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VIRGINIA BOARD OF BAR EXAMINERS
Richmond, Virginia

FIRST DAY

June 24-25, 1963

SECTION ONE

QUESTIONS

1. Oliver Lam, a war veteran, graduated from law school and was admitted to the bar of Virginia. He believed that the current economic boom was beginning to fade and that creditors' rights presented a promising field of practice for a young lawyer. After practicing alone for one year and without many clients, Lam concluded that a partnership would be desirable, and he initiated conversations with Clarence Richman, a successful collection attorney. Before negotiations had progressed very far, Richman died, and his widow qualified as executrix of his estate. Knowing of Lam's interest, Mrs. Richman proposed the sale to him of her late husband's good will, all files, accounts receivable and law practice for \$3,000 cash or for 10 per cent of the future receipts from Mr. Richman's clients for a period of five years.

Can Lam ethically accept the widow's proposal in either form?

2. Brand, an Illinois citizen, was injured in Bath County, Virginia, by a motorist named Titus, a citizen of Kentucky. Brand brought an action in Kentucky against Titus for the recovery of damages for his personal injuries. The action was instituted in Kentucky more than one year after the accident and the statute of limitations for such action in Kentucky was one year. Upon a plea of the statute of limitations filed by Titus, the action was dismissed. Subsequently, but within two years from the date of the accident, an action was instituted by Brand against Titus, in the Circuit Court of Bath County to recover damages for his injuries. Titus filed a plea of res adjudicata.

How should the Virginia court rule on the plea?

3. Frances Royal obtained a judgment in the Corporation Court of the City of Charlottesville against Cling Peach, in the amount of \$10,000 for personal injuries sustained by her when struck by an automobile owned by White Heath and operated by Cling Peach. As Cling Peach was worthless, Frances Royal sued Rocky Mount Automobile Insurance Company to recover the amount of the judgment. The public liability policy issued by that company to White Heath provided that the word "insured" as used in the policy included not only the named insured, but also any person using the automobile with the permission of the named insured. During the trial of the action against the Insurance Company, Frances Royal offered to testify that, while she was in the hospital following the accident, Cling Peach called on her and told her that Heath had loaned the car

to him and that he was operating the vehicle at the time of the accident with the permission of Heath. Counsel for the Insurance Company objected to the introduction of this evidence.

How should the court rule?

4. Buck Wheat and John Barley owned adjoining farms. As Barley had a heavy crop of hay he decided to purchase a second-hand hay baler. Casting about in search of a baler that would suit his purposes he found that Wheat had just the right baler for him. Whereupon, Barley purchased the baler from Wheat. Shortly after Barley took possession of the hay baler, Timothy Hay called upon Barley to deliver the baler to him, claiming that he owned the equipment and that he had lent it to Wheat. Barley promptly advised Wheat of Hay's demand and he was assured by Wheat that he had given to Barley good title to the equipment. In an action by Timothy Hay to recover the hay baler from John Barley, Hay offered to prove by Seed Corn that he, Corn, had tried to purchase the hay baler from Buck Wheat before its sale to John Barley, and that Wheat told him that the hay baler belonged to Timothy Hay and that he would have to talk to him about purchasing it. Counsel for John Barley objected to the introduction of this evidence.

Is the evidence admissible?

5. In an action at law pending in the Circuit Court of Augusta County, Virginia, E. Z. Hopalong sought to recover damages from Hank Salmon for an alleged breach of warranty. After the parties were at issue plaintiff served upon defendant a written notice that he would take the deposition of William Stout, a resident of Augusta County, at a fixed time and place. Stout was actively engaged in business in Augusta County and had knowledge of facts material to the issues in the case. Upon receiving the notice counsel for defendant inquired of counsel for plaintiff his purpose in taking the deposition and he was advised that his intention was to commit Stout to answers under oath so that he could use the deposition for cross-examining him at the time of trial. Counsel for defendant strongly desires to prevent the taking of the deposition.

(1) By what procedure may counsel for defendant object to the taking of the deposition?

(2) Does defendant have grounds upon which to successfully oppose the taking of the deposition?

6. Gladys Honeywell sued West Lake Hospital, Inc., a non-charitable corporation, in the Circuit Court of Brunswick County, Virginia, to recover damages for personal injuries alleged to have been sustained by her while she was upon the hospital premises visiting her mother, a patient in the hospital. In her motion for judgment plaintiff charged that the defendant was negligent in the

following particulars:

- "1. The maintenance of a step in the hospital in a defective and dangerous condition;
- "2. Failure to keep the steps properly lighted; and
- "3. Failure to have hand rails on the steps which could be used by the plaintiff when descending the stairs."

Defendant filed the following responsive pleading:

"Defendant assigns the following grounds of defense:

- "1. Defendant denies it maintained a step in the hospital in a defective and dangerous condition;
- "2. Defendant denies that it failed to keep the steps properly lighted;
- "3. Defendant denies that it failed to have hand rails on the steps which could be used by the plaintiff when descending the stairs."

During the trial of the case plaintiff offered evidence to prove the averments contained in her motion for judgment and rested. Defendant then offered to prove by the superintendent of the hospital that plaintiff, while walking down the steps with very high heels, was talking to a companion, that she did not look where she was going, and that her ankle gave way because she stepped too close to the edge of the steps thus causing her to fall. Counsel for plaintiff objected to the introduction of this evidence.

Is the evidence admissible?

7. In an action pending in the United States District Court for the Western District of Virginia, Herdsman, a citizen of Texas, sought to recover from Rancher, a citizen of Virginia, \$20,000 as the purchase price of cattle shipped pursuant to a contract dated April 1, 1963. Rancher filed an answer averring payment of the purchase price, and he also filed a counterclaim for the recovery of \$5,000 for an alleged breach of an express warranty respecting that shipment of cattle. Rancher filed another counterclaim to recover damages in the amount of \$4,000 for an alleged breach of a written contract for the sale of other cattle, such contract bearing date November 15, 1962.

Herdsman consults you and inquires whether Rancher may properly assert his counterclaims in this action.

What should you advise him?

8. Joe Skeeter was tried in the Circuit Court of Halifax County, Virginia, upon an indictment charging burglary. At the conclusion of the evidence offered by the Commonwealth the accused, by counsel, moved the court to strike the evidence of the Commonwealth on the ground that the accused had not been identified as the person committing the alleged offense. The motion was overruled and exceptions duly noted. Skeeter offered no evidence in his defense. The jury returned a verdict of guilty and fixed the accused's punishment at a term in the penitentiary. After the discharge of the jury, counsel for the accused moved the court to set aside the verdict as contrary to the law and evidence, and the court fixed a later date to hear argument on the motion. Before hearing argument on the motion, counsel for the accused obtained a transcript of the testimony and all incidents of the trial and upon a careful study of the transcript he found that there was no evidence offered by the Commonwealth showing that the alleged offense had been committed in Halifax County. Promptly, counsel for Skeeter filed written grounds of his motion to set aside the verdict, one of which was that the Commonwealth had failed to establish venue by proving that the offense had been committed in Halifax County.

How should the court rule on this ground of the motion?

9. On the evening of May 1, 1963, Frank Cox visited John Waters in his spacious residence in the City of Richmond, such residence having a fair market value of \$95,000. Waters was an elderly bachelor. During the visit Cox falsely informed Waters that he was the son of Hiram Cox, a wealthy old college classmate of Waters whom Waters had not seen for many years. In fact, Frank Cox was not the son of Hiram Cox but was a person of bad reputation and of no financial worth. Waters, relying on the statement of Cox, agreed to sell him the residence for \$50,000 and to receive in exchange therefor Cox's unsecured promissory note in like amount payable six months after date. On May 3rd Waters executed and delivered to Cox a deed conveying to him the residence, and received from Cox the latter's promissory note for \$50,000. Shortly thereafter Cox duly recorded the deed. Waters, having now learned the true facts, has brought a suit against Cox in the Law and Equity Court of the City of Richmond seeking a rescission of the transaction. He expresses to you his fear that, before the suit can be finally determined, Cox may convey the property to some unsuspecting person and thus defeat the rights of Waters.

Waters asks what he might quickly do to preserve those rights. What should you advise him?

10. In May of 1963 David Street entered into a written contract by the terms of which he agreed to sell to Robert Forest a residence owned by him in the City of Danville. The residence was one in a "row" of houses, each being quite similar to the others and the majority being for sale at the same price for which Street had agreed to sell to Forest. Shortly thereafter Forest informed

Street that he refused to make the purchase. Thereupon Street brought a suit for specific performance against Forest in the Corporation Court of the City of Danville. After Forest had filed his answer denying liability, the court heard evidence ore tenus and entered an order finding that Street had an adequate remedy at law and directing the transfer of the case from the equity side to the law side of the court for the impaneling of a jury to assess damages. No decision has yet been made on the question of damages. Street, much upset by the action of the court, inquires of you whether he may, at this stage of the proceeding, undertake an appeal to the Supreme Court of Appeals.

What should your advice be?

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VIRGINIA BOARD OF BAR EXAMINERS
Richmond, Virginia

FIRST DAY

June 24-25, 1963

SECTION TWO

QUESTIONS

1. James Ash interested several prominent citizens of the City of Richmond in forming and operating a corporation to engage in the manufacture of pre-fabricated dwellings, the corporation to be known as Pre-Fab, Inc. Before the corporation was created, and without the knowledge of its future incorporators, Ash prepared a written agreement by the terms of which Thrifty Floors, Inc. agreed to sell to Pre-Fab, Inc. 20,000 linear feet of oak flooring during the year 1964. This agreement was executed on May 1, 1963 by Thrifty Floors, Inc. and by Ash signing "on behalf of Pre-Fab, Inc." During the month of May, Thrifty Floors, Inc., relying on the agreement, purchased and stored in its warehouse large quantities of oak flooring. On June 20th, Pre-Fab, Inc., became incorporated and, at the first meeting of its Board of Directors held on the morning of June 21st, it was moved and seconded that the agreement with Thrifty Floors, Inc. be ratified. Such motion was unanimously carried.

However, having now learned that suitable oak flooring can be bought at a substantially lower price from a competitor of Thrifty Floors, Inc., Pre-Fab, Inc., inquires of you whether it must perform the agreement with Thrifty Floors, Inc.

What should you advise?

2. Susie Adams and Tommy Ball were engaged to be married. Both Mr. Call, an old friend of the Adams family, and Mr. Dent, an old friend of the Ball family, were delighted with the engagement, but felt that as Tommy Ball would be required to continue his schooling for the next few years some funds should be paid the couple for their support. Accordingly, on the day of the marriage, and to the delight of Susie and Tommy, Mr. Call and Mr. Dent entered into a written contract by the terms of which Mr. Dent agreed to pay Tommy the sum of \$1500 during each of the succeeding four years, and Mr. Call agreed to make similar payments to Susie. On the next day, and before any payment had been made, Mr. Call and Mr. Dent altered their views and decided they should not contribute to the support of Susie and Tommy for fear it might prevent their acquiring a feeling of self-reliance. Thereupon Mr. Call and Mr. Dent wrote at the foot of the contract:

"This contract mutually rescinded. June 21, 1963.

(s) Charles C. Call

(s) Dan D. Dent"

Susie and Tommy have just learned of this endorsement to rescind, and Tommy asks you whether he may sue Mr. Dent for breach of contract, and whether Susie may sue Mr. Call for breach of contract.

How should you answer each of these questions?

3. On April 1, 1963 Irvin Dodd of the City of Petersburg wrote and mailed the following letter to Paul Pate, a bachelor of the same City:

"May 1, 1963

"Dear Paul:

"You will recall our conversation of last Tuesday evening in which we discussed my buying your residence at 1001 E. Sycamore Street. I have decided to make the purchase and so I offer you \$25,000 for the house and lot, conveyance and settlement to be made within thirty days.

"Unless I hear otherwise from you on or before May 15th, I shall definitely consider the deal closed and the house and lot mine.

Sincerely,

(s) Irvin Dodd"

On May 20th Pate telephoned Dodd and stated he accepted Dodd's offer. Dodd replied he had on May 17th decided to withdraw the offer and had agreed to buy property adjoining that of Pate. On June 15th Pate brought a suit for specific performance against Dodd in the Circuit Court of the City of Petersburg.

Dodd now consults you, recites the foregoing facts, and inquires whether he may effectively plead the Statute of Frauds in defense to the suit.

What should you advise him?

4. Alfred White took his antique china cabinet to "Carter's Fix-It Shop" for repair. The Shop was owned and operated by Tom Carter as sole proprietor. Two weeks later, White having been telephoned by Carter that the repairs had been made, went to the Shop to obtain the cabinet. Carter told White he could not let him have the cabinet until he paid him the \$136 repair charge. Although White felt that the charge was fair, he told Carter that he was very short of funds and could not then pay the charge and asked whether Carter would let him take the cabinet on credit. This Carter refused to do and told White that he must pay the charge within the following month. With that White became quite angry and left the establishment. White not having paid during the following month, Carter thereafter showed the cabinet to Arthur Creech who bought it at the reasonable price of \$1500. Carter mailed his

check for the balance of \$1364 to White. When White received Carter's check, he did not cash it, but came to see you and inquired whether he could compel Creech to surrender to him possession of the cabinet.

What should your advice have been?

5. On April 20, 1963, a widower, James Jones, executed and delivered a deed which recited the conveyance to Sam Smith with general warranty of title a tract of timber land situated in Fluvanna County. Simultaneously Jones received from Smith the latter's certified check for \$10,000 in payment of the agreed price. Smith at once had the deed properly recorded. Unknown to Smith, at the time of the transaction the property was not owned by Jones but by Rufus Bott. On May 14th, Bott properly conveyed the property to Jones. On May 21st, Jones duly executed and delivered to Thomas Huntley a deed to the property, Huntley paying the agreed purchase price and not knowing of the prior transaction between Jones and Smith.

You are now consulted by Smith who informs you of all these facts and asks you (a) whether he may have the deed from Jones to Huntley set aside, and (b) the nature of the rights, if any, he may have against Jones.

What should you advise him?

6. Herbert Homer died in 1949 leaving a holographic will which was duly probated and which provided:

"November 4, 1946

"This is my last will.

1. I name my son Jerry Homer to be the Executor of this will and I direct him to pay all my debts promptly after my death.

2. I devise my residence at 1212 Clayton Street in the City of Richmond to my friend Arthur Brown for life and on his death to his son Paul Brown in fee simple should he then have become twenty-one years of age.

3. All the rest of my property I leave absolutely to my son Jerry.

(s) Herbert Homer"

Paul Brown became twenty-one years of age on September 10, 1959. On February 12, 1960 he married Sarah Brent. Paul died on October 1, 1960 leaving surviving him only his widow Sarah and his father Arthur Brown. Arthur Brown died on May 30, 1963.

A contest has now arisen between Jerry Homer and Sarah,

each claiming title to the residence in the City of Richmond.

Which should prevail?

7. On March 1, 1963, Winchester Feed Company entered into a contract to sell 100 bags of #2 turkey feed to Harrisonburg Poultry Company at \$15 per 100 lb. bag. The contract provided delivery to be made by truck to Harrisonburg late in March. On March 25th, Feed Company dispatched their truck to Harrisonburg for delivery of the feed. However, upon arrival at Harrisonburg, the Poultry Company refused to accept delivery from the truck driver, and ordered him to return the feed to Winchester. The driver immediately returned to Winchester with the feed and a letter from Harrisonburg Poultry Company, which read as follows:

"March 25, 1963

"To Winchester Feed Company

We will not accept this order. The drastic action of the European Common Market has created a crisis in the turkey market, and the price of turkey feed has dropped substantially.

(s) Harrisonburg Poultry Company."

What remedies, if any, are available to Winchester Feed Company?

8. John Lord was the owner of a warehouse in the City of Newport News. The warehouse was quite old and badly in need of repair. On January 2, 1963 Lord leased the building to Ben Tate for a term of four years at a low rental. A provision of the lease obligated Tate to place the building in safe condition by repairs to be made within a period of three months. On April 10th Lord visited the building and, seeing that Tate had not made the repairs required of him, stated that he must do so within the next thirty days or face eviction. Tate promised faithfully to make the repairs. However, by May 26th no repairs had been made and on that day while Frank Jones was carefully driving his automobile in a public alley alongside the building a cornice of the building broke loose, fell upon the automobile, and seriously injured Jones.

Jones now consults you, reciting the foregoing facts. He inquires what rights of action, if any, he might have (a) against Lord, and (b) against Tate.

What should your advice be?

9. Jerry, an infant patient in Disabled Children's Hospital, a charitable corporation of Bedford, was fatally burned due to the negligence of a night nurse who was an employee. Frank Walton, the father of Jerry, upon hearing of the fatality raced to the hospital late at night, and on entering the hospital fell into an unlighted elevator shaft and suffered serious personal injuries.

Shortly thereafter, Walton filed two motions for judgment in the Circuit Court of Bedford County against the Hospital. The first, as Administrator of Jerry Walton, was for his wrongful death, and the second was for his own personal injuries caused by falling into the elevator shaft.

In each case, the Hospital filed identical defenses, viz. that the Hospital was a charitable institution and was not liable for the negligence of its employees.

In both trials, the uncontradicted evidence showed that the Hospital had exercised due care in the selection and retention of its employees, but in each instance there was clear evidence that due care had not been exercised by the defendant's employees. In each case, the jury rendered a verdict for the plaintiff.

The attorney for the defendant Hospital has moved to set aside each verdict on the ground of charitable immunity.

- How should the court rule on the motion to set aside
- (1) in the action for wrongful death of Jerry Walton; and
 - (2) in the action for the personal injuries to James Walton?

10. Bill Careless operated his truck in a westerly direction on Route 7 in Clarke County, Virginia. Noticing a friend plowing corn in a field to his right, Careless parked his truck with the left wheels standing on the traveled portion of the west-bound lane, and walked into the field to converse with his friend.

John Bull, while traveling in a westerly direction on the same road and when he was approximately 500 feet to the rear of the parked truck, observed the approach of an automobile traveling in an easterly direction and operated by Sally Prudence. As Bull approached the parked truck he applied his brakes, but as they were not in proper adjustment, a fact known to Bull, he was unable to bring his car to a stop. Although Bull reduced his speed, his automobile swerved slightly to the left and struck the corner of the parked truck. Losing control of his car, Bull's vehicle collided with the automobile driven by Sally Prudence at a point 100 feet west of the parked truck. Sally Prudence was injured and sued both Careless and Bull in the same action to recover damages.

In the trial of the action the foregoing facts were proved by Sally Prudence. When the plaintiff rested her case, each defendant moved the court to strike plaintiff's evidence.

How should the court rule on each motion?

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