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Question # 1 - Torts

A homeowner was using a six-foot stepladder to clean the furnace in his home. The homeowner broke his arm when he slipped and fell from the ladder. The furnace had no warnings or instructions on how it was to be cleaned.

In a suit by the homeowner against the manufacturer of the furnace to recover for his injury, is the homeowner likely to prevail?

(A) No, because the danger of falling from a ladder is obvious.

Correct. A manufacturer has no obligation to warn against obvious dangers. There appears to be nothing unique to the furnace that would add to the ordinary dangers of working on a ladder.

(B) No, because the homeowner should have hired a professional to clean the furnace.

(C) Yes, because the furnace did not have a ladder attached to it for cleaning purposes.

(D) Yes, because the lack of warnings or instructions for how to clean the furnace made the furnace defective.

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Question # 2 - Real Property

A landlord and a tenant orally agreed to a commercial tenancy for a term of six months beginning on July 1. Rent was to be paid by the first day of each month, and the tenant paid the first month's rent at the time of the agreement.

When the tenant arrived at the leased premises on July 1, the tenant learned that the previous tenant had not vacated the premises at the end of her lease term on May 31 and did not intend to vacate. The tenant then successfully sued the previous tenant for possession. The tenant did not inform the landlord of the eviction action until after the tenant received possession.

The tenant then sued the landlord, claiming damages for that portion of the lease period during which the tenant was not in possession.

If the court finds for the landlord, what will be the most likely explanation?

(A) By suing the previous tenant for possession, the tenant elected that remedy in lieu of a suit against the landlord.

(B) The landlord had delivered the legal right of possession to the tenant.

Correct. The landlord granted the legal right of possession to the tenant, which means that neither the landlord nor anyone holding of the landlord prevented the tenant from going into possession at the commencement of the lease term. The previous tenant's lease term had ended before the new lease term began. The previous tenant then became a trespasser and was not holding of the landlord. The court found for the landlord, and thus there is no rule in this jurisdiction that the landlord need also put the tenant into actual possession.

(C) The tenant failed to timely vacate as required to sue for constructive eviction.

(D) The tenant had not notified the landlord before bringing the eviction action.

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Question # 3 - Constitutional Law

A state law provides that a person who has been divorced may not marry again unless he or she is current on all child-support payments. A woman who was refused a marriage license pursuant to this law sued the appropriate state officials.

What standard should the court apply in reviewing the constitutionality of this law?

(A) The state must show that the law is necessary to serve a compelling government interest.

Correct. U.S. Supreme Court precedent establishes that an individual's decision to marry is a fundamental right, and that therefore laws that unduly burden a decision to marry trigger strict judicial scrutiny. This strict scrutiny standard obligates the state to prove that the law is necessary to serve a compelling government interest.

(B) The state must show that the law is substantially related to an important government interest.

(C) The woman must show that the law serves no important public purpose.

(D) The woman must show that the legislature did not have a rational basis for enacting the law.

Question # 4 - Contracts

Before putting her home up for sale, a homeowner painted the living room ceiling to conceal major water damage caused by a leaking roof that had not yet been repaired. On the first day the home was offered for sale, the homeowner gave a buyer a personal tour. The homeowner made no statements at all regarding the water damage or the roof. Without discovering the water damage or the leaking roof and without consulting a lawyer, the buyer immediately agreed in writing to buy the home for $200,000.

Before the closing date, the buyer discovered the water damage and the leaking roof. The cost of repair was estimated at $22,000. The buyer has refused to go through with the purchase.

If the homeowner sues the buyer for breach of contract, is the homeowner likely to prevail?

(A) No, because no contract was formed since the buyer did not have a real opportunity to understand the essential terms of the contract.

(B) No, because the homeowner concealed evidence of the water damage and of the leaking roof.

Correct. A misrepresentation of fact that induces assent provides a basis for avoidance of a contract. A misrepresentation is defined as a statement that is not in accord with the facts. Affirmative conduct that is "intended or known likely to prevent another from learning a fact is equivalent to an assertion that the fact does not exist" and constitutes a misrepresentation. The homeowner's painting over the water damage constituted affirmative conduct intended to prevent the buyer from learning of the water damage and the leaking roof. Therefore, the buyer's assent was induced by a misrepresentation, and the buyer can avoid the contract.

(C) Yes, because the homeowner made no affirmative statements of fact about the water damage or the leaking roof.

(D) Yes, because the buyer acted unreasonably by failing to employ an inspector to conduct an independent inspection of the home.

Question # 5 - Evidence

A defendant is being tried for the murder of a woman who disappeared 10 years ago and has not been heard from since. Her body has never been found. The prosecutor has presented strong circumstantial evidence that she was murdered by the defendant. To help establish the fact of her death, the prosecutor has requested that the judge give the following instruction, based on a recognized presumption in the jurisdiction: "A person missing and not heard from in the last seven years shall be presumed to be deceased."

Is the instruction proper?

(A) No, because the fact that someone has not been heard from in seven years does not necessarily lead to a conclusion that the person is dead.

(B) No, because mandatory presumptions are not allowed against a criminal defendant on an element of the charged crime.

Correct. The U.S. Supreme Court has held it to be a violation of due process for a judge to give a mandatory jury instruction in a criminal case on an element of the charged crime. The instruction is unconstitutional because the phrase "shall be presumed" could be interpreted by the jury as shifting the burden of proof to the defendant or as requiring the jury to find an element of the charged crime, neither of which is permissible.

(C) Yes, because it expresses a rational conclusion that the jury should be required to accept.

(D) Yes, because the defendant has a chance to rebut the presumption by offering evidence that the woman is alive or has been heard from in the last seven years.

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Question # 6 - Criminal Law and Procedure

An executive of an accounting firm was fired and told to immediately leave the building where she worked. The executive went home, but she returned that night to retrieve personal items from her office. When she discovered that her key no longer opened a door to the building, she forced the door open and went to her former office. To avoid attracting attention, she did not turn on any lights. In the dark, she knew that she was taking some items that were not hers; she planned to sort these out later and return them.

Upon arriving home, she found that she had taken a record book and some financial papers that belonged to the firm. After thinking it over and becoming angrier over being fired, she burned the book and papers in her fireplace.

The jurisdiction has expanded the crime of burglary to include all buildings.

What crime(s) has the executive committed?

(A) Burglary and larceny.

(B) Burglary, but not larceny.

(C) Larceny, but not burglary.

Correct. The executive committed larceny, but not burglary. There was no burglary because the executive did not break and enter the building with the intent to commit a felony therein. She did, however, commit larceny, under the theory of continuing trespass.

(D) Neither larceny nor burglary.

Question # 7 - Contracts

A wholesaler contracted in a signed writing to sell to a bakery 10,000 pounds of flour each week for 10 weeks, the flour to be delivered to the bakery on Mondays and payment to be made on Wednesdays of each week. The bakery did all of its weekly bread baking on Tuesdays. On Monday morning of the first week, the wholesaler tendered delivery of 8,000 pounds of flour to the bakery, and the bakery accepted it on the wholesaler's assurance that the remaining 2,000 pounds would be delivered later that evening, which it was. The bakery paid for both deliveries on Wednesday. On Monday of the second week, the wholesaler tendered delivery of 5,000 pounds of flour to the bakery and said that the remaining 5,000 pounds could not be delivered on Monday but would be delivered by Wednesday. The bakery rejected the tender.

Was the bakery legally justified in rejecting the tender of the 5,000 pounds of flour?

(A) Yes, because the bakery was legally entitled to reject any tender that did not conform perfectly to the contract.

(B) Yes, because the tender was a substantial impairment of that installment and could not be cured.

Correct. UCC § 2-612(2) provides that a buyer may reject any installment that is nonconforming if the nonconformity substantially impairs the value of that installment and it cannot be cured. The delivery of less than the contracted-for amount constituted a nonconformity that substantially impaired the value of the installment since the wholesaler could not deliver the remaining 5,000 pounds until the day after the bakery needed the flour to fulfill its weekly baking needs, and the bakery was entitled to reject the tender.

(C) No, because the tender was not a substantial impairment of the entire contract, and the wholesaler had given assurance of a cure.

(D) No, because by accepting the first 8,000 pounds on Monday of the first week, the bakery had waived the condition of perfect tender and had not reinstated it.

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Question # 8 - Constitutional Law

Congress enacted a statute prohibiting discrimination in the rental of residential property anywhere in the United States on the basis of sexual orientation or preference by any person or entity, public or private.

Which of the following provisions provides the strongest basis for Congress's authority to enact this statute?

(A) The enforcement clause of the Fourteenth Amendment.

(B) The privileges and immunities clause of Article IV.

(C) The commerce clause of Article I, Section 8.

Correct. Congress can regulate the rental terms for residential property pursuant to the commerce clause because such rentals constitute economic activity that, in the aggregate, has a substantial effect on interstate commerce.

(D) The general welfare clause of Article I, Section 8.

Question # 9 - Criminal Law and Procedure

A woman and her sister took a trip to the Caribbean. When they passed through U.S. Customs inspection upon their return, the customs officials found liquid cocaine in several bottles each of them was carrying. They were arrested. Upon separate questioning by customs officers, the woman broke down and cried, "I told my sister there were too many officers at this airport." The sister did not give a statement.

The woman and her sister were indicted for conspiracy to import cocaine. They were tried separately. At the woman's trial, after the government introduced the above evidence and rested its case, her lawyer moved for a judgment of acquittal on grounds of insufficient evidence.

Should the court grant the motion?

(A) No, because the evidence shows that both the woman and her sister agreed to import cocaine.

Correct. A conviction of conspiracy requires proof of an agreement to commit a crime and, in some jurisdictions or under some statutes, proof of an overt act in furtherance of the agreement. The conspiratorial agreement need not be proven through direct evidence, as long as the circumstantial evidence taken in the light most favorable to the prosecution is sufficient to allow a rational jury to find that there was a conspiratorial agreement beyond a reasonable doubt. Here, because a jury rationally could conclude beyond a reasonable doubt from all the circumstances (including the woman's statement about her discussion with her sister) that the woman and her sister had agreed to import cocaine, the issue is for the jury, and the woman is not entitled to a court-ordered acquittal.

(B) No, because the evidence shows that both the woman and her sister possessed cocaine.

(C) Yes, because the evidence shows only that the woman and her sister committed separate crimes of cocaine possession.

(D) Yes, because the evidence shows that the woman effectively withdrew from the conspiracy when she cooperated by giving a statement.

Question # 10 - Evidence

Several defendants, senior executives of a corporation, were charged with securities fraud. The government called as a witness another executive of the corporation, who had not been charged and who had been given immunity from prosecution, to authenticate handwritten notes that she had made after meetings of the corporation's management team at which the alleged fraud was discussed. The witness testified that she had prepared the notes on her own initiative to help her remember what had happened at the meetings. After this testimony, the government offered the notes into evidence to establish what had happened at the meetings.

Should the witness's notes be admitted?

(A) No, because the notes are hearsay not within any exception.

Correct. The notes are hearsay because they are out-of-court statements offered to prove the truth of the matter asserted, and they do not fit any hearsay exception.

(B) No, because the witness's immunity agreement with the government makes her notes untrustworthy and thus substantially more prejudicial than probative.

(C) Yes, because they are business records.

(D) Yes, because they are past recollections recorded.

Question # 11 - Torts

A college student was asleep in his bed in a college dormitory when his roommate, in a drunken fury, entered their room intending to attack the student with an ice pick while he slept. Fortunately, the phone rang and awakened the student. The roommate retreated quickly and threw the ice pick under his own bed in the same room. The next day, the student heard from friends about the roommate's murderous plans and later found the ice pick under the roommate's bed. Even though the college expelled his roommate, the student remained extremely upset and afraid to sleep.

In a suit against the roommate for assault, will the student prevail?

(A) No, because the roommate did not touch the student.

(B) No, because the student was not awake when the roommate entered the room and was unaware until later that the roommate was intending to attack him.

Correct. To establish a claim for assault, a plaintiff must demonstrate that he reasonably apprehended that a harmful or offensive touch was imminent. In this case, because he was asleep, the student did not have the apprehension necessary for an assault claim.

(C) Yes, because it was reasonable for the student to feel afraid of sleeping in his room afterward.

(D) Yes, because the roommate intended to inflict serious harm.

Question # 12 - Real Property

Six months ago, a man told his cousin that he would give her his farm as a gift on her next birthday. The cousin then entered into a valid written contract to sell the farm to an investor with the closing to take place "one week after [the cousin's] next birthday."

The man failed to convey the farm to the cousin on her birthday. One week after the cousin's birthday, on the intended closing date, the investor first learned of the cousin's inability to convey the farm because the man had breached his promise. The investor considered suing the cousin but realized that she could not compel the cousin to convey the farm because it was still owned by the man.

Two weeks after the cousin's birthday, the man died. Under his valid will, the man devised the farm to the cousin. Within a week, the executor of the man's estate gave the cousin an executor's deed to the farm in compliance with state law. The investor promptly learned of this transfer and demanded that the cousin convey the farm to her. The cousin refused.

The investor sued the cousin for specific performance.

Who will likely prevail?

(A) The cousin, because the contract to convey was not signed by the legal owner of the farm as of the date of the contract and was therefore void.

(B) The cousin, because she received title by devise rather than by conveyance.

(C) The investor, because the contract to convey merged into the executor's deed to the cousin.

(D) The investor, because the contract to convey remained enforceable by her within a reasonable period of time after the proposed closing date.

Correct. The cousin and the investor had a valid contract for the sale of the farm. The contract did not specify that time was of the essence, and thus the investor should be able to enforce the contract within a reasonable time after the proposed closing date. The cousin acquired the land two weeks after the intended closing date, which was within a reasonable time period afterward.

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Question # 13 - Evidence

A plaintiff sued a defendant, alleging that she was seriously injured when the defendant ran a red light and struck her while she was walking in a crosswalk. During the defendant's case, a witness testified that the plaintiff had told him that she was "barely touched" by the defendant's car.

On cross-examination, should the court allow the plaintiff to elicit from the witness the fact that he is an adjuster for the defendant's insurance company?

(A) No, because testimony about liability insurance is barred by the rules of evidence.

(B) No, because the reference to insurance raises a collateral issue.

(C) Yes, for both substantive and impeachment purposes.

(D) Yes, for impeachment purposes only.

Correct. The evidence is not admissible for substantive purposes. FRE 411 bars evidence of liability insurance to prove negligence or wrongful conduct. However, the rule contains an exception allowing the use of such evidence to prove bias. The fact that the witness is an adjuster for the defendant's insurance company is a legitimate ground for impeachment for bias.

Question # 14 - Contracts

An engineer entered into a written contract with an owner to serve in the essential position of on-site supervisor for construction of an office building. The day after signing the contract, the engineer was injured while bicycling and was rendered physically incapable of performing as the on-site supervisor. The engineer offered to serve as an off-site consultant for the same pay as originally agreed to by the parties.

Is the owner likely to prevail in an action against the engineer for damages resulting from his failure to perform under the contract?

(A) No, because the engineer offered a reasonable substitute by offering to serve as an off-site consultant.

(B) No, because the engineer's physical ability to perform as on-site supervisor was a basic assumption of the contract.

Correct. The engineer is not in breach. The incapacity of a particular person to perform his or her duty under a contract renders the performance impracticable and operates as an excuse for nonperformance. The parties contracted for the engineer to personally provide on-site services. Therefore, the engineer's continued ability to perform those services was a basic assumption of the contract, and his nonperformance is excused.

(C) Yes, because the engineer breached the contract by disappointing the owner's expectations.

(D) Yes, because the engineer's duty to perform was personal and absolute.

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Question # 15 - Constitutional Law

A state law made it a criminal offense for any state employee to "knowingly provide educational services or extend welfare benefits" to a foreign national who was in the United States in violation of U.S. immigration laws. The principal of a public elementary school was prosecuted under the law for enrolling and providing education to several foreign nationals he knew to be in the country illegally. All of these actions took place before the new law was adopted. No federal statute applied to the principal's actions.

What constitutional provision would be most helpful to the principal's defense?

(A) The due process clause of the Fourteenth Amendment.

(B) The equal protection clause of the Fourteenth Amendment.

(C) The ex post facto clause of Article I, Section 10.

Correct. Article I, Section 10 of the Constitution prohibits states from passing ex post facto laws. An ex post facto law punishes conduct that occurred before the law became effective. Because the principal had enrolled the foreign nationals before the state adopted the law under which he was prosecuted, it was an unconstitutional ex post facto law as applied to his prosecution.

(D) The privileges or immunities clause of the Fourteenth Amendment.

Question # 16 - Criminal Law and Procedure

A store owner whose jewelry store had recently been robbed was shown by a police detective a photograph of the defendant, who previously had committed other similar crimes. The store owner examined the photograph and then asked the detective whether the police believed that the man pictured was the robber. After the detective said, "We're pretty sure," the store owner stated that the man in the photograph was the one who had robbed her.

The defendant was indicted for the robbery. His counsel moved to suppress any trial testimony by the store owner identifying the defendant as the robber.

Should the court grant the motion and suppress the store owner's trial testimony identifying the defendant as the robber?

(A) No, because suppression of in-court testimony is not a proper remedy, even though the out-of-court identification was improper.

(B) No, because the out-of-court identification was not improper.

(C) Yes, because the improper out-of-court identification has necessarily tainted any in-court identification.

(D) Yes, unless the prosecution demonstrates that the in-court identification is reliable.

Correct. Even if an out-of-court identification procedure is unnecessarily suggestive, which this one plainly was, suppression of in-court testimony is not required if the eyewitness's identification is shown to be reliable under a multi-factor inquiry.

Question # 17 - Real Property

A mother who died testate devised her farm to her son and her daughter as "joint tenants with right of survivorship." The language of the will was sufficient to create a common law joint tenancy with right of survivorship, which is unmodified by statute in the jurisdiction. After the mother's death and with the daughter's permission, the son took sole possession of the farm and agreed to pay the daughter a stipulated monthly rent.

Several years later, the son defaulted on a personal loan, and his creditor obtained a judgment against him for $30,000. The creditor promptly and properly filed the judgment.

A statute of the jurisdiction provides: "Any judgment properly filed shall, for 10 years from filing, be a lien on the real property then owned or subsequently acquired by any person against whom the judgment is rendered."

Six months later, the son died.

There are no other applicable statutes.

Is the creditor entitled to enforce its judgment lien against the farm?

(A) No, because the daughter became sole owner of the farm free and clear of the creditor's judgment lien when the son died.

Correct. The recording of a judgment against a joint tenant with right of survivorship allows the judgment creditor to obtain a writ of execution but does not effect a severance of the joint tenancy. The son's creditor failed to execute on the judgment against the son before his death, and the daughter, as the survivor, became the sole owner of the farm.

(B) No, because the son's interest was severed from the daughter's interest upon the filing of the lien.

(C) Yes, because a joint tenancy cannot be created by devise, and the son died owning a 50% undivided interest in the farm as a tenant in common.

(D) Yes, because the son died owning a 50% undivided interest in the farm as a joint tenant with the daughter.

Question # 18 - Contracts

An experienced rancher contracted to harvest his neighbor's wheat crop for $1,000 "when the crop [was] ripe." In early September, the neighbor told the rancher that the crop was ripe. The rancher delayed because he had other customers to attend to. The neighbor was concerned that the delay might cause the crop to be lost, for hailstorms were common in that part of the country in the fall. In fact, in early October, before the crop was harvested, it was destroyed by a hailstorm.

Is the rancher liable for the loss?

(A) No, because no time for performance was established in the contract.

(B) No, because the neighbor failed to tell the rancher that the crop might be destroyed by a hailstorm.

(C) Yes, because at the time the contract was made, the rancher had reason to foresee the loss as a probable result of his breach.

Correct. According to the Restatement (Second) of Contracts § 351, a non-breaching party is entitled to recover damages that the party in breach "had reason to foresee as a probable result of the breach" when the parties entered into the contract. The rancher's experience and the frequency of hailstorms in the fall combined to make the loss resulting from the rancher's breach foreseeable.

(D) Yes, because a party who undertakes a contractual obligation is liable for all the consequences that flow from his breach.

Question # 19 - Torts

When a tire of a motorist's car suffered a blowout, the car rolled over and the motorist was badly injured. Vehicles made by the manufacturer of the motorist's car have been found to be negligently designed, making them dangerously prone to rolling over when they suffer blowouts. A truck driver who was driving behind the motorist when the accident occurred stopped to help. Rescue vehicles promptly arrived, and the truck driver walked along the side of the road to return to his truck. As he approached his truck, he was struck and injured by a speeding car. The truck driver has sued the manufacturer of the injured motorist's car.

Is the truck driver likely to prevail in a suit against the car manufacturer?

(A) No, because the car manufacturer's negligence was not the proximate cause of the truck driver's injuries.

(B) No, because the truck driver assumed the risk of injury when he undertook to help the motorist.

(C) Yes, because it is foreseeable that injuries can result from rollovers.

(D) Yes, because the car manufacturer's negligence caused the dangerous situation that invited the rescue by the truck driver.

Correct. It is well established that injury to rescuers is sufficiently foreseeable to support proximate cause. As Cardozo said, "Danger invites rescue."

Question # 20 - Constitutional Law

An unconstrued state law prohibited the distribution within the state of "seditious propaganda." The state prosecuted United States Post Office letter carriers under this law for delivering propaganda from a foreign country to state residents.

Which of the following statements is an INACCURATE description of the state's law as applied to the letter carriers?

(A) It is an unconstitutional bill of attainder.

Correct. A bill of attainder is a legislative act that inflicts punishment on named individuals or on easily identifiable members of groups. Because the statute proscribes a type of conduct when engaged in by anyone, it is not a bill of attainder.

(B) It is void for vagueness.

(C) It may not be applied to the letter carriers, because they are employees of a federal instrumentality carrying out an authorized function.

(D) It unconstitutionally abridges rights protected by the First and Fourteenth Amendments.

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Question # 21 - Evidence

A defendant was charged with the crime of defrauding the federal agency where he worked as an accountant. At trial, the court allowed the defendant to call his supervisor at the large corporation where he had previously worked, who testified about the defendant's good reputation in the community for honesty. Over objection, the defendant then sought to elicit testimony from his former supervisor that on several occasions the corporation had, without incident, entrusted him with large sums of money.

Should the testimony be admitted?

(A) No, because the testimony is extrinsic evidence on a collateral matter.

(B) No, because good character cannot be proved by specific instances of conduct unless character is an essential element of the charge or defense.

Correct. When a criminal defendant seeks to prove his good character under FRE 404(a)(1), FRE 405(a) allows proof only by reputation evidence or opinion evidence, not by specific instances of conduct.

(C) Yes, because it is evidence of a pertinent character trait offered by an accused.

(D) Yes, because it is relevant to whether the defendant was likely to have taken money as charged in this case.

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Question # 22 - Contracts

A niece had worked in her aunt's bookstore for many years. The bookstore business, which was housed in a building that the aunt leased, was independently appraised at $200,000. The aunt decided to retire. She wrote to the niece, expressing her affection for the niece and offering to sell her the bookstore business for $125,000 if the landlord would agree to a transfer of the lease. The letter also specified when the aunt would transfer the business. The niece wrote back accepting her aunt's offer. In a phone call to the niece, the aunt stated that the landlord had approved the transfer of the lease and that she would now ask her attorney to draft a written contract so that there would be a record of the terms. Before the attorney had finished drafting the document, the aunt changed her mind about selling the business and informed the niece of her decision.

In an action for breach of contract brought by the niece against her aunt, is the niece likely to prevail?

(A) No, because the motivation for the transfer of the business was the aunt's affection for her niece, not the price.

(B) No, because the promised consideration was inadequate in light of the market value of the business.

(C) Yes, because the condition concerning the landlord's assent to the transfer of the lease was beyond the control of either party.

(D) Yes, because the document being drafted by the attorney was merely a record of an agreement already made, not a condition to it.

Correct. Manifestations of assent are sufficient to conclude an enforceable contract even though parties manifest intent to memorialize their agreement in a writing that is not subsequently prepared. Here, the parties' agreement on essential terms constituted the manifestation of mutual assent sufficient to create an enforceable contract.

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Question # 23 - Criminal Law and Procedure

A man and his friend were watching a televised football game at the man's home. Upset by a penalty called by the referee, the friend threw a bottle of beer at the man's television, breaking the screen. Enraged, the man picked up a nearby hammer and hit the friend on the head with it. The friend died from the blow.

The crimes below are listed in descending order of seriousness.

In a jurisdiction that follows common law principles, what is the most serious crime of which the man could properly be convicted?

(A) Murder.

Correct. At common law, a defendant could be convicted of murder not only for an intentional killing but also for causing another's death by actions intended to cause serious bodily injury short of death. Under the facts of this case, a jury could properly convict the man of murder under that common law theory. While a jury could certainly convict the man of lesser manslaughter or assault crimes, murder is the most serious crime of which the man could properly be convicted.

(B) Voluntary manslaughter.

(C) Involuntary manslaughter.

(D) Assault.

Question # 24 - Constitutional Law

A protester entered an IRS office during business hours. He denounced the income tax and set fire to pages from his copy of the Internal Revenue Code. The fire was extinguished before it caused any other damage. The protester was arrested and charged with violating a state law that prohibited igniting a fire in a public building. He claimed that his prosecution was unconstitutional under the First Amendment.

May the protester constitutionally be convicted?

(A) No, because he was exercising his right to freedom of speech by burning a copy of the code.

(B) No, because the copy of the code belonged to him, and thus burning it did not infringe upon a legitimate government interest.

(C) Yes, because the burning of the code was conduct rather than speech.

(D) Yes, because the state law is narrowly drawn to further a substantial government interest in prohibiting the noncommunicative aspects of the act in question.

Correct. The protester's burning of the tax code qualifies as expressive conduct protected by the free speech clause of the First Amendment because (1) the protester intended to communicate a message and (2) the audience was likely to understand the communication. But because the state's interest underlying the law that the protester violated (preventing the burning of public buildings) is unrelated to the message communicated by the burning of the tax code, a court will not subject the state law to strict scrutiny. Instead, the court will uphold application of the law to the protester if the law is narrowly tailored to further a substantial government interest, a standard of justification that this law should satisfy easily.

Question # 25 - Torts

A gas company built a large refining facility that conformed to zoning requirements on land near a landowner's property. The landowner had his own home and a mini-golf business on his property.

In a nuisance action against the gas company, the landowner established that the refinery emitted fumes that made many people feel quite sick when they were outside on his property for longer than a few minutes. The landowner's mini-golf business had greatly declined as a consequence, and the value of his property had gone down markedly.

Is the landowner likely to prevail?

(A) No, because the landowner has offered no evidence demonstrating that the gas company was negligent.

(B) No, because the refinery conforms to the zoning requirements.

(C) Yes, because the refinery has substantially and unreasonably interfered with the landowner's use and enjoyment of his property.

Correct. To prevail on a nuisance claim, the plaintiff must show that the defendant's activity has substantially and unreasonably interfered with the plaintiff's use and enjoyment of his property. The evidence that there has been a significant decrease in the value of the landowner's property and that his business is suffering a marked decline would support a claim that the intrusion by the gas company is both substantial and unreasonable.

(D) Yes, because the value of the landowner's property has declined.

Question # 26 - Criminal Law and Procedure

A defendant was charged with attempted murder. At the preliminary hearing, the presiding judge heard the testimony of four prosecution witnesses and found that the prosecution had failed to establish probable cause that the defendant had committed any offense. Accordingly, he dismissed the charge.

The prosecutor then called the same four witnesses before a grand jury. The grand jury indicted the same defendant for attempted murder.

The defendant has moved to quash the indictment on the ground of double jeopardy.

How should the court proceed?

(A) Grant the motion, because the dismissal of the first charge on the merits, whether correct or incorrect, bars any further prosecution.

(B) Grant the motion, unless the prosecution has evidence that was not presented in the first case.

(C) Deny the motion, because the defendant has not yet been in jeopardy of conviction on the attempted murder charge.

Correct. For double jeopardy purposes, jeopardy does not attach until trial, when the jury is sworn in (or, in a bench trial, when the first witness is sworn in).

(D) Deny the motion, because the protection of the double jeopardy clause does not come into play until there has been a conviction or an acquittal.

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Question # 27 - Evidence

A plaintiff sued his insurance company for the proceeds of a casualty insurance policy covering his 60-foot yacht, claiming that the yacht was destroyed by an accidental fire. The company denied liability, claiming that the plaintiff hired his friend to set the fire. In the hospital the day after the fire, the friend, who had been badly burned in the fire, said to his wife, in the presence of an attending nurse, "I was paid to set the fire." Two weeks later, the friend died of an infection resulting from the burns. At trial, the insurance company called the wife to testify to the friend's statement.

Is the wife's testimony admissible over the plaintiff's objection?

(A) No, because the marital privilege survives the communicating spouse's death.

(B) No, because the statement was made after the conspiracy ended.

(C) Yes, because it is a statement against interest.

Correct. The statement is against the friend's interest because it could subject him to civil or criminal liability. The friend is unavailable, so the statement satisfies FRE 804(b)(3).

(D) Yes, because it is a statement by a co-conspirator.

Question # 28 - Torts

A fire that started in the defendant's warehouse spread to the plaintiff's adjacent warehouse. The defendant did not intentionally start the fire, and the plaintiff can produce no evidence as to how the fire started. However, the defendant had failed to install a sprinkler system, which was required by a criminal statute. The plaintiff can produce evidence that had the sprinkler system been installed, it could have extinguished the fire before it spread.

In an action by the plaintiff against the defendant to recover for the fire damage, is it possible for the plaintiff to prevail?

(A) No, because the statute provides only for criminal penalties.

(B) No, because there is no evidence that the defendant negligently caused the fire to start.

(C) Yes, because a landowner is strictly liable for harm to others caused by the spread of fire from his premises under the doctrine of *Rylands v. Fletcher*.

(D) Yes, because the plaintiff was harmed as a result of the defendant's violation of a statute that was meant to protect against this type of occurrence.

Correct. A criminal statute can be used to set the standard of care in a negligence action if it was meant to protect against the type of harm that occurred by specifying preventive steps that should be taken. In that case, violation of the statute is negligence per se.

Question # 29 - Constitutional Law

A private university is owned and operated by a religious organization. The university is accredited by the department of education of the state in which it is located. This accreditation certifies that the university meets prescribed educational standards. Because it is accredited, the university qualifies for state funding for certain of its operating expenses. Under this funding program, 25 percent of the university's total operating budget comes from state funds.

A professor at the university was a part-time columnist for the local newspaper. In one of her published columns, the professor argued that "religion has become a negative force in society." The university subsequently discharged the professor, giving as its sole reason for the dismissal her authorship and publication of this column.

The professor sued the university, claiming only that her discharge violated her constitutional right to freedom of speech.

The university moved to dismiss the professor's lawsuit on the ground that the U.S. Constitution does not provide the professor with a cause of action in this case.

Should the court grant the university's motion to dismiss?

(A) Yes, because the First and Fourteenth Amendments protect the right of the university to employ only individuals who share and communicate its views.

(B) Yes, because the action of the university in discharging the professor is not attributable to the state for purposes of the Fourteenth Amendment.

Correct. The protections afforded by the Fourteenth Amendment apply only to conduct that is attributable to the state. Because the professor was discharged by a private university and not by a state actor, the Fourteenth Amendment does not apply.

(C) No, because the accreditation and partial funding of the university by the state are sufficient to justify the conclusion that the state was an active participant in the discharge of the professor.

(D) No, because the U.S. Constitution provides a cause of action against any state-accredited institution that restricts freedom of speech as a condition of employment.

Question # 30 - Evidence

A defendant was charged with possession of marijuana with intent to distribute. On direct examination, the defendant testified that he worked with disadvantaged children as a drug counselor, that he hated drugs, that he would "never possess or distribute drugs," and that he had never used drugs and would not touch them. The government offered as a rebuttal witness a police officer who would testify that, three years earlier, he saw the defendant buy cocaine from a street dealer. The defendant objected.

Is the testimony of the police officer about the prior drug transaction admissible to impeach the defendant?

(A) No, because the bad act of buying drugs is not sufficiently probative of a witness's character for truthfulness.

(B) No, because it is contradiction on a collateral matter.

(C) Yes, because it is proper contradiction.

Correct. This is an example of impeachment by contradiction. The evidence of the prior cocaine purchase directly contradicts the defendant's testimony on direct examination that he would never possess drugs and is admissible for that purpose.

(D) Yes, because the bad act shows a disregard for the law and makes it less likely that the defendant would respect the oath of truthfulness.

Question # 31 - Real Property

A landowner borrowed $100,000 from a lender and executed a valid mortgage on a commercial tract of land to secure the debt. The lender promptly recorded the mortgage.

A year later, the landowner conveyed the same tract to a developer by a deed that expressly stated that the conveyance was subject to the mortgage to the lender and that the grantee expressly assumed and agreed to pay the mortgage obligation as part of the consideration for the purchase. The mortgage was properly described in the deed, and the deed was properly executed by the landowner; however, because there was no provision or place in the deed for the developer to sign, he did not do so. The developer promptly recorded the deed.

The developer made the monthly mortgage payments of principal and interest for six payments but then stopped payments and defaulted on the mortgage obligation. The lender properly instituted foreclosure procedures in accordance with the governing law. After the foreclosure sale, there was a $10,000 deficiency due to the lender. Both the landowner and the developer had sufficient assets to pay the deficiency.

There is no applicable statute in the jurisdiction other than the statute relating to foreclosure proceedings.

At the appropriate stage of the foreclosure action, which party will the court decide is responsible for payment of the deficiency?

(A) The developer, because he accepted delivery of the deed from the landowner and in so doing accepted the terms and conditions of the deed.

Correct. The deed stated that the conveyance was subject to the lender's mortgage and that the grantee expressly assumed and agreed to pay the mortgage obligation as part of the consideration. While the developer did not sign the deed, the developer accepted the deed and recorded it, thereby agreeing to the mortgage assumption. When the developer assumed the mortgage obligation, the developer became personally liable to the lender, and the landowner became merely a surety. The developer, having sufficient assets to pay the deficiency judgment, must do so.

(B) The developer, because he is estopped by his having made six monthly payments to the lender.

(C) The landowner, because the developer was not a signatory to the deed.

(D) The landowner, because he was the maker of the note and the mortgage, and at most the developer is liable only as a guarantor of the landowner's obligation.

Question # 32 - Contracts

An actor straight out of drama school and an agent entered into a one-year written contract that described the services the agent would provide. Because he was eager for work, the actor agreed, in the contract, to pay the agent 15% of his yearly earnings. At the end of the year, the actor was so pleased with his many roles that he gave the agent 20% of his earnings. After the first contract had expired, the actor and the agent decided to continue working together. They photocopied their old contract, changed the date, and signed it. At the end of the year, a dispute arose as to what percentage of earnings the actor owed. It is a trade practice in the acting profession for actors to pay their agents 10% of their yearly earnings, payable at the end of the year.

What percentage of the actor's earnings is a court most likely to award the agent?

(A) 20%, because course of dealing is given greater weight than trade usage.

(B) 15%, because it was an express term of the contract.

Correct. The parties' new contract adopted the terms of their previous contract, which included the 15% fee. Evidence of express terms is given greater weight than evidence of trade usage. Therefore the express term, the 15% fee, is controlling because a court would give it greater weight than the evidence of trade usage, the 10% fee.

(C) 10%, because trade usage is the applicable default rule.

(D) Nothing, because the contract is too indefinite.

Question # 33 - Torts

A schizophrenic patient who was institutionalized in a psychiatric facility pushed a nurse down a stairwell at the facility. The nurse, a paid employee of the facility who was trained to care for schizophrenic patients, was injured. The patient is an indigent whose care is paid for by the government.

The jurisdiction generally follows the rule that a person with a mental deficiency is held to the standard of a reasonable person. In a negligence action brought by the nurse against the patient, the patient's lawyer will argue that the patient should not be held responsible for the nurse's injury.

Which of the following facts will be LEAST helpful to the patient's lawyer's argument?

(A) The nurse was a professional caregiver.

(B) The nurse was trained to care for patients with schizophrenia.

(C) At the time she pushed the nurse, the patient thought she was being attacked by an elephant.

(D) The patient is an indigent whose care is paid for by the government.

Correct. Whether the patient has the resources to satisfy an adverse judgment is irrelevant to the judgment itself and should not be a subject of argument on the issue of liability in the case, although the patient's financial situation might affect a lawyer's decision to take on the case.

Question # 34 - Real Property

Seven years ago, a man, his sister, and his cousin became equal owners, as tenants in common, of a house. Until a year ago, the man lived in the house alone. The sister and the cousin are longtime residents of another state.

One year ago, the man moved to an apartment and rented the house to a tenant for three years under a lease that the man and the tenant both signed. The tenant has since paid the rent each month to the man.

Recently, the sister and the cousin learned about the rental. They brought an appropriate action against the tenant to have the lease declared void and to have the tenant evicted. The tenant raised all available defenses.

What will the court likely decide?

(A) The lease is void, and the tenant is evicted.

(B) The lease is valid, and the tenant retains exclusive occupancy rights for the balance of the term.

(C) The lease is valid, but the tenant is evicted because one-third of the lease term has expired and the man had only a one-third interest to transfer.

(D) The lease is valid, and the tenant is not evicted but must share possession with the sister and the cousin.

Correct. An individual tenant in common may transfer his or her undivided interest by a lease for a term of years. The tenant obtains only the transferor's concurrent right of possession with the other tenants in common. The man, as a tenant in common, validly transferred his interest in the tenancy in common to the tenant by a lease for a term of years. The tenant must, however, share the right of possession with the other cotenants, the sister and the cousin, for the term of the lease. The man must share the rental income with the sister and the cousin.

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Question # 35 - Criminal Law and Procedure

A man had spent the evening drinking at a local bar and was weaving down the street on his way home, singing. Suddenly, a person wearing a cartoon character mask jumped out from an alley, pointed his gun at the man, and snarled, "This is loaded, buddy, and I don't mind using it. Hand over your cash pronto." The man was so drunk that he failed to understand what was going on and started to howl with laughter at the sight of the cartoon mask. Surprised and rattled by the man's reaction, the masked gunman fled. The man soon recovered his composure and staggered home safely.

The crimes below are listed in descending order of seriousness.

What is the most serious crime of which the masked gunman may properly be charged and convicted?

(A) Attempted robbery.

Correct. The masked gunman could properly be convicted of attempted robbery because, though unsuccessful, he committed an act intended to take the man's property through force or fear. The confluence of the act and intent would suffice to constitute an attempt under any of the various approaches to attempt liability.

(B) Attempted battery.

(C) Attempted larceny.

(D) No crime.

Question # 36 - Contracts

A bank agreed to lend a merchant $10,000 for one year at 8% interest. The loan proceeds were to be disbursed within two weeks. The merchant intended to use the loan proceeds to purchase a specific shipment of carpets for resale at an expected profit of $5,000 but said nothing about these plans to the bank. The bank failed to disburse the proceeds and refused to assure the merchant that it would do so. The merchant was able to secure a loan from another lender at 10% interest for one year. However, by the time the merchant started the application process for a substitute loan, it was too late to pursue the opportunity to buy the shipment of carpets.

In an action against the bank for breach of contract, which of the following amounts is the merchant likely to recover?

(A) Nothing, because lost opportunities are not foreseeable.

(B) Nothing, because the parties failed to tacitly agree that the merchant would be entitled to damages in the event of a breach by the bank.

(C) The difference in cost over time between a loan at 10% and a loan at 8%.

Correct. The presumed wide availability of credit limits a borrower's recovery to the additional cost of obtaining a loan from another lender. In the typical case, a lender has no reason, at the time of contract formation, to foresee that the borrower will not be able to obtain a substitute loan. Therefore, the borrower's recovery is limited to the difference in cost over time between a loan at 10% and a loan at 8%.

(D) $5,000, the merchant's foreseeable loss.

Question # 37 - Torts

A farmer kept antiques in an uninhabited farmhouse on his property. The farmhouse had been broken into several times in the past, and some of the farmer's goods had been stolen. Instead of posting "No Trespassing" signs, the farmer decided to install an alarm system to deter intruders.

While the farmer was in the farmhouse installing the alarm system, he heard a window open in the adjoining room. The farmer crept very quietly to the door of the room, threw the door open, and found an intruder, a young child. The farmer immediately struck the child, a 10-year-old girl, very hard in the face, breaking her nose.

In an action on behalf of the child against the farmer to recover for the injury to her nose, is the child likely to prevail?

(A) No, because the farmer did not use deadly force.

(B) No, because the farmer had probable cause to believe that the child was a thief.

(C) Yes, because the farmer should have posted a "No Trespassing" sign.

(D) Yes, because the farmer used excessive force.

Correct. The farmer was privileged to use reasonable force to prevent or end a trespasser's intrusion upon his land or to protect his property, but he was not privileged to use force that threatened serious bodily injury unless he was himself in danger of serious bodily harm. The force the farmer used was sufficient to and did in fact cause serious bodily injury. The child appeared to pose no threat of bodily harm to the farmer and could have been deterred by less forceful means.

Question # 38 - Constitutional Law

A state law that restricted abortion was challenged in state court as a violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution and as a violation of a similar due process provision of the state constitution. The case made its way to the state's highest court, which ruled that the law violated the due process provisions of both the U.S. and the state constitutions.

If petitioned to do so, may the U.S. Supreme Court exercise jurisdiction to review the state court decision?

(A) No, because the state court's decision in this case rests on adequate and independent state law grounds.

Correct. The U.S. Supreme Court does not have appellate jurisdiction over a decision by the highest court of a state when that decision is supported by state law grounds that are (1) independent of federal law and (2) adequate to sustain the result in the case. The result in this case is fully supported by the state court's ruling that the law violated the state constitution, and this ruling is independent of any consideration of the federal constitutional claim. Accordingly, even if the U.S. Supreme Court were to reverse the state court's ruling on the federal constitutional issue, the result in the case would not change, and thus the decision is not reviewable.

(B) No, because the U.S. Supreme Court has appellate jurisdiction only over state court decisions that determine the constitutionality of federal laws.

(C) Yes, because the U.S. Supreme Court has appellate jurisdiction over any ruling of a state's highest court based on an interpretation of federal law.

(D) Yes, because the U.S. Supreme Court has appellate jurisdiction over decisions that find state laws in violation of the federal Constitution.

Question # 39 - Torts

A mining company that operated a copper mine in a remote location kept dynamite in a storage facility at the mine. The storage facility was designed and operated in conformity with state-of-the-art safety standards. In the jurisdiction, the storage of dynamite is deemed an abnormally dangerous activity.

Dynamite that was stored in the mining company's storage facility and that had been manufactured by an explosives manufacturer exploded due to an unknown cause. The explosion injured a state employee who was at the mine performing a safety audit. The employee brought an action in strict liability against the mining company.

What would be the mining company's best defense?

(A) The mine was in a remote location.

(B) The mining company did not manufacture the dynamite.

(C) The state employee assumed the risk of injury inherent in the job.

Correct. Assumption of risk can be an affirmative defense to strict liability, and in this case, the state employee willingly took on auditing duties in potentially dangerous environments.

(D) The storage facility conformed to state-of-the-art safety standards.

Question # 40 - Evidence

A woman sued her friend for injuries she received as a passenger in the friend's car. On direct examination, the woman testified that the friend had been speeding and ran a red light. On cross-examination, the woman was asked whether she was under the influence of drugs at the time of the accident. The woman invoked the privilege against self-incrimination.

How should the court treat the woman's claim of privilege?

(A) Deny it, because the woman waived the privilege by voluntarily testifying.

(B) Deny it, because evidence of the woman's drug intoxication is essential to assessing the accuracy of her observations.

(C) Uphold it, because the privilege applies in both civil and criminal cases.

Correct. The privilege against self-incrimination applies in civil cases as well as criminal cases. The woman cannot be forced to reveal facts that could subject her to criminal prosecution.

(D) Uphold it, because the woman's credibility cannot be impeached by a crime for which she has not been convicted.

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Question # 41 - Criminal Law and Procedure

Police, who had probable cause to arrest a man for a series of armed robberies, obtained a warrant to arrest him. At 6 a.m. they surreptitiously entered the man's house and, with guns drawn, went to the man's bedroom, where they awakened him. Startled, the man asked, "What's going on?" and an officer replied, "We've got you now." Another officer immediately asked the man if he had committed a particular robbery, and the man said that he had. The police then informed him that he was under arrest and ordered him to get dressed.

Charged with robbery, the man has moved to suppress the use of his statement as evidence.

What is the man's best argument for granting his motion?

(A) The police did not give him the required Miranda warnings.

Correct. Under the U.S. Supreme Court's decision in *Orozco v. Texas*, 394 U.S. 324 (1969), the man was very likely in custody, even though he was in his home, given the time and manner of the police entry. Accordingly, the police could not properly interrogate the man without first providing him with Miranda warnings.

(B) The statement was not voluntary.

(C) He was not informed that he was under arrest until after he made the statement.

(D) The police did not have a search warrant authorizing entry into the house.

Question # 42 - Real Property

A man decided to give his farm to his nephew. The man took a deed to his attorney and told the attorney to deliver the deed to the nephew upon the man's death. The man also told the attorney to return the deed to him if he asked. None of these instructions to the attorney were in writing, and the deed was not recorded. The man then e-mailed the nephew informing him of the arrangement.

Shortly thereafter, the nephew died testate. In his will, he devised the farm to his daughter. Several years later, the man died intestate, survived by two sons. The nephew's daughter immediately claimed ownership of the farm and demanded that the attorney deliver the deed to her.

Must the attorney deliver the deed to the daughter?

(A) No, because a gratuitous death escrow is void unless supported by a written contract.

(B) No, because the man never placed the deed beyond his control.

Correct. When the man delivered the deed to his attorney with instructions to deliver it to the nephew on his death, he was attempting to create a valid death escrow. To create a valid death escrow, however, the man had to place the deed beyond his control, reserving no power over it once it had been given to the attorney. Because the man instructed the attorney to return the deed to the man if he asked, the man did not place the deed beyond his control, and no death escrow was created.

(C) Yes, because the death of the nephew rendered the gratuitous death escrow irrevocable by the man.

(D) Yes, because the deed to the nephew was legally delivered when the man took it to his attorney.

Question # 43 - Contracts

A buyer sent a seller an offer to buy 50 tons of cotton of a specified quality. The offer contained no terms except those specifying the amount and quality of the cotton. The seller then sent an acknowledgment by fax. The acknowledgment repeated the terms of the buyer's offer and stated that shipment would occur within five days. Among 12 printed terms on the acknowledgment was a statement that any dispute about the cotton's quality would be submitted to arbitration. Neither the buyer nor the seller said anything further about arbitration. The seller shipped the cotton, and it was accepted by the buyer. A dispute arose between the buyer and the seller as to the quality of the cotton, and the seller asserted that the dispute had to be submitted to arbitration. The buyer instead sued the seller in court.

In that suit, which of the following arguments best supports the seller's position that the buyer must submit the dispute to arbitration?

(A) Arbitration is a more efficient method of resolving disputes than resolving them in court.

(B) The provision for arbitration did not contradict any term in the buyer's offer.

(C) The provision for arbitration did not materially alter the parties' contract.

Correct. Because the buyer's offer was silent as to arbitration, the arbitration provision in the seller's acknowledgment should be characterized as an additional term. Under UCC § 2-207(2), an additional term is considered a proposal for addition to the contract. Section 2-207(2) also provides that an additional term becomes a term of the parties' contract unless certain specified circumstances are present. One such circumstance is where an additional term materially alters the parties' contract. Because none of the other circumstances appear applicable here, the arbitration provision will be considered a term of the contract if the seller can successfully argue that the provision did not materially alter the parties' contract.

(D) The seller's acknowledgment containing a provision for arbitration constituted a counteroffer that was accepted by the buyer when it accepted delivery of the cotton.

Question # 44 - Constitutional Law

A recently enacted federal statute requires the President to make each appointment of a United States ambassador to a foreign country from a list of three individuals. The list is to be compiled by the Senate Foreign Relations Committee and approved by the full Senate in advance of the appointment. The statute also provides that Senate confirmation of the appointment is deemed to occur automatically 30 days after the time the President names an appointee from the list, unless the full Senate determines otherwise within the 30-day period.

Is this statute constitutional?

(A) No, because the statute violates the constitutional requirements for appointment of principal officers of the United States.

Correct. Two provisions of the statute violate the appointments clause of the Constitution. First, the provision limiting the President to a list of three potential nominees violates the President's power to nominate principal officers. Second, the automatic confirmation provision violates the requirement that the Senate consent to the appointment of a principal officer.

(B) No, because the statute impermissibly restricts the plenary foreign affairs powers of the President.

(C) Yes, because the statute is consistent with the constitutional requirement that the presidential appointment of ambassadors be with the advice and consent of the Senate.

(D) Yes, because the statute is a necessary and proper measure in furtherance of Congress's power to regulate commerce with foreign states.

Question # 45 - Contracts

A janitorial service contracted in writing with a hospital for a one-year term. Under the terms of the contract, the janitorial service agreed to clean the hospital daily in accordance with the hygiene standards of the city's health code. Because the janitorial service did not clean a patient's room in accordance with the required hygiene standards, the patient contracted an infection that required continued hospitalization. In addition to suing the hospital, the patient sued the janitorial service for breach of contract.

Which of the following statements is most accurate with respect to the breach of contract claim against the janitorial service?

(A) The janitorial service is liable to the patient as a matter of public policy, because it violated the city's health code.

(B) The patient is an intended third-party beneficiary under the contract, because the janitorial service's promise was intended to benefit all hospital patients.

(C) The patient has no claim for breach of contract against the janitorial service, because she is an incidental beneficiary.

Correct. The patient cannot recover because she is an incidental beneficiary rather than an intended third-party beneficiary. The circumstances fail to indicate that the hospital intended to give the patient the benefit of the promised performance.

(D) The patient cannot sue on the contract, because she was not named in the contract.

Question # 46 - Torts

A driver negligently ran into a pedestrian who was walking along a road. The pedestrian sustained an injury to his knee, causing it to buckle from time to time. Several months later, the pedestrian sustained an injury to his shoulder when his knee buckled, causing him to fall down a flight of stairs. The pedestrian then brought an action against the driver for the injuries to his knee and shoulder.

In his action against the driver, for which of his injuries may the pedestrian recover damages?

(A) For the injuries to his knee and shoulder, because the driver takes the victim as he finds him.

(B) For the injuries to his knee and shoulder, if the jury finds that the pedestrian's fall down a flight of stairs was a normal consequence of his original injury.

Correct. The driver is liable for the full extent of the consequential damages arising from injuries to the pedestrian even if some of the injuries did not materialize for some time after the accident. While mere passage of time may cause statute of limitations problems if substantially longer than several months is involved, time passage in itself will not give rise to a proximate cause limitation.

(C) For the injury to his knee only, because the injury to the pedestrian's shoulder is separable.

(D) For the injury to his knee only, if the jury finds that the driver could not have foreseen that his negligent driving would cause the pedestrian to fall down a flight of stairs.

Question # 47 - Evidence

A consumer has sued the manufacturer of a microwave oven for burn injuries allegedly caused by the manufacturer's negligent failure to warn purchasers of the dangers of heating foods in certain types of containers. The consumer has offered into evidence three letters, all received by the manufacturer before the oven was shipped to the consumer, in which customers had complained of serious burns under circumstances similar to those in the consumer's case. The manufacturer has objected to the letters on the grounds of hearsay and, in the alternative, has asked for a limiting instruction directing that the letters be considered not for the truth of the assertions contained in them but only regarding the issue of notice.

How should the court respond?

(A) The court should sustain the objection and treat the request for a limiting instruction as moot.

(B) The court should overrule the objection and deny the request for a limiting instruction.

(C) The court should overrule the objection and give the limiting instruction.

Correct. The letters are not hearsay if offered only for the limited purpose of proving that the manufacturer was put on notice of possible dangers in using the microwave. Such notice supports the claim of negligence because it suggests that the manufacturer should have investigated and taken action to protect future consumers. The letters would be hearsay if offered to prove the assertions contained in them—that other persons had been injured or that the microwave was dangerous.

(D) The court should overrule the objection but allow only that the letters be read to the jury, not received as exhibits.

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Question # 48 - Torts

A rancher and his neighbor were involved in a boundary dispute. In order to resolve their differences, each drove his truck to an open pasture area on his land where the two properties were separated by a fence. The rancher was accompanied by four friends, and the neighbor was alone.

The neighbor got out of his truck and walked toward the fence. The rancher got out but simply stood by his truck. When the neighbor came over the fence, the rancher shot him, inflicting serious injury.

In a battery action brought by the neighbor against the rancher, the rancher testified that he actually thought his neighbor was armed, although he could point to nothing that would have reasonably justified this belief.

Is the neighbor likely to prevail?

(A) No, because the rancher was standing on his own property and had no obligation to retreat.

(B) No, because the rancher suspected that the neighbor was armed.

(C) Yes, because deadly force is never appropriate in a property dispute.

(D) Yes, because it was unreasonable for the rancher to consider the use of a gun necessary for self-defense.

Correct. While the rancher's belief that deadly force was necessary to protect himself from harm may have been actual, it was not reasonable. To justify the use of force sufficient to cause death or serious bodily injury, a defendant must have a reasonable belief that he himself is threatened with force of that sort.

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Question # 49 - Real Property

A businesswoman owned two adjoining tracts of land, one that was improved with a commercial rental building and another that was vacant and abutted a river.

Twenty years ago, the businesswoman conveyed the vacant tract to a grantee by a warranty deed that the businesswoman signed but the grantee did not. The deed contained a covenant by the grantee as owner of the vacant tract that neither he nor his heirs or assigns would "erect any building" on the vacant tract, in order to preserve the view of the river from the commercial building on the improved tract. The grantee intended to use the vacant tract as a nature preserve. The grantee promptly and properly recorded the deed.

Last year, the businesswoman conveyed the improved tract to a businessman. A month later, the grantee died, devising all of his property, including the vacant land, to his cousin.

Six weeks ago, the cousin began construction of a building on the vacant tract.

The businessman objected and sued to enjoin construction of the building.

Who is likely to prevail?

(A) The businessman, because the commercial building was constructed before the cousin began his construction project.

(B) The businessman, because the cousin is bound by the covenant made by the grantee.

Correct. The businesswoman and the grantee created a valid equitable servitude. The promise was in a writing—the deed—that satisfied the statute of frauds. The promise restricting the use of the vacant land touched and concerned the land, placing a burden on the vacant tract and giving a benefit to the improved tract. The writing showed an intent that the promise would be binding on the grantee's heirs and assigns. The grantee recorded the deed. The cousin had constructive notice of the equitable servitude and is bound by it because nothing has occurred that would terminate the equitable servitude.

(C) The cousin, because an equitable servitude does not survive the death of the promisor.

(D) The cousin, because the grantee did not sign the deed.

Question # 50 - Criminal Law and Procedure

A defendant was charged with battery, defined as at common law. At trial, an expert witness testified for the defense that the defendant, an athlete, was under the influence of a performance-enhancing drug at the time he committed the battery and that he would not have done so had he not been so influenced. The defendant asked for an instruction to the effect that if the jury believed that he was influenced by the drug at the time of the crime and would not have committed it otherwise, it had to acquit him.

Which of the following circumstances would most aid the defendant's argument in favor of such an instruction?

(A) Evidence that the defendant is addicted to this drug and has an overwhelming urge to consume it.

(B) Evidence that the defendant's coach, who gave him the drug, told him it was only an aspirin.

Correct. The most helpful fact supporting an intoxication defense would be evidence that the intoxication was involuntary, which could be shown by evidence demonstrating that the defendant was tricked into taking a substance that he did not know was an intoxicant.

(C) Evidence that the victim of the assault taunted the defendant about his use of the drug immediately before the assault.

(D) Expert testimony that a reasonable person, on consuming this drug, may experience uncontrollable rages.

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Question # 51 - Constitutional Law

Under a state law, a drug company that makes a false factual claim about a prescription drug is strictly liable in tort to any user of the drug.

In an advertisement promoting sales of a particular drug, a drug company claimed that the drug was safe for children. Suit was filed against the company on behalf of a child who allegedly was harmed as a result of taking the drug. At the time the child took the drug, the available medical studies supported the company's claim that the drug was safe for children, but later research proved that the drug actually was harmful to children. The company has moved to dismiss the suit on First Amendment grounds.

Should the court grant the motion?

(A) No, because false or misleading commercial speech is not constitutionally protected.

Correct. The drug company's claim that the drug was safe for children is commercial speech because it promoted the sale of a commercial product. U.S. Supreme Court precedent establishes that the First Amendment does not protect commercial speech that is false or misleading.

(B) No, because the drug business is subject to extensive health and safety regulation.

(C) Yes, because liability cannot be imposed for false statements without a showing of actual malice.

(D) Yes, because the company's claims about the drug were a matter of public concern.

Question # 52 - Contracts

A developer contracted in writing to sell to a buyer a house on a one-acre lot for $100,000. The developer told the buyer that the lot abutted a national park and that the water for the house came from a natural artesian spring. The developer knew that both of these representations were important to the buyer and that both were false. The buyer moved into the house and eight months later learned that a private golf course was being constructed on the adjacent land and that the water for his house was piped in from the city reservoir. The buyer immediately sued the developer to avoid the contract.

The construction of the golf course will probably increase the market value of the buyer's property, and the water from the city reservoir exceeds all established standards for drinking water.

Is the buyer likely to prevail?

(A) No, because eight months exceeds a reasonable time for contract avoidance.

(B) No, because the developer's misstatements caused no economic harm to the buyer.

(C) Yes, because the contract was void ab initio.

(D) Yes, because the buyer retained the power to avoid the contract due to fraud.

Correct. A party may avoid a contract to which the party's assent was induced by fraud. The time period within which a party may avoid a contract due to misrepresentation does not begin to run until that party either knows or has reason to know of the misrepresentation. In this case, the buyer's eight-month delay will not preclude him from avoiding the contract because he did not learn of the misrepresentation until eight months after the parties entered into the contract; the buyer immediately sought to avoid the contract after learning of the misrepresentation.

Question # 53 - Real Property

A seller owns a 400-acre tract of land with 5,000 feet of frontage on a county highway. The seller and a buyer entered into a written agreement for the sale of a portion of the tract identified only as "a parcel of land, containing not less than 100 acres and having not less than 1,000 feet of frontage on the county highway, whose exact location and dimensions are to be determined by the parties hereto, at a price of $8,000 per acre."

Shortly after the execution of the agreement, the parties met to stake out the parcel of land to be sold, but they could not agree. The disagreement intensified, and the seller repudiated the contract.

The buyer has sued the seller for specific performance. The seller has asserted all available defenses.

Is the buyer entitled to specific performance of the contract?

(A) No, because a contract for the sale of real property that requires further agreement on an essential element cannot be specifically enforced.

Correct. The statute of frauds requires a writing evidencing an agreement to sell real property to identify the land to be sold. Although courts are sometimes lenient with this requirement, the writing must contain some evidence of the specific real property to be sold. The writing in this case noted that the parties were yet to agree on what land was to be conveyed. Thus, the statute of frauds makes the contract unenforceable.

(B) No, because the purchase price was not fixed by, nor determinable under, the contract terms.

(C) Yes, because the contract bound the parties to act in good faith and to agree upon the specific land to be conveyed.

(D) Yes, because the equity powers of the court enable the court to appoint a master, or to take other appropriate action, to identify the land to be conveyed.

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Question # 54 - Evidence

A plaintiff sued for injuries arising from a car accident, claiming a back injury. At trial, she wishes to testify that prior to the accident she had never had any problems with her back.

Is the plaintiff's proposed testimony admissible?

(A) No, because the plaintiff has not been qualified as an expert.

(B) No, because the plaintiff's pain could have been caused by factors arising after the accident, such as an injury at work.

(C) Yes, because it is probative evidence of the plaintiff's injury.

Correct. The fact that the back problems arose after the accident is probative on the issue of whether the accident was the cause of the injury. Therefore, the evidence meets the standard of relevance, and the testimony should be allowed.

(D) Yes, because the testimony of parties is not subject to the lay opinion rule.

Question # 55 - Constitutional Law

A state owned a large natural gas field and took bids for its exploitation. The highest bid came from an interstate pipeline company that distributed natural gas to providers throughout the country. A local gas company submitted the next highest bid, which included the commitment that it would pass along to local customers any savings if it was awarded the contract. The state awarded the contract to the local company. The interstate company sued to overturn this decision.

Should the interstate company prevail?

(A) No, because the state has a compelling interest in reducing the cost of gas for state citizens.

(B) No, because the state acted as a market participant.

Correct. When the state participates in the economic marketplace, it may decide with whom it wishes to contract without regard to the restrictions of the dormant commerce clause. Here the state is a market participant because it is selling the rights to exploit a natural gas field that it owns. The usual rules of the dormant commerce clause restricting the power of the state to prefer local economic actors over interstate companies therefore do not apply.

(C) Yes, because the state acted irrationally by not choosing the highest bidder and thus denied the interstate company due process of law.

(D) Yes, because the state discriminated against interstate commerce.

Question # 56 - Real Property

A woman died, devising land that she owned in another state to her daughter, who was then 17 years old.

A neighbor who owned the property immediately adjacent to the land wrongfully began to possess the land at that time. For 24 of the next 25 years, the neighbor planted and harvested crops on the land, hunted on it, and parked cars on it. However, in the sixth year after he first took possession of the land, the neighbor neither planted crops nor hunted nor parked cars on the land because he spent that entire year living in Europe. The neighbor built a small gardening shed on the land, but he never built a residence on it.

When the daughter was 28, she was declared mentally incompetent and had a conservator appointed to oversee her affairs. Since then, she has continuously resided in a care facility.

The applicable statute of limitations provides as follows: "An ejectment action shall be brought within 21 years after the cause of action accrues, but if the person entitled to bring the cause of action is under age 18 or mentally incompetent at the time the cause of action accrues, it may be brought by such person within 10 years after attaining age 18 or after the person becomes competent."

If the daughter's conservator wins an ejectment action against the neighbor, what will be the most likely explanation?

(A) The daughter was age 17 when the neighbor first took possession of the land.

(B) Because the daughter is mentally incompetent, the statute of limitations has been tolled.

(C) The neighbor never built a residence on the land.

(D) The neighbor was not in continuous possession of the land for 21 years.

Correct. The time period to acquire title by adverse possession in this jurisdiction is a minimum of 21 years. The neighbor has not been in continuous adverse possession for the entire 21-year period required because the neighbor spent one year in Europe after the first five years of possession.

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Question # 57 - Criminal Law and Procedure

A common law jurisdiction defines first-degree murder as any murder that is (1) committed by means of poison or (2) premeditated. All other murder is second-degree murder, and manslaughter is defined as at common law.

An employee was angry with her boss for denying her a raise. Intending to cause her boss discomfort, the employee secretly dropped into his coffee three over-the-counter laxative pills. The boss drank the coffee containing the pills. Although the pills would not have been dangerous to an ordinary person, because the boss was already taking other medication, he suffered a seizure and died.

If the employee is charged with murder in the first degree, should she be convicted?

(A) Yes, only because she used poison.

(B) Yes, only because she acted with premeditation.

(C) Yes, both because she used poison and because she acted with premeditation.

(D) No.

Correct. Murder requires that a killer have acted with malice aforethought, express or implied. Because the employee here did not intend to kill or cause serious injury to her boss or act with extreme indifference to human life, she would not be guilty of any degree of murder.

Question # 58 - Contracts

A lawn service company agreed in writing to purchase from a supplier all of its requirements for lawn care products during the next calendar year. In the writing, the supplier agreed to fulfill those requirements and to give the company a 10% discount off its published prices, but it reserved the right to increase the published prices during the year. After the parties had performed under the agreement for three months, the supplier notified the company that it would no longer give the company the 10% discount off the published prices.

Does the company have a viable claim against the supplier for breach of contract?

(A) Yes, because part performance of the agreement by both parties made it enforceable for the full year.

(B) Yes, because the company's agreement to buy all of its lawn care products from the supplier made the agreement enforceable.

Correct. The parties entered into an enforceable requirements contract under UCC § 2-306. Although the terms of the parties' agreement granted the supplier the discretion to increase the published prices during the year, the contract did not grant the supplier the right to discontinue the promised 10% discount off the published prices. The supplier's refusal to give the company the 10% discount was a breach of the contract's agreed-upon terms.

(C) No, because the supplier could, and did, revoke its offer with respect to future deliveries.

(D) No, because the absence of a minimum quantity term rendered the company's promise illusory.

Question # 59 - Torts

A driver was traveling along a highway during an unusually heavy rainstorm when the roadway began to flood. To protect his car from water damage, the driver pulled his car up a steep, unmarked driveway abutting the highway that led to a homeowner's residence. The driver left his car parked in the driveway and walked home, intending to return when the floodwater had subsided. Shortly after the driver started to walk home, the homeowner carefully rolled the car back down his driveway and parked it on the highway shoulder. The floodwater continued to rise and caused damage to the driver's car.

If the driver sues the homeowner to recover for damage to the car, is the driver likely to prevail?

(A) Yes, because the driver was privileged to park his car on the homeowner's property.

Correct. A landowner has no right to forcibly expel a trespasser or a trespasser's property when the trespasser was driven by necessity to trespass on his land, and the landowner is liable for any damage to property of the trespasser that results from an expulsion. If the car had damaged the homeowner's property, the homeowner could have collected damages from the driver.

(B) Yes, because there were no "no trespassing" signs posted.

(C) No, because the driver intentionally drove his car onto the homeowner's property.

(D) No, because the homeowner was privileged to remove the car from his property.

Question # 60 - Criminal Law and Procedure

Federal agents had a hunch that a local man was engaged in illegal gambling activities. An agent decided to enter the man's house while he was not at home and see what he could find. The agent discovered an envelope containing $5,000 in cash and an executive's business card. Returning the envelope to its place, the agent located and interviewed the executive, who admitted that he had paid the man $5,000 to settle a gambling debt; the executive also disclosed that the man regularly took illegal bets from the executive and several of his acquaintances. The agent then interviewed the acquaintances, who confirmed what the executive had told him. The agent then arranged to be introduced to the man at a local bar. After a few drinks, the man, unaware of the agent's identity, boasted that he was one of the biggest bookmakers in the state.

The agent testified to all of his investigation's discoveries before a grand jury, which returned an indictment against the man for illegal gambling activities, based solely on the agent's testimony. The man's attorney then filed a motion to dismiss the indictment, claiming that it rested on violations of the man's constitutional rights.

Should the court grant the motion?

(A) No, because dismissal of the indictment is not the appropriate remedy.

Correct. Dismissal of the indictment would not be warranted, because a grand jury is entitled to consider hearsay and is not limited by the exclusionary rule.

(B) Yes, because much of the agent's testimony before the grand jury was inadmissible hearsay.

(C) Yes, because of the agent's unlawful search of the man's home.

(D) Yes, because of the agent's violation of the man's right to counsel.

Question # 61 - Evidence

A plaintiff, who had been injured in an automobile collision with the defendant, sued the defendant for damages. The defendant denied negligence and denied that the plaintiff's injuries were severe. At trial, the plaintiff has offered in evidence a color photograph of himself made from a videotape taken by a television news crew at the scene of the collision. The plaintiff has demonstrated that the videotape has since been routinely reused by the television station and that the footage of the plaintiff was erased. The photograph shows the plaintiff moments after the collision, with his bloodied head protruding at a grotesque angle through the broken windshield of his car.

Should the photograph be admitted over the defendant's objection?

(A) No, because the plaintiff has failed to establish that a duplicate could not be found.

(B) No, because the plaintiff has failed to produce the original videotape or a duplicate.

(C) Yes, because it tends to prove a controverted fact.

Correct. The defendant has denied that the plaintiff's injuries were severe. Therefore, the plaintiff is entitled to show the severity of his injuries by introducing the photograph. The evidence relates directly to the appropriate amount of damages.

(D) Yes, because a photograph that establishes a disputed fact cannot be excluded as prejudicial.

Question # 62 - Real Property

Ten years ago, a seller sold land to a buyer, who financed the purchase price with a loan from a bank that was secured by a mortgage on the land. The buyer purchased a title insurance policy running to both the buyer and the bank, showing no liens on the property other than the buyer's mortgage to the bank. Eight years ago, the buyer paid the mortgage in full.

Seven years ago, the buyer sold the land to an investor by a full covenant and warranty deed without exceptions.

Six years ago, the investor gave the land to a donee by a quitclaim deed.

Last year, the donee discovered an outstanding mortgage on the land that predated all of these conveyances. As a result of a title examiner's negligence, this mortgage was not disclosed in the title insurance policy issued to the buyer and the bank.

Following this discovery, the donee successfully sued the buyer to recover the amount of the outstanding mortgage.

If the buyer sues the title insurance company to recover the amount he paid to the donee, is he likely to prevail?

(A) No, because the buyer conveyed the land to an investor.

(B) No, because the title insurance policy lapsed when the buyer paid off the bank's mortgage.

(C) Yes, because the buyer is protected by the title insurance policy even though he no longer owns the land.

Correct. Although the lender's policy of title insurance ended when the loan was repaid, an owner's policy of title insurance continues to protect the owner if the owner (here, the buyer) is ever successfully sued on a title covenant in a future conveyance. The donee successfully sued the buyer on the title covenant in the buyer's full warranty deed which was given without exception to the investor. The buyer can now recover on the owner's policy of title insurance.

(D) Yes, because the buyer was successfully sued by a donee and not by a bona fide purchaser for value.

Question # 63 - Contracts

On June 1, a general contractor and a subcontractor entered into a contract under which the subcontractor agreed to deliver all of the steel joists that the general contractor required in the construction of a hospital building. The contract provided that delivery of the steel joists would begin on September 1.

Although the general contractor had no reason to doubt the subcontractor's ability to perform, the general contractor wanted to be sure that the subcontractor was on track for delivery in September. He therefore wrote a letter on July 1 to the subcontractor demanding that the subcontractor provide assurance of its ability to meet the September 1 deadline. The subcontractor refused to provide such assurance.

The general contractor then immediately obtained the steel joists from another supplier.

If the subcontractor sues the general contractor for breach of contract, is the subcontractor likely to prevail?

(A) No, because the subcontractor anticipatorily repudiated the contract when it failed to provide adequate assurance.

(B) No, because the contract failed to specify a definite quantity.

(C) Yes, because a demand for assurance constitutes a breach of contract when the contract does not expressly authorize a party to demand assurance.

(D) Yes, because the subcontractor's failure to provide assurance was not a repudiation since there were no reasonable grounds for the general contractor's insecurity.

Correct. The adequate assurance doctrine requires that a party respond to a demand for adequate assurance only if the demand is reasonable and justified. A demand is justified if the demanding party has reasonable grounds for insecurity with respect to the other party's potential performance. The facts in this case state that the general contractor had no reason to doubt the subcontractor's ability to perform. Therefore, the general contractor was unjustified in demanding adequate assurance, and the subcontractor properly refused to respond to the demand.

Question # 64 - Torts

A hotel employed a carefully selected independent contractor to rebuild its swimming pool. The hotel continued to operate while the pool was being rebuilt. The contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts. A guest of the hotel fell into the excavation, which the contractor had negligently left unguarded.

In an action by the guest against the hotel to recover for his injuries, what would be the most likely outcome?

(A) Liability, because the hotel had a nondelegable duty to the guest to keep a safe premises.

Correct. Ordinarily, someone who hires an independent contractor would not be vicariously liable for the contractor's negligence. However, a landowner who holds his land open to the public has a nondelegable duty to keep the premises safe for business visitors. Such a landowner is liable for any negligence that causes a guest to be injured by unsafe conditions on the premises, even the negligence of an independent contractor.

(B) Liability, because the contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts.

(C) No liability, because the contractor was the actively negligent party.

(D) No liability, because the hotel exercised reasonable care in employing the contractor.

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Question # 65 - Criminal Law and Procedure

A man asked his girlfriend to lend him something he could use to break into his neighbor's padlocked storage shed in order to steal a lawn mower. She handed him a crowbar. He took the crowbar but then found a bolt cutter that the neighbor had left outside the shed. Using the bolt cutter, he cut the padlock on the shed and took the mower, which he then used to mow his girlfriend's lawn. She was surprised and pleased by this gesture.

Burglary in the jurisdiction applies to any structure or building, and there is no nighttime element.

The girlfriend has been charged as an accomplice to burglary and larceny.

Of which crimes, if any, is she guilty?

(A) Burglary and larceny.

Correct. The girlfriend is guilty as an accomplice because she provided aid to the man with the intent of helping him break into the shed and steal the mower; the fact that the man ultimately used an alternative means to accomplish his crimes does not eliminate the girlfriend's accomplice liability.

(B) Burglary, but not larceny, because she intended to assist only in the breaking.

(C) Larceny, but not burglary, because she provided no actual assistance to the breaking but received a benefit from the larceny.

(D) Neither burglary nor larceny, because she provided no actual assistance.

Question # 66 - Constitutional Law

Congress enacted a statute authorizing the denial of all federal funding to public school districts in which a specified percentage of the students enrolled in the public schools fail to pass a national achievement test. According to the terms of the federal statute, the first national achievement test was scheduled for administration five years from the effective date of the statute.

After reviewing then-current levels of public school student performance, the officials of a state became concerned that several of its public school districts would lose their federal funding after the administration of the first national achievement test. Then-current levels of private school student performance were substantially higher.

In order to improve the chances of those school districts retaining their federal funding, the state recently enacted a law that requires all children of elementary and secondary school age to attend the schools operated by their respective local public school districts. The law is to take effect at the beginning of the next school year.

Parents of children enrolled in private schools within the state have filed suit to challenge the constitutionality of this state law.

Should the court uphold the law?

(A) Yes, because it is rationally related to a legitimate state interest.

(B) Yes, because it is necessary to further a compelling state interest.

(C) No, because it is not rationally related to a legitimate state interest.

(D) No, because it is not necessary to further a compelling state interest.

Correct. U.S. Supreme Court precedent establishes that a state law requiring children to attend public schools infringes on the right of parents to control the upbringing of their children. Supreme Court precedent also establishes that this right is a fundamental aspect of liberty protected by the due process clause of the Fourteenth Amendment. A state law that infringes on that right must therefore undergo strict judicial scrutiny, which requires the state to prove that the law is necessary to further a compelling state interest. In this case, the state cannot satisfy strict scrutiny, because requiring private school students to attend public schools in order to raise the test scores in public school districts is not necessary to further a compelling state interest.

Question # 67 - Torts

A newspaper published an editorial in which an editor asserted that a candidate for high political office was a user of illegal drugs. The accusation was untrue. The editor acted unreasonably in not investigating the accusation before publishing it; however, the editor honestly believed that the accusation was true.

The candidate sued the editor for defamation.

Is the candidate entitled to recover?

(A) No, because the accusation appeared in an editorial and was, therefore, merely an opinion.

(B) No, because the editor honestly believed that the accusation was true.

Correct. In a defamation action brought by a candidate for public office, the plaintiff must establish more than mere negligence with regard to the truth or falsity of the allegedly defamatory statement of fact. The plaintiff must establish that the defendant acted with actual malice, that is, that the defendant in fact knew the statement to be false or entertained serious doubts as to the truth of the statement. Here, the candidate cannot establish actual malice on the part of the editor in publishing the statement.

(C) Yes, because calling someone an illegal drug user is defamatory per se.

(D) Yes, because the accusation was false and was injurious to the candidate's reputation.

Question # 68 - Real Property

A woman owned a house on a lot abutting a public street. Six months ago, the city validly revised its zoning ordinances and placed the woman's lot and the surrounding lots abutting the public street from the north in a zone limited to residential use; the lots abutting the public street on the south side were zoned for both residential and light business use.

The woman asked the city's zoning appeals board to approve her proposal to operate a court-reporting service from her house. This type of use would be permitted on the south side of the public street and, in fact, one such business has existed there for several years.

The board approved the woman's proposal.

Why?

(A) A variance was granted.

Correct. A variance permits a waiver from a zoning requirement. A variance will be granted when an owner convinces a zoning appeals board that without the variance the owner would suffer a hardship regarding the use of the land. In this case, the board approved the woman's application to operate a court-reporting service in her house, and thus this jurisdiction allows use variances that permit nonresidential uses in areas that are otherwise zoned residential.

(B) The doctrine of amortization applied.

(C) The doctrine of change of circumstances applied.

(D) The woman's use of her house was a nonconforming use.

Question # 69 - Evidence

A cyclist sued a defendant corporation for injuries sustained when she was hit by a truck owned by the defendant and driven by its employee, who was making deliveries for the defendant. The day after the accident, the employee visited the cyclist in the hospital and said, "I'm sorry for what I did." At trial, the employee testified that he had exercised due care.

Why is the cyclist's testimony relating what the defendant's employee said at the hospital admissible to prove negligence?

(A) It is a prior inconsistent statement.

(B) It is a statement against interest.

(C) It is a statement by a party-opponent's agent.

Correct. FRE 801(d)(2)(D) provides that a statement is "not hearsay" if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

(D) It is a statement of then-existing state of mind.

Question # 70 - Torts

An elderly neighbor hired a 17-year-old boy with a reputation for reckless driving to drive the neighbor on errands once a week. One day the teenager, driving the neighbor's car, took the neighbor to the grocery store. While the neighbor was in the store, the teenager drove out of the parking lot and headed for a party on the other side of town.

While on his way to the party, the teenager negligently turned in front of a moving car and caused a collision. The other driver was injured in the collision.

The injured driver has brought an action for damages against the neighbor, based on negligent entrustment, and against the teenager.

The jury has found that the injured driver's damages were $100,000, that the injured driver was 10% at fault, that the teenager was 60% at fault, and that the neighbor was 30% at fault for entrusting his car to the teenager.

Based on these damage and responsibility amounts, what is the maximum that the injured driver could recover from the neighbor?

(A) $100,000.

(B) $90,000.

Correct. In a system of pure comparative negligence with joint and several liability, a plaintiff can recover all the damages due, after discounting for the plaintiff's negligence, from any one of the defendants, and that defendant must pursue the other defendants for contribution. In this case, the driver would be able to recover the full $90,000 from the neighbor, and the neighbor would have to pursue the teenager for contribution of his $60,000 share.

(C) $60,000.

(D) $30,000.

Question # 71 - Contracts

A seller entered into a contract to sell to a buyer a house for a price of $150,000. The contract contained the following clause: "This contract is conditional on the buyer's securing bank financing at an interest rate of 7% or below." The buyer did not make an application for bank financing and therefore did not secure it, and refused to proceed with the purchase. The seller sued the buyer for breach of contract.

Is the seller likely to prevail?

(A) No, because the buyer did not secure bank financing.

(B) No, because the contract did not expressly impose on the buyer any obligation to apply for bank financing.

(C) Yes, because a court will excuse the condition to avoid a disproportionate forfeiture.

(D) Yes, because a court will imply a term imposing on the buyer a duty to use reasonable efforts to secure bank financing.

Correct. A performance that is subject to an express condition cannot become due unless the condition occurs or its nonoccurrence is excused. The duty of good faith imposed an obligation on the buyer to make reasonable efforts to secure bank financing. Accordingly, the failure of the condition (in this case, the bank financing commitment) to occur did not discharge the buyer's performance obligation.

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Question # 72 - Criminal Law and Procedure

A defendant was charged with the capital offense of first-degree murder, for which the only available penalties were death or life in prison without parole. During jury selection, the trial court, over the defendant's objection, granted the prosecution's for-cause challenge of five prospective jurors who indicated upon questioning by both parties that they personally were opposed to the death penalty and were unsure if they could ever vote to impose it. The jury convicted the defendant and, following a separate sentencing hearing, sentenced him to death.

On appeal, the defendant's only argument was that excusing the prospective jurors violated his federal constitutional right to be tried by a jury chosen from a fair cross section of the community.

How should the court of appeals rule on the conviction and the death sentence?

(A) Affirm both.

Correct. A trial court properly may excuse a juror for cause from serving in both the guilt and penalty phases of a capital case if a juror's views regarding the death penalty would prevent or substantially impair the juror from impartially deciding whether the death penalty is warranted in that particular case. Exclusion of such jurors does not violate the fair cross-section right of the Sixth Amendment.

(B) Affirm the conviction, but reverse the death sentence and remand for a new sentencing hearing before a different jury.

(C) Affirm the conviction, but reverse the death sentence and remand for resentencing to life in prison.

(D) Reverse both.

Question # 73 - Constitutional Law

Congress enacted a statute establishing a program to protect areas in the United States that are rich in biological diversity. The program is consistent with the terms of an environmental treaty that the President objected to and did not sign.

The statute creates an executive agency and authorizes it to designate parts of federal lands for inclusion in the program in accordance with criteria taken from the treaty. In an inseverable provision, the statute further provides that the agency must report each designation to a committee of Congress and that the committee may overturn the agency's designation by a majority vote.

Why is the statute unconstitutional?

(A) It constitutes an invalid delegation of legislative authority to an executive agency.

(B) It interferes with the exercise of the President's paramount authority in foreign affairs.

(C) It requires an executive agency to report its decisions to Congress.

(D) It authorizes a committee of Congress to overturn an executive decision.

Correct. The provision of the statute authorizing a congressional committee to overturn the agency's designations of federal lands is an unconstitutional legislative veto. Congress may overturn the action of an executive agency only by enacting a statute.

Question # 74 - Torts

A patient received anesthesia while giving birth. Upon awakening from the anesthesia, she discovered a severe burn on the inner portion of her right knee. The patient has brought a medical malpractice action in which she has joined all of the physicians and nurses who exercised control over her person, the delivery room, the medical procedures, and the equipment used during the period in which she was unconscious.

The defendants have jointly moved for summary judgment. The patient has produced affidavits that establish that the applicable professional standard of care was violated.

What would be the patient's best argument against the motion?

(A) At least one of the defendants had control over whatever agency or instrumentality caused the patient's injury.

Correct. *Ybarra v. Spangard* and cases that follow its approach have relied on this extension of res ipsa loquitur to establish causation in situations in which the plaintiff was treated by a medical team that, as a group, had exclusive control of the patient and in which the patient, because she was unconscious, cannot identify what went wrong. The doctrine may be limited to medical cases in which there may be a concern that none of the medical professionals would be willing to testify against another.

(B) The defendants were acting in concert.

(C) The patient has produced affidavits that establish that the applicable professional standard of care was violated.

(D) The patient was in no way responsible for her injury.

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Question # 75 - Evidence

A defendant is on trial for bank robbery. Evidence at the trial has included testimony by a bank teller who was present during the robbery. The teller testified for the prosecution after having refreshed her memory by looking at an FBI agent's investigative report that was created shortly after the robbery. The defendant has asked to examine the report.

How should the court respond?

(A) The court may allow the examination if the report was used by the teller to refresh her memory before testifying, and must allow it if she used it during her testimony.

Correct. FRE 612 provides that "if a witness uses a writing to refresh memory for the purpose of testifying, either—(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness."

(B) The court must allow the examination, but only to the extent that the report contains the teller's own statement to the FBI agent.

(C) The court should not allow the examination, unless the report was used by the teller to refresh her memory while on the witness stand.

(D) The court should not allow the examination, because the report was not shown to have been read and approved by the teller while the matter was fresh in her mind.

Question # 76 - Real Property

A woman died testate. In her will, she devised a farm she owned to her husband for life, remainder to her niece. Her will did not specify the duties of the husband and the niece with regard to maintenance and expenses related to the farm. The husband took sole possession of the farm, did not farm the land, and did not rent the land to a third person, although the fair rental value was substantial.

For two years in a row after the woman died, the county assessor sent the tax bills to the niece, but the niece did not pay the bills, because she and the husband could not agree on who should pay them. Finally, the niece paid the taxes to avoid a tax foreclosure sale.

The niece then sued the husband for reimbursement for the two years' worth of property taxes.

There is no applicable statute.

Is the niece likely to prevail?

(A) No, because remaindermen are solely responsible for the payment of property taxes.

(B) No, because the county assessor sent the bills to the niece.

(C) No, because the woman's will was silent on responsibility for payment of property taxes.

(D) Yes, because the niece paid an obligation that was the sole responsibility of the husband.

Correct. In the absence of a contrary direction in the document creating the life estate—in this case, the will—it is the duty of the life tenant to pay all general property taxes that accrue during the continuance of the life estate. The only limitation on this duty is that the life tenant has no duty to expend more than the income that can be generated from the land. Because the fair rental value of the farmland was substantial, this limitation does not apply. If the remainderman does pay any property taxes due during the life tenancy, he or she is entitled to a judgment against the life tenant for reimbursement.

Question # 77 - Contracts

A computer retail outlet contracted to service a bank's computer equipment for one year at a fixed monthly fee under a contract that was silent as to assignment or delegation by either party. Three months later, the retail outlet sold the service portion of its business to an experienced and well-financed computer service company. The only provision in the agreement between the retail outlet and the computer service company relating to the outlet's contract with the bank stated that the outlet "hereby assigns all of its computer service contracts to [the computer service company]."

The computer service company performed the monthly maintenance required under the service contract. Its performance was defective, however, and caused damage to the bank's operations.

Whom can the bank sue for damages arising from the computer service company's defective performance?

(A) The retail outlet only, because the computer service company made no promises to the bank.

(B) Either the retail outlet or the computer service company, because the bank has not released the outlet and the bank is an intended beneficiary of the outlet's agreement with the computer service company.

Correct. The retail outlet effectively delegated to the computer service company the outlet's duty of performance owed to the bank. However, absent consent by the obligee (the bank) or performance by the delegate (the computer service company), an effective delegation does not relieve the delegating party (the retail outlet) of its duty to the obligee. When the computer service company purchased the service contracts, the bank also became an intended beneficiary of the computer service company's promise to the retail outlet. The computer service company expressly agreed with the retail outlet to perform the outlet's obligation to the bank, making the bank an intended beneficiary of that obligation. Thus, both the retail outlet and the computer service company remain liable to the bank.

(C) Either the retail outlet or the computer service company, because since each has the right to enforce the bank's performance of its contract with the retail outlet, mutuality of remedy renders either potentially liable for the defective performance.

(D) The computer service company only, because it is a qualified and a financially responsible supplier of computer services.

Question # 78 - Constitutional Law

A city ordinance prohibited individuals from picketing in residential neighborhoods unless the picketing related to the neighborhood zoning requirements. This exception to the ordinance was adopted in response to local citizens' strong views about proposed rezoning of residential neighborhoods.

A group that wished to picket in front of a business owner's home because of the business owner's employment practices challenged the ordinance as unconstitutional under the First Amendment.

Will the group's challenge likely prevail?

(A) No, because the ordinance is a content-neutral regulation of speech.

(B) No, because the ordinance regulates conduct rather than speech.

(C) Yes, because the ordinance irrationally discriminates between different types of protesters.

(D) Yes, because the ordinance is a content-based regulation of speech.

Correct. The ordinance is a content-based regulation of speech because it permits an expressive activity (picketing) on one subject (neighborhood zoning requirements) and prohibits it on all other subjects. Such a content-based restriction on expression presumptively violates the freedom of speech protected by the First Amendment. To justify a content-based restriction, the government must satisfy strict judicial scrutiny, proving that the restriction is necessary to serve a compelling government interest. The city would be unable to meet that burden in this case.

Question # 79 - Criminal Law and Procedure

A defendant was tried for armed robbery. The state introduced evidence that a man, identified by witnesses as the defendant, entered a convenience store at 11 p.m. on March 5, threatened the clerk with a gun, and took $75 from the cash register.

The defendant did not testify, but his sister did. She testified that on March 5, at the time of the robbery, the defendant was with her in a city 300 miles away. On cross-examination, the sister admitted having given a statement to the police in which she had said that the defendant was not with her on March 5, but she claimed that the earlier statement was mistaken.

The court instructed the jury that in order to convict the defendant, they had to find all of the elements of the crime beyond a reasonable doubt.

As to the defendant's claim of alibi, which of the following additional instructions would be proper?

(A) Alibi is a matter of defense and so must be established by the defendant; however, the burden of persuasion is by a preponderance of the evidence, not beyond a reasonable doubt.

(B) Before you may consider the defendant's claim of alibi, you must decide whether he has produced sufficient evidence to raise the issue.

(C) If you have a reasonable doubt as to whether the defendant was present at the convenience store at about 11 p.m. on March 5, you must find him not guilty.

Correct. Due process requires the prosecution to prove all elements of a crime beyond a reasonable doubt. Because alibi is not a traditional defense, but rather negates an essential element of the crime (the defendant's actual commission thereof), due process precludes imposing upon a defendant the burden of proving alibi.

(D) If the defendant's evidence has caused you to have a reasonable doubt as to whether he was the robber, you must find him not guilty.

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Question # 80 - Real Property

A woman acquired title to a four-acre lot. Several years later, she executed a mortgage on the lot to a bank to secure repayment of a $100,000 loan. Subsequently, the woman executed a mortgage on the same four-acre lot to a finance company to secure repayment of a $50,000 loan. Both mortgages were promptly recorded.

The woman recently defaulted on both loans. The bank promptly initiated foreclosure proceedings and sent proper notice to all necessary parties. The current fair market value of the four-acre lot is $250,000.

The finance company has filed a timely motion in the foreclosure proceeding asking the court to require the bank to first foreclose on two of the four acres in the four-acre lot. The bank opposes this motion and insists that it has the right to subject the entire four-acre lot to the foreclosure sale.

Will the court grant the finance company's motion?

(A) No, because the bank holds a purchase-money mortgage.

(B) No, because the entire four-acre lot is subject to the bank's senior mortgage.

Correct. Both mortgagees have mortgages on the entire four-acre lot. Priority of mortgages in the foreclosure process is based on the order in which the mortgages were recorded. The bank's mortgage was recorded first and thus has priority. The two mortgages do not cover different tracts of land.

(C) Yes, because a pro rata foreclosure of the lot will not prejudice the rights of the bank.

(D) Yes, because of the "two funds" rule of marshalling.

Question # 81 - Criminal Law and Procedure

A state statute provides: "Aggravated robbery of the elderly consists of robbery committed against a victim who is 65 years of age or older." Another state statute provides that when a criminal statute does not designate a necessary mental state, the mental state required is recklessness. A third state statute provides that a person acts recklessly if the person "consciously disregards a substantial and unjustified risk that the material element exists or will result from the person's conduct."

The evidence at a criminal trial showed that the defendant robbed a 66-year-old man outside a senior citizens' center. The defendant testified truthfully that the robbery had occurred on a dark night, that she had had no idea how old the victim was and had not cared how old the victim was, and that she had intended to rob whomever she encountered.

Could the defendant properly be convicted of aggravated robbery of the elderly?

(A) No, because the only evidence on the issue showed that the defendant did not know, nor could she reasonably have known, the victim's age.

(B) No, because there was no evidence of a substantial risk that the victim was age 65 or older.

(C) Yes, because the evidence was clear that the victim was 66 years old, and the statute is designed to protect the elderly.

(D) Yes, because the jury could find that there was no justification for the defendant's conduct and that she was willing to take the risk that the victim was age 65 or older.

Correct. The mens rea or scienter standard for a conviction under the statute is recklessness, defined as disregard of a substantial and unjustified risk. Given the totality of the circumstances—including the crime's location, the victim's age, and the defendant's intent and unjustifiable actions—a jury could properly conclude that the defendant had acted with reckless disregard of the victim's age.

Question # 82 - Contracts

A farmer contracted to sell 100,000 bushels of wheat to a buyer. When the wheat arrived at the destination, the buyer discovered that the farmer had delivered only 96,000 bushels. The buyer sued the farmer for breach of contract. At the trial of the case, the court found that the written contract was intended as a complete and exclusive statement of the terms of the agreement. The farmer offered to prove that in the wheat business, a promise to deliver a specified quantity is considered to be satisfied if the delivered quantity is within 5% of the specified quantity. The buyer objected to the offered evidence.

Is the court likely to admit the evidence offered by the farmer?

(A) No, because the offered evidence is inconsistent with the express language of the agreement.

(B) No, because the written contract was totally integrated.

(C) Yes, because the offered evidence demonstrates that the farmer substantially performed the contract.

(D) Yes, because the offered evidence explains or supplements the agreement by usage of trade.

Correct. This transaction involves a sale of goods and is subject to UCC Article 2. Under Article 2, evidence of trade usage that can be construed as reasonably consistent with an agreement's express language is admissible to interpret or supplement an agreement. The majority rule provides that trade usage will be viewed as consistent with an agreement's express language unless the usage completely negates specific express language. The trade usage allowing for a variation of up to 5% does not completely negate but rather qualifies the express language calling for the delivery of 100,000 bushels of wheat.

Question # 83 - Constitutional Law

A state law prohibits the withdrawal of groundwater from any well within the state for use in another state. The express purpose of the law is to safeguard the supply of water for state citizens. Adoption of this state law followed enactment of a federal statute providing that "the transport of groundwater from one state to another may be restricted or prohibited in accordance with the laws of the state in which the water originates."

An association of water users in a neighboring state has filed suit to have the state law declared unconstitutional and enjoined on the ground that it violates the negative implications of the commerce clause.

Which of the following is the best argument supporting a motion to dismiss the lawsuit?

(A) The law promotes a compelling state interest that outweighs any burden on interstate commercial activity that might result from this state regulation of its groundwater.

(B) Groundwater located within a state is not itself an article of interstate commerce, and therefore state regulation of the withdrawal of such groundwater does not implicate the commerce clause.

(C) The Tenth Amendment reserves to the states plenary authority over the regulation of the natural resources located within their respective borders.

(D) The federal statute explicitly consents to a state's regulation of its groundwater in a way that would otherwise violate the negative implications of the commerce clause.

Correct. Congress may exercise its authority under the commerce clause to permit a state regulation that would otherwise violate the negative implications of the commerce clause, as long as the congressional legislation unmistakably grants such permission. The federal statute that permits states to restrict or prohibit the transport of groundwater from one state to another qualifies as such legislation.

Question # 84 - Torts

A customer pledged a stock certificate to a bank as security for a loan. A year later, when the customer fully repaid the loan, the bank refused the customer's demand to return the stock certificate because the officer dealing with the loan had the mistaken belief that there was still a balance due. No one at the bank reviewed the records until two months later, at which time the error was discovered. The bank then offered to return the stock certificate. However, the customer refused to accept it.

At the time the customer pledged the certificate, the shares were worth $10,000; at the time the customer repaid the loan, the shares were worth $20,000; and at the time the bank offered to return the certificate, the shares were worth $5,000.

If the customer brings an action against the bank based on conversion, how much, if anything, should the customer recover?

(A) Nothing, because the bank lawfully came into possession of the certificate.

(B) $5,000, because that was the value of the shares when the customer refused to accept the certificate back.

(C) $10,000, because that was the value of the shares when the bank came into possession of the certificate.

(D) $20,000, because that was the value of the shares when the customer was entitled to the return of the certificate.

Correct. Conversion is equivalent to a forced sale of the chattel to the defendant, who is liable for the full value of the chattel at the time of the tort. The tort occurred when the bank refused to relinquish the stock certificate in response to the customer's lawful demand, and at that time the shares were worth $20,000.

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Question # 85 - Evidence

A patient sued a hospital for medical negligence, claiming that a nurse employed by the hospital failed to administer critical medication prescribed by the patient's treating physician during the plaintiff's hospitalization. To prove the nurse's failure to administer the prescribed medication, the patient called the medical records librarian, who authenticated the hospital's record of the patient's treatment, which contained no entry showing that the medication in question had been administered.

Is the hospital record admissible?

(A) No, because it is hearsay not within any exception.

(B) No, because the nurse's testimony would be the best evidence of her actions in treating the plaintiff.

(C) Yes, although hearsay, because it is a statement against interest by agents of the hospital.

(D) Yes, because it is within the hearsay exception covering the absence of entries in business records.

Correct. The hospital record itself is hearsay, but it qualifies as a record of regularly recorded conduct under FRE 803(6). The absence of an entry in such a record is admissible under FRE 803(7) to prove the nonoccurrence of a matter that would normally have been recorded if it had occurred. Thus, the absence of an entry can be used by the patient to establish that the medication was not administered.

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Question # 86 - Contracts

The mother of a son and a daughter was dying. The daughter visited her mother in a hospice facility and said, "You know that I have always been the good child, and my brother has always been the bad child. Even so, you have left your property in the will to us fifty-fifty. But it would be really nice if you would sell me the family home for $100,000."

"I don't know," said the mother. "It is worth a lot more than that—at least $250,000."

"That is true," said the daughter. "But I have always been good and visited you, and my brother has never visited you, so that ought to be worth something. And besides, if you won't sell me the house for that price, maybe I won't visit you anymore, either."

"Oh, I wouldn't want that," said the mother, and she signed a contract selling the house to her daughter for $100,000.

Shortly thereafter, the mother died. When her son found out that the house had been sold and was not part of his mother's estate, he sued to have the contract avoided on behalf of the mother.

On what ground would the contract most likely be avoided?

(A) Duress.

(B) Inadequate consideration.

(C) Mistake.

(D) Undue influence.

Correct. A contract is voidable if the elements of undue influence—undue susceptibility to pressure and excessive pressure—are established. The undue susceptibility element can be established either by the circumstances (e.g., the mother's illness) or the existence of a confidential relationship (such as a parent-child relationship). The following facts support a finding of excessive pressure: the daughter's statement that she might not visit her mother, the daughter pressuring her mother to sell the property while her mother was in a hospice facility, the mother assenting without obtaining independent advice, and the mother's susceptibility to pressure.

Question # 87 - Real Property

Under the terms of his duly probated will, a testator devised his house to his "grandchildren in fee simple" and the residue of his estate to his brother. The testator had had two children, a son and a daughter, but only the daughter survived the testator. At the time of the testator's death, the daughter was 30 years old and had two minor children (grandchildren of the testator) who also survived the testator.

A third grandchild of the testator, who was the child of the testator's predeceased son, had been alive when the testator executed the will, but had predeceased the testator. Under the applicable intestate succession laws, the deceased grandchild's sole heir was his mother.

A statute of the jurisdiction provides as follows: "If a devisee, including a devisee of a class gift, who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will or fails to survive the testator, the issue of such deceased devisee shall take the deceased's share under the will, unless the will expressly provides that this statute shall not apply. For this purpose, words of survivorship, such as 'if he survives me,' are a sufficient expression that the statute shall not apply."

Who now owns the house?

(A) The testator's brother.

(B) The testator's two surviving grandchildren.

Correct. The testator devised his house, which he owned at his death, to his grandchildren as a class gift. The testator was survived by two grandchildren who became the sole surviving members of the class. The deceased grandchild's interest lapsed because the grandchild, though alive at the time of the will execution, died before the testator. The deceased grandchild would qualify under the anti-lapse statute, but he was not survived by any issue who would be substituted for him under the statute.

(C) The testator's two surviving grandchildren and all other grandchildren who are born to the testator's daughter.

(D) The testator's two surviving grandchildren and the deceased grandchild's mother.

Question # 88 - Criminal Law and Procedure

While on their way home from a ball game, a driver and his passenger stopped at an all-night gas station. The passenger offered to pay for the gas. While the passenger pumped gas, he was surprised to see the driver enter the station, take money from the unattended cash drawer, and get back in the car. The passenger paid the attendant for the gas, and the driver drove off. The driver offered to reimburse the passenger for the gas, but the passenger declined. After discovering the missing cash, the gas station attendant called the police, and the driver was later stopped. The driver escaped with the stolen money, however, and was never prosecuted.

If the passenger is prosecuted for theft as an accomplice, should he be convicted?

(A) No, because he had no intent to promote the commission of the offense.

Correct. A conviction for accomplice liability requires not only proof that an accomplice aided a principal's crime but also proof that the accomplice acted with a culpable mental state. Because the passenger had no prior knowledge of the driver's crime and no intent to help the driver commit that crime, the passenger may not properly be convicted.

(B) No, because the driver, the principal, was never prosecuted.

(C) Yes, because he facilitated commission of the offense by failing to make any effort to stop it.

(D) Yes, because he paid the attendant while he knew the driver was holding the stolen money.

Question # 89 - Real Property

Last year, a buyer and a seller entered into a valid contract for the sale of a parcel of real property. The contract contained no contingencies. The seller was killed in a car accident before the parcel was conveyed, but the closing eventually took place with the conveyance by a deed from the personal representative of the seller's estate.

The personal representative of the seller's estate wants to distribute the proceeds of the real property sale. The seller's will was executed many years ago and was duly admitted to probate. Paragraph 5 of his will leaves all of the seller's real property to his son, and Paragraph 6 leaves the residue of the estate to the seller's daughter. No other provisions of the will are pertinent to the question regarding to whom the proceeds of the sale should be distributed.

What will determine who receives the proceeds?

(A) Whether Paragraph 5 refers specifically to the parcel of real property that was sold or simply to "all of my real property."

(B) Whether the closing date originally specified in the contract was a date before or after the seller's death.

(C) Whether the jurisdiction has adopted the doctrine of equitable conversion.

Correct. Many events may occur during the executory time period, which is the time between the contract signing and the closing. If the seller dies during this time period leaving a will that devises the real estate to one person and the personalty to another, and if the contract contained no contingencies or all contingencies had been satisfied at the time of the death, the doctrine of equitable conversion applies. The determination of who will receive the proceeds thus depends on who had equitable title. In this case, the son had only a legal interest in the land at the time of the seller's death, and the daughter had the equitable interest in the proceeds and should receive them.

(D) Whether the sale was completed in accordance with a court order.

Question # 90 - Evidence

A college student sued an amusement company for injuries he sustained when the amusement company's roller coaster allegedly malfunctioned so that the student fell out. At trial, after the student presented his case, the amusement company called a witness who testified that just before the accident he heard a bystander say to the bystander's companion, "That crazy fool is standing up in the car."

The student then offered the testimony of another witness who would testify that the day after the accident she was with the same bystander, and that in describing the accident, the bystander told her that the car jerked suddenly and "just threw the guy out of his seat."

How should the court rule with respect to this offered testimony?

(A) Rule it admissible only to impeach the bystander's credibility.

Correct. The statement is admissible only as a prior inconsistent statement to impeach the bystander. It contradicts the bystander's earlier statement, which suggested that the student was entirely at fault by standing up in the car. The testimony is not admissible as substantive evidence to prove the facts asserted in the statement, because it would be hearsay.

(B) Rule it admissible to impeach the bystander's credibility and to prove the amusement company's negligence.

(C) Rule it inadmissible, because the bystander was given no opportunity to deny or explain her apparently inconsistent statement.

(D) Rule it inadmissible, because the bystander herself was not called as a witness.

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Question # 91 - Constitutional Law

Congress passed a statute providing that parties could no longer seek review in the U.S. Supreme Court of final judgments in criminal matters made by the highest court in each state.

What is the best argument supporting the constitutionality of the statute?

(A) Congress has the power to make exceptions to the appellate jurisdiction of the Supreme Court.

Correct. The text of the exceptions clause of Article III does not limit congressional power to strip the U.S. Supreme Court of its appellate jurisdiction to hear particular types of cases, and the Court's own decisions arguably support the view that the exceptions clause grants Congress this power.

(B) Criminal matters are traditionally governed by state law.

(C) The proper means of federal judicial review of state criminal matters is by habeas corpus.

(D) The review of state court judgments is not within the original jurisdiction of the Supreme Court.

Question # 92 - Contracts

A borrower owed a lender $50,000 due on March 1. On January 10, the lender telephoned the borrower and said that he would discharge the debt if the borrower would promise to pay the lender $45,000 by January 15. The borrower responded, "I will attempt to get the money together." On January 11, the lender again telephoned the borrower and said that he had changed his mind and would expect the borrower to make full payment on March 1. On January 15, the borrower tendered $45,000 as full payment, which the lender refused to accept. On March 1, the borrower refused the lender's demand for $50,000, and the lender sued for that amount.

Which of the following statements best supports the lender's position?

(A) The borrower's January 10 statement was not a return promise, and therefore the lender effectively revoked his offer on January 11.

Correct. The lender's offer requested that the borrower accept by making a return promise. The borrower's response to the lender's offer was a statement of intention, which was not sufficiently promissory to constitute acceptance of an offer and create a binding contract. Therefore the lender effectively revoked his offer on January 11.

(B) The January 10 telephone conversation between the lender and the borrower created an executory accord and therefore did not operate as a discharge of the $50,000 debt.

(C) The lender's offer to discharge the debt was a gift promise and therefore was not binding on the lender.

(D) The lender's promise to discharge the $50,000 debt was not enforceable because it was not in writing.

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Question # 93 - Torts

A man rented a car from a car rental agency. Unbeknownst to the rental agency, the car had a bomb hidden in it at the time of the rental. The bomb exploded an hour later, injuring the man.

Immediately prior to renting the car to the man, the rental agency had carefully inspected the car to be sure it was in sound operating condition. The rental agency did not inspect for hidden explosive devices, but such an inspection for explosives would have revealed the bomb.

There had been no previous incidents of persons hiding bombs in rental cars.

In a negligence action by the man against the car rental agency, is the man likely to prevail?

(A) No, because the rental agency could not have reasonably foreseen the likelihood of someone placing a bomb in the car it was about to rent to the man.

Correct. The standard to be applied in a negligence action is whether the defendant acted with ordinary care. The presence of a bomb in a rental car is sufficiently unlikely that a reasonable rental agency would not routinely inspect for such a device. In the absence of evidence that the agency should have foreseen that there might be a bomb in the car, the man cannot prove a negligence claim.

(B) No, because the rental agency did not hide the bomb in the car.

(C) Yes, because an inspection for explosive devices would have revealed the bomb.

(D) Yes, because the bomb made the car abnormally dangerous.

Question # 94 - Evidence

A defendant was charged with robbery of a savings and loan branch after being arrested near the scene and found with marked bills. An hour after the robbery, the officer investigating the crime videotaped an interview with an eyewitness, in which the eyewitness described the crime and the robber. The officer then arranged for a lineup, at which the teller who was robbed identified the defendant as the robber. The officer later obtained computerized records of that day's deposits and withdrawals at the savings and loan, which allowed the calculation of how much cash was taken in the robbery. A month later, the teller testified before a grand jury, which indicted the defendant. The teller and the eyewitness both died of unrelated causes shortly afterward.

At trial, which of the following evidence, if properly authenticated, may properly be admitted against the defendant over his attorney's objection that its receipt would violate the confrontation clause?

(A) A transcript of the teller's sworn grand jury testimony.

(B) The computerized records from the savings and loan.

Correct. The computerized records are not a testimonial statement. The *Crawford* case specifically cites business records as an example of statements that are generally not testimonial.

(C) The officer's testimony that the teller picked the defendant out of the lineup as the robber.

(D) The videotape of the eyewitness's statement.

Question # 95 - Criminal Law and Procedure

Police responded to a call that shots had been heard coming from a certain house. Upon arriving at the house, the police looked through a window and saw a man lying on the living room floor. The police opened the front door, which was not locked, and found that the man had recently been shot in the back and was unconscious. An ambulance was called. While waiting for the ambulance, one officer walked through the house to see if anyone else was present. No one else was found, but the officer did see on the kitchen table clear bags of what he believed to be cocaine. The officer seized the bags, and laboratory tests later confirmed that the contents were cocaine.

After the ambulance arrived a few minutes later and took the man to the hospital, the police went through the house and opened drawers trying to find the gun used in the shooting. No gun was found, but upon opening a drawer in an upstairs bedroom, the police found marijuana and seized it.

Later investigation led to charging a young woman, who lived in the house, with unlawful possession of the cocaine and the marijuana. The young woman has filed a motion to suppress the use of both as evidence on the ground that the entry into the house and the searches were made without a warrant.

How should the court decide the young woman's motion?

(A) Grant it as to the cocaine, but deny it as to the marijuana.

(B) Deny it as to the cocaine, but grant it as to the marijuana.

Correct. The police entry of the home was reasonable to provide aid to a man in need of emergency assistance. Once they were inside the home, the police officers could properly seize contraband in plain view but could not conduct an exploratory search for contraband. Accordingly, the police properly seized the cocaine (which was in plain view) but not the marijuana (which was the fruit of an improper, warrantless search).

(C) Grant it as to both the cocaine and the marijuana.

(D) Deny it as to both the cocaine and the marijuana.

Question # 96 - Real Property

A man conveyed his house to his wife for life, remainder to his only child, a son by a previous marriage. Thereafter, the man died, devising his entire estate to his son.

The wife later removed a light fixture in the dining room of the house and replaced it with a chandelier that was one of her family heirlooms. She then informed her nephew and her late husband's son that after her death, the chandelier should be removed from the dining room and replaced with the former light fixture, which she had stored in the basement.

The wife died and under her will bequeathed her entire estate to her nephew. She also named the nephew as the personal representative of her estate. After the nephew, in his capacity as personal representative, removed the chandelier and replaced it with the original light fixture shortly after the wife's death, the son sued to have the chandelier reinstalled.

Who will likely prevail?

(A) The nephew, because he had the right to remove the chandelier within a reasonable time after the wife's death.

Correct. As the life tenant, the wife had a right to annex a chattel, in this case the chandelier. It was clear that the wife did not intend to make the chandelier a permanent annexation, as evidenced by her discussions with her nephew and the man's son. The wife's personal representative, the nephew, had the right to remove the chandelier within a reasonable time after the termination of the wife's life estate.

(B) The nephew, because of the doctrine of accession.

(C) The son, because the chandelier could not be legally removed after the death of the wife.

(D) The son, because a personal representative can remove only trade fixtures from real property.

Question # 97 - Constitutional Law

A state adopted a rule denying admission to its bar to anyone who was currently or had previously been a member of a subversive group. The state's bar application form was modified to ask applicants whether they were or had previously been members of any subversive organization. An applicant refused to answer the question and was denied bar admission on that basis. The applicant challenged the decision, arguing that the question infringed upon his freedom of association.

Is the applicant likely to prevail?

(A) No, because membership in a subversive group constitutes endorsement of the group's illegal activities.

(B) No, because the Constitution does not apply to the bar.

(C) Yes, because denying bar admission based on any association with a subversive organization violates the First Amendment.

(D) Yes, because denying bar admission based solely on past membership in a subversive organization violates the First Amendment.

Correct. The U.S. Supreme Court has held that the freedom of association protected by the First Amendment prohibits a state from inquiring about an individual's associations in order to withhold a right or benefit because of the individual's beliefs. Although the state has a legitimate interest in determining the character and professional competence of bar applicants, the Court has held that the state has other means of making these determinations that are less restrictive of First Amendment freedoms.

Question # 98 - Contracts

A seller entered into an agreement to sell a machine to a buyer for $5,000. At the time of the order, the buyer gave the seller a down payment of $1,000. The buyer then built a foundation for the machine at a cost of $250. The seller failed to deliver the machine. The buyer made reasonable efforts to find a similar machine and bought one for $5,500 that did not fit on the foundation. The buyer sued the seller for breach of contract.

Which of these amounts claimed by the buyer, if any, could best be described as restitution?

(A) The $250 cost of the foundation.

(B) The $500 difference in price.

(C) The $1,000 down payment.

Correct. The protection of the restitutionary interest restores to a party any benefit conferred to the other party. Under UCC § 2-711(3), on a rightful rejection, a buyer is entitled to a return of any payments made on the goods.

(D) None of the claimed amounts.

Question # 99 - Evidence

A defendant is being prosecuted for conspiracy to possess with intent to distribute cocaine. At trial, the government seeks to have its agent testify to a conversation that he overheard between the defendant and a co-conspirator regarding the incoming shipment of a large quantity of cocaine. That conversation was also audiotaped, though critical portions of it are inaudible. The defendant objects to the testimony of the agent on the ground that it is not the best evidence of the conversation.

Is the testimony admissible?

(A) No, because the testimony of the agent is not the best evidence of the conversation.

(B) No, because the testimony of the agent reports hearsay not within any exception.

(C) Yes, because the best evidence rule does not require proof of the conversation through the audiotape.

Correct. Since the agent personally heard the conversation, he is not relying on the contents of the audiotape for his testimony. Therefore there is no violation of the best evidence rule. The agent is not attempting to prove the contents of the audiotape, only what he overheard. The conversation could, of course, also be proved by introducing the audiotape, and it can be argued that the audiotape is "better" evidence than the agent's testimony. Nonetheless, so long as the agent obtained his knowledge of the conversation from his own perception, and not by listening to the audiotape, the best evidence rule is not violated.

(D) Yes, because the audiotape is partly inaudible.

Question # 100 - Torts

In an action by a man against a pharmacy, the man offered only the following evidence:

The man took a clearly written prescription to a pharmacy. The pharmacy's employee filled the prescription by providing pills with 30 milligrams of the active ingredient instead of 20 milligrams, as was prescribed. Shortly after taking the pills as directed, the man, who had no previous history of heart problems, suffered a heart attack. Overdoses of the active ingredient had previously been associated with heart problems.

Does the man have a valid claim against the pharmacy?

(A) No, because pharmacies are not strictly liable for injuries caused by incorrectly filled prescriptions.

(B) No, because the man offered no specific proof as to the pharmacy's negligence.

(C) Yes, because a jury could reasonably conclude that the man would not have suffered a heart attack had the pharmacy provided the correct dosage.

Correct. There is sufficient circumstantial evidence to support a conclusion that the pharmacy's employee was negligent in filling the prescription and that the consequent overdose caused the heart attack. The pharmacy would be vicariously liable for its employee's negligence under respondeat superior principles.

(D) Yes, because by providing the 30-milligram pills rather than the 20-milligram pills, the pharmacy sold the man a defective product.