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Virginia Bar Exam, July 1989, Section 2

VIRGINIA BOARD OF BAR EXAMINERS
Roanoke, Virginia - July 25, 1989

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1. Southern Brokerage Co. purchased carloads of grain which it stored in silos in Norfolk, Virginia, pending sale to overseas customers. On July 5, 1987, Southern executed a contract with Slavic Importers, a Russian company with which it had done business for a number of years, for the purchase at a stated price of a minimum of 500,000 bushels of wheat each year for three years from the date of the contract. Shipments by common carrier were to be made upon receipt of an order from Slavic Importers. During the first contract year, Slavic ordered and Southern shipped 600,000 bushels of wheat. In the fall of 1988, the world price of wheat plunged and Slavic cut back substantially on its orders as it was unable to resell the wheat at a profit. During the second year of the contract Slavic only ordered 250,000 bushels of wheat. Accordingly, Southern, without bothering to notify Slavic of its intentions, sold 250,000 bushels at market price and brought an action against Slavic in the Circuit Court of the City of Norfolk for $60,000, the difference between market price and the contract price.

In the course of the trial, Slavic tendered evidence that it was the custom of the trade to treat specific quantities and firm prices in sales contracts for wheat as mere estimates because of the uncertainty of crops, weather and governmental activities. Slavic also attempted to introduce testimony that in past dealings with Southern, prior to the present contract, Southern had on occasion failed to supply agreed quantities of grain because of lack of rain and Slavic took no objection to the failure. The trial court refused to admit Slavic's evidence on the ground that the contract was clear and unambiguous and its terms could not be altered by custom and usage of the trade or by a course of dealing between the parties. Finally, Slavic offered evidence that the market improved in the months following Southern's sale and had Southern waited, it may not have had so large a loss. Slavic argued that Southern's sale should not be used to measure its damages as Slavic had no notice of Southern's intention to resell and no opportunity to protect its interests. This evidence and accompanying argument was also rejected and the Court entered judgment on behalf of Southern against Slavic for $60,000.

Slavic appealed on the grounds that

(a) the court improperly refused to consider evidence as to the custom or usage of the trade and the course of dealing between the parties, and

(b) that the Court improperly rejected Slavic's evidence as to market conditions after the sale.

How should the Supreme Court of Virginia rule on (a) and (b)?

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2. Bea Careful, a resident of Maryland, sued the Metropolitan Dairy Corporation, a Delaware Corporation with principal offices in the District of Columbia. The suit was brought in the United States District Court for the District of Columbia, and demanded $200,000 in damages arising out of an automobile accident which occurred in Virginia. The complaint included a claim for certain damages which were not recoverable in Virginia but could be recovered in Maryland. Defendant moved to transfer the case to the United States District Court for the Eastern District of Virginia, under the forum non conveniens doctrine, because most of the important witnesses were residents of Virginia. Its motion was granted.

Defendant also moved to dismiss the plaintiff's claim as to those damages not recoverable in Virginia. The plaintiff urged the Court to deny the motion and argued that the law of the original forum, the District of Columbia, was applicable which applied the rule of the most significant governmental interest in choice-of-law cases. Under that law, Maryland had the most significant governmental interest in this litigation. Accordingly, Maryland law should be applied, and her claim should be allowed. The Defendant argued that the United States District Court for the Eastern District of Virginia should apply the law of Virginia, the situs of the accident. How should the court rule on the motion to dismiss?

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3. Paul Preppy, a recent college graduate, was given $5,000 cash as a present from his parents which he deposited in an account in his name at the Empire Savings & Loan Association in Emporia, Virginia. Paul decided to buy a 1982 Honda automobile from First Class Motor Company, a used car dealer in Emporia, for $3,500. First Class agreed to sell the Honda to Paul and to give him immediate possession upon the condition that payment be made in cash or by a bank check. Paul went to Empire Savings & Loan and, upon execution of a withdrawal application in the amount of $3,500, Empire drew a check on its account with ABC Bank in that amount payable to First Class Motor Company and gave the check to Paul. Paul took the check and delivered it to First Class whereupon First Class gave Paul possession of the Honda. First Class then deposited that check to its account in XYZ Bank.

Paul left on the day that he took possession of the Honda for a trip to Virginia Beach, but after driving about 50 miles, the Honda broke down because of a defect in the transmission. He called Empire, explained the problem, and asked Empire to stop payment on the check. Empire, in turn, directed ABC Bank to stop payment on the check. Paul then called First Class and told it that he did not want the Honda after which he had it towed back to the First Class Motor Company's used car lot.

When XYZ Bank presented the check to ABC Bank for payment, it was returned to XYZ marked "payment stopped" whereupon XYZ immediately notified First Class of the stopped payment and that $3,500 had been deducted from its account at XYZ.

First Class comes to you and asks whether it has an enforceable claim for $3,500 against:

(a) XYZ Bank

(b) Empire Savings & Loan.

How should you advise First Class?

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4. On July 4, 1982, while leaving a fireworks display at a municipal park in the City of Portsmouth, Virginia, George Goodtime ran into a parked city police car and damaged it to the extent of $2,200. The police chief referred the matter to the City Attorney's Office where it was assigned to Bob Barrister, an assistant city attorney. A couple of weeks later, Barrister was appointed to a judgeship, and the matters he was handling were divided among the remaining assistant city attorneys. Unfortunately, the file relating to the Goodtime claim was mixed in with files of matters that Barrister had completed, and was put into storage with those old files rather than being given to an attorney for handling.

In February 1988, a clerk was going through the old files to see which of them could be destroyed and came upon the Goodtime file. She immediately took it to the City Attorney who instructed Sam Solicitor, a new assistant, to try to collect on the city's claim.

Solicitor immediately filed suit against Goodtime. Recognizing that the city might have a statute of limitations problem and hoping that Goodtime would not notice, Solicitor alleged that the accident took place on July 4, 1984. Goodtime did, however, notice the incorrect date and in his responsive pleadings he denied that the accident occurred on July 4, 1984, affirmatively alleged that it occurred on July 4, 1982, and then filed a plea that the action was barred by the statue of limitations. At the oral argument on the plea, Solicitor admitted that the accident had occurred in 1982, but urged the court to overrule the plea of the statute of limitations on the ground that the statute could not be invoked against the city under the doctrine of sovereign immunity.

At the argument, the judge asked Solicitor why he had initially alleged that the accident occurred in 1984, and whether he had acted improperly in making that allegation. Solicitor replied that he did so to fulfill his ethical duty as an advocate to represent zealously the interests of his client, the city, and that it was up to Goodtime's lawyer, in representing the interests of his client, to check the accuracy of the allegations and to deny any that he found to be incorrect. He further told the judge that, in his opinion, his actions were entirely proper under our adversary system of justice. Solicitor added that he could have responded to the question by stating that the allegation of the incorrect date was an inadvertent error, but it would have been clearly improper for him to make such a misrepresentation to the court even though there would have been no way to dispute it.

(a) How should the Court rule on the plea of the statute of limitations?

(b) Were Solicitor's actions justified under the Virginia Code of Professional Responsibility?

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5. Ed Easy, Fred Fox and Gina George, each recently admitted to the bar in the Commonwealth of Virginia, formed a partnership to engage in the practice of law in Bedford, Virginia. They determined that each should put up $50,000 to use as working capital. Easy had just inherited a substantial amount of money so he deposited $50,000 of his personal funds to the partnership bank account in the Bedford National Bank. Fox borrowed $50,000 from his bank evidenced by a personal note signed by him and his wife and deposited the proceeds in the partnership bank account.

George went to her old friend, Helen How, and told her that the partnership of Easy, Fox and George had just been formed and that it needed to borrow $150,000 to help with start-up costs. George told How that Easy, Fox and George had each agreed to undertake to borrow $50,000 on behalf of the partnership, that Easy and Fox had each already done so, and that she (George) hoped that How would lend the partnership $50,000. How readily agreed because she thought highly of all three lawyers, but she also was aware that Easy was independently wealthy. How wrote a check payable to Easy, Fox and George, attorneys-at-law, in exchange for which George delivered a note payable to How on demand for $50,000 with interest at the rate of 9% per annum. Unknown to Easy and Fox, the note to How was signed "Easy, Fox & George, by Gina George, Partner." George then deposited How's $50,000 check to the partnership account in the Bedford National Bank.

About six months later, George decided that she did not like practicing law and, without notice to Easy and Fox, abruptly left Bedford and moved to Australia to raise sheep. When How learned of this, she became concerned and called upon Easy and Fox to pay the note. After explaining to How that George had no authority to sign the note on behalf of the partnership, and that they had no knowledge of it, Easy and Fox refused to pay How.

(a) Is the partnership obligated to pay $50,000 to How?

(b) If George had told How that the $50,000 to Easy, Fox & George was to be used by the partnership to buy an equity interest in the building in which the law firm had its offices, would the partnership be obligated to pay $50,000 to How?

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6. David Director, a lawyer who has a general practice in Short Pump, Virginia, was elected as one of the five directors of Moola Corporation, a Virginia corporation, because David's wife, to whom he had been married for about three months, owns 30% of the outstanding stock of Moola. Moola was engaged in the business of owning and operating a very successful farm machinery business and had been in that business for about 75 years. At the first board meeting he attended, David was asked to vote on a proposal under which Moola would buy a drive-in frozen custard operation for $250,000.

Harry Highpower, the longtime Chairman of the Board, President of Moola, and a 60% stockholder, whom David met for the first time at that meeting, reported that the purchase had been recommended by a committee of the board which had been appointed to study the proposed acquisition. Highpower stated that a 100 page written report of the committee had previously been distributed to the members of the board for their consideration. David had not received a copy of that report.

Highpower then asked for a motion to approve the acquisition which was promptly made by Sam Sycophant and seconded by Mike Metoo, both of whom are Vice Presidents of Moola and cousins of Highpower. They were the only members of the committee appointed to study the acquisition.

The fifth director, Angus Absent, was not present at the meeting. Highpower then asked if there were any questions or if there was any discussion on the motion. Being somewhat shy and not wanting to appear presumptuous at this first meeting, David asked no questions and did not see or ask to see the report referred to by Mr. Highpower. The motion was then approved by the unanimous vote of the directors present, including David.

Two days later, Sarah Stockholder, who owned 10% of Moola stock, confronted David at his law office and complained of the action of the board. She advised David that the frozen custard business was owned by Highpower's son, was on the verge of bankruptcy, and that she was going to bring suit against the directors for breach of their duties to Moola. She then stormed out of David's office.

David, somewhat shaken, calls you, a law school classmate who practices corporate law with a large Richmond firm, and asks you the following questions:

(a) Does Sarah's claim have any merit?

(b) If Sarah Stockholder were to institute suit, who would have the burden of proof with respect to whether Director had acted properly?

How would you advise David?

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7. You are a partner in the Lynchburg, Virginia, firm of Able and Baker. A substantial amount of your practice is defense litigation for insurance companies. On Friday afternoon you receive a telephone call from an adjuster for an insurance company that you do not regularly represent. He advises you that the company's regular attorneys are presently overburdened and cannot respond in time to meet its needs. He tells you that he needs a written legal opinion on the liability aspects of a very serious personal injury claim that has not yet gone into litigation. He says that he has no details about the facts of the case because the file is presently in the home office in Ohio but that he will have it shipped to you by express carrier with the hopes that you can give the Company a written opinion promptly. He says that the insurance company is particularly interested in knowing how strong a contributory negligence defense the company will have when suit is brought as expected, since the accident happened in a parking lot.

On Saturday morning your partner, Charlie Able, who does criminal defense work and plaintiff's litigation, receives a telephone call from William Wounded who reports that he has been a patient in the University of Virginia Hospital for the past seven weeks following an automobile accident in which he was seriously injured. He tells your partner that the accident occurred in a parking lot in Lynchburg where he was run over by an automobile driven by a person who was then intoxicated. He advises that both of his legs and pelvis were broken, that he had a serious fracture of his skull and was in a coma for about three weeks. He is quite anxious to retain a successful plaintiff's lawyer in Lynchburg to "sock it to that insurance company."

At a nine o'clock Monday morning firm meeting where new business is regularly discussed, you and your partner, Able, exchange the foregoing information. At 10:00 a.m. a package arrives in your office by Federal Express with an indication on the cover that it has come from Thomas Turner at the ABC Insurance Company in Cleveland, Ohio. Without opening the package you call Mr. Turner and ask him whether or not the name of the anticipated plaintiff is William Wounded. He states that indeed that is the plaintiff's name and that the insurance company is very concerned about the case. You advise Mr. Turner that before you can tell him what you are going to do you must confer with one of your partners and that you will call him back.

(a) Is there any action your firm can take to be able to represent the insurance company?

(b) Is there any action your firm can take to be able to represent William Wounded?

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8. T. S. Tator died peacefully in his home in Orange County, Virginia, on March 25, 1989. Tator was survived by his daughters Abigail, Beverly and Charlotte. Abigail, being the eldest and the most responsible of Tator's heirs, took it upon herself to gather up her father's important papers and take them to the local lawyer, A. L. Ford.

After spending several days going through the 15 shoeboxes of important papers which Abigail had brought him, Ford identified and extracted 3 documents which appeared to be wills. The first document had been prepared in Ford's office, and he recognized it as the will which he had prepared for Tator in 1987. Following Ford's normal format, the will in its initial clause revoked all previous wills made by Tator. On the third page of the will Ford noticed that it had been signed by Tator on April 15, 1987, and, after an attestation clause, it was witnessed by Ford's secretary, Miss Prim, but the second witness line bore no signature and was left blank. Quickly searching his memory, Ford recalled having been present in the room when the will was executed along with several other people, but he could not explain why there was no signature by a second witness.

Wiping his brow, Ford next looked at the second testamentary document. It was also prepared in Ford's office and, like the 1987 will, its initial clause revoked all previous wills. This will had been executed in 1982. There was a large red X across each of the three pages of the will, and the word "Revoked" was written at the upper right-hand corner of the first page.

On the blue backing covering the will, Ford spied the following notation in Tator's handwriting in red ink:

"4/15/86

Go back to 1956 version.

T. S. Tator"

The third will had been executed by Tator in 1956 in New York, where he had lived before retiring and coming to Virginia. The will was properly executed, but its dispositive scheme was decidedly different from that of the two later versions. Abigail shrieked when she saw the specific bequest in the will of the family heirloom mergatroid ball to her sister Charlotte, and she recounted to Ford the stir that had been caused in the family when their father made a gift of the mergatroid ball to Abigail in 1987.

Ford is thoroughly confused and calls you on the telephone. How do you answer his questions?

(a) Is the 1987 will valid?

(b) Is the 1982 will valid?

(c) Is the 1956 will valid?

(d) Since Ford was in the room and actually witnessed Tator signing the 1987 will, what would be the effect if he now added his signature as an attesting witness?

(e) Who gets the mergatroid ball?

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9. John Thom owned Greenacre, a 100-acre cattle farm in Page County, Virginia. His farm adjoined land owned by Page Quarry Inc., a working rock quarry, with a common boundary 4200 feet in length. In 1972 Bill Stone, president of Page Quarry Inc., offered John $5,000 for a 100-foot wide strip along their entire common boundary. Bill proposed to build a haul road to the rear of the quarry property and offered to plant trees along the way as a screen. Not anxious to sell, John demanded $15,000 for the strip of land which Bill reluctantly agreed to pay in exchange for John's promise to construct and maintain a fence along the new common boundary adequate to keep John's cattle from coming onto the quarry property. John agreed to this provision and the deed of conveyance, a general warranty deed signed under seal and dated June 1, 1973, contained John's convenant to build and maintain the fence with the added language "this convenant shall run with the land." Page Quarry Inc. promptly constructed the haul road and planted the trees within the strip purchased from John. John never built the fence and no demand was ever made that John do so. In 1984 John sold Greenacre to Sam Sorry. He gave Sam a general warranty deed which contained the following: "This deed is subject to all covenants, restrictions, and easements of record." In 1985 the quarry property was sold to Virginia National Quarries Inc. by a deed from Page Quarry Inc. Virginia National became concerned that the fence had never been constructed and promptly demanded that Sam undertake

the requirement of the covenant. Sam did not build the fence and in 1988 his prize bull "Boniface" wandered onto the quarry property and was killed by a quarry truck on the haul road. Sam filed an action against Virginia National to recover for the loss of his bull to which Virginia National filed a response alleging that Sam's predecessor in title had waived any claims resulting from a failure to fence in the cattle as required. Virginia National also filed a bill of complaint against Sam seeking specific performance of the covenant to build the fence to prevent any future losses.

(a) Does Virginia National have a valid defense to the damage action on the grounds stated?

(b) Does Virginia National have an enforceable right to specific performance of the covenant to build the fence?

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10. Michael Mason, a resident of Winchester, Virginia, provided in his will that his executor and trustee, First Bank of Winchester, divide his entire estate into two equal shares. One share was to be held in trust for the benefit of the minor children of his only nephew, William. When the youngest reached 35 years of age the trust assets were to be paid to the two beneficiaries equally. Until then the income of this trust was to be used by the trustee for the education of the beneficiaries. The other share of Michael's estate was to be held by the Bank in trust, the income therefrom to be paid to Valley Memorial Hospital, one of the city's two not-for-profit hospitals, to support medical research at a diabetes clinic. Michael died in 1986. His nephew, William, was his sole heir at law. In 1988 Valley Memorial Hospital went out of business. Its assets were purchased by a private health management organization, and was reopened as a clinic in early 1989 to be operated for profit. The diabetes clinic at Valley Memorial was closed permanently. The trust officer of First Bank advises you that he has received a written demand from William's lawyer asking that the Bank pay over to William the entire balance of the Valley Memorial trust fund, amounting to $500,000, on the grounds that the trust has terminated. The trust officer also tells you that he recently learned that Winchester Community Hospital, the other not-for-profit hospital in town, has announced a critical need for funds to support its cancer clinic research program.

What do you advise?

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