in credit life, accident, health or loss of income insurance. Although the Truth in Lending Act did not require the issuance of the policy, the Savings and Loan Association agreed to obtain the policy at the request and at the expense of the borrower. Bundy requested such coverage and the loan was closed. Shortly thereafter, Bundy was struck by a car and killed. His wife, Mildred, who qualified as executrix of his estate, inquired of the Savings and Loan Association as to the steps she would have to take to apply for the benefits of the insurance policy, only to be told that no coverage had, in fact, been obtained.

After consultation with her attorney, Mrs. Bundy filed suit in the United States District Court in Richmond seeking damages

in the amount of \$15,000 as a result of the failure of the Savings and Loan Association to procure the insurance for which Bob Bundy had applied. The Savings and Loan Association filed a motion to dismiss for want of jurisdiction. Did the Court have jurisdiction?

* * *

4. William Whitby was tried before a jury in the Circuit Court of Virginia Beach on a charge of armed robbery. The evidence against him was based on an identification of Whitby by the victim, Walter Wallaby, first made in police headquarters while Whitby was standing in a small room in the custody of two police officers. At the trial, Whitby's attorney made no objection to the admissibility of Wallaby's testimony when Wallaby again identified Whitby as the man who robbed him. At the conclusion of the Commonwealth's evidence, Whitby's counsel moved to strike the Commonwealth's evidence on the ground that the in-court identification resulted from an "unconstitutional lineup or identification procedure" conducted at police headquarters in the absence of counsel and under very suggestive circumstances. How should the Court rule on Whitby's motion to strike?

* * *

5. In a chancery suit commenced in the Circuit Court of Augusta County, Virginia, the court heard the evidence ore tenus. Upon the conclusion of the evidence, and after hearing argument of counsel, the court entered an interlocutory order adjudicating certain matters, and retained the cause upon the docket for further proceedings that were deemed necessary before a final decree could be entered. Before a final decree was entered the lawyer for the defendant in the suit concluded that the court had misconstrued the law and had thus committed error in entering the interlocutory order. Also, following the entry of the interlocutory order, the defendant advised his lawyer that he had, for the first time, learned of new and material evidence that might well alter the finding upon which the interlocutory order was based.

What, if anything, may the lawyer for the defendant do, prior to the entry of the final decree, in an effort to correct what were considered to be errors of law in the judgment of the court, and to secure findings of fact favorable to the defendant?

* * *

6. Solicitor, an attorney practicing law in West Virginia, addressed a letter to Barrister, an attorney practicing law in Richmond, Virginia. In that letter Solicitor advised that his client had some claims against a Virginia resident living in Richmond that would have to be asserted in a court of equity in Virginia, and he requested Barrister to be associated with him in representing his client. In the letter Solicitor inquired of Barrister: (a) how a suit in equity is commenced in Virginia; (b) if a defendant decides to file a motion to quash process or a motion challenging

venue, is it necessary that this be done upon a special appearance; (c) if the motion to quash process is filed and overruled, when must defendant answer the bill of complaint, and if a motion to quash is not filed, when must an answer be filed by the defendant; (d) if defendant decides to file a cross-bill, within what time must it be filed; and (c) if a cross-bill is filed by the defendant against the plaintiff, within what period of time must responsive pleadings be filed by the plaintiff.

What response should Barrister make to the inquiries directed by the letter?

* * *

7. Al Sport, an antique car buff living in Norfolk, Virginia, was interested in purchasing a Duesenberg Roadster owned by Sam Mechanic, a resident of Roanoke, Virginia. On April 17, 1980, Sport addressed a letter to his friend, John Cook, in Roanoke, with a copy to Mechanic, requesting Cook to represent him as his agent in purchasing the antique Duesenberg. Sport offered to pay Cook for his services a fee of 10% of the purchase price. With the letter to Cook, Sport enclosed a proposed written contract of sale with the purchase price being left blank. The proposed contract was signed by Sport at the time it was mailed to Cook. Two days after Cook and Mechanic received the letter from Sport, Cook received a telegram from Sport instructing him not to purchase the car and to return the proposed contract to him. On the same day that the telegram was sent to Cook, Sport addressed and posted a letter to Mechanic advising him that he was no longer interested in purchasing the car, and that he had cancelled Cook's authority to act in his behalf. After Cook had received the telegram, he immediately presented the written contract, which included the amount of the purchase price, to Mechanic who signed it and delivered it back to Cook. The contract provided that the car would be delivered to Sport five days after the signing of the contract. A few hours after Mechanic signed the contract, he received the letter sent to him by Sport terminating Cook's authority to act for him as his agent. Mechanic consults you inquiring whether the contract is binding upon Sport.

What would you advise?

* * *

8. Chuck Clearcut purchased some unfenced timber land in Botetourt County, Virginia. Before purchasing the land the owner took Clearcut on the property and showed him what he claimed were the boundary lines. The deed conveying the property to Clearcut described the property as containing 2,500 acres. A survey would have revealed that there were actually only 2,000 acres in the property he had purchased; however, Clearcut did not have the property surveyed. Believing that he owned the entire 2,500 acres described in the deed and within the boundary lines shown to him by the seller, he immediately moved his crews onto the land and cut all the timber on the 2,500 acres, which included 500 acres

belonging to Dan Derelict. After cutting the timber, Clearcut had it milled into finished lumber of various grades, which he comingled with his other existing inventory. The value of Derelict's timber on the stump at the time of the cutting was \$20,000, and the value of the finished lumber milled from Derelict's trees had a total value of \$100,000.

Derelict went to his property to go hunting and discovered Clearcut's timber crews had cut his trees. Derelict immediately confronted Clearcut and demanded that he be paid \$100,000 for the timber which had been cut. When shown Derelict's deed, Clearcut admitted his mistake in cutting Derelict's trees and offered to pay him \$20,000 for the trees, the admitted fair market value of the standing trees.

Before accepting Clearcut's offer, Derelict consulted his attorney as to what rights, if any, he may have in the lumber produced from his trees.

What should his attorney advise him?

* * *

9. On April 1, 1979, Sam Spendthrift and Sally Spendthrift, his wife, executed a general deed of assignment by which they conveyed to Tom Terry, trustee, all their assets, both real and personal, for the benefit of all their creditors. Included in the properties conveyed was Blackacre, a tract of land containing 600 acres, upon which the Peoples Bank and Trust Company, the only lien creditor, held a first deed of trust securing a debt to the Bank with an unpaid balance of \$10,250. The deed to Terry provided that he should convert all the property conveyed to him to cash as soon as possible and that "upon the conversion [the trustee shall] pay all taxes and all claims having priority by reason of any valid lien securing the same and the residue of the fund coming into the hands of said trustee shall be distributed by him prorata to and among the creditors above named".

On April 28, 1979 Terry filed a bill of complaint in the Circuit Court of Greenville County in which he made the Spendthrifts, the Bank and all other creditors parties defendant and by which he sought direction and guidance in the administration of the trust. The Bank answered the complaint by stating that it had no objection to the sale of Blackacre even though debt to it was not yet due.

Pursuant to an order of the court, the trustee, Tom Terry, sold all the property, including Blackacre, free and clear of all liens. Blackacre was sold for \$8,250 and all other assets were sold for \$10,500 - a total of \$18,750. The total amount of the debts of all creditors other than the Bank was in excess of \$10,500.

Charles Carter, the special commissioner to whom the matter was referred for a report on the scheme of distribution of the proceeds of the sales, reported that because of the lien the Bank had on Blackacre it was entitled to receive the entire unpaid balance of its debt - that is, \$10,250. The general creditors filed exceptions to the commissioner's report in the Circuit Court of Greenville County in which they claimed that the Bank was entitled to no priority, that it should be treated as a general creditor and that the total proceeds from the sale - that is, \$18,750 - should be applied prorata among all the creditors.

How should the court rule with respect to how the proceeds of the sale should be distributed?

* * *

10. By a final decree entered on February 14, 1977 by the Circuit Court of Augusta County, Virginia, Lucy Lucky and Larry Lucky, her husband, were divorced and Larry was ordered to pay Lucy the sum of \$1,000 per month as alimony. On February 14, 1978, Lucy married Harry Hustler. On March 18, 1978, Lucy filed a bill of complaint against Harry Hustler in the Circuit Court of Rockingham County, Virginia, seeking the annulment of her marriage to Harry on the ground of Harry's fraud. On July 4, 1978, that court, by final decree, annulled the marriage on the ground of fraud and declared it to be "null, void and of no effect."

Lucy seeks your advice whether she can obtain reinstatement of the \$1,000 alimony payment from Larry Lucky that had been terminated upon her marriage to Harry Hustler. What should you advise Lucy with respect to that question?

* * *