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VIRGINIA BOARD OF BAR EXAMINERS
Richmond, Virginia

FIRST DAY

December 14-15, 1964

SECTION ONE

QUESTIONS

1. (a) Jasper Hickory was indicted upon a charge of murder. He employed a local attorney, John C. Lawyer, to represent him. Lawyer conferred at length with his client and made a careful investigation of the facts. Hickory insisted at all times that he was not guilty, and that he was in fact not present at the time and place of the killing. The Commonwealth was relying strongly upon the testimony of Joe Bean, a close relative of the deceased, who said that he had seen Hickory shoot and kill the deceased. Hickory insisted that he was at home, but that as he lived alone he had no evidence to corroborate his statement. Lawyer finally concluded that his client was guilty.

May Lawyer continue to represent Jasper Hickory? ^{Yes}

(b) In the case stated under paragraph (a) of this question, assume that Jack Swindle told the Commonwealth's Attorney that, at the time of the killing, he saw Joe Bean in another town thirty miles from the place where the killing occurred. The Commonwealth's Attorney knew that Swindle had a questionable reputation for truth and veracity, and he did not believe him.

Under the circumstances, was there any duty on the part of the Commonwealth's Attorney to advise Lawyer of Swindle's statement? ^{No}

2. Goodbidder Construction Corporation, a Virginia corporation, was engaged in construction work in Tennessee pursuant to a contract with Owner. During the progress of the work, Sourgrapes Construction Company, a Virginia corporation with its principal office in Richmond, which had been an unsuccessful bidder on the job, committed certain tortious acts on the job site which directly interfered with Goodbidder's completion of its contract with a resultant loss to Goodbidder. Goodbidder sued Sourgrapes in the Circuit Court of the City of Richmond, and the evidence established the liability of Sourgrapes. Among other damages, Goodbidder claimed out-of-pocket expenses for wages paid certain workers who could only stand by during the trouble and not work, and Goodbidder also claimed punitive damages.

Under the facts presented, Tennessee law would allow recovery of the "paid wage" claim but Virginia law would not, and Virginia law would allow recovery of punitive damages but Tennessee law would not.

In this action, is Goodbidder entitled to recover (1) the "paid wage" claim and (2) the punitive damage claim?

3. Not-At-Fault was a guest in an automobile that was in the process of making a left turn off the highway when it was struck from the rear by an automobile driven by Reckless. Reckless was driving at an unlawful rate of speed, failed to keep a proper lookout and failed to keep his automobile under proper control. When arrested by a State Trooper at the scene of, and immediately after, the accident, Reckless had a strong odor of alcohol on his breath, and was most unsteady on his feet.

In an action against Reckless for \$25,000 damages for personal injuries sustained by Not-At-Fault, Reckless admitted that he was legally responsible for the accident and for the injuries sustained by the plaintiff. Reckless objected when Not-At-Fault sought to have the State Trooper testify concerning evidence of his intoxication.

How should the trial court rule on the admissibility of this evidence?

4. Speedy was tried in the Circuit Court of Washington County on a charge of operating an automobile in a 45-mile per hour zone at 60 miles per hour as determined by radar. In laying the foundation for testimony based upon radar readings, State Trooper X testified for the Commonwealth that he was familiar with the operation of radar; that he, while working with Trooper Y, set up at the location in question a radar machine used by the Virginia State Police; that the State Police followed a regular procedure to test the accuracy of radar machines both before and after they had been put in operation at a particular point; that the procedure used was to set up the equipment and allow a short time for it to "warm up", after which one officer drove his automobile through the zone of operation at speeds of 70, 60 and 50 miles per hour while the second officer read the radar meter on the ground.

Trooper Y was in the hospital on the day of the trial. After X had testified as indicated above, the Commonwealth offered to prove by him that the standard procedure was followed immediately prior to Speedy's arrest; that after the radar machine had been set up and allowed to "warm up", he drove his automobile through the operation zone at speeds of 70, 60 and 50 miles per hour while Trooper Y observed those speeds on the radar meter; and that Trooper Y then drove his automobile through the zone at speeds of 70, 60 and 50 miles per hour, while he, Trooper X, read the radar meter. Speedy objected to this evidence.

Was it admissible?

5. Section 8 of the Constitution of Virginia provides in part that if an accused pleads not guilty, trial by jury may be waived "with his consent and the concurrence of the Commonwealth's attorney and of the court entered of record, * * *."

Johnston was indicted in the Circuit Court of Hanover County for murder in the first degree. He pleaded not guilty to the

indictment, and at the commencement of his trial Johnston, his attorney and the Commonwealth's Attorney stated orally in open court that they waived trial by jury. Thereupon, the case was tried and the Judge found Johnston guilty as charged. In so far as is pertinent here, the order of conviction recited "the court proceeded to hear and determine the case without the intervention of a jury, and thereupon found the defendant to be guilty of murder in the second degree." By a later order the court entered final judgment sentencing Johnston to imprisonment for a term of ten years.

May the order of conviction be attacked successfully by Johnston? *js*

6. A final judgment in favor of Defendant was entered June 25, 1962. On July 25, 1962, Plaintiff filed with the Clerk of the trial court notice of appeal and assignments of error. On August 27, 1962, counsel for Defendant accepted service of a notice that the transcript of the evidence would be presented to the trial court for certification on August 28, 1962. Although presented to the court on that day, the transcript was never presented to opposing counsel for his signature and was not signed at the end by counsel for all parties. The certificate of the trial judge was that the transcript "was tendered and signed by me within 70 days after final judgment."

Among the incidents of the trial the transcript contained the following which was assigned as error:

Question by Plaintiff's counsel:

"Q. Witness state what Defendant was doing when you first saw him?

"Defendant's counsel - 'I object'; the Court - 'Objection sustained'; Counsel for Plaintiff - 'Exception noted.'"

(1) Should the appeal be granted?

(2) If granted should this assignment of error be considered?

7. Pater, a widower, died intestate July 1, 1961, seized of a farm and leaving surviving him three children, Tom, Dick and Harry. For several years before his death Pater had entrusted the possession and management of the farm to Tom, who had operated it as if it were his own. Dick and his wife, by a written agreement dated July 10, 1962, contracted to sell Dick's interest in the land to Harry, but later Dick informed Harry that he had changed his mind and they wouldn't carry out the agreement. Tom continued in possession of the farm and in July, 1964, Dick brought suit for partition, making Tom and Harry parties. Process was served on Harry, July 8, 1964. On July 12, 1964, Harry consults you, tells

you the foregoing facts and asks you the following questions:

(a) May he in the present proceeding, and if so how, seek an accounting from Tom because of his management of the farm?

(b) May he, in the present proceeding, and if so how, secure an adjudication of his right to compel Dick and his wife to comply with the sales contract?

How ought you to answer these questions?

8. Plaintiff, a citizen of New Jersey, suffered personal injuries in Pulaski County, which is in the Western District of Virginia, when the automobile he was driving was in collision with one driven in a negligent manner by Defendant, a citizen of Florida. There was some evidence that Plaintiff was guilty of contributory negligence. Plaintiff instituted a civil action against Defendant in the United States District Court for the Western District of Virginia for \$25,000, alleging the diversity of citizenship. Defendant employs you to represent him, and asks whether he can be compelled to stand trial in the Federal Court.

(A) How and within what time should this question be raised?

(B) How ought the court to decide the question?

*Is it in a federal court?
No - wrong venue
no diversity*

9. Plaintiff, while driving his automobile, was injured in an accident that also involved three other motor vehicles operated by X, Y and Z. Thinking that he had a strong case against X and Y and at best only a weak case against Z, Plaintiff brought an action for \$15,000 for personal injuries in the Circuit Court of Augusta County against X and Y, charging each with negligence that proximately caused the accident. You are employed by Y, who does not like Z and who wants to be informed fully as to his rights. He is particularly interested in knowing which, if any, of the following claims Y may assert in the pending action against the parties named:

(A) His claim against Z for \$25,000 for personal injuries arising out of the same accident.

(B) His claim against the Plaintiff and X, or either of them, for \$25,000 for personal injuries arising out of the same accident.

(C) His claim against the Plaintiff and X, or either of them, for \$14,000 for personal injuries arising out of another accident.

(D) His claim against the Plaintiff on the latter's negotiable note for \$5,000 which is past due.

(E) His claim against the Plaintiff and X, or either of them, on an open account for \$2,000.

10. In a pending action by Smith against Daisy Dairy Corporation (hereinafter called "Daisy") in the Corporation Court for the City of Lynchburg for \$25,000 for personal injuries caused by the explosion of an ammonia compressor at Daisy's place of business in the City of Lynchburg, Daisy sought to take the deposition of Smith in order to ascertain the names and addresses of Smith's witnesses and to secure from Smith the contents of medical reports in his possession concerning his physical and mental condition. Smith opposed the taking of his deposition for any purpose and particularly with respect to the medical reports. His position concerning the medical reports was that they were privileged in that they were based upon a confidential relationship existing between physician and patient.

(A) What steps must be taken, and what must be shown, by Daisy to obtain an order requiring Smith to give a discovery deposition?

(B) May the order requiring the discovery deposition direct Smith to disclose the names and addresses of Smith's witnesses, and direct him to produce the medical reports?

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FIRST DAY

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SECTION TWO

QUESTIONS

NOTE

This Section contains some questions which involve the law of sales. In answering these questions you must state whether your answer is based on the law of sales presently in effect in Virginia, or on the uniform commercial code (U.C.C.) which will become effective on January 1, 1966. A correct answer on either basis will receive full credit.

1. Frank Dolan retained John East, a real estate agent, to find for him a suitable lot on which to erect a store building. East said: "I know the very lot for you, #105 Broad Street; it is well located and reasonably priced, the owner is anxious to sell, and the trade can be closed for \$5,000 plus my commission." Dolan replied: "I know the lot and will take it." A written memorandum agreeing to purchase the lot was signed by Dolan, and he gave East a check for \$100 to use in binding the bargain. On the date set for closing the transaction, East tendered Dolan a deed to the lot from himself and his wife and demanded the balance of the purchase price plus his commission. Dolan refused to accept the deed, assigning as his reason that until the tender of the deed he didn't know that East was the owner of the lot.

What are the respective rights of the parties?

2. Blanton recovered and docketed a judgment against Carmen for \$2,000. At that time Carmen owned a lot worth \$1,000 and no other property. A few months later Carmen sold this lot to Delman for \$900 cash. Blanton wrote Delman that he intended to subject the lot to the payment of his judgment; Delman wrote in reply: "If you will wait twelve months to do this, I will pay the judgment." Blanton agreed to delay proceedings for this period and at its expiration demanded payment from Delman, who refused to pay. Blanton has now brought an action against Delman on his promise to pay the amount of the judgment.

May he recover?

3. Retailer, of Roanoke, Virginia, owed Wholesaler, of Richmond, Virginia, \$5,000 that was past due. When Wholesaler demanded payment, Retailer wrote him: "I can't pay this now and I doubt that I can ever pay it because I am practically broke, but if you will take \$2,500 and cancel the debt, I will try to get it for you." Wholesaler, upon inquiry, found that Retailer's finances were in such bad condition that he might lose the whole debt so he wrote Retailer: "I accept your proposition, send me \$2,500 and I will call the account square." Retailer paid the \$2,500 but received no receipt or acknowledgment of it. About a year later, Retailer's affairs took quite a turn for the better and Wholesaler asks your advice as to whether he can now collect the balance of the debt.

How ought you to advise him?

4. Henry Brown, in consideration of natural love and affection, conveyed a storehouse and lot in Charlottesville to "Abel Brown and Ethel Brown, husband and wife, as tenants by the entireties, with right of survivorship as at common law." Several years later Lubin secured and docketed a judgment against Abel Brown, and later Abel Brown became insolvent. Lubin consults you as to his rights, if any, with respect to the storehouse and lot.

How ought you to advise him? *None*

5. Testator in Virginia devised "my farm to my wife, Jane, for her life, with remainder in fee to Sam my son by my first marriage." After the death of her husband, Jane consults you and asks the following questions:

(1) Who is liable for the taxes?

(2) Suppose mineral is found on the land, may I get the royalties on it?

(3) If I want to sell all the timber, may I do so?

(4) If I don't want to farm it may I just allow it to grow up in briars?

(5) Do I have to keep the buildings on the property insured?

How ought you to answer these questions?

6. Dealer desires to sell Hardup a TV set for \$900, payable \$300 cash, balance in six equal monthly installments and he asks you by what means he may secure, by lien on the TV set, the unpaid installments of purchase money.

What would you advise him to do?

*Could - Sale K
no necessary mention
under SEC laws
- 1000 -*

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How ought you to advise him? *None*

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What would you advise him to do?

*Could - Sale K
no records needed
with 300 cash
... ..*

signed? 2-20-7

7. Wholesaler wrote Dealer: "I offer you a carload of #1 potatoes at \$3.00 per cwt., f.o.b. Richmond." Dealer wrote: "Accept offer only if price is for potatoes f.o.b. Roanoke." *no record*

Wholesaler made no reply and Dealer several days later wrote: "I accept your offer of potatoes at \$3.00 per cwt., f.o.b. Richmond." *no effect of contract?*

Potatoes having advanced in price Dealer seeks your advice as to his rights, if any, against Wholesaler.

How ought you to advise?

8. On January 1, 1963, Weaver contracted with Bennett to sell to Bennett 800 bolts of canvas of a specified quality and grade for a price of \$4,000 with delivery by January 20. On January 5, Weaver furnished a sample of the material to Bennett and advised that he could ship the 800 bolts within five days. On January 7, Weaver received a letter from Bennett advising that the sample did not conform to the specifications and was unacceptable and Weaver should consider the order cancelled. On January 12, Weaver received a letter from Bennett advising that he, Bennett, was mistaken and that the sample was acceptable, so Weaver should ship the canvas immediately.

After receipt of this letter, Weaver was persuaded by Badran to sell to Badran his entire stock of this canvas, and this was done on January 14. Weaver then advised Bennett that the canvas could not be delivered since Bennett had cancelled the order. Bennett obtained canvas from another source at an additional cost of \$1,000 and, thereafter, brought an action against Weaver for \$1,000 damages.

Is Weaver liable to Bennett?

9. Otis, knowing that Clyde had worked for demolition firms for about a year as a laborer, contracted with Clyde to demolish two buildings on Otis' property. The contract provided that for \$2,500 Clyde would furnish all labor, machinery, and material, including explosives, and would be responsible for all details to accomplish the demolition in sixty days. Because of the slowness of the work, Clyde obtained a crane, never having used one before, and while using the crane and blasting some footings, one building was caused to fall and damage the adjoining building of Neighbors.

In an action by Neighbors against Otis and Clyde, it was shown that the work was done pursuant to the contract, with no direction and control by Otis, and that the negligence of Clyde, in fact, caused the damage.

Is Otis liable to Neighbors?

10. Sport had the gasoline tank on his automobile filled with gasoline at the Meek Oil Company. After traveling two miles, his engine quit, and he stopped his automobile opposite the Pristine Gas Company station. Attentive, an employee of Pristine, diagnosed the trouble as water in the gasoline and, at Sport's insistence, agreed to drain the eighteen-gallon automobile tank by using a six-gallon tire-testing tank. When it was apparent that the gasoline was draining very slowly, Sport became impatient and increasingly angry and insisted on going back to Meek Oil Company to make complaint. After repeated urging, Attentive took Sport back to Meek Oil Company, and Sport learned that Meek, in fact, had negligently allowed water to mix with the gasoline. While they were gone the receptacle into which the gasoline was draining overflowed, and a passerby, Curious, wondered aloud if it was water or gasoline that was in the gutter and to find out threw a lighted match in it with the result that Sport's automobile was destroyed by fire.

Sport brought an action for damages against Meek Oil Company for the loss of his automobile.

Is Sport entitled to a recovery?

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