

CRIMINAL LAW QUESTIONS

Question 1

In which of the following situations is Defendant's claim of intoxication most likely to result in his being found not guilty?

- (A) Defendant is charged with manslaughter for a death resulting from an automobile accident. Defendant, the driver, claims he was so drunk he was unable to see the other car involved in the accident.
- (B) Defendant is charged with assault with intent to kill Watts, as a result of his wounding Watts by shooting him. Defendant claims he was so drunk he did not realize anyone else was around when he fired the gun.
- (C) Defendant is charged with armed robbery. He claims he was so drunk he did not know whether the gun was loaded.
- (D) Defendant is charged with statutory rape, after he had sexual intercourse with a girl aged 15, in a jurisdiction where the age of consent is 16. Defendant claims he was so drunk he did not realize the girl was a minor.

Question 2

Jackson and Brannick planned to break into a federal government office to steal food stamps. Jackson telephoned Crowley one night and asked whether Crowley wanted to buy some "hot" food stamps. Crowley, who understood that "hot" meant stolen, said, "Sure, bring them right over." Jackson and Brannick then successfully executed their scheme. That same night they delivered the food stamps to Crowley, who bought them for \$500. Crowley did not ask when or by whom the stamps were stolen. All three were arrested. Jackson and Brannick entered guilty pleas in federal court to a charge of larceny in connection with the theft. Crowley was brought to trial in the state court on a charge of conspiracy to steal food stamps.

On the evidence stated, Crowley should be found:

- (A) Guilty, because, when a new confederate enters a conspiracy already in progress, he becomes a party to it.
- (B) Guilty, because he knowingly and willingly aided and abetted the conspiracy and is chargeable as a principal.
- (C) Not guilty, because, although Crowley knew the stamps were stolen, he neither helped to plan nor participated or assisted in the theft.
- (D) Not guilty, because Jackson and Brannick had not been convicted of or charged with conspiracy, and Crowley cannot be guilty of conspiracy by himself.

Question 3

Jack and Paul planned to hold up a bank. They drove to the bank in Jack's car. Jack entered while Paul remained as lookout in the car. After a few moments, Paul panicked and drove off.

Jack looked over the various tellers, approached one and whispered nervously, "Just hand over the cash. Don't look around, don't make a false move—or it's your life." The teller looked at the fidgeting Jack, laughed, flipped him a dollar bill, and said, "Go on, beat it." Flustered, Jack grabbed the dollar and left.

Paul's best defense to a charge of robbery would be that:

- (A) Jack alone entered the bank.
- (B) Paul withdrew, before commission of the crime, when he fled the scene.
- (C) Paul had no knowledge of what Jack whispered to the teller.
- (D) The teller was not placed in fear by Jack.

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Question 4

Adam and Bailey, brothers, operated an illicit still. They customarily sold to anyone unless they suspected the person of being a revenue agent or an informant. One day when Adam was at the still alone, he was approached by Mitchell, who asked to buy a gallon of liquor. Mitchell was in fact a revenue officer. After Adam had sold him the liquor, Mitchell revealed his identity. Adam grabbed one of the rifles that the brothers kept handy in case of trouble with the law, and shot and wounded Mitchell. Other officers, hiding nearby, overpowered and arrested Adam.

Shortly thereafter, Bailey came on the scene. The officers in hiding had been waiting for him. One of them approached him and asked to buy liquor. Bailey was suspicious and refused to sell. The officers nevertheless arrested him.

Adam and Bailey were charged with conspiracy to violate revenue laws, illegal selling of liquor, and battery of the officer.

On the charge of battery, which statement concerning Adam and Bailey is true?

- (A) Neither is guilty.
- (B) Both are guilty.
- (C) Adam is guilty but Bailey is not, because the conspiracy had terminated with the arrest of Adam.
- (D) Adam is guilty but Bailey is not, because Adam's act was outside the scope of the conspiracy.

Question 5

Dent, while eating in a restaurant, noticed that a departing customer at the next table had left a five-dollar bill as a tip for the waitress. Dent reached over, picked up the five-dollar bill, and put it in his pocket. As he stood up to leave, another customer who had seen him take the money ran over to him and hit him in the face with her umbrella. Enraged, Dent choked the customer to death.

Dent is charged with murder. He requests the court to charge the jury that they can find him guilty of voluntary manslaughter rather than murder. Dent's request should be:

- (A) Granted, because the jury could find that Dent acted recklessly and not with the intent to cause death or serious bodily harm.
- (B) Granted, because the jury could find that being hit in the face with an umbrella constitutes adequate provocation.
- (C) Denied, because the evidence shows that Dent intended to kill or to cause serious bodily harm.
- (D) Denied, because the evidence shows that Dent provoked the assault on himself by his criminal misconduct.

Question 6

Brown suffered from the delusion that he was a special agent of God. He frequently experienced hallucinations in the form of hearing divine commands. Brown believed God told him several times that the local Roman Catholic bishop was corrupting the diocese into heresy, and that the bishop should be "done away with." Brown, a devout Catholic, conceived of himself as a religious martyr. He knew that shooting bishops for heresy is against the criminal law. He nevertheless carefully planned how he might kill the bishop. One evening Brown shot the bishop, who was taken to the hospital, where he died two weeks later.

Brown told the police he assumed the institutions of society would support the ecclesiastical hierarchy, and he expected to be persecuted for his God-inspired actions. Psychiatrist Stevens examined Brown and found that Brown suffered from schizophrenic psychosis, that in the absence of this psychosis he would not have shot the bishop, and that because of the psychosis Brown found it extremely difficult to determine whether he should obey the specific command that he do away with the bishop or the general commandment "Thou shalt not kill"; Brown was charged with murder.

If Brown interposes an insanity defense and the jurisdiction in which he is tried has adopted only the *M'Naghten* test of insanity, then the strongest argument for the defense under that test is that:

- (A) Brown did not know the nature of the act he was performing.
- (B) Brown did not know that his act was morally wrong.
- (C) Brown did not know the quality of the act he was performing.
- (D) Brown's acts were the product of a mental disease.

Question 7

In which of the following situations is Defendant most likely to be guilty of common law murder?

- (A) During an argument in a bar, Norris punches Defendant. Defendant, mistakenly believing that Norris is about to stab him, shoots and kills Norris.
- (B) While committing a robbery of a liquor store, Defendant accidentally drops his revolver, which goes off. The bullet strikes and kills Johnson, a customer in the store.
- (C) While hunting deer, Defendant notices something moving in the bushes. Believing it to be a deer, Defendant fires into the bushes. The bullet strikes and kills Griggs, another hunter.
- (D) In celebration of the Fourth of July, Defendant discharges a pistol within the city limits in violation of a city ordinance. The bullet ricochets off the street and strikes and kills Abbott.

Question 8

Dutton, disappointed by his eight-year-old son's failure to do well in school, began systematically depriving the child of food during summer vacation. Although his son became

seriously ill from malnutrition, Dutton failed to call a doctor. He believed that as a parent he had the sole right to determine whether the child was fed or received medical treatment. Eventually, the child died. An autopsy disclosed that the child had suffered agonizingly as a result of the starvation, that a physician's aid would have alleviated the suffering, and that although the child would have died in a few months from malnutrition, the actual cause of death was an untreatable form of cancer.

The father was prosecuted for murder, defined in the jurisdiction as "unlawful killing of a human being with malice aforethought." The father should be:

- (A) Acquitted, because of the defendant's good faith belief concerning parental rights in supervising children.
- (B) Acquitted, because summoning the physician or feeding the child would not have prevented the child's death from cancer.
- (C) Convicted, because the father's treatment of his son showed a reckless indifference to the value of life.
- (D) Convicted, because the child would have died from malnutrition had he not been afflicted with cancer.

Question 9

Vance had cheated Dodd in a card game. Angered, Dodd set out for Vance's house with the intention of shooting him. Just as he was about to set foot on Vance's property, Dodd was arrested by a police officer who noticed that Dodd was carrying a revolver. A statute in the jurisdiction makes it a crime to "enter the property of another with the intent to commit any crime of violence thereon."

If charged with attempting to violate the statute, Dodd should be found:

- (A) Not guilty, because the statute defines an attempt crime and there cannot be an attempt to attempt.

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- (B) Not guilty, because to convict him would be to punish him simply for having a guilty mind.
- (C) Guilty, because he was close enough to entering the property and he had the necessary state of mind.
- (D) Guilty, because this is a statute designed to protect the public from violence, and Dodd was dangerous.

Questions 10-15 are based on the following fact situation and require you to assume that you are in either a TYPE A or a TYPE B jurisdiction:

TYPE A. The homicide statute in this jurisdiction reads in part as follows:

Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. Every person guilty of murder shall suffer death or confinement in the state prison for life, at the discretion of the jury trying the same.

TYPE B. The homicide statute in this jurisdiction reads in part as follows:

Murder is the unlawful killing of a human being with malice aforethought. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when the circumstances attending the killing show an abandoned and malignant heart. All murder that is perpetrated by willful, deliberate, or premeditated killing or that is committed in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary is murder of the second degree. Every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the

discretion of the jury trying the same. Every person convicted of murder in the second degree shall be confined in the state prison for life.

Both TYPE A and TYPE B jurisdictions have a statute reading as follows:

Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

1. Voluntary—upon a sudden quarrel or heat of passion.
2. Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act that might produce death in an unlawful manner or without due caution and circumspection.

Manslaughter is punishable by imprisonment in the state prison not exceeding 15 years.

Victor and Defendant were 16 and 17, respectively. Both were old enough to be legally responsible for a crime in the particular jurisdiction. By prearrangement they met at the Dairy Shoppe, a teenage hangout. They were depressed. It had been raining for some days, and school had been out for several weeks. Defendant asked Victor if he would like to play Russian roulette. They played with a revolver, as they had done before. The cylinder of the revolver had six chambers, from which they would remove all but one cartridge. One of them would then spin the cylinder, point the revolver at the other's head, and fire it. With six chambers and one cartridge, the odds were 5 to 1 that the revolver would not fire.

Defendant obtained the revolver from his parents' bedroom. Adam, his father, kept the revolver in the bedroom at all times. Adam repeatedly bragged that he kept a loaded revolver in his room. Defendant took the revolver ~~took out an out one cartridge, placed the others~~ in his pocket, and then proceeded to the Dairy Shoppe.

Victor agreed to play Russian roulette. Defendant, pointing the revolver at Victor's head, pulled the trigger. Nothing happened. Victor then spun the cylinder and pointed the revolver at Defendant's head. He pulled the trigger. Nothing happened. Defendant spun the cylinder and pointed the revolver at Victor's head. He pulled the trigger. The gun fired. He was heard to exclaim: "Victor, Victor, I didn't think it would shoot! I'm sorry!" Victor died en route to the hospital.

10. Defendant is charged with murder in a TYPE A jurisdiction. Which of the following is the soundest result?
 - (A) Not guilty, because consent is a complete defense.
 - (B) Not guilty, because the negligence of Adam is a complete defense.
 - (C) Guilty of murder.
 - (D) Guilty of involuntary manslaughter.
11. Defendant is charged with first degree murder in a TYPE B jurisdiction. Which of the following is Defendant's soundest theory of defense?
 - (A) Laws making a 17-year-old liable for any homicide are unconstitutional as imposing a cruel and unusual punishment.
 - (B) A revolver with only one of its six chambers loaded is not a deadly weapon, and its use therefore cannot prove deliberate killing.
 - (C) Defendant, because of his youth, could not have the malice aforethought required for murder.
 - (D) Defendant is guilty of murder, but his deed does not fall within the definition of first degree murder.
12. Defendant is charged with murder in a TYPE A jurisdiction. The trial judge can properly charge the jury on which of the following theories?
 - (A) Involuntary manslaughter only.
 - (B) Murder and involuntary manslaughter.
 - (C) Murder and voluntary manslaughter.
 - (D) First degree murder, second degree murder, and involuntary manslaughter.
13. Defendant is charged with murder in a TYPE A jurisdiction. Which of the following is the soundest argument of the prosecutor?
 - (A) Defendant's actions demonstrated an abandoned and malignant heart because he knew his act might cause death or great bodily harm.
 - (B) The homicide is a felony murder since Victor's death was the result of an assault with a deadly weapon.
 - (C) Defendant by definition is not a juvenile and can be found guilty of a capital crime.
 - (D) The negligence of Adam is not a supervening cause which will relieve Defendant of liability.
14. Defendant is charged with first degree murder in a TYPE B jurisdiction. Defendant's best argument for acquittal of first degree murder would be that:
 - (A) He committed no arson, rape, robbery, or burglary.
 - (B) He did not deliberate or premeditate.
 - (C) Victor consented to the homicide.
 - (D) He did not deliberate, premeditate, or commit a first degree felony murder.

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15. Assuming statutes covering the following offenses, in a TYPE A jurisdiction Adam, the father, can be most appropriately charged with:
- (A) Assault with a deadly weapon.
 - (B) Contributing to the delinquency of a minor.
 - (C) Murder.
 - (D) Voluntary manslaughter.
- (B) Linda consented to his actions.
- (C) He was entrapped by Linda's appearance.
- (D) He did not intend to contribute to her delinquency.
17. With respect to the contributing charge under the statute set out in the question above, proof by Duke that he was so inebriated that he could not have formed a criminal intent would be a:

Questions 16-17 are based on the following fact situation:

Linda was 15 years old, but she appeared and acted older. When asked, she always said she was 22, and she carried false identification saying she was that old. She frequented taverns and drank heavily. One evening in a bar she became acquainted with Duke. He believed her when she told him her claimed age. They had several drinks and became inebriated. Later, they drove in Duke's car to a secluded spot. After they had necked for a while, Duke propositioned Linda and she consented. Before Duke achieved penetration, Linda changed her mind, saying, "Stop! Don't touch me! I don't want to do it." When Duke did not desist, Linda started to cry and said, "I am only 15." Duke immediately jumped from the car and ran away. Duke was indicted for attempted rape, assault with intent to rape, contributing to the delinquency of a minor, and attempted statutory rape. The age of consent in the jurisdiction is 16.

16. If the contributing charge were based on a statute reading, "Whoever shall commit an act affecting the morals of a minor under 16 years of age shall be deemed guilty of contributing to the delinquency of a minor and shall be punished by imprisonment in the state penitentiary for a period not to exceed 5 years," Duke's best legal defense would be that:

- (A) The statute is unconstitutionally vague.

- (B) Linda consented to his actions.
 - (C) He was entrapped by Linda's appearance.
 - (D) He did not intend to contribute to her delinquency.
17. With respect to the contributing charge under the statute set out in the question above, proof by Duke that he was so inebriated that he could not have formed a criminal intent would be a:
- (A) Good defense, because the charge requires a specific intent.
 - (B) Good defense, because at least a general criminal intent is required for every offense.
 - (C) Poor defense, because contributing to the delinquency of a minor is an offense against a child.
 - (D) Poor defense, because the state of mind of the defendant is irrelevant to this offense, so long as he was legally sane.

Questions 18-20 are based on the following fact situation:

Adams, Bennett, and Curtis are charged in a common law jurisdiction with conspiracy to commit larceny. The state introduced evidence that they agreed to go to Nelson's house to take stock certificates from a safe in Nelson's bedroom, that they went to the house, and that they were arrested as they entered Nelson's bedroom.

Adams testified that he thought the stock certificates belonged to Curtis, that Nelson was improperly keeping them from Curtis, and that he went along to aid in retrieving Curtis's property.

Bennett testified that he suspected Adams and Curtis of being thieves and joined up with them in order to catch them. He also testified that he made an anonymous telephone call to the police alerting them to the crime and that the call caused the police to be waiting for them when they walked into Nelson's bedroom.

Curtis did not testify.

18. If the jury believes Adams, it should find him:
 - (A) Guilty, because there was an agreement and the entry into the bedroom is sufficient for the overt act.
 - (B) Guilty, because good motives are not a defense to criminal liability.
 - (C) Not guilty, because he did not have a corrupt motive.
 - (D) Not guilty, because he did not intend to steal.

19. If the jury believes Bennett, it should find him:
 - (A) Guilty, because there was an agreement and the entry into the bedroom is sufficient for the overt act.
 - (B) Guilty, because he is not a police officer and thus cannot claim any privilege of apprehending criminals.
 - (C) Not guilty, because he did not intend to steal.
 - (D) Not guilty, because he prevented the theft from occurring.

20. If the jury believes both Adams and Bennett, it should find Curtis:
 - (A) Guilty, because there was an agreement and the entry into the bedroom is sufficient for the overt act.
 - (B) Guilty, because he intended to steal.

- (C) Not guilty, because a conviction would penalize him for exercising his right not to be a witness.
- (D) Not guilty, because Adams and Bennett did not intend to steal.

Questions 21-25 are based on the four case summaries below. For each question, select the case that would be most applicable as a precedent:

- (A) *Commonwealth v. Mason*. Two brothers see a wealthy neighbor's pedigreed dog on the street. They take the dog home, intending to conceal it until the owner offers a reward. Held, guilty of larceny.
- (B) *Saferite v. State*. Two young men saw a motor car on the street with the keys in the ignition lock. They drove the car to a neighboring town with the intention, they said, of visiting the wife of one of them. The car was wrecked on their way back. Conviction for larceny reversed.
- (C) *People v. Noblett*. Defendant, a tenant of a city apartment, advertised it for sublease. Will agreed to sublease for three months, and on March 12 paid Defendant \$550, the total agreed rental. Will was to receive possession on March 20, but possession was never given him. Held, not guilty of common law larceny.
- (D) *King v. Pear*. From a stablekeeper, Defendant hired a horse to go to Sutton and back, saying he would be back at 8 p.m. He did not return. Investigation showed that Defendant had given a false address, and that he had sold the horse the same day. Conviction of larceny affirmed.

21. Davis paid Realtor \$500 as down payment on a house. That night, Davis broke into a hardware store and took a brace and bit. Davis broke into Realtor's office and used the tools to open the safe, where he had seen Realtor place the \$500. The safe was empty. Davis's fingerprints on the tools, left lying in front of the safe, led to his arrest. He is charged with larceny of the tools.

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22. Smith placed a newspaper advertisement reading, "Wanted: responsible man to collect for large firm. \$500 security required. Address Box 66, Times." Vincent answered the ad and was called on by Smith, who said he represented Ames Advertising Agency. He took Vincent to the office of the company (a large actual firm), but as they were about to enter the building Smith said, "There is Mr. Ames now," and introduced him to a companion of Smith who impersonated Ames. The result of the conversation was that the false Ames agreed to hire Vincent. It was agreed that Vincent would draw \$500 from the bank to put up as security, and that this money would be placed in a bank and Vincent given a certificate of deposit in his own name. They went to the bank where Vincent gave Smith the money, after which Smith and "Ames" disappeared. Smith was later charged with larceny.
23. Jones, angry at a neighbor with whom he had quarreled, for revenge surreptitiously removed a piece of stone statuary from the neighbor's garden and concealed it in his garage. He intended to replace it a day or two later, after giving the neighbor a chance to feel bad over its being stolen. Suspecting who was guilty, the neighbor had Jones arrested and charged with larceny.
24. Harris, a heroin addict, broke into a home and took several cameras and watches, which he promptly pawned to obtain cash with which to purchase a "fix." Harris was later charged with larceny of the cameras and watches.
25. Allison told Mark that he, Allison, was the legal representative for a syndicate that had a photoelectric machine for making counterfeit money, and to prove that the money was good enough to "pass anywhere," Allison showed what he said was one of the counterfeit \$10 bills. He said that if Mark would invest \$1,000, the syndicate would pay him counterfeit money in the amount of \$10,000. Mark paid the \$1,000

to Allison, who then disappeared. Allison is caught and charged with larceny.

Question 26

Ted frequently visited Janet, his next-door neighbor. Janet was separated from her husband, Howard. Howard resided with his mother but jointly owned the house in which Janet resided. Late one night, Ted and Janet were sitting on the bed in Janet's bedroom drinking when Howard burst through the door and told Ted, "Get out!" When Ted refused, Howard challenged him to go outside and "fight it out." Ted again refused. Howard then pulled a knife from his pocket and lunged at Ted. Ted grabbed a lamp, struck Howard on the head, and killed him. Ted is charged with murder.

On a charge of murder, Ted should be found:

- (A) Not guilty, because Ted had as much right as Howard to be in the house.
- (B) Not guilty, because Howard attacked Ted with a deadly weapon.
- (C) Guilty, because Ted's presence in Janet's bedroom prompted Howard's attack.
- (D) Guilty, because Ted's failure to obey Howard's order to leave the house made him a trespasser.

Question 27

Defendant is charged with assault and battery. The state's evidence shows that Victim was struck in the face by Defendant's fist.

In which of the following situations is Defendant most likely to be **not guilty** of assault and battery?

- (A) Defendant had been hypnotized at a party and ordered by the hypnotist to strike the person he disliked the most.

- (B) Defendant was suffering from an epileptic seizure and had no control over his motions.
- (C) Defendant was heavily intoxicated and was shadow boxing without realizing that Victim was near him.
- (D) Defendant, who had just awakened from a deep sleep, was not fully aware of what was happening and mistakenly thought Victim was attacking him.

Question 28

Donna was arrested and taken to police headquarters, where she was given her *Miranda* warnings. Donna indicated that she wished to telephone her lawyer and was told that she could do so after her fingerprints had been taken. While being fingerprinted, however, Donna blurted out, "Paying a lawyer is a waste of money because I know you have me."

At trial, Donna's motion to prevent the introduction of the statement she made while being fingerprinted will most probably be:

- (A) Granted, because Donna's request to contact her attorney by telephone was reasonable and should have been granted immediately.
- (B) Granted, because of the "fruit of the poisonous tree" doctrine.
- (C) Denied, because the statements were volunteered and not the result of interrogation.
- (D) Denied, because fingerprinting is not a critical stage of the proceeding requiring the assistance of counsel.

Question 29

Driving down a dark road, Defendant accidentally ran over a man. Defendant stopped and found that the victim was dead. Defendant, fearing that he might be held responsible, took the victim's wallet, which contained a substantial

amount of money. He removed the identification papers and put the wallet and money back into the victim's pocket.

Defendant is *not guilty* of:

- (A) Larceny, because he took the papers only to prevent identification and not for his own use.
- (B) Larceny, because he did not take anything from a living victim.
- (C) Robbery, because he did not take the papers by means of force or putting in fear.
- (D) Robbery, because he did not take anything of monetary value.

Question 30

Tom had a heart ailment so serious that his doctors had concluded that only a heart transplant could save his life. They therefore arranged to have him flown to Big City to have the operation performed.

Dan, Tom's nephew, who stood to inherit from him, poisoned him. The poison produced a reaction which required postponing the journey. The plane on which Tom was to have flown crashed, and all aboard were killed. By the following day, Tom's heart was so weakened by the effects of the poison that he suffered a heart attack and died.

If charged with criminal homicide, Dan should be found:

- (A) Guilty.
- (B) Not guilty, because his act did not hasten the deceased's death, but instead prolonged his life by one day.
- (C) Not guilty, because the deceased was already suffering from a fatal illness.
- (D) Not guilty, because the poison was not the sole cause of death.

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Questions 31-32 are based on the following fact situation:

Statutes in the jurisdiction define criminal assault as “an attempt to commit a criminal battery” and criminal battery as “causing an offensive touching.”

As Edward was walking down the street, a gust of wind blew his hat off. Edward reached out, trying to grab his hat, and narrowly missed striking Margaret in the face with his hand. Margaret, fearful of being struck by Edward, pushed Edward away.

31. If charged with criminal assault, Edward should be found:

- (A) Guilty, because he caused Margaret to be in apprehension of an offensive touching.
- (B) Guilty, because he should have realized he might strike someone by reaching out.
- (C) Not guilty, because he did not intend to hit Margaret.
- (D) Not guilty, because he did not hit Margaret.

32. If charged with criminal battery, Margaret should be found:

- (A) Guilty, because she intentionally pushed Edward.
- (B) Guilty, because she caused the touching of Edward whether she meant to do so or not.
- (C) Not guilty, because a push is not an offensive touching.
- (D) Not guilty, because she was justified in pushing Edward.

Question 33

A state statute makes it a felony for any teacher at a state institution of higher education

to accept anything of value from a student at the same institution. Monroe, a student at the state university, offered Professor Smith, his English teacher, \$50 in exchange for a good grade in his English course. Smith agreed and took the money. Professor Smith and Monroe are tried jointly for violation of the state statute. Professor Smith is charged with violating the statute and Monroe with aiding and abetting him.

Monroe’s best argument for a dismissal of the charge against him is that:

- (A) A principal and an accessory cannot be tried together, since the principal must be convicted first.
- (B) He cannot be an accessory, since he is the victim of the crime.
- (C) The legislature did not intend to punish the person giving the thing of value.
- (D) He did not assist Professor Smith in violating the statute.

Question 34

In which of the following situations is Defendant most likely to be guilty of larceny?

- (A) Defendant took Sue’s television set, with the intention of returning it the next day. However, he dropped it and damaged it beyond repair.
- (B) Defendant went into Tom’s house and took \$100 in the belief that Tom had damaged Defendant’s car to that amount.
- (C) Mistakenly believing that larceny does not include the taking of a dog, Defendant took his neighbor’s dog and sold it.
- (D) Unreasonably mistaking George’s car for his own, Defendant got into George’s car in a parking lot and drove it home.

CRIMINAL LAW ANSWERS

Answer to Question 1

- (B) Voluntary intoxication is a defense to a crime that requires *intent* (assault with intent to kill), and in (B) the intoxication prevented Defendant from formulating the intent to commit the crime. (A) and (D) are incorrect because voluntary intoxication is no defense to crimes involving recklessness or strict liability. (C) is incorrect because Defendant's intoxication did not prevent him from formulating the purpose or intent to commit the crime.

Answer to Question 2

- (C) Crowley should be found not guilty because what he did was commit the crime of *receiving* stolen property knowing it to be stolen. This crime would not be necessary if the mere agreement to purchase the loot after another had already stolen it were enough to make the purchaser a conspirator. (A) is wrong. The point of law stated is accurate enough, but it assumes that simply by agreeing to buy the stamps, Crowley joined in the conspiracy to steal them. (B) is wrong because Crowley did not aid and abet the conspiracy to commit larceny because that conspiracy had already accomplished its target object, the stealing of the stamps. (D) is wrong. It is true that one may not conspire with himself. But it is not true that one who does enter into a conspiracy with one or more people cannot be convicted unless the others are at least charged with the conspiracy. If only one conspirator is prosecuted, however, the prosecution must show that, in fact, others were involved with the defendant on trial.

Answer to Question 3

- (D) Paul's best defense is that Jack did not commit a robbery. Robbery is in effect a larceny from the person, committed by force or fear. Here, force was threatened, not actually used. Had the teller felt any apprehension that Jack would use a gun if he did not do what he was told, this would be "fear" even though the victim remained cool and poised while complying with the demands, and knew that as long as he did so, no force would be used. In this case, however, it is obvious that the teller felt no fear at all. (Paul's crime was *attempted* robbery.) (A) is wrong. Paul was an accomplice to Jack. He would incur vicarious liability for crimes committed by Jack. (B) is wrong. Paul would be an accomplice to attempted robbery (and perhaps larceny) because he did not repudiate his assistance before fleeing; thus, he did not effectively withdraw. (C) is wrong. We are told that Paul and Jack planned to hold up a bank. It is not necessary that the accomplice know all the precise details of how this is to be carried out. It suffices that Paul knew that Jack would use the threat of force to obtain property permanently.

Answer to Question 4

- (B) Battery is an unlawful application of force to the person of another resulting in bodily injury or an offensive touching. Adam's shooting and wounding of Mitchell meets all the elements of the crime. Thus, Adam is guilty of battery. Bailey is also guilty of battery because Adam conspired with Bailey to operate an illegal still, and each co-conspirator is liable for the crimes of all other co-conspirators if: (i) the crimes were committed in furtherance of the objective of the conspiracy; and (ii) the crimes were a natural and probable consequence of the conspiracy (*i.e.*, foreseeable). The battery was committed in furtherance of the conspiracy (to keep the still in operation) and was foreseeable because the conspirators kept guns on the site in case of trouble with the law, and the wounding of a peace officer would be a "natural and probable" consequence. Thus, (B) is correct, and it follows that (A) must be incorrect. (C) is wrong because even if the conspiracy was terminated by Adam's arrest, the battery occurred before the arrest, when the conspiracy was

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clearly ongoing. Bailey made no legally effective withdrawal prior to the battery, and he remains liable for Adam's act. (D) is wrong because, as discussed above, the battery was in furtherance of the objective of the conspiracy and a foreseeable consequence of the conspiracy.

Answer to Question 5

- (B) The existence of adequate provocation may reduce a killing to voluntary manslaughter. Being subjected to a serious battery is frequently recognized as constituting adequate provocation. Here, the jury should decide whether being hit in the face with an umbrella qualifies. (A) is incorrect because a finding that Dent acted recklessly would not necessarily suffice to reduce the crime to voluntary manslaughter. Provocation is the key. (C) is incorrect because to the extent that Dent intended to kill or to cause serious bodily harm, he was acting in the wake of a sudden and intense passion that caused him to lose his self-control, which would make voluntary manslaughter applicable. (D) is incorrect because it is questionable whether Dent's taking of the money that had been left for the waitress constituted sufficient reason for the customer to hit him in the face with an umbrella. Thus, the jury should be allowed to consider voluntary manslaughter as an option.

Answer to Question 6

- (B) The traditional *M'Naghten* rule provides that a defendant is entitled to acquittal if the proof establishes that: (a) a disease of the mind; (b) caused a defect of reason; (c) such that the defendant lacked the ability at the time of his actions to either: (i) know the wrongfulness of his actions; or (ii) understand the nature and quality of his actions. (B) is the best answer here, because this option goes directly to the wrongfulness issue and is supported by the facts, which indicate Brown's moral dilemma. His conclusion that direct orders from God overrode the general prohibition against killing indicates that Brown did not know the wrongfulness of his act. (A) and (C) are incorrect because the *M'Naghten* test speaks of nature *and* quality, and each of these options contains only one of these two elements. In addition, the facts are less likely to support an assertion that Brown was ignorant of either the nature or quality of his act than that he did not understand it was wrong. (D) is wrong because mental disease is but one element of the *M'Naghten* test. Acts that occur as a "product of mental disease or defect" fall under the insanity defense in jurisdictions that apply the *Durham* rule, which is substantially broader than *M'Naghten*.

Answer to Question 7

- (B) The defendant is guilty of felony murder in this fact situation, since even an accidental killing committed during the course of a felony constitutes common law murder. Malice is implied from the intent to commit the underlying felony. Since defendant did have the requisite intent to commit the robbery with no defense to cut off liability, he would be liable at common law for the accidental death as well. (A) is wrong, since this fact situation would give the defendant a possible self-defense claim, and if that failed, it would be manslaughter, not common law murder. (C) is wrong because here there was no malice aforethought. At most, the defendant would be guilty of involuntary manslaughter. (D) is not as good a choice as (B) because a jury could find that there was no malice aforethought. Defendant then would be guilty only of misdemeanor manslaughter while committing an "unlawful act," not common law murder.

Answer to Question 8

- (B) Dutton would have to be acquitted because his actions did not cause the death of the child. (A) is wrong because the defendant's beliefs about his rights are irrelevant. If the child had died of

malnutrition, the defendant's good faith belief concerning parental rights in supervising children would have been of no help to him. (C) is wrong because that reckless indifference did not cause the child's death. (D) is wrong because the child did not actually die from malnutrition.

Answer to Question 9

- (C) Vance could not be convicted of actually violating the statute because he did not enter the property of another. However, since he was approaching the property with the requisite state of mind, he could be charged with attempting to violate that statute. (A) is wrong because the statute does not define an attempt crime. Entering onto the property of another is an affirmative action. (B) is wrong because entering the property of another with the intent to commit a crime of violence constitutes more than merely "having a guilty mind." (D) is wrong because it is overbroad and overly subjective.

Answer to Question 10

- (C) Defendant's conduct qualifies as a killing with "an abandoned and malignant heart" because it exhibited a reckless indifference to the "very high" risk of death or serious injury. (A) is wrong because consent is not a defense to acts involving serious bodily injury. (B) is wrong because the misconduct of Adam is not a defense to homicide. (D) is wrong because the manslaughter statute requires that the killing be without malice. Here, malice is implied from Defendant's "abandoned and malignant heart."

Answer to Question 11

- (D) Since the felony murder rule is not involved here, the only theory of first degree murder available would be that killing was "willful, deliberate, or premeditated." First degree murder requires an actual intent to kill, which Defendant lacked. (A) is wrong under common law. At common law, it was possible to convict a seven-year-old of a crime. Also, there is nothing under this statute to indicate that a 17-year-old could not be convicted of a crime. Nor is youthfulness (of a defendant over the age of 14) a legally recognized source of "mitigating" a criminal homicide to manslaughter. Hence, (C) is wrong. (B) is wrong because a revolver is a deadly weapon and intentional use of it would support an inference that Defendant intended to kill.

Answer to Question 12

- (B) This is the best alternative. The choice as to whether this behavior is wanton or reckless (murder) or criminal or gross negligence (involuntary manslaughter) is best left to the jury. Hence, it would be wrong to instruct the jury "only" on involuntary manslaughter, and thus (A) is incorrect. (D) is wrong because the question relates to a Type A jurisdiction where murder is not divided into degrees. (C) is wrong as there is no way that Defendant would be guilty of voluntary manslaughter, which would involve an unjustified, unexcused but mitigated, intentional homicide. Defendant did not intend to kill or seriously injure.

Answer to Question 13

- (A) This question tests your understanding of the "abandoned and malignant heart" terminology still found in many murder statutes. (B) is wrong because "assault with a deadly weapon" is not the "independent" or "collateral felony" required for the felony murder rule. (C) and (D) are wrong because they do not concern issues that would be the most relevant to the murder charges. Both of these cover responses to defenses raised by the defendant rather than a necessary element to be proved by the prosecutor.

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Answer to Question 14

- (D) This answer covers all the possible ways to commit a first degree murder under a Type B statute (felony murder *and* premeditative or deliberate). Hence, both (A) and (B) are incomplete and wrong. (C) is wrong because consent of the victim will not excuse, mitigate, or reduce the level of a criminal homicide.

Answer to Question 15

- (B) This is the only possible charge. Although the 17-year-old son is old enough to be “legally” responsible for a crime, he is still a minor, and the father’s bragging about a loaded revolver in his room could be deemed contributory to his delinquency. At best, the father’s act was “criminally” negligent, and therefore any liability on the father’s part would not rise above the level of involuntary manslaughter. Therefore, (C) is wrong; merely leaving a loaded gun about is not an “abandoned and malignant heart” situation. (D) is also wrong; the father did not kill Victor as a result of a sudden quarrel or in the heat of passion. (A) is wrong because the father did not assault anyone and also because the assault charge would merge into the murder charge.

Answer to Question 16

- (A) The best defense is challenging the statute, because all of the other choices do not offer defenses. Linda’s consent is irrelevant under the statute, as is her appearance of being older. Duke’s intent is likewise irrelevant under this type of statute, which is a strict liability statute. Therefore, his only possible challenge is that the statute is void for vagueness because it does not apprise a defendant of which acts are proscribed.

Answer to Question 17

- (D) This is a strict liability crime. Voluntary intoxication is no defense to crimes of strict liability because a defense that negates intent is not a defense to a strict liability crime. Thus, (D) is the correct answer and (A) is incorrect. (B) is misleading because voluntary intoxication is an insufficient defense to general intent offenses. (C) is irrelevant.

Answer to Question 18

- (D) Adams is not guilty if he did not intend to achieve the objective of the conspiracy—*i.e.*, to permanently deprive the owner of his property, since Adams thought that Curtis was the owner and that Nelson was improperly keeping the certificates from Curtis. (A) is incorrect because an agreement and overt act are insufficient for conspiracy if Adams did not have the intent to commit larceny. (B), while a correct statement of law, is irrelevant to the required specific intent element. The corrupt motive doctrine is a minority view requiring conspirators to know that their objective is illegal. However, (C) is inapplicable to these facts since Adams had no intent to commit larceny.

Answer to Question 19

- (C) The crime of conspiracy requires that each conspirator intend to achieve an unlawful goal. If the jury believes Bennett, he must be found not guilty because he did not intend to achieve an unlawful goal. (A) is therefore incorrect. (D) is incorrect because Bennett’s act of prevention would not have excused the conspiracy if he had the proper mental state. (*Note:* The Model Penal Code recognizes such a defense.) (B) is incorrect because the privilege to apprehend criminals is not in issue here.

Answer to Question 20

- (D) If the jury believes both Adams and Bennett, neither could be guilty of conspiracy because of absence of intent. Therefore, Curtis could not be guilty of conspiracy at common law because there was never an agreement to achieve an unlawful purpose. (A) is wrong because there was never an agreement between two or more persons. (B) is incorrect because intent is but one element of conspiracy—there must also be an agreement. (C) is a nonsensical statement.

Answer to Question 21

- (A) Case squib (A) is the most applicable. Case squib (A) illustrates that the state of mind required for larceny is satisfied when the defendant intends to deal with the property in a manner that involves a substantial risk of loss to the owner, such as intending to sell the property back to the owner or hold it until a reward is offered. In this question, Davis used the tools to break open a safe. While he probably never intended to keep the tools, he also never intended to return them either—he did not care whether the hardware store ever got the tools back. Thus, the charge of larceny here is based on an intent to deal with the property in a manner that involves a high risk of loss to the owner, just as in squib (A). Squib (B) is not as applicable because the decisive element there was the defendants' intent only to borrow the car and to return it within a reasonable time. Squibs (C) and (D) are inapplicable because they involved a taking by means of false representations, which is not the case here.

Answer to Question 22

- (D) Squib (D) is the most applicable precedent. That squib establishes that the “trespassory” aspect of the taking is satisfied when the victim consents to defendant’s taking possession of the property only as a result of defendant’s misrepresentations. In this question, Vincent transferred possession of the \$500 as a result of the false representations of Smith. Squib (C) is not applicable because it establishes that one obtaining *title* to property as a result of false representations is not guilty of larceny. Here, Vincent only transferred *possession* of the \$500—he was expecting to receive a certificate of deposit for it.

Answer to Question 23

- (B) Squib (B) is most applicable because it establishes that an intent to borrow another’s property without permission for a short period of time is not sufficient for common law larceny. Here, Jones took the statuary with the intent to return it within a day or two. Despite his vindictive motive, Jones would not be liable for larceny if the jury decides that he did not intend to keep it for an unreasonable length of time. Regardless of the verdict, squib (B) is the most applicable precedent. Squib (A) is not applicable because the defendants in that case were not planning to return the dog until the owner offered a reward, which is not the case here.

Answer to Question 24

- (A) Squib (A) is most applicable. That case squib establishes that an intent to deal with another’s property in any manner that creates a substantial risk of loss of the property is a sufficient intent for larceny. Here, Harris’s conduct in pawning the property after taking it from the owner created a substantial risk of loss to the owner—enough to make Harris liable for larceny. Squib (B) is inappropriate because pawning the property negates any intent to return it. Squibs (C) and (D) are inapplicable because there were no misrepresentations in this case.

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Answer to Question 25

- (C) Case squib (C) is most applicable because it establishes that common law larceny does not apply in the fact situation here. In squib (C), the decisive element is that the victim, Will, gave the cash to the defendant with the intent that he keep it (*i.e.*, with the intent to convey title to the cash to defendant in exchange for possession of the apartment). As a result, defendant was not guilty of common law larceny of the cash because more than possession was transferred. Similarly, here Mark passed *title* to the money to Allison based on Allison's false representations. Squib (C) is therefore more applicable than squib (D) because (C) establishes that common law larceny does not apply in this case.

Answer to Question 26

- (B) It seems clear from the facts that Ted has killed in self-defense. Even if striking Howard with the lamp were seen as the use of deadly force, it was necessary in response to the latter's use of deadly force. (A) is simply irrelevant. (C) might have been relevant to a defense for Howard if he had killed Ted, but it is irrelevant to the facts of this case. (D) is a misstatement of law.

Answer to Question 27

- (B) Battery is a general intent crime that may be satisfied by a showing of recklessness or criminal negligence. (B) involves facts that are most clearly inconsistent with the defendant having any mental state whatever. Alternatively, (B) is to be preferred because it most clearly indicates that there was not a willed act, since convulsive acts are not considered to be voluntary. Even while in a hypnotic state, Defendant's striking Victim was a voluntary physical movement. (A) is therefore incorrect. (C) is wrong because voluntary intoxication is not a defense to crimes requiring recklessness. (D) is inapplicable because, although he was mistaken as to Victim's actions, Defendant willed himself to hit Victim.

Answer to Question 28

- (C) Answer (A) is to be rejected because the request for the attorney means interrogation must cease and not that the attorney be produced immediately. In this case, interrogation had not yet begun. (B) is inapplicable since there is no suggestion that the arrest was unlawful. (D) is accurate but nonsensical. It is the introduction of the statement, not the fingerprints, that is in issue. The best answer is (C), because truly volunteered statements are not the product of custodial interrogation.

Answer to Question 29

- (C) It is clear that the taking was not achieved by the use of force, an element of robbery. (It would be different if Defendant had run down the victim with the intent to appropriate his property.) (A) and (B) are based on mistaken legal premises and are thus incorrect. The Defendant's motive is irrelevant, and larceny does not require a taking from a living person. (D) might be accurate at common law but modern statutes normally include documents as being property subject to larceny and thus, robbery.

Answer to Question 30

- (A) Dan should be found guilty. The problem here is whether Dan caused Tom's death. Dan's act was not only the "but for" cause but also, since the death as it happened was the natural and foreseeable result, the "proximate" cause. The fact that other preexisting conditions contributed to the

death does not absolve Dan. Therefore, (D) is incorrect. (B) is irrelevant to whether Dan committed murder. (C) is a misstatement of the facts relating to Tom's "serious" illness. Moreover, an act that hastens an inevitable result is still a legal cause of that result.

Answer to Question 31

- (C) The statute defines assault as "an attempt to commit a battery." Attempts require the specific intent to commit the crime. We are told Edward had no such intent. Hence, (C) is the best answer. Thus, (A) and (B) are incorrect. (D) is incorrect because an assault is an attempt to cause an offensive touching, and thus it would not be necessary for him to actually hit Margaret.

Answer to Question 32

- (D) There is no doubt that Margaret committed a battery. Hence, (C) is to be rejected. The question is whether it was justified. Since she is permitted to use nondeadly force when she reasonably believes such is necessary to avoid the danger of harm from an aggressor and the facts indicate this was her position, the best answer is (D). (A) is incorrect because, even though her conduct was intentional, she has a defense of self-defense. (B) is incorrect because of her justification for the pushing.

Answer to Question 33

- (C) A court, in enforcing a criminal statute, will construe legislative intent in assessing criminal liability. If a statute defines a crime in a way that necessarily involves more than one participant and provides for the liability of only one participant, it is presumed that the legislative intent was to immunize the other participant from liability as an accomplice (*e.g.*, the buyer in an illegal sale of drugs is neither guilty of being an accessory to the sale nor in a conspiracy with the seller). Further, the rule of lenity requires that an ambiguous criminal statute must be strictly construed in favor of the defendant. (A) is wrong because those who provide inducement for a crime that requires two parties are not accessories. Further, Monroe was not an accessory at common law because accessories were not present when the crime was committed. (B) is wrong because Monroe is not the victim; the state is. (D) is wrong because Monroe did assist Professor Smith in violating the statute by offering him the \$50.

Answer to Question 34

- (C) Answer (A) is wrong because we are told Defendant did not have the requisite intent to steal. (B) is incorrect because Defendant's mistake may have gone to civil law—his right to use self-help in recovering a debt—rather than to the former type of mistake. (D) is to be rejected because of the facts; Defendant did not intend to steal the property of another. (C) is the best answer because Defendant's mistake is as to the coverage of the criminal law and that is not an excuse.

EVIDENCE QUESTIONS

Questions 1-2 are based on the following fact situation:

Paula sued for injuries she sustained in a fall in a hotel hallway connecting the lobby of the hotel with a restaurant located in the hotel building. The hallway floor was covered with vinyl tile. The defendants were Horne, owner of the hotel building, and Lee, lessee of the restaurant. The evidence was that the hallway floor had been waxed approximately an hour before Paula slipped on it, and although the wax had dried, there appeared to be excessive dried wax caked on several of the tiles. Horne's defense was that the hallway was a part of the premises leased to Lee over which he retained no control, and Lee denied negligence and alleged contributory negligence.

1. Lee offered to prove by Marks, the restaurant manager, that in the week immediately preceding Paula's fall at least 1,000 people had used the hallway in going to and from the restaurant, and Marks had neither seen anyone fall nor received reports that anyone had fallen. The trial judge should rule this evidence:
 - (A) Admissible, because it tends to prove that Paula did not use the care exercised by reasonably prudent people.
 - (B) Admissible, because it tends to prove that Lee was generally careful in maintaining the floor.
 - (C) Inadmissible, because Marks's testimony is self-serving.
 - (D) Inadmissible, because it does not bear on the issue of Lee's exercise of due care on this specific occasion.

2. If Paula offered to prove that the day after she fell, Horne had the vinyl tile taken up and replaced with a new floor covering, the trial judge should rule the evidence:
 - (A) Admissible, because it is relevant to the issue of whether Horne retained control of the hallway.

- (B) Admissible, because it is relevant in the issue of awareness of the unsafe condition of the hallway at the time of Paula's fall.
- (C) Inadmissible, because there was no showing that the new floor covering would be any safer than the old.
- (D) Inadmissible, because to admit such would discourage a policy of making repairs to prevent further injury, regardless of fault.

Question 3

Powers sued Debbs for battery. At trial, Powers's witness, Wilson, testified that Debbs had made an unprovoked attack on Powers.

On cross-examination, Debbs asks Wilson about a false claim that Wilson had once filed on an insurance policy. The question is:

- (A) Proper, because the conduct involved untruthfulness.
- (B) Proper, provided that the conduct resulted in conviction of Wilson.
- (C) Improper, because the impeachment involved a specific instance of misconduct.
- (D) Improper, because the claim form would be the best evidence.

Question 4

In a tort action, Fisher testified against Dawes. Dawes then called Jones, who testified that Fisher had a bad reputation for veracity. Dawes then also called Weld to testify that Fisher once perpetrated a hoax on the police.

Weld's testimony is:

- (A) Admissible, because a hoax involves untruthfulness.
- (B) Admissible, provided that the hoax resulted in conviction of Fisher.

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- (C) Inadmissible, because it is merely cumulative impeachment.
- (D) Inadmissible, because it is extrinsic evidence of a specific instance of misconduct.

Questions 5-6 are based on the following fact situation:

Peters sued Davis for \$100,000 for injuries received in a traffic accident. Davis charges Peters with contributory negligence and alleges that Peters failed to have his lights on at a time when it was dark enough to require them.

5. Davis calls Bystander to testify that Passenger, who was riding in Peters's automobile and who was injured, confided to him at the scene of the accident that "we should have had our lights on." Bystander's testimony is:
 - (A) Admissible as an admission of a party opponent.
 - (B) Admissible as a statement against interest.
 - (C) Inadmissible, because it is hearsay not within any exception.
 - (D) Inadmissible, because it is opinion.
6. Davis offers to have Bystander testify that he was talking to Witness when he heard the crash and heard Witness, now deceased, exclaim, "That car doesn't have any lights on." Bystander's testimony is:
 - (A) Admissible as a statement of present sense impression.
 - (B) Admissible, because Witness is not available to testify.
 - (C) Inadmissible as hearsay not within any exception.
 - (D) Inadmissible, because of the Dead Man's Statute.

Questions 7-8 are based on the following fact situation:

Owner and his employee, Driver, consult Attorney about a motor vehicle collision resulting in a suit by Litigant against Owner and Driver as joint defendants. Attorney calls Irving, his investigator, into the conference to make notes of what is said, and those present discuss the facts of the collision and Owner's insurance. Owner thereafter files a cross-claim against Driver for indemnity for any damages obtained by Litigant.

7. Litigant calls Driver to testify in Litigant's case-in-chief to admissions made by Owner in the conference. On objection by Owner, the court should rule that Driver's testimony is:
 - (A) Admissible, because of the presence of persons in the conference other than Attorney and Owner.
 - (B) Admissible, because Driver is an adverse party in the lawsuit.
 - (C) Inadmissible, because of the attorney-client privilege.
 - (D) Inadmissible, because the best evidence is Irving's notes of the conference.
8. Driver calls Irving in his defense against the cross-claim. He seeks to have Irving testify to admissions made by Owner in the conference. On objection by Owner, the court should rule Irving's testimony:
 - (A) Admissible, because the attorney-client privilege does not apply, in suits between those conferring with him, to joint consultations with an attorney.
 - (B) Admissible, because the attorney-client privilege does not apply to testimony by one who does not stand in a confidential relationship with the person against whom the evidence is offered.

- (C) Admissible, because the conference was not intended to be confidential, since it concerned anticipated testimony in open court.
- (D) Inadmissible, because Owner has not waived the attorney-client privilege.

Questions 9-11 are based on the following fact situation:

Pemberton and three passengers, Able, Baker, and Charley, were injured when their car was struck by a truck owned by Mammoth Corporation and driven by Edwards. Helper, also a Mammoth employee, was riding in the truck. The issues in *Pemberton v. Mammoth* include the negligence of Edwards in driving too fast and in failing to wear glasses, and of Pemberton in failing to yield the right of way.

9. Pemberton's counsel proffers evidence showing that shortly after the accident, Mammoth put a speed governor on the truck involved in the accident. The judge should rule the proffered evidence:
 - (A) Admissible as an admission of a party.
 - (B) Admissible as res gestae.
 - (C) Inadmissible for public policy reasons.
 - (D) Inadmissible, because it would lead to the drawing of an inference on an inference.
 10. Pemberton's counsel seeks to introduce Helper's written statement that Edwards, Mammoth's driver, had left his glasses (required by his operator's license) at the truck stop which they had left five minutes before the accident. The judge should rule the statement admissible only if:
 - (A) Pemberton first proves that Helper is an agent of Mammoth and that the statement concerned a matter within the scope of his agency.
 - (B) Pemberton produces independent evidence that Edwards was not wearing corrective lenses at the time of the accident.
 - (C) Helper is shown to be beyond the process of the court and unavailable to testify.
 - (D) The statement was under oath in affidavit form.
- Question 12**
- In a contract suit between Terrell and Ward, Ward testified that he recalls having his first conversation with Terrell on January 3. When asked how he remembers the date, he answers, "In the conversation, Terrell referred to a story in that day's newspaper announcing my daughter's engagement." Terrell's counsel moves to strike the reference to the newspaper story.
- The judge should:
- (A) Grant the motion on the ground that the best evidence rule requires production of the newspaper itself.
 - (B) Grant the motion, because the reference to the newspaper story does not fit within any established exception to the hearsay rule.

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- (C) Deny the motion on the ground that the court may take judicial notice of local newspapers and their contents.
- (D) Deny the motion on the ground that a witness may refer to collateral documents without providing the documents themselves.

Question 13

In Peel's personal injury action, Wilson, a physician who had no previous knowledge of the matter, sat in court and heard all of the evidence about Peel's symptoms and conditions.

Wilson is called to give her opinion whether Peel's injuries are permanent. May Wilson so testify?

- (A) Yes, provided she first identifies the data on which her opinion is based.
- (B) Yes, because an expert may base her opinion on facts made known to her at the trial.
- (C) No, because she has no personal knowledge of Peel's condition.
- (D) No, because permanence of injury is an issue to be decided by the jury.

Questions 14-15 are based on the following fact situation:

Rider, a bus passenger, sued Transit Company for injuries to his back from an accident caused by Transit's negligence. Transit denies that Rider received any injury in the accident.

14. Rider's counsel seeks to introduce an affidavit he obtained in preparation for trial from Dr. Bond, who has since died. The affidavit avers that Dr. Bond examined Rider two days after the Transit Company accident and found him suffering from a recently incurred back injury. The judge should rule the affidavit:

- (A) Admissible as a statement of present bodily condition made to a physician.

- (B) Admissible as prior recorded testimony.
- (C) Inadmissible, because it is irrelevant.
- (D) Inadmissible, because it is hearsay not within any exception.

15. Transit Company calls Observer to testify that right after the accident, Rider told him that he had recently suffered a recurrence of an old back injury. The judge should rule Observer's testimony:

- (A) Admissible as an admission of a party-opponent.
- (B) Admissible as a spontaneous declaration.
- (C) Inadmissible, because it is irrelevant.
- (D) Inadmissible, because it is hearsay not within any exception.

Question 16

Patty sues Mart Department Store for personal injuries, alleging that while shopping she was knocked to the floor by a merchandise cart being pushed by Handy, a stock clerk, and that as a consequence her back was injured.

Handy testified that Patty fell near the cart but was not struck by it. Thirty minutes after Patty's fall, Handy, in accordance with regular practice at Mart, had filled out a printed form, "Employee's Report of Accident—Mart Department Store," in which he stated that Patty had been leaning over to spank her young child and in so doing had fallen near his cart. Counsel for Mart offers in evidence the report, which had been given him by Handy's supervisor.

The judge should rule the report offered by Mart:

- (A) Admissible as res gestae.
- (B) Admissible as a business record.

- (C) Inadmissible, because it is hearsay not within any exception.
- (D) Inadmissible, because Handy is available as a witness.

Question 17

Pace sues Def Company for injuries suffered when Pace's car collided with Def Company's truck. Def's general manager prepared a report of the accident at the request of the company's attorney, in preparation for the trial, and delivered the report to the attorney. Pace demands that the report be produced.

Will production of the report be required?

- (A) Yes, because business reports are not generally privileged.
- (B) No, because it is a privileged communication from client to the attorney.
- (C) No, because such reports contain hearsay.
- (D) No, because such reports are self-serving.

Question 18

At the trial of Davis for a murder that occurred in Newtown, the prosecution called Waite, who testified that she saw Davis kill the victim. Davis believed that Waite was 600 miles away in Old Town, engaged in the illegal sale of narcotics, on the day in question. On cross-examination by Davis, Waite was asked whether she had in fact sold narcotics in Old Town on that date. Waite refused to answer on the ground of self-incrimination.

The judge, over the prosecutor's objection, ordered that if Waite did not testify, her direct testimony should be stricken.

The order to testify or have the testimony stricken can best be supported on the basis that:

- (A) Waite had not been charged with any crime and, thus, could claim no privilege against self-incrimination.

- (B) Waite's proper invocation of the privilege prevented adequate cross-examination.
- (C) The public interest in allowing an accused to defend himself or herself outweighs the interest of a nonparty witness in the privilege.
- (D) The trial record, independent of testimony, does not establish that Waite's answer could incriminate her.

Question 19

Alex and Sam were arrested for holding up a gas station. They were taken to police headquarters and placed in a room for interrogation. As a police officer addressing both started to give them *Miranda* warnings prior to the questioning, Alex said, "Look, Sam planned the damned thing and I was dumb enough to go along with it. We robbed the place—what else is there to say?" Sam said nothing. Sam was escorted into another room and a full written confession was then obtained from Alex.

If Sam is brought to trial on an indictment charging him with robbery, the fact that Sam failed to object to Alex's statement and remained silent after Alex had implicated him in the crime should be ruled:

- (A) Admissible, because his silence was an implied admission by Sam that he had participated in the crime.
- (B) Admissible, because a statement of a participant in a crime is admissible against another participant.
- (C) Inadmissible, because under the circumstances there was no duty or responsibility on Sam's part to respond.
- (D) Inadmissible, because whatever Alex may have said has no probative value in a trial against Sam.

Question 20

Pack sued Donlon for slander, alleging that Donlon had publicly accused Pack of being a

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thief. In his answer, Donlon admitted making the accusation, but alleged that it was a true statement.

At trial, Donlon offers evidence that Pack stole a ring worth \$10,000 from a jewelry store.

Evidence concerning this theft should be:

- (A) Admitted, because specific instances of conduct may be proved when character is directly in issue.
- (B) Admitted, because Pack's actions constituted a felony.
- (C) Excluded, because character must be shown by reputation or opinion.
- (D) Excluded, because its relevance is substantially outweighed by the danger of unfair prejudice.

Question 21

In a suit attacking the validity of a deed executed 15 years ago, Plaintiff alleges mental incompetency of Joe, the grantor, and offers in evidence a properly authenticated affidavit of Harry, Joe's brother. The affidavit, which was executed shortly after the deed, stated that Harry had observed Joe closely over a period of weeks, that Joe had engaged in instances of unusual behavior (which were described), and that Joe's appearance had changed from one of neatness and alertness to one of disorder and absentmindedness.

The judge should rule Harry's affidavit:

- (A) Inadmissible as opinion.
- (B) Inadmissible as hearsay not within any exception.
- (C) Admissible as an official document.
- (D) Admissible as an ancient document.

Question 22

Park brought an action against Dan for injuries received in an automobile accident, alleging negligence in that Dan was speeding and inattentive. Park calls White to testify that Dan had a reputation in the community of being a reckless driver and was known as "Daredevil Dan."

White's testimony is:

- (A) Admissible as habit evidence.
- (B) Admissible, because it tends to prove that Dan was negligent at the time of this collision.
- (C) Inadmissible, because Dan has not offered testimony of his own good character.
- (D) Inadmissible to show negligence.

Question 23

In Polk's negligence action against Dell arising out of a multiple-car collision, Witt testified for Polk that Dell went through a red light. On cross-examination, Dell seeks to question Witt about her statement that the light was yellow, made in a deposition that Witt gave in a separate action between Adams and Baker. The transcript of the deposition is self-authenticating.

On proper objection, the court should rule the inquiry:

- (A) Admissible for impeachment only.
- (B) Admissible as substantive evidence only.
- (C) Admissible for impeachment and as substantive evidence.
- (D) Inadmissible, because it is hearsay not within any exception.

Questions 24-25 are based on the following fact situation:

Price sued Derrick for injuries Price received in an automobile accident. Price claimed Derrick was negligent in (a) exceeding the posted speed limit of 35 m.p.h., (b) failing to keep a lookout, and (c) crossing the center line.

24. Bystander, Price's eyewitness, testified on cross-examination that Derrick was wearing a green sweater at the time of the accident. Derrick's counsel calls Wilson to testify that Derrick's sweater was blue. Wilson's testimony is:
- (A) Admissible as substantive evidence of a material fact.
 - (B) Admissible as bearing on Bystander's truthfulness and veracity.
 - (C) Inadmissible, because it has no bearing on the capacity of Bystander to observe.
 - (D) Inadmissible, because it is extrinsic evidence of a collateral matter.
25. Derrick testified in his own behalf that he was going 30 m.p.h. On cross-examination, Price's counsel did not question Derrick with regard to his speed. Subsequently, Price's counsel calls Officer to testify that, in his investigation following the accident, Derrick told him he was driving 40 m.p.h. Officer's testimony is:
- (A) Admissible as a prior inconsistent statement.
 - (B) Admissible as an admission.
 - (C) Inadmissible, because it lacks a foundation.
 - (D) Inadmissible, because it is hearsay not within any exception.

Question 26

Drew is charged with the murder of Pitt. The prosecutor introduced testimony of a police

officer that Pitt told a priest administering the last rites, "I was stabbed by Drew. Since I am dying, tell him I forgive him." Thereafter, Drew's attorney offers the testimony of Wall that the day before, when Pitt believed he would live, he stated that he had been stabbed by Jack, an old enemy.

The testimony of Wall is:

- (A) Admissible under an exception to the hearsay rule.
- (B) Admissible to impeach the dead declarant.
- (C) Inadmissible, because it goes to the ultimate issue in the case.
- (D) Inadmissible, because irrelevant to any substantive issue in the case.

Question 27

Post sued Dean for personal injury alleged to have been caused by Dean's negligence. A major issue at trial was whether Post's disability was caused solely by trauma or by a preexisting condition of osteoarthritis.

Post called Dr. Cox, who testified that the disability was caused by trauma. On cross-examination, Dr. Cox testified that a medical textbook entitled *Diseases of the Joints* was authoritative and that she agreed with the substance of passages from the textbook that she was directed to look at, but that the passages were inapplicable to Post's condition because they dealt with rheumatoid arthritis rather than with the osteoarthritis that Post was alleged to have.

Dean then called his expert, Dr. Freed, who testified that, with reference to the issue being litigated, there is no difference between the two kinds of arthritis. Dean's counsel then asks permission to read to the jury the textbook passages earlier shown to Dr. Cox.

The judge should rule the textbook passages:

- (A) Admissible only for the purpose of impeaching Cox.

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- (B) Admissible as substantive evidence if the judge determines that the passages are relevant.
- (C) Inadmissible, because they are hearsay not within any exception.
- (D) Inadmissible, because Cox contended that they are not relevant to Post's condition.

Question 28

Pratt sued Danvers for injuries suffered by Pratt when their automobiles collided. At trial, Pratt offers into evidence a properly authenticated letter from Danvers that says, "Your claim seems too high, but, because I might have been a little negligent, I'm prepared to offer you half of what you ask."

The letter is:

- (A) Admissible as an admission by a party-opponent.
- (B) Admissible as a statement against pecuniary interest.
- (C) Inadmissible, because Danvers's statement is lay opinion on a legal issue.
- (D) Inadmissible, because Danvers's statement was made in an effort to settle the claim.

Question 29

Parker sued Dodd over title to an island in a river. Daily variations in the water level were important.

For many years Wells, a commercial fisherman, kept a daily log of the water level at his dock opposite the island in order to forecast fishing conditions. Parker employed Zee, an engineer, to prepare graphs from Wells's log.

Wells was called to testify to the manner in which he kept the log, which had been available for inspection. His testimony should be:

- (A) Excluded on a general objection because not admissible for any purpose.

- (B) Excluded on a specific objection that it calls for hearsay.
- (C) Admitted to support the credibility of Wells and Zee as witnesses.
- (D) Admitted as part of the foundation for admission of Zee's graphs.

Question 30

Polk sued DeVore on a written contract. In her case-in-chief, DeVore testified that she withdrew from the contractual arrangement, as the contract permitted, by notifying Polk by means of a letter. She testified that she put the letter in an envelope, with proper postage, addressed to Polk at his place of business, and that she placed it in a United States Post Office mailbox.

In rebuttal, Polk testified that he got his mail each day from a locked post office box and that he had never received any such letter. There was no other evidence relating to receipt of the notice letter.

When the case is ready to go to the jury, the trial judge should:

- (A) Withdraw from the jury's consideration the issue of whether Polk received the notice.
- (B) Instruct the jury that it may presume that Polk received the notice.
- (C) Instruct the jury that it should find that Polk received the notice.
- (D) Submit the case to the jury without instruction concerning a presumption of receipt.

Question 31

Park sued Dent for breach of an oral contract which Dent denied making. Weston testified that he heard Dent make the contract on July 7. Dent discredited Weston, and Park offers evidence of Weston's good reputation for truthfulness.

The rehabilitation is most likely to be permitted if the discrediting evidence by Dent was testimony that:

- (A) Weston had been promoting highly speculative stocks.
- (B) Weston had been Park's college roommate.
- (C) Weston had attended a school for mentally retarded children.
- (D) Weston had been out of town the whole week of July 4-10.

Question 32

In a will case, Paula seeks to prove her relationship to the testator Terrence by a statement in a deed of a gift from Terrence, "I transfer to my niece Paula . . ." The deed was recorded pursuant to statute in the office of the county recorder and is kept there. Paula calls Recorder, who authenticates an enlarged print photocopy of the deed. The photocopy was made from the microfilm records kept in Recorder's office pursuant to statute.

The photocopy is:

- (A) Admissible as a record of a document affecting an interest in property.
- (B) Admissible as recorded recollection.
- (C) Inadmissible as hearsay not within any recognized exception.
- (D) Inadmissible as not the best evidence.

Question 33

Alice was held up at the point of a gun, an unusual revolver with a red-painted barrel, while she was clerking in a neighborhood grocery store. Dennis is charged with armed robbery of Alice.

The prosecutor calls Winthrop to testify that, a week after the robbery of Alice, he was robbed

by Dennis with a pistol that had red paint on the barrel. Winthrop's testimony is:

- (A) Admissible as establishing an identifying circumstance.
- (B) Admissible as showing that Dennis was willing to commit robbery.
- (C) Inadmissible, because it is improper character evidence.
- (D) Inadmissible, because its probative value is substantially outweighed by the danger of unfair prejudice.

Question 34

Darden was prosecuted for armed robbery. At trial, Darden testified in his own behalf, denying that he had committed the robbery. On cross-examination, the prosecutor intends to ask Darden whether he had been convicted of burglary six years earlier.

The question concerning the burglary conviction is:

- (A) Proper if the court finds that the probative value for impeachment outweighs the prejudice to Darden.
- (B) Proper, because the prosecutor is entitled to make this inquiry as a matter of right.
- (C) Improper, because burglary does not involve dishonesty or false statement.
- (D) Improper, because the conviction must be proved by court record, not by question on cross-examination.

EVIDENCE ANSWERS

Answer to Question 1

- (D) The testimony of Marks presents a problem of relevance. When evidence that relates to a time, event, or person other than the time, event, or persons directly involved in the controversy being litigated is offered, the relevance of that evidence is suspect. However, such evidence may be relevant if it is probative of the material issue involved, and if such probative value outweighs the risk of confusion or unfair prejudice. Specifically, the evidence being offered here is evidence of the absence of similar accidents. Many courts are reluctant to admit evidence of the absence of similar accidents or complaints to show absence of negligence, or lack of a defect. Thus, (D) correctly concludes that the testimony cannot be admitted to show that, at the time of Paula's injury, Lee was exercising due care. For the same reason, (B) is incorrect in stating that the evidence may be used to show that Lee was generally careful in maintaining the floor. (A) is incorrect because, if this type of evidence cannot be used to show that the defendant was not negligent, then it certainly cannot be used to show that the plaintiff was negligent. (C) is incorrect because the fact that evidence may be self-serving does not render it inadmissible; virtually all evidence is self-serving to its proponent, or else it would not be offered by that party.

Answer to Question 2

- (A) The law encourages the repair of defective conditions that cause injury. Thus, evidence of repairs or other precautionary measures made following an injury is inadmissible to prove negligence or culpable conduct. However, such evidence may be admissible for other purposes. One such purpose is to show ownership or control, since it is unlikely that a stranger would make repairs. Here, Horne has denied that he had control of the hallway in which the injury occurred. Thus, evidence that he had a new floor covering placed in the hallway is relevant to show that he did in fact have control of the subject premises. This conclusion is accurately reflected in (A). (B) is incorrect because it points to precisely a reason why the evidence might *not* be admissible (*i.e.*, it tries to use the evidence to show that Horne was negligent). (D) is incorrect because proof of ownership or control is, as detailed above, an exception to the general rule that evidence of subsequent repairs is inadmissible. Regarding (C), we have already established that the evidence is admissible to show control. Whether the new floor covering is actually safer than the old will not change this result.

Answer to Question 3

- (A) A witness may be interrogated upon cross-examination, in the discretion of the court, with respect to any act of misconduct that is probative of truthfulness, regardless of whether the witness was convicted as a result of the "bad act." Thus, (A) is correct. (B) is incorrect because, although it arrives at the correct conclusion that the question is proper, it incorrectly requires that the misconduct have resulted in a conviction. (C) is incorrect because impeachment may be based on specific acts of misconduct. (D) is incorrect because such specific acts of misconduct can only be elicited on cross-examination of the witness; extrinsic evidence is not permitted.

Answer to Question 4

- (D) A witness may be interrogated upon cross-examination, in the discretion of the court, with respect to any act of misconduct that is probative of truthfulness, regardless of whether the witness was convicted as a result of the "bad act." Such specific act of misconduct *can only be elicited on cross-examination* of the witness. Extrinsic evidence is not permitted. Weld's testimony would constitute extrinsic evidence of a specific instance of misconduct. Thus, (D) is correct. It follows that (A) and (B) are incorrect. (C) is incorrect because there is no rule limiting cumulative impeachment.

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Answer to Question 5

- (C) Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Bystander's testimony as to Passenger's statement is offered to prove the truth of the matter asserted therein; *i.e.*, that Peters did not have his lights on and was thus contributorily negligent. Therefore, the statement is not admissible unless it comes within one of the hearsay exceptions. (A) is incorrect because Passenger is not a party, and there is no indication either that Peters adopted Passenger's statement or that Peters and Passenger had such a relationship that would render the statement a vicarious admission by Peters. (B) is incorrect because the statement against interest exception requires that the declarant be unavailable as a witness. Passenger does not appear to be unavailable. Also, the statement does not seem to be against the interest of Passenger (although it certainly is against the interest of Peters). (D) is incorrect because the matter is one about which laypersons regularly form opinions.

Answer to Question 6

- (A) Witness's statement is hearsay but within the present sense impression exception to the hearsay rule. This exception comes into play when a person perceives some event that is not particularly shocking, yet that person nevertheless is moved to comment on what he perceived at the time of receipt of the sense impression or immediately thereafter. Here, the statement conveys what Witness perceived at the time of the accident; thus, it is allowed into evidence as a present sense impression. Because the statement falls within one of the hearsay exceptions, (C) is incorrect. (B) is incorrect because, for the present sense impression exception, the declarant's availability is immaterial. (D) is incorrect because a Dead Man's Statute prohibits testimony as to a personal transaction or communication with a decedent when such testimony is offered against the representative or successors in interest of the deceased. This question does not involve a suit against a decedent's estate.

Answer to Question 7

- (C) A communication is confidential, for purposes of the attorney-client privilege, if it was not intended to be disclosed to third persons, other than those to whom disclosure would be in furtherance of the rendition of legal services to the client. Also, where a lawyer acts for two parties, the privilege can be claimed in a suit between either or both of the parties and third persons. Here, Attorney's investigator is someone to whom disclosure was in furtherance of the rendition of legal services. Thus, any statements made in Irving's presence will still be confidential. In addition, the fact that Owner made statements in the presence of a joint client does not deprive those statements of the protection of the attorney-client privilege. For these reasons, (A) is incorrect in holding the privilege inapplicable because of the presence of third persons in the conference. (B) is incorrect because Driver and Owner are both defendants in Litigant's suit, and communications made by joint clients are privileged as against third parties. (D) is incorrect because the best evidence rule does not apply to these facts. According to the rule, in proving the terms of a writing, where the terms are material, the original writing must be produced. Testimony is not offered here to prove the contents of Irving's notes.

Answer to Question 8

- (A) Where a lawyer acts for joint clients, no privilege can be invoked in a suit between the two parties, as they could not have desired nor could they have expected confidentiality as between themselves in a joint consultation. There is a suit (a cross-claim) between Owner and Driver.

Thus, in this suit, Owner cannot claim the privilege as to statements made during the joint conference. Therefore, (A) is correct. (B) is wrong because where a privilege attaches, the holder can prevent disclosure by anyone. (C) is incorrect because the lack of confidentiality arises from the fact that the two litigants participated in a joint conference, rather than from the fact that the conference related to testimony to be given in open court. (D) reaches the incorrect conclusion that the testimony is inadmissible, because the privilege has not been waived. As explained above, the requisite confidentiality is missing.

Answer to Question 9

- (C) Evidence of repairs or other precautionary measures made following an injury is inadmissible to prove negligence or culpable conduct. This is because public policy encourages people to make such repairs. Such evidence *is* admissible for other purposes, *e.g.*, to prove ownership or control. Here, we are told that the issues involve negligence. Thus, the evidence as to the speed governor is being offered to prove culpable conduct or negligence, and therefore is inadmissible. (A) and (B) each incorrectly conclude that the evidence is admissible. (D) makes absolutely no sense.

Answer to Question 10

- (A) The statement by Helper is one made by the declarant (Helper) other than while testifying at the trial, offered to prove the truth of the matter asserted (*i.e.*, that Edwards was not wearing his glasses at the time of the accident). This presents a hearsay issue. However, an admission by a party-opponent is not considered hearsay under the Federal Rules. Here, the party-opponent is Mammoth Corporation, while the statement is by an employee of Mammoth. Statements by an agent concerning any matter within the scope of his agency, made during the course of the employment relationship, are not hearsay and are admissible against the principal. Thus, (A) correctly states that the statement is admissible only if Helper is an agent of Mammoth and the statement concerned a matter within the scope of the agency. (B) is incorrect because admissibility of the statement is not dependent on independent corroboration of the truth thereof. (C) is incorrect because unavailability of the declarant is not a prerequisite for an admission of a party-opponent. (D) is incorrect because an admission need not be under oath in order to be admissible.

Answer to Question 11

- (A) As detailed in the answer to the preceding question, an admission by a party-opponent is non-hearsay under the Federal Rules. An admission is a statement made or act done that amounts to a prior acknowledgment by one of the parties of a relevant fact. Here, a fact in issue is whether Pemberton failed to yield the right of way. Pemberton's statement to Sheriff acknowledges fault. Thus, the testimony as to the statement is admissible as an admission by a party-opponent of Mammoth's. Because the evidence is not considered hearsay, (D) incorrectly concludes that it *is* hearsay. (B) is incorrect because statements made in such a manner may be inadmissible multiple hearsay. (C) is incorrect because the admissibility of the testimony centers on a party's admission of a relevant fact. The declarant's use of the word "fault," which may be a legal conclusion, does not affect the admissibility of the statement.

Answer to Question 12

- (D) Pursuant to the best evidence rule, when proving the terms of a writing (where the terms are material), the original writing must be produced. The rule does not apply to writings of minor importance to the matter in controversy. Thus, a witness may refer to collateral documents

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without providing the documents themselves. Here, the newspaper issue is tangential. As a result, there is no need to produce the newspaper. Therefore, (A) incorrectly concludes that the best evidence rule requires production of the newspaper. (B) is wrong because the newspaper story is not offered to prove the truth of its contents. (C) is incorrect because courts may take judicial notice of the *existence* of a local newspaper (a matter of common knowledge within the community) but not the *contents* of articles appearing therein.

Answer to Question 13

- (B) An expert's opinion may be based upon one or more of three possible sources of information: (i) facts that he knows from his own observation; (ii) facts presented in evidence at the trial and submitted to the expert; or (iii) facts not in evidence that were supplied to the expert out of court, which facts are of a type reasonably relied upon by experts in the particular field in forming opinions on the subject. (B) correctly refers to (ii), above, as a proper source of information for the expert. (A) is incorrect because, where an expert bases her opinion on facts made known to her at the trial, the expert need not disclose the reasons for the opinion on direct examination unless the court orders it. (C) is incorrect because, although personal observation is one of the sources upon which an expert opinion may be based, it is not the only such source. (D) is incorrect because permanence of injury is an issue that requires specialized knowledge to assist the jury.

Answer to Question 14

- (D) The statement is inadmissible hearsay. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Here, the affidavit is being offered to prove that Rider incurred a recent back injury. Because Dr. Bond is dead, the adverse party is denied the opportunity to cross-examine him and test the veracity of his statement. Furthermore, the statement falls within no recognized exception to the hearsay rule. Thus, (D) is correct. (A) is incorrect because declarations of present bodily condition are statements made contemporaneously with the symptoms. Here, the affidavit was prepared later in contemplation of trial. It does not contain Rider's contemporaneous statements regarding his symptoms, but rather the physician's observation that Rider suffered from a recent back injury. Hence, the statement does not fall within the exception. (B) is incorrect because the former testimony exception requires that the statement be given during formal proceedings and under oath by a witness subject to cross-examination. (C) is incorrect because the statement relates to a time, event, or person in controversy. Whether Rider's back injury was an old or a recent injury is such a matter in controversy. Hence, the statement is relevant.

Answer to Question 15

- (A) An admission by a party-opponent is considered nonhearsay under the Federal Rules. An admission is a statement that amounts to a prior acknowledgment by one of the parties to an action of one of the relevant facts. If the party said or did something inconsistent with his contentions at trial, the law regards him as estopped from preventing its admission into evidence. (A) is correct because Rider's statement that his back injury was a recurrence of an old injury is inconsistent with his assertion that the injury resulted from the recent accident. (B) is wrong because a spontaneous declaration (or "excited utterance") must concern the immediate facts of a startling occurrence. Rider's statement does not refer to the accident itself. Nor is it clear from the facts that the statement was made under the stress of the excitement. (C) is wrong because the statement relates to a time, event, or person in controversy (*i.e.*, whether Rider's back injury resulted from Transit Company's negligence). Hence, it is relevant. (D) is wrong because (as noted in the

discussion of option (A), above) an admission by a party-opponent is nonhearsay under the Federal Rules of Evidence.

Answer to Question 16

- (C) The report is hearsay, as it is a statement, not made by the declarant while testifying at the trial, offered to prove the truth of the matter asserted. Thus, the report is inadmissible unless it comes within a hearsay exception. The only applicable exception is the business records exception, under which a writing or record made as a memorandum of any act, transaction, occurrence, or event is admissible as proof of such act, etc., if made in the regular course of a business, and if it was the regular course of such business to make it at the time of the act, or within a reasonable time thereafter. Many courts exclude self-serving employee accident reports that are prepared primarily for litigation by someone with a strong motive to misrepresent. Under the Federal Rules, courts have discretion to exclude a business record if the source of information indicates a lack of trustworthiness. The report at issue was prepared primarily for litigation purposes by Handy, who had a strong motive to misrepresent the facts. Therefore, the report is sufficiently lacking in trustworthiness so as to not qualify for admission as a business record. Because the report is inadmissible, (A) and (B) are incorrect for concluding that it is admissible. (D) is incorrect because unavailability is not germane to the business records exception.

Answer to Question 17

- (B) Communications between attorney and client, made during professional consultation, are privileged from disclosure. A business report prepared as a communication from client to attorney is privileged. Here, Def's general manager prepared the report at the request of the company's attorney. This report constitutes a privileged, confidential communication between a client (Def Company) and its attorney. Therefore, production of the report will not be required. (A) is incorrect because the facts indicate that this particular business report is of a privileged nature. (C) and (D) are wrong because the fact that a report contains hearsay or is self-serving does not prevent its discovery by the opponent.

Answer to Question 18

- (B) Waite's invocation of the privilege meant that Davis could not cross-examine her on a critical issue in the case. If Waite actually was in Old Town, she could not have witnessed the murder, and her testimony would be impeached. Because she cannot be adequately cross-examined on this matter, her testimony should be stricken in its entirety. (A) is wrong because it is not necessary for a person to have been charged with a crime in order to claim a privilege against self-incrimination. (C) is wrong because a non-party's privileges are not outweighed by the rights of the accused. (D) is wrong because it is not necessary for one claiming a privilege against self-incrimination to establish that she would actually be self-incriminated by her testimony.

Answer to Question 19

- (C) Under the Fifth Amendment to the United States Constitution, a witness cannot be compelled to testify against himself. A prosecutor may not comment on a defendant's silence after being arrested and receiving *Miranda* warnings. The warnings carry an implicit assurance that silence will carry no penalty. Thus, Sam's silence after Alex's incriminating statement is inadmissible against Sam and (C) is correct. It follows that (A) is incorrect. The self-incrimination privilege negates the "adoptive admission" doctrine, and failure to reply to an accusation or statement

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made by police in a criminal case can almost never be used as an implied admission of a criminal act. (B) is wrong because the statement is overbroad, and because the issue of admissibility involves Sam's silence (which is protected by the Fifth Amendment) rather than Alex's confession. (D) is an incorrect statement of fact. Alex's statement relates to a time, person, or event in controversy, and thus is relevant and obviously has probative value. However, the issue of admissibility in this question involves Sam's silence and not Alex's statement. Thus, option (D) is unresponsive to the call of the question.

Answer to Question 20

- (A) Evidence concerning the theft should be admitted because specific instances of conduct may be proved when character is directly in issue. Although character evidence, including evidence of specific acts, is generally inadmissible in a civil case, there is an exception where character is directly in issue. In defamation cases, character is always in issue, and evidence is admissible on the trait in question. Here, the issue is whether Pack is a thief. Evidence of acts of theft by Pack are admissible. (B) is wrong because whether the act is a felony is only important if it is offered as a prior conviction to attack the character for truthfulness of a testifying witness. Any act of theft, felony or misdemeanor, would be admissible here to show that Pack is a thief; it is not being offered for impeachment purposes. (C) is incorrect because, under the Federal Rules, any of the types of character evidence (reputation, opinion, or specific acts) may be used to prove character when character is directly in issue. (D) is wrong because the evidence is central to the ultimate issue in the case—the truth of Donlon's statement. Its relevance could not be greater and could not be substantially outweighed by the danger of unfair prejudice.

Answer to Question 21

- (B) Harry's affidavit is inadmissible. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Here, the affidavit is an out-of-court statement Plaintiff seeks to introduce to prove that Joe was incompetent when he conveyed the property. Hence, it is hearsay. The affidavit does not fall within any recognized exception to the hearsay rule. Hence, (B) is correct. (A) is wrong because opinion testimony by lay witnesses is admissible when: (i) it is rationally based on the perception of the witness; and (ii) it is helpful to a clear understanding of testimony or to the determination of a fact in issue. Opinions of laypersons as to the general appearance or condition of a person are generally admissible. The problem here does not involve "opinion," but rather the fact that the affidavit is hearsay. (C) is wrong because the affidavit does not qualify as an official document. The official records exception to the hearsay rule covers records, reports, statements, or data compilations of public offices and agencies made by, and within the scope of duty of, the public employee. Harry and his affidavit have no such official standing. (D) is wrong because the affidavit is 15 years old, and the Federal Rules of Evidence require that a document be at least 20 years old to qualify as an "ancient document." (It should also be noted that statements affecting an interest in property are not subject to the 20-year rule. However, the affidavit is not a deed, a will, or a document that otherwise disposes of property. Therefore, it does not qualify under the exception.)

Answer to Question 22

- (D) White's testimony is inadmissible to show negligence. Evidence of character to prove the conduct of a person in the litigated event is generally not admissible in civil cases, because the slight probative value of character is outweighed by the danger of prejudice, the possible distraction of the jury from the main question in issue, and the possible waste of time required by examination of collateral issues. There is an exception to this general rule when a person's character itself is

one of the issues in the case. Here, Dan's character is not in issue. Thus, the general rule applies, and (D) is correct. (A) is incorrect because habit describes one's regular response to a specific set of circumstances. Here, however, what is involved is character evidence rather than habit evidence. Character describes one's disposition in respect to general traits (*i.e.*, Dan's reputation in the community as a reckless driver). (B) is wrong because reputation evidence in civil cases is admitted only for the purpose of proving character. Negligence of Dan on a particular occasion does not raise character issues. (C) is wrong because it applies the general rule for criminal cases, and the case in question is a civil one.

Answer to Question 23

- (C) Under Federal Rule 801(d)(1), Witt's statement made in the earlier deposition is considered nonhearsay as a prior inconsistent statement made by a witness while testifying under oath at some prior proceeding, and thus is admissible as substantive proof. It can be admitted for impeachment purposes so long as a proper foundation is laid. Federal Rule 613 requires that the witness must be first examined "so as to give him an opportunity to explain or deny" the allegedly inconsistent statement unless "the interests of justice otherwise require." (A) is wrong because this was a former statement made under oath, is considered not to be hearsay, and is admissible as substantive proof. (B) is wrong because so long as a proper foundation is laid, it can be introduced for impeachment purposes as well. (D) is wrong because it is not hearsay.

Answer to Question 24

- (D) Where a witness makes a statement not directly relevant to the issues in the case, the opponent is barred from proving the statement untrue either by extrinsic contradictory facts or by a prior inconsistent statement. The color of the sweater worn by Derrick is collateral to the issues in this case. Thus, allowing testimony contradicting Bystander's testimony on this matter would raise the possibility of unfair surprise, confusion of issues, and inefficient use of the court's time. For these reasons, Wilson's testimony is inadmissible. (A) is wrong because nothing in the facts indicates that the color of Derrick's sweater is of consequence to the action. (B) and (C) are wrong because even if the evidence has some bearing on the witness's credibility, it is excluded because of possible confusion of issues or waste of time.

Answer to Question 25

- (B) The statement made by Derrick to Officer is an admission by a party-opponent (*i.e.*, a statement that amounts to a prior acknowledgment by a party of one of the relevant facts). We are told that the rate of speed at which Derrick was traveling is in issue. Thus, Derrick's statement that he was driving 40 m.p.h. comes in as an admission. (D) is wrong because, under the Federal Rules, an admission is not hearsay. (A) is wrong because an admission is admissible whether or not it discredits later testimony. (C) is wrong because no foundation is necessary for the admission into evidence of an admission by a party-opponent.

Answer to Question 26

- (B) Where an out-of-court statement is admitted into evidence under one of the exceptions to the rule against hearsay, it is admissible if the declarant had testified. The testimony of Wall is admissible to show that Pitt made a statement that was inconsistent with the statement related by the police officer. (A) is incorrect because impeachment evidence is *excluded* from the hearsay rule. (C) refers to the traditional

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rule prohibiting expert witnesses from expressing opinions on the ultimate issue in the case. This rule has been repudiated by the Federal Rules. Also, this case does not involve expert testimony. In addition, the testimony does not relate an opinion. For these reasons, (C) is incorrect. (D) is wrong because Pitt's credibility is crucial to Drew's culpability.

Answer to Question 27

- (B) The Federal Rules allow for substantive admissibility of learned treatises, if such treatises are called to the attention of the expert witness upon cross-examination or relied upon by her during direct examination and they are established as reliable authority by the testimony or admission of the witness, or by other expert testimony, or by judicial notice. This is an exception to the hearsay rule. Here, the medical textbook was called to the attention of Dr. Cox on cross-examination, and she testified that it was authoritative. Thus, the passages from the textbook are admissible as substantive evidence. It logically follows that (A) and (C) are incorrect. (D) is incorrect because it is not Dr. Cox's job to determine the relevancy of proffered evidence.

Answer to Question 28

- (D) Evidence of compromises or offers to compromise a claim disputed as to either liability or damages is inadmissible to prove liability for or invalidity of a claim. Also, any conduct or statement made in the course of negotiating a compromise is inadmissible. It follows that (A) and (B) are incorrect. (C) is incorrect because, were it not for the rule excluding offers of compromise, the statement would be an admission of a party-opponent. Such an admission can be in the form of an opinion.

Answer to Question 29

- (D) Zee's graphs are demonstrative evidence, offered to illustrate the daily variations in water level at issue here. Because the graphs are reproductions of the data contained in Wells's log, Wells's testimony regarding the compilation of the log is necessary to determine whether the graphs are based on a foundation strong enough to justify their admission into evidence. It follows that (A) is incorrect. (B) is incorrect because this is not hearsay. Wells is going to testify to the manner in which he kept the log, not to an out-of-court statement offered to prove the truth of the matter asserted. (C) is incorrect because, generally, credibility may not be bolstered until it has been impeached.

Answer to Question 30

- (D) A letter shown to have been properly addressed, stamped, and mailed is presumed to have been delivered in the due course of mail. Under the Federal Rules, such a presumption is overcome when the party against whom it is directed produces sufficient evidence contradicting the presumed fact. Here, DeVore's testimony raises a presumption of due delivery of the notice letter. However, Polk, by his testimony, has produced enough evidence to rebut the presumption of receipt, because that presumption is gone. (A) is incorrect because the jury must determine questions of fact, such as whether Polk received the notice. (B) is incorrect because, as explained above, there is no longer a presumption that Polk received the notice. (C) is incorrect because it goes even further than to call for a presumption. Rather, it calls for a "conclusive" presumption, which cannot be rebutted by contrary evidence. Such a presumption runs afoul of the Federal Rules, which permit a presumption to be rebutted.

Answer to Question 31

- (D) A witness's good reputation for truth and veracity may be shown after attack. However, only under certain circumstances will it be proper. (A) is not correct because selling speculative stocks does not need the response of good reputation for truth. (B) is not correct because good reputation for truth and veracity does not refute bias. (C) is not correct since attending a school for the mentally retarded does not go to credibility. (D) is a fundamental attack going to the credibility of Weston's entire testimony. It is thus the best answer.

Answer to Question 32

- (A), (C) (A) and (C) were both given credit by the examiners. (B) is wrong because for past recollection recorded there must be a record made at or near the event by someone with firsthand knowledge who has no present recollection but who can say it was accurate when written. That is not present here. (D) is wrong because the best evidence rule requires the production of the original unless it is accounted for. Photocopies would be admissible, absent a genuine dispute about the authenticity of the original or other unfairness. Either (A) or (C) could be correct depending upon interpretation. This is a document affecting an interest in property. Statements in documents affecting an interest in property are admissible if they are "relevant to the purpose of the document." If one interprets the statement that the recipient of the deed of gift is related to the donor to be "relevant to the purpose of the document," then (A) would be correct. If not, then (C) would be correct.

Answer to Question 33

- (A) Other crimes or wrongs are not generally admissible. They may be shown, however, to prove identity (among a few other relevant things). Other crimes are admissible on identity only when they are highly individual and amount to a "signature." Red paint on a gun is individual enough to qualify. Thus, (A) is right and (D) is wrong. (B) is an incorrect theory. Having a red gun does not show anything about the defendant's willingness to commit a crime. (C) is wrong, too. This is not character evidence.

Answer to Question 34

- (A) The Federal Rules allow impeachment by: (i) any felony conviction, if the trial judge decides that the probative value of the conviction outweighs its prejudicial effect; and (ii) conviction of any other crime requiring proof or admission of an act of dishonesty or false statement. The prior conviction may be shown either by cross-examination of the witness or by introducing a record of the judgment. It follows that (D) is incorrect. (C) is incorrect because impeachment may be accomplished by showing any felony conviction (if the probative value outweighs the prejudicial effect), not just by showing conviction of crimes involving dishonesty or false statement. (B) is incorrect because it fails to account for the need to find that the probative value outweighs the prejudicial effect.

REAL PROPERTY QUESTIONS

Questions 1-3 are based on the following fact situation:

Sue owned a five-acre tract of land, one acre of which had previously been owned by Opal, but to which Sue had acquired title by adverse possession. Sue contracted to convey the full five-acre tract to Peg, but the contract did not specify the quality of title Sue would convey.

1. Suppose Peg pays the purchase price and accepts a deed. Subsequently, Sue's title to the one acre proves inadequate and Opal ejects Peg from that acre. Peg sues Sue for damages. Which of the following statements applies most accurately to the determination of Peg's rights?
 - (A) Sue's deed was fraudulent.
 - (B) The terms of the deed control Sue's liability.
 - (C) The only remedy available for breach of warranty of title is rescission.
 - (D) Peg's rights are based on the implied covenants that the title conveyed shall be marketable.

2. Suppose Sue's contract had called for the conveyance of "a good and marketable title." Pursuant to that contract, Peg paid the purchase price and accepted a deed from Sue containing no covenants of title. Sue's title to the one acre subsequently proved defective and Peg was ejected by Opal. Peg sued Sue. Which of the following results is most likely?
 - (A) Peg will win, because Sue's deed was fraudulent.
 - (B) Peg will win, because the terms of the deed control Sue's liability.
 - (C) Sue will win, because the terms of the deed control her liability.
 - (D) Sue will win, because the deed incorporates the terms of the contract.

3. Suppose that before closing, the house on the property had been totally destroyed by fire. In determining the rights of Sue and Peg, the court would most likely consider the doctrine of equitable:

- (A) Marshaling.
- (B) Sequestration.
- (C) Subrogation.
- (D) Conversion.

Question 4

Owens contracted to sell a tract of land, Overlea, to Painter by general warranty deed. However, at the closing Painter did not carefully examine the deed and accepted a quitclaim deed without covenants of title. Painter later attempted to sell Overlea to Thompson, who refused to perform because Owens had conveyed an easement for a highway across Overlea before Painter bought the property.

Painter sued Owens for damages. Which of the following arguments will most likely succeed in Owens's defense?

- (A) The existence of the easement does not violate the contract.
- (B) The mere existence of an easement that is not being used does not give rise to a cause of action.
- (C) Painter's cause of action must be based on the deed and not on the contract.
- (D) The proper remedy is rescission of the deed.

Question 5

Lord leased a warehouse building and the lot on which it stood to Taylor for a term of 10 years. The lease contained a clause prohibiting Taylor from subletting his interest.

Can Taylor assign his interest under the lease?

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- (A) Yes, because restraints on alienation of land are strictly construed.
- (B) Yes, because disabling restraints on alienation are invalid.
- (C) No, because the term "subletting" includes "assignment" when the term is employed in a lease.
- (D) No, because even in the absence of an express prohibition on assignment, a tenant may not assign without the landlord's permission.

Question 6

The following facts concern a tract of land in a state which follows general law. Each instrument is in proper form, recorded, marital property rights were waived when necessary, and each person named was adult and competent at the time of the named transaction.

1. In 1940, Oleg, the owner, conveyed his interest in fee simple "to my brothers Bob and Bill, their heirs and assigns as joint tenants with right of survivorship."
2. In 1950 Bob died, devising his interest to his only child, "Charles, for life, and then to Charles's son, Sam, for life, and then to Sam's children, their heirs and assigns."
3. In 1970 Bill died, devising his interest "to my friend, Frank, his heirs and assigns."
4. In 1972 Frank conveyed by quitclaim deed "to Paul, his heirs and assigns, whatever right, title, and interest I own."

Paul has never married. Paul has contracted to convey marketable record title in the land to Patrick. Can Paul do so?

- (A) Yes, without joinder of any other person in the conveyance.
- (B) Yes, if Charles, Sam, and Sam's only child (Gene, aged 25) will join in the conveyance.

- (C) No, regardless of who joins in the conveyance, because Sam may have additional children whose interests cannot be defeated.
- (D) No, regardless of who joins in the conveyance, because a title acquired by quitclaim deed is impliedly unmarketable.

Questions 7-8 are based on the following fact situation:

Oscar, the owner in fee simple, laid out a subdivision of 325 lots on 150 acres of land. He obtained governmental approval (as required by applicable ordinances) and, between 1968 and 1970, he sold 140 of the lots, inserting in each of the 140 deeds the following provision:

The Grantee, for himself and his heirs, assigns and successors, covenants and agrees that the premises conveyed herein shall have erected thereon one single-family dwelling and that no other structure (other than a detached garage, normally incident to a single-family dwelling) shall be erected or maintained; and, further, that no use shall ever be made or permitted to be made other than occupancy by a single family for residential purposes only.

Because of difficulty encountered in selling the remaining lots for single-family use, in January 1971, Oscar advertised the remaining lots with prominent emphasis: "These lots are not subject to any restrictions and purchasers will find them adaptable to a wide range of uses."

7. Payne had purchased one of the 140 lots and brought suit against Oscar to establish that the remaining 185 lots, as well as the 140 sold previously, can be used only for residential purposes by single families. Assuming that procedural requirements have been met, to permit adjudication of the issue Payne has tendered, which of the following is the most appropriate comment?

- (A) Oscar should win because the provision binds only the grantee.
- (B) The outcome turns on whether a common development scheme had been established for the entire subdivision.
- (C) The outcome turns on whether there are sufficient land areas devoted to multiple family uses within the municipality to afford reasonable opportunity for all economic classes to move into the area so as to satisfy the standards of equal protection of the law.
- (D) Payne should win under an application of the doctrine, which requires construction of deeds, to resolve any doubt against the grantor.
8. Suppose that Oscar sold 50 lots during 1971 without inserting in the deeds any provisions relating to structures or uses. Doyle purchased one of the 50 lots and proposes to erect a service station and to conduct a retail business for the sale of gasoline, etc.
- Pringle purchased a lot from Boyer. Boyer had purchased from Oscar in 1968 and the deed had the provision that is quoted in the fact situation.
- Pringle brings suit to prevent Doyle from erecting the service station and from conducting a retail business.
- In the litigation between Pringle and Doyle, which of the following constitutes the best defense for Doyle?
- (A) Oscar's difficulty in selling with provisions relating to use establishes a change in circumstances which renders any restrictions which may once have existed unenforceable.
- (B) Enforcement of the restriction, in view of the change of circumstances, would be an unreasonable restraint on alienation.
- (C) Since the proof (as stated) does not establish a danger of monetary loss to Pringle, Pringle has failed to establish one of the necessary elements in a cause of action to prevent Doyle from using his lot for business purposes.
- (D) The facts do not establish a common building or development scheme for the entire subdivision.

Question 9

Odum owned Brightacre (a tract of land) in fee simple. He conveyed it "to Pike, his heirs and assigns; but if Farley shall be living 30 years from the date of this deed, then to Farley, his heirs and assigns."

The limitation "to Farley, his heirs and assigns" is:

- (A) Valid, because Farley's interest is a reversion.
- (B) Valid, because the interest will vest, if at all, within a life in being.
- (C) Valid, because Farley's interest is vested subject to divestment.
- (D) Invalid.

Questions 10-11 are based on the following fact situation:

Trease owned Hilltop in fee simple. By his will, he devised as follows: "Hilltop to such of my grandchildren who shall reach the age of 21; and by this provision I intend to include all grandchildren whenever born." At the time of his death, Trease had three children and two grandchildren.

10. Courts hold such a devise valid under the common law Rule Against Perpetuities. What is the best explanation of that determination?
- (A) All of Trease's children would be measuring lives.
- (B) The rule of convenience closes the class of beneficiaries when any grandchild reaches the age of 21.

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- (C) There is a presumption that Trease intended to include only those grandchildren born prior to his death.
- (D) There is a subsidiary rule of construction that dispositive instruments are to be interpreted so as to uphold interests rather than to invalidate them under the Rule Against Perpetuities.
11. Which of the following additions to or changes in the facts of the preceding question would produce a violation of the common law Rule Against Perpetuities?
- (A) A posthumous child was born to Trease.
- (B) Trease's will expressed the intention to include all afterborn grandchildren in the gift.
- (C) The instrument was an inter vivos conveyance rather than a will.
- (D) Trease had no grandchildren living at the time of his death.

Question 12

Assume for the purposes of this question that you are counsel to the state legislative committee that is responsible for real estate laws in your state. The committee wants you to draft a statute, governing the recording of deeds, that fixes priorities of title, as reflected on the public record, as definitely as possible.

Which of the following, divorced from other policy considerations, would best accomplish this particular result?

- (A) Eliminate the requirement of witnesses to deeds.
- (B) Make time of recording the controlling factor.
- (C) Make irrebuttable the declarations in the deeds that valuable consideration was paid.
- (D) Make the protection of bona fide purchasers the controlling factor.

Questions 13-15 are based on the following fact situation:

Owen held in fee simple Farmdale, a large tract of vacant land. The state wherein Farmdale is situated has a statute which provides, in substance, that unless the conveyance is recorded, every deed or other conveyance of an interest in land is void as to a subsequent purchaser who pays value without notice of such conveyance. The following transactions occurred in the order given.

- First: Owen conveyed Farmdale, for a fair price, to Allred by general warranty deed. Allred did not immediately record.
- Second: Owen executed a mortgage to secure repayment of a loan concurrently made to Owen by Leon. Leon had no notice of the prior conveyance to Allred and promptly recorded the mortgage.
- Third: Owen, by general warranty deed, gratuitously conveyed to Niece, who promptly recorded the deed.
- Fourth: Allred recorded his deed from Owen.
- Fifth: Niece, by general warranty deed, conveyed Farmdale to Barrett. Barrett had no actual notice of any of the prior transactions, paid full value, and promptly recorded the deed.
13. Asserting that his title was held free of any claim by Barrett, Allred instituted suit against Barrett to quiet title to Farmdale. If Barrett prevails, it will be because:
- (A) Allred's prior recorded deed is deemed to be outside Barrett's chain of title.
- (B) Barrett's grantor, Niece, recorded before Allred.
- (C) As between two warranty deeds, the later one controls.
- (D) Barrett's grantor, Niece, had no notice of Allred's rights.

14. Asserting that his title was held free of any claim by Leon, Allred instituted suit against Leon to quiet title to Farmdale. Judgment should be for:
- Allred, because Leon is deemed not to have paid value.
 - Allred, because a mortgagee is not a subsequent purchaser within the meaning of the statute mentioned.
 - Leon, because he recorded before Allred.
 - Leon, because he advanced money without notice of Allred's rights.
15. Assume for this question only that Niece had not conveyed to Barrett. After Allred recorded his deed from Owen, Allred, asserting that Allred's title was held free of any claim by Niece, instituted suit against Niece to recover title to Farmdale. Judgment should be for:
- Niece, because she had no notice of Allred's rights when she accepted the deed from Owen.
 - Niece, because she recorded her deed before Allred recorded his.
 - Allred, because Niece was not a bona fide purchaser who paid value.
 - Allred, because he had paid value for Farmdale and had no actual or constructive notice of the deed to Niece.
- Questions 16-17** are based on the following fact situation:
- Ogden was the fee simple owner of three adjoining vacant lots fronting on a common street in a primarily residential section of a city which had no zoning laws. The lots were identified as Lots 1, 2, and 3. Ogden conveyed Lot 1 to Akers and Lot 2 to Bell. Ogden retained Lot 3, which consisted of three acres of woodland. Bell, whose lot was between the other two, built a house on his lot. Bell's house included a large window on the side facing Lot 3. The window provided a beautiful view from Bell's living room, thereby adding value to Bell's house.
- Akers erected a house on his lot. Ogden made no complaint to either Akers or Bell concerning the houses they built. After both Akers and Bell had completed their houses, the two of them agreed to and did build a common driveway running from the street to the rear of their respective lots. The driveway was built on the line between the two houses so that one-half of the way was located on each lot. Akers and Bell exchanged right-of-way deeds by which each of them conveyed to the other, his heirs and assigns, an easement to continue the right of way. Both deeds were properly recorded.
- After Akers and Bell had lived in their respective houses for 30 years, a new public street was built bordering on the rear of Lots 1, 2, and 3. Akers informed Bell that, since the new street removed the need for their common driveway, he considered the right-of-way terminated; therefore, he intended to discontinue its use and expected Bell to do the same. At about the same time, Ogden began the erection of a six-story apartment house on Lot 3. If the apartment house is completed, it will block the view from Bell's window and will substantially reduce the value of Bell's lot.
16. In an action brought by Bell to enjoin Akers from interfering with Bell's continued use of the common driveway between the two lots, the decision should be for:
- Akers, because the termination of the necessity for the easement terminated the easement.
 - Akers, because the continuation of the easement after the change of circumstances would adversely affect the marketability of both lots without adding any commensurate value to either.

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- (C) Bell, because an incorporeal heredament lies in grant and cannot be terminated without a writing.
- (D) Bell, because the removal of the need for the easement created by express grant does not affect the right to the easement.
17. In an action brought by Bell to enjoin Ogden from erecting the apartment building in such a way as to obstruct the view from Bell's living room window, the decision should be for:
- (A) Bell, because Ogden's proposed building would be an obstruction of Bell's natural right to an easement for light and air.
- (B) Bell, because Bell was misled by Ogden's failure to complain when Bell was building his house.
- (C) Ogden if, but only if, it can be shown that Ogden's intention to erect such a building was made known to Bell at or prior to the time of Ogden's conveyance to Bell.
- (D) Ogden, because Bell has no easement for light, air, or view.

Question 18

Morgan conveyed Greenacre, her one-family residence, to "Perez for life, remainder to Rowan, her heirs and assigns, subject, however, to First Bank's mortgage thereon." There was an unpaid balance on the mortgage of \$10,000, which is payable in \$1,000 annual installments plus interest at 6% on the unpaid balance, with the next payment due on July 1. Perez is now occupying Greenacre. The reasonable rental value of the property exceeds the sum necessary to meet all current charges. There is no applicable statute.

Under the rules governing contributions between life tenants and remaindermen, how should the burden for payment be allocated?

- (A) Rowan must pay the principal payment, but Perez must pay the interest to First Bank.
- (B) Rowan must pay both the principal and interest payments to First Bank.
- (C) Perez must pay both the principal and interest payments to First Bank.
- (D) Perez must pay the principal payment, but Rowan must pay the interest to First Bank.

Question 19

Anders conveyed her only parcel of land to Burton by a duly executed and delivered warranty deed, which provided:

To have and to hold the described tract of land in fee simple, subject to the understanding that within one year from the date of the instrument said grantee shall construct and thereafter maintain and operate on said premises a public health center.

The grantee, Burton, constructed a public health center on the tract within the time specified and operated it for five years. At the end of this period, Burton converted the structure into a senior citizens' recreational facility. It is considered by all parties in interest that a senior citizens' recreational facility is not a public health center.

In an appropriate action, Anders seeks a declaration that the change in the use of the facility has caused the land and structure to revert to her. In this action, Anders should:

- (A) Win, because the language of the deed created a determinable fee, which leaves a possibility of reverter in the grantor.
- (B) Win, because the language of the deed created a fee subject to condition subsequent, which leaves a right of entry or power of termination in the grantor.

- (C) Lose, because the language of the deed created only a contractual obligation and did not provide for retention of property interest by the grantor.
- (D) Lose, because an equitable charge is enforceable only in equity.

Question 20

Homer conveyed his home to his wife Wanda, for life, remainder to his daughter, Dixie. There was a \$20,000 mortgage on the home, requiring monthly payment covering interest to date plus a portion of the principal.

Which of the following statements about the monthly payment is correct?

- (A) Wanda must pay the full monthly payment.
- (B) Wanda must pay a portion of the monthly payment based on an apportionment of the value between Wanda's life estate and Dixie's remainder.
- (C) Wanda must pay the portion of the monthly payment that represents interest.
- (D) Dixie must pay the full monthly payment.

Questions 21-22 are based on the following fact situation:

The owner of Newacre executed and delivered to a power company a right-of-way deed for the building and maintenance of an overhead power line across Newacre. The deed was properly recorded. Newacre then passed through several intermediate conveyances until it was conveyed to Sloan about 10 years after the date of the right-of-way deed. All the intermediate deeds were properly recorded, but none of them mentioned the right-of-way.

Sloan entered into a written contract to sell Newacre to Jones. By the terms of the contract, Sloan promised to furnish an abstract of title to Jones. Sloan contracted directly with Abstract Company to prepare and deliver an abstract to Jones, and Abstract Company did so. The

abstract omitted the right-of-way deed. Jones delivered the abstract to his attorney and asked the attorney for an opinion as to title. The attorney signed and delivered to Jones a letter stating that, from the attorney's examination of the abstract, it was his "opinion that Sloan had a free and unencumbered marketable title to Newacre."

Sloan conveyed Newacre to Jones by a deed which included covenants of general warranty and against encumbrances. Jones paid the full purchase price. After Jones had been in possession of Newacre for more than a year, he learned about the right-of-way deed. Sloan, Jones, Abstract Company, and Jones's attorney were all without actual knowledge of the existence of the right-of-way prior to the conveyance from Sloan to Jones.

21. If Jones sues Abstract Company for damages caused to Jones by the presence of the right-of-way, the most likely result will be a decision for:
 - (A) Jones, because Jones was a third-party creditor beneficiary of the contract between Sloan and Abstract Company.
 - (B) Jones, because the abstract prepared by Abstract Company constitutes a guarantee of Jones's title to Newacre.
 - (C) Abstract Company, because Abstract Company had no knowledge of the existence of the right-of-way.
 - (D) Abstract Company, because there was no showing that any fraud was practiced upon Jones.
22. If Jones sues Sloan because of the presence of the right-of-way, the most likely result will be a decision for:
 - (A) Jones, because Sloan is liable for his negligent misrepresentation.
 - (B) Jones, because the covenants in Sloan's deed to Jones have been breached.

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- (C) Sloan, because Jones relied upon Abstract Company, not Sloan, for information concerning title.
- (D) Sloan, because Sloan was without knowledge of any defects in the title to Newacre.

Question 23

Testator devised his farm "to my son, Selden, for life, then to Selden's children and their heirs and assigns." Selden, a widower, had two unmarried adult children.

In an appropriate action to construe the will, the court will determine that the remainder to the children is:

- (A) Indefeasibly vested.
- (B) Contingent.
- (C) Vested subject to partial defeasance.
- (D) Vested subject to complete defeasance.

Questions 24-25 are based on the following fact situation:

Ohner holds title in fee simple to a tract of 1,500 acres. He desires to develop the entire tract as a golf course, country club, and residential subdivision. He contemplates forming a corporation to own and to operate the golf course and country club; the stock in the corporation will be distributed to the owners of lots in the residential portions of the subdivision, but no obligation to issue the stock is to ripen until all the residential lots are sold. The price of the lots is intended to return enough money to compensate Ohner for the raw land, development costs (including the building of the golf course and the country club facilities), and developer's profit, if all of the lots are sold.

Ohner's market analyses indicate that he must create a scheme of development that will offer prospective purchasers (and their lawyers) a

very high order of assurance that several aspects will be clearly established:

- 1. Aside from the country club and golf course, there will be no land use other than for residential use and occupancy in the 1,500 acres.
- 2. The residents of the subdivision will have unambiguous right of access to the club and golf course facilities.
- 3. Each lot owner must have an unambiguous right to transfer his lot to a purchaser with all original benefits.
- 4. Each lot owner must be obligated to pay annual dues to a pro rata share (based on the number of lots) of the club's annual operating deficit (whether or not such owner desires to make use of club and course facilities).
- 24. In the context of all aspects of the scheme, which of the following will offer the best chance of implementing the requirement that each lot owner pay annual dues to support the club and golf course?
 - (A) Covenant.
 - (B) Easement.
 - (C) Mortgage.
 - (D) Personal contractual obligation by each purchaser.
- 25. Of the following, the greatest difficulty that will be encountered in establishing the scheme is that:
 - (A) Any judicial recognition will be construed as state action which, under current doctrines, raises a substantial question whether such action would be in conflict with the Fourteenth Amendment.
 - (B) The scheme, if effective, renders title unmarketable.

- (C) One or more of the essential aspects outlined by Ohner will result in a restraint on alienation.
- (D) There is a judicial reluctance to recognize an affirmative burden to pay money in installments and over an indefinite period as a burden that can be affixed to bind future owners of land.

Question 26

Oaks, the owner of Blackacre, conveyed a right-of-way to United Utility “for the underground transportation of gas by pipeline, the location of right-of-way to be mutually agreed upon by Oaks and United Utility.” United Utility then installed a six-inch pipeline at a location selected by it and not objected to by Oaks. Two years later, United Utility advised Oaks of its intention to install an additional six-inch pipeline parallel to and three feet laterally from the original pipeline. In an appropriate action, Oaks sought a declaration that United Utility has no right to install the second pipeline.

If Oaks prevails, it will be because:

- (A) Any right implied to expand the original use of the right-of-way creates an interest that violates the Rule Against Perpetuities.
- (B) The original installation by United Utility defined the scope of the easement.
- (C) Oaks did not expressly agree to the location of the right-of-way.
- (D) The assertion of the right to install an additional pipeline constitutes inverse condemnation.

Question 27

Martinez, a widower, owns in fee simple a ranch, Ranchacre. Martinez has one child, Enrique, who is married. Enrique has one child, Ana Maria, who is also married but has no children. In an effort to dispose of Ranchacre to

his descendants and to honor a request by Ana Maria that she be skipped in any such disposition, Martinez conveys Ranchacre to his son, Enrique, for life with the remainder to Ana Maria’s children in fee simple.

What interest, if any, is created in favor of Ana Maria’s unborn children at the time of the conveyance?

- (A) A contingent remainder.
- (B) A vested remainder subject to divestment.
- (C) A springing use.
- (D) None.

Question 28

While hospitalized, Marsh requested her attorney to draw a deed conveying her home to her son, Simon. While Marsh remained in the hospital, the deed was drawn, properly executed, and promptly and properly recorded. On being informed of the existence of the deed, Simon told his mother, “I want no part of the property; take the deed right back.” Marsh recovered and left the hospital, but shortly thereafter, before any other relevant event, Simon died intestate.

Marsh brought an appropriate action against Simon’s heirs to determine title.

If Marsh wins, it will be because:

- (A) The court will impose a constructive trust to carry out the intent of the deceased son.
- (B) The presumption of delivery arising from the recording is not valid unless the grantee has knowledge at the time of the recording.
- (C) Simon’s declaration was a constructive reconveyance of the land.
- (D) There was no effective acceptance of delivery of the deed.

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Question 29

Andres conveyed Applewood Farm "to Bogatz, her heirs and assigns, so long as the premises are used for residential and farm purposes, then to Cohen and his heirs." The common law Rule Against Perpetuities, unmodified by statute, is part of the law of the jurisdiction in which Applewood Farm is located.

As a consequence of the conveyance, Cohen's interest in Applewood Farm is:

- (A) Nothing.
- (B) A valid executory interest.
- (C) A possibility of reverter.
- (D) A right of entry for condition broken.

Question 30

Metterly, the owner in fee simple of Brownacre, by quitclaim deed conveyed Brownacre to her daughter, Doris, who paid no consideration for the conveyance. The deed was never recorded. About a year after the delivery of the deed, Metterly decided that this gift had been ill-advised. She requested that Doris destroy the deed, which Doris dutifully and voluntarily did. Within the month following the destruction of the deed, Metterly and Doris were killed in a common disaster. Each of the successors in interest claimed title to Brownacre.

In an appropriate action to determine the title to Brownacre, the probable outcome will be that:

- (A) Metterly was the owner of Brownacre, because Doris was a donee and therefore could not acquire title by quitclaim deed.
- (B) Metterly was the owner of Brownacre, because title to Brownacre reverted to her upon the voluntary destruction of the deed by Doris.

- (C) Doris was the owner of Brownacre, because her destruction of the deed to Brownacre was under the undue influence of Metterly.
- (D) Doris was the owner of Brownacre, because the deed was merely evidence of her title, and its destruction was insufficient to cause title to pass back to Metterly.

Question 31

By her validly executed will, Sallie devised a certain tract of land to her son, Ben, for his life with remainder to such of Ben's children as should be living at his death, "Provided, however, that no such child of Ben shall mortgage or sell, or attempt to mortgage or sell, his or her interest in the property prior to attaining 25 years of age; and, if any such child of Ben shall violate this provision, then upon such violation his or her interest shall pass to and become the property of the remaining children of Ben then living, share and share alike."

Sallie's will included an identical provision for each of her four other children concerning four other tracts of land. The residuary clause of the will gave the residuary estate to Sallie's five children equally. Sallie died and was survived by the five children named in her will and by 11 grandchildren. Several additional grandchildren have since been born.

In an action for a declaration of rights, it was claimed that the attempted gifts to Sallie's grandchildren were entirely void and that the interests following the life estates to Sallie's children passed to the children absolutely by the residuary clause.

Assuming that the action was properly brought with all necessary parties and with a guardian ad litem appointed to represent the interests of unborn and infant grandchildren, the decision should be that:

- (A) The attempted gifts to grandchildren are void under the Rule Against Perpetuities.
- (B) The attempted gifts to grandchildren are void as unlawful restraints on alienation.

- (C) The provisions concerning grandchildren are valid and will be upheld according to their terms.
- (D) Even if the provisions against sale or mortgage by the grandchildren are void, the remainders to grandchildren are otherwise valid and will be given effect.

Questions 32-33 are based on the following fact situation:

Meadowview is a large tract of undeveloped land. Black, the owner of Meadowview, prepared a development plan creating 200 house lots in Meadowview with the necessary streets and public areas. The plan was fully approved by all necessary governmental agencies and duly recorded. However, construction of the streets, utilities, and other aspects of the development of Meadowview has not yet begun, and none of the streets can be opened as public ways until they are completed in accordance with the applicable ordinances of the municipality in which Meadowview is located.

College Avenue, one of the streets laid out as part of the Meadowview development, abuts Whiteacre, an adjacent one-acre parcel owned by White. Whiteacre has no access to any public way except an old, poorly developed road which is inconvenient and cannot be used without great expense. White sold Whiteacre to Breyer. The description used in the deed from White to Breyer was the same as that used in prior deeds except that the portion of the description which formerly said, "thence by land of Black, north-easterly a distance of 200 feet, more or less," was changed to "thence by College Avenue as laid out on the Plan of Meadowview North 16° East 201.6 feet," with full reference to the plan and as recording data.

Breyer now seeks a building permit which will show that Breyer intends to use College Avenue for access to Whiteacre. Black objects to the granting of a building permit on the grounds that he has never granted any rights to White or Breyer to use College Avenue. There

are no governing statutes or ordinances relating to the problem. Black brings an appropriate action in which the right of Breyer to use College Avenue without an express grant from Black is at issue.

- 32. The best argument for Black in this action is that:
 - (A) Breyer's right must await the action of appropriate public authorities to open College Avenue as a public street, since no private easements arose by implication.
 - (B) The Statute of Frauds prevents the introduction of evidence which might prove the necessity for Breyer to use College Avenue.
 - (C) Breyer's right to use College Avenue is restricted to the assertion of a way by necessity and the facts preclude the success of such a claim.
 - (D) Breyer would be unjustly enriched if he were permitted to use College Avenue.
- 33. The best argument for Breyer in this action is that:
 - (A) There is a way by necessity over Meadowview's lands to gain access to a public road.
 - (B) The deed from White to Breyer referred to the recorded plan and therefore created rights to use the streets delineated on the plan.
 - (C) Sale of lots in Meadowview by reference to its plan creates private easements in the streets shown on the plan.
 - (D) The recording of the plan is a dedication of the streets shown on the plan to public use.

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Question 34

Lester, the owner in fee simple of a small farm consisting of 30 acres of land improved with a house and several outbuildings, leased the same to Tanner for a 10-year period. After two years had expired, the government condemned 20 acres of the property and allocated the compensation award to Lester and Tanner according to their respective interest so taken. It so happened, however, that the 20 acres taken embraced all of the farm's tillable land, leaving only the house, outbuildings, and a small woodlot. There is no applicable statute in the jurisdiction where the property is located nor any provision in the lease relating to condemnation. Tanner quit possession and Lester brought suit against him to recover rent.

Lester will:

- (A) Lose, because there has been a frustration of purpose which excuses Tanner from further performance of his contract to pay rent.
- (B) Lose, because there has been a breach of the implied covenant of quiet enjoyment by Lester's inability to provide Tanner with possession of the whole of the property for the entire term.
- (C) Win, because of the implied warranty on the part of the tenant to return the demised premises in the same condition at the end of the term as they were at the beginning.
- (D) Win, because the relationship of landlord and tenant was unaffected by the condemnation, thus leaving Tanner still obligated to pay rent.

REAL PROPERTY ANSWERS

Answer to Question 1

- (B) Every land sale contract (not deed) contains an implied warranty of marketable title. For bar examination purposes, title acquired by adverse possession is unmarketable. However, the buyer's acceptance of a deed discharges the seller's contractual obligation to furnish marketable title, and leaves the buyer with remedies only on the covenants in the deed. (D) is wrong because a deed contains no implied covenant of marketability. (A) is wrong because it is not supported by the facts, and (C) is an incorrect statement of law; a buyer can choose to rescind, sue for damages for breach, get specific performance with abatement of the purchase price, or, in some jurisdictions, require the seller to quiet title.

Answer to Question 2

- (C) Acceptance of a deed discharges the seller's liability on the contract. Since the deed here contained no covenants of title, it was a quitclaim deed. Conveyances under a quitclaim deed give the buyer only that which the seller owns. If Sue did not own the one acre she believed that she had acquired by adverse possession, then her quitclaim deed conveyed only the four remaining acres to Peg. Thus, Peg cannot prevail and (B) and (D) are wrong. (A) is not supported by the facts.

Answer to Question 3

- (D) Once a land sale contract is signed, the doctrine of equitable conversion applies, making the buyer the equitable owner of the property. Under the majority view, the risk of loss then rests on the buyer; Peg must pay the purchase price. Thus, (D) is correct and the other choices are incorrect. Note that if Sue had insured the house for loss by fire, most courts would require her to give Peg credit, in the amount of the insurance proceeds, against the purchase price.

Answer to Question 4

- (C) Painter's acceptance of the deed constituted a discharge of Owens's liability on the contract. A quitclaim deed contains no warranties and conveys only what the seller owns—here, property encumbered by an easement. Therefore, (C) is correct and (D) is inapplicable since there was no breach. (A) and (B) are not valid defenses, since existence of the easement was violative of the contract. The contract contained an implied warranty of marketable title, which generally means an unencumbered fee simple with good record title. An easement is an encumbrance. Note that if Owens had conveyed a general warranty deed to Painter, it would have contained a covenant against encumbrances.

Answer to Question 5

- (A) Anti-transfer covenants are strictly construed; therefore, a prohibition against subleasing does not prevent assignment, and (C) is thus incorrect. (D) is wrong because an anti-assignment covenant must be express. Regarding (B), disabling restraints on a legal interest are always void. However, lease provisions restricting assignments and subleases are valid restraints. These are considered promissory restraints, breach of which will void an attempted assignment or transfer. Thus, (B) is wrong.

Answer to Question 6

- (A) Oleg expressly conveyed a fee simple to Bob and Bill as joint tenants with the right of survivorship. Since the joint tenancy was not severed, Bill became the owner in fee simple at the instant

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of Bob's death. Bob's will was not effective until his death, at which time he no longer had an interest in the property; the act of making a will containing a testamentary devise of the land is not sufficient to sever the joint tenancy. Hence, Bob's attempt to devise his interest was inoperative, and (B) and (C) are thus incorrect. (D) is wrong because conveyance by quitclaim deed does not render title unmarketable.

Answer to Question 7

- (B) If Oscar had a scheme for an exclusively residential subdivision, the court could *imply* a reciprocal negative servitude limiting the remaining lots to the same use. Reciprocal negative servitudes are implied only when the sales begin. Since all 140 lots already sold contain the covenant restricting the land use to single-family residential dwellings, a common scheme will be implied. Any subsequent purchaser will be bound by the covenant if there was notice. The appearance of an area containing only single-family residences is sufficient to constitute inquiry notice. Hence, (A) is wrong. (C) is incorrect because covenants are a private land use control. (D) is wrong because the issue does not concern construction of the deeds.

Answer to Question 8

- (D) If Oscar had no uniform development scheme, there is no basis for implying a residential restriction in Doyle's deed. (A) is not the best defense because selling difficulties probably do not establish changes such as would render enforcement of the covenants inequitable. (B) is wrong because restraints upon use (as opposed to restraints upon alienation) of land are valid and enforceable. (C) is wrong because monetary loss is irrelevant in an action to establish an implied equitable servitude.

Answer to Question 9

- (B) Pike had a fee simple subject to a shifting executory interest in Farley. If Farley lives 30 more years, the fee simple will shift to him. Therefore, (B) is correct and (D) is wrong. The Rule Against Perpetuities requires that the interest vest, if at all, within 21 years after a life in being and, using Farley's life as the measuring life, it is clear that his interest will vest, if at all, within his lifetime. (A) is wrong because a reversion occurs by operation of law when a grantor conveys less than the entire estate. Here, Odum transferred a fee simple in Brightacre to either Pike or Farley; there was no interest left to revert to Odum. (C) is wrong because an executory interest is not vested.

Answer to Question 10

- (A) The class of Trease's grandchildren would close at the death of his last surviving child, who was necessarily a life in being at Trease's death (when the gift took effect); the gift would then vest (or fail) within 21 years thereafter. (C) is wrong because the express language of the will controls. The rule of convenience is used to determine when a class closes only absent an express intent to include all persons described no matter when born. Since Trease expressed such an intention, the rule is inapplicable and (B) is incorrect. (D) is wrong because the gift is valid without resort to preferential rules of construction.

Answer to Question 11

- (C) If Trease had made the gift by inter vivos conveyance, he might have had another child thereafter who would not have been a life in being at the creation of the interest (and whose children might

have reached 21 after the permissible perpetuities period). (A) is wrong because the Rule Against Perpetuities allows for periods of gestation. (B) is wrong because it changes nothing; the will already expresses an intention to include afterborn grandchildren. Further, (B) and (D) are wrong because all of Trease's grandchildren would be born to his children, who were lives in being at his death.

Answer to Question 12

- (B) Priorities based on time of recording would protect most persons obtaining an interest in land that is timely recorded. Since the purpose of recordation is to give notice to others of a conveyance of title, prospective purchasers could easily determine the status of the title. Furthermore, priorities based on recording generally protect bona fide purchasers. (D) is wrong because simply protecting bona fide purchasers would not assure an accurate reflection of priority of title on the public record (*e.g.*, "notice" statutes). (A) and (C) alone have no bearing on priority of title. Moreover, they are misstatements of law; witnesses to a deed are generally unnecessary and no recital of consideration is required for a valid deed.

Answer to Question 13

- (A) A subsequent grantee has constructive knowledge of all prior recorded deeds except those outside of his chain of title. (B) and (D) are wrong because Niece's recordation would be relevant only if she had been a bona fide purchaser who could "shelter" Barrett. Under the shelter rule, a person who takes from a bona fide purchaser will prevail against any interest that the bona fide purchaser would have prevailed against—even if the grantee knew of the prior unrecorded interest. However, donees are not bona fide purchasers and thus, are not protected. (C) is wrong because the state statute governs priority of title.

Answer to Question 14

- (D) Leon will prevail because he had no actual or constructive notice of the conveyance to Allred, since it was not recorded at the time of the mortgage. A mortgagee who gives a concurrent loan is considered a purchaser for value within state recording acts. Hence, (A) and (B) are incorrect. (C) is wrong because the statute is a pure notice statute, which does not require that the subsequent purchaser be the first to record to protect his rights against a *prior* purchaser.

Answer to Question 15

- (C) Judgment should be for Allred. Under the statute, unrecorded conveyances are void only as against bona fide purchasers. Since Niece took by a gratuitous conveyance, her prior recordation without notice is irrelevant. Thus, (A) and (B) are incorrect because Niece is not protected by the recording statute. (D) is incorrect because, absent a bona fide purchaser, priority is determined by the first-in-time rule.

Answer to Question 16

- (D) Because the easement was validly created and recorded, the removal of the need for the easement does not affect the continuing right to the easement. (A) is wrong because there is no such automatic termination. If the parties had failed validly to create the easement in this case, a court might still have found an easement by necessity. If that had been the case, the end of the necessity would result in the expiration of the easement. But that was not the case here. Because an easement was created and recorded, the fact that the easement is no longer necessary has no

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bearing on its continued existence. The easement could be terminated by release or abandonment, but Bell does not wish to terminate the easement. (B) is wrong because an easement is a right that exists even if it adversely affects the marketability of land. (C) is wrong because easements can be terminated in ways other than by a writing. For example, Bell could abandon his easement by long nonuse accompanied by intent to abandon.

Answer to Question 17

- (D) Bell has no claim because he had no easement for light, air, or view. (A) is wrong because there is no “natural right” to an easement for light and air. (B) is wrong because Bell’s building of his house has no relationship to whether an easement for light and air was created. (C) is wrong because even if Ogden had no plans, at the time of his conveyance to Bell, to erect such a building, no easement for light and air would automatically be created. Bell could have requested and could have been granted an easement for light, air, or view, but there is no evidence that he did so.

Answer to Question 18

- (A) A life tenant is obligated to pay interest on any encumbrances to the extent of the income or profits from the land. He does not, however, have to pay anything on the principal. The remainderman, here Rowan, must pay off the principal in order to protect her own interests. (B) is wrong because Rowan is only liable for the principal. (C) is wrong because Perez is only liable for the interest payments. (D) is wrong because it reverses the duties of the life tenant and the remainderman.

Answer to Question 19

- (C) Anders could have constructed a deed such that she would have retained a property interest in the parcel of land, but she did not do so. Rather, she only created a contractual obligation which was met in the first five years after the conveyance. Because she retained no property interest, she has no claim to the land. (A) is wrong because this could have been a determinable fee only if durational language, such as “for as long as,” “while,” “during,” or “until,” had been used in the deed. Because it was not, no possibility of reverter was created in Anders. (B) is wrong because the grantor did not reserve the right to terminate the grantee’s estate on the happening of a specified condition subsequent, and thus reserved no right of entry for condition broken. (D) is wrong because it has been stated that Anders has instituted an appropriate action, so it is assumed that she is in the proper court. In any event, the contract or covenant obligation of Burton would probably be enforceable both at law (for damages) and in equity (for an injunction). In most jurisdictions today the same court could order either remedy.

Answer to Question 20

- (C) The application of a basic allocation rule is involved here. A life tenant is obligated to pay interest on any encumbrances on the land to the extent of the income or profits from the land (or in their absence to the extent of the reasonable rental value of the land). However, she does not have to pay anything on the principal of the debt: reversioners or remaindermen must pay the principal in order to protect their interests. Thus, (C) is correct because it applies the rule correctly. (A) is incorrect because Dixie must make the portion of the monthly payment allocated to principal. (B) is wrong because the allocation between life tenant and remainderman is a simple allocation between interest and principal and hence the actual value of the life estate and

the remainder are not considered. (D) is wrong because Wanda must make the portion of the monthly payment allocated to interest.

Answer to Question 21

- (A) Jones was the intended third-party creditor beneficiary of the contract between Sloan and the Abstract Company to prepare and deliver the abstract. Abstract Company is liable because it failed to uncover the existence of the right-of-way deed which was in the chain of title. Jones should recover because he was the intended beneficiary. (B) is wrong because Abstract Company is liable on breach of its contract to describe accurately the state of the record title. It gave no title guarantee. (C) is wrong because, while Abstract Company may have had no actual knowledge of the deed, it had a contractual duty to find any encumbrances in the record chain of title. (D) is wrong because fraud is not necessary for a showing of breach of contract.

Answer to Question 22

- (B) Sloan conveyed a deed including covenants of general warranty and against encumbrances. Because an encumbrance exists in the form of the right-of-way, Sloan is in breach of the covenant against encumbrances. (A) is wrong because Sloan was diligent in his attempt to establish clear title through the Abstract Company. (C) is wrong because it was Sloan and not the Abstract Company which actually made the covenant against encumbrances. (D) is wrong because Sloan covenanted that there were no encumbrances at all. It makes no difference whether he had any actual knowledge of such encumbrances.

Answer to Question 23

- (C) Because the remainder is created in a class of persons (*i.e.*, Selden's children) that is certain to take on the termination of the preceding estate, but is subject to diminution by reason of other persons becoming entitled to share in the remainder (*i.e.*, additional children that Selden could sire), the remainder is vested subject to partial defeasance (or divestment). This is also sometimes called a vested remainder subject to open. (A) is wrong because an indefeasibly vested remainder must not be subject to being diminished in size, which could be the case if Selden has more children. (B) is incorrect because the remainder here is not subject to a condition precedent or in favor of unborn or unascertained persons. Hence, it is not contingent. (D) is wrong because a vested remainder subject to complete defeasance arises when the remainderman is in existence and ascertained and his right to possession and enjoyment is subject to being defeated by the happening of some condition subsequent. Under the facts, Selden's children or their heirs under all circumstances will be entitled to a portion of the fee.

Answer to Question 24

- (A) A covenant is the best choice because a real covenant, normally found in deeds, is a written promise to do something on the land or a promise not to do something on the land. Real covenants run with the land at law, which means that subsequent owners of the land may enforce or be burdened by the covenant. In cases where the covenant involves a promise to pay money, the majority rule is that if the money is to be used in a way connected with the land, the burden will run with the land. The most common example is a covenant to pay a homeowners' association an annual fee for maintenance of common ways, parks, etc., in a subdivision. Such a situation is analogous to the golf course and country club dues presented in the facts. (B) is incorrect because the holder of an easement has the right to use a tract of land (called the servient tenement) for a special purpose but has no right to possess and use the land. The annual dues requirement does

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not constitute the right to use another's land for a special purpose. (C) is incorrect because a mortgage is a security interest in real estate (usually to secure a promise to repay a loan represented by a promissory note). The payment of dues does not result in a security interest in the golf course, and is thus inapplicable to the facts. (D) is wrong because a personal contractual obligation by each purchaser does not bind subsequent purchasers, who would, therefore, be under no obligation to pay the annual dues.

Answer to Question 25

- (D) (D) is the correct answer by a process of elimination. (A) is incorrect because there is no racial discrimination or other constitutionally questionable activity presented in the facts. (B) is wrong because marketable title is title reasonably free from doubt. Generally, this involves either defects in the chain of title or encumbrances that might present an unreasonable risk of litigation. The dues scheme is not such an encumbrance. (C) is incorrect because the scheme does not impose a direct restraint on alienation of the fee. There are no disabling restraints, forfeiture restraints, or promissory restraints on transferability of property. Thus, by a process of elimination, (D) presents the greatest obstacle to establishing the scheme, even though a majority of courts today allow real covenants that require payment of an annual fee for maintenance of common ways, parks, etc.

Answer to Question 26

- (B) If Oaks prevails, it will be because the original installation defined the scope of the easement. The scope of the easement depends on the intent of the parties. In determining the intent of the parties, the courts look at the subsequent conduct of the parties respecting the arrangement as well as the language of the instrument. Here, the instrument states the location is to be mutually agreed upon. Oaks and United agreed to the original pipeline and its location, but have not agreed upon the location of the second set of pipes. The parties' subsequent conduct could also lead to the conclusion that the first installation was the full extent of what the parties intended. (A) is incorrect because the Rule Against Perpetuities has absolutely no application to these facts. The easement was vested when it was created, and easements are presumed to be perpetual. (C) is incorrect because Oaks will be deemed to have acquiesced in the location of the original easement. (D) is wrong because inverse condemnation is the term for a landowner's lawsuit for damages to recover for a governmental taking without exercising its formal power of eminent domain (*e.g.*, regulatory takings that deprive the owner of all economically viable uses of the property). Even if United were a government agency and this were a regulatory taking, inverse condemnation would not be correct since Oaks is seeking an injunction, not compensation.

Answer to Question 27

- (A) A remainder is a future interest created in a transferee that is capable of becoming a present interest upon the natural termination of the preceding estates created in the same disposition. A contingent remainder is a remainder that is subject to a condition precedent, or a remainder that is created in favor of unborn or unascertained persons. Here, Ana Maria's unborn children will take a remainder, because their interest will become a present interest upon the natural termination of the preceding estate (upon Enrique's death). Because this remainder is created in favor of unborn and unascertained persons, it is contingent. A vested remainder subject to divestment arises when the remainderman is in existence and ascertained and his interest is not subject to

any condition precedent, but his right to possession is subject to being defeated by some condition subsequent. (B) is incorrect because the remaindermen are neither in existence nor ascertained. A springing use is a form of executory interest (a future interest in a transferee that is not capable of taking on the natural termination of the preceding estate). (C) is incorrect because Ana Maria's children's interest will become a present interest upon the natural termination of the preceding estate. Finally, because (A) is correct, (D) is obviously incorrect.

Answer to Question 28

- (D) If Marsh wins, it will be because there was no effective acceptance of delivery of the deed. There must be acceptance by the grantee to complete a conveyance. Although acceptance is presumed, this presumption is rebutted by evidence of rejection. Here, Simon expressly rejected the conveyance, and therefore, title never passed to Simon. (A) is incorrect because a constructive trust presumes that Simon had legal title. As discussed above, title did not pass to Simon. Furthermore, even had title passed, a constructive trust would probably be inappropriate here. Constructive trust is the appropriate remedy for unjust enrichment, and there is no indication of any wrongdoing under these facts. (B) is an incorrect statement of law. If the grantor intends the recording of the deed to be the final act in vesting title in the grantee, such recording creates a presumption of delivery even though the grantee did not know of the recordation. (C) is wrong because there is no such thing as a constructive reconveyance. Had Simon accepted the deed and then changed his mind, he would have had to execute a new deed to reconvey the property back to Marsh.

Answer to Question 29

- (A) Cohen's interest purports to be an executory limitation. However, Cohen cannot take the land until such time as the premises are no longer used for residential and farm purposes. This could happen more than 21 years after the death of Bogatz or Cohen, the relevant lives in being. Thus, this interest violates the Rule Against Perpetuities. It follows that (B), (C), and (D) are incorrect. Note also that, regarding (C) and (D), possibilities of reverter and rights of entry for condition broken are future interests left in a *grantor*. Cohen is not a grantor.

Answer to Question 30

- (D) The deed, once it has been delivered, is merely evidence of its own existence, and its destruction does not cause any change in the title. Doris therefore continued to own the property. (A) is wrong because a title can be acquired by a quitclaim deed and that is true, even though the grantee has paid no consideration. (B) is wrong because destruction of the deed does not cause title to revert. (C) is wrong because there is no evidence of undue influence, and, in any event, destruction of the deed would cause no change in the status of the title.

Answer to Question 31

- (D) The question is somewhat confusing, since there are really two gifts to grandchildren. The first is the vested remainder in the grandchildren that follows Ben's life estate. The second is the executory interest that is given to the other grandchildren if one of the grandchildren purports to mortgage or sell in violation of the condition. This latter gift is void both as a violation of the Rule Against Perpetuities and as an unlawful restraint on alienation. It violates the Rule because by its terms it could purport to vest possession in the "other" grandchildren more than 21 years after the termination of a life in being. However, these objections apply only to the second of the two gifts to the grandchildren. The first gift, that is, the remainder to them, is entirely valid. The

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language dealing with the restraint on alienation would probably be stricken by the court, leaving the initial gift intact. (D) is the answer that best expresses this result.

Answer to Question 32

- (A) The best argument is that Breyer's rights depend on the existence of a public street. (B) is wrong because no issue of the Statute of Frauds is present. There has been no purported conveyance to Breyer of rights in the street by anyone who owns such rights. (C) is wrong because, if a public street exists, Breyer need not assert a way of necessity. (D) is wrong because there is no legal objection to the enrichment that results if persons other than the dedicator are permitted to use a public street.

Answer to Question 33

- (D) The dedication argument is Breyer's strongest, although even it is not likely to be successful unless and until the city bodies accept the dedication. (A) is wrong because Breyer does not need a way of necessity, since he has other access to his land. (B) is wrong because the deed from White to Breyer, while referring to the plan, used it only as a boundary reference and did not create any rights to the use of the streets. (C) is wrong because, while the sale of lots by reference to a plan does create private easements in the streets, the easements serve only the lots in the subdivision plan itself and not such land as Whiteacre that is outside the plan.

Answer to Question 34

- (D) In a partial condemnation case, the landlord-tenant relationship continues, as does the tenant's obligation to pay the entire rent for the remaining lease term. (A) is wrong because the law of landlord and tenant traditionally refuses to recognize frustration of purpose as a ground for termination of a lease. (B) is wrong because the covenant of quiet enjoyment can be breached only by actions of the landlord and not those of a third party, such as the government. (C) is wrong because, while the tenant generally is obligated to return the premises in the same condition as when received (except for ordinary wear and tear), that obligation would not be considered breached by the actions of a third party such as the government.

TORTS QUESTIONS

Questions 1-2 are based on the following fact situation:

Innes worked as a secretary in an office in a building occupied partly by her employer and partly by Glass, a retail store. The two areas were separated by walls and were in no way connected, except that the air conditioning unit served both areas and there was a common return-air duct.

Glass began remodeling, and its employees did the work, which included affixing a plastic surfacing material to counters. To fasten the plastic to the counters, the employees purchased glue, with the brand name Stick, that was manufactured by Steel, packaged in a sealed container by Steel, and retailed by Paint Company.

In the course of the remodeling job, one of Glass's employees turned on the air conditioning and caused fumes from the glue to travel from Glass through the air conditioning unit and into Innes's office. The employees did not know that there was common ductwork for the air conditioners. Innes was permanently blinded by the fumes from the glue.

The label on the container of glue read, "DANGER. Do not smoke near this product. Extremely flammable. Contains Butanone, Toluol, and Hexane. Use with adequate ventilation. Keep out of the reach of children."

The three chemicals listed on the label are very toxic and harmful to human eyes. Steel had received no reports of eye injuries during the 10 years that the product had been manufactured and sold.

1. If Innes asserts a claim against Paint Company, the most likely result is that she will:
 - (A) Recover if she can recover against Steel.
 - (B) Recover, because Innes was an invitee of a tenant in the building.

- (C) Not recover, unless Paint Company was negligent.
 - (D) Not recover, because the glue came in a sealed package.
2. If Innes asserts a claim against Glass, the most likely result is that she will:
 - (A) Recover, because a user of a product is held to the same standard as the manufacturer.
 - (B) Recover, because the employees of Glass caused the fumes to enter her area of the building.
 - (C) Not recover, because Glass used the glue for its intended purpose.
 - (D) Not recover, because the employees of Glass had no reason to know that the fumes could injure Innes.

Questions 3-4 are based on the following fact situation:

When Denton heard that his neighbor, Prout, intended to sell his home to a minority purchaser, Denton told Prout that Prout and his wife and children would meet with "accidents" if he did so. Prout then called the prospective purchaser and told him that he was taking the house off the market.

3. If Prout asserts a claim against Denton for assault, Prout will:
 - (A) Recover if Denton intended to place Prout in fear of physical harm.
 - (B) Recover, because Denton's conduct was extreme and outrageous.
 - (C) Not recover if Denton took no action that threatened immediate physical harm to Prout.
 - (D) Not recover, because Prout's action removed any threat of harmful force.

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4. If Prout asserts a claim against Denton for intentional infliction of emotional distress, Prout will:
- (A) Recover if Prout suffered severe emotional distress as a consequence of Denton's conduct.
 - (B) Recover, because Denton intended to frighten Prout.
 - (C) Not recover, because Denton made no threat of immediate physical harm to Prout or his family.
 - (D) Not recover if Prout suffered no physical harm as a consequence of Denton's conduct.

Question 5

Doctor, a licensed physician, resided in her own home. The street in front of the home had a gradual slope. Doctor's garage was on the street level, with a driveway entrance from the street.

At two in the morning, Doctor received an emergency call. She dressed and went to the garage to get her car and found a car parked in front of her driveway. That car was occupied by Parker, who, while intoxicated, had driven to that place and now was in a drunken stupor in the front seat. Unable to rouse Parker, Doctor pushed him into the passenger's side of the front seat and got in on the driver's side. Doctor released the brake and coasted the car down the street, planning to pull into a parking space that was open. When Doctor attempted to stop the car, the brakes failed to work, and the car crashed into the wall of Owner's home, damaging Owner's home and Parker's car and injuring Doctor and Parker. Subsequent examination of the car disclosed that the brake linings were badly worn. A state statute prohibits the operation of a motor vehicle unless the brakes are capable of stopping the vehicle within specified distances at specified speeds. The brakes on Parker's car were incapable of stopping the vehicle within the limits required by the statute. Another state statute makes it a criminal offense

to be intoxicated while driving a motor vehicle. The state follows traditional contributory negligence rules.

If Parker asserts a claim against Doctor for his injuries, Parker will probably:

- (A) Recover, because Doctor was negligent as a matter of law.
- (B) Recover, because Doctor had no right to move the car.
- (C) Not recover, because his brakes were defective.
- (D) Not recover, because he was in a drunken stupor when injured.

Question 6

Construction Company contracted to build a laundry for Wash Company on the latter's vacant lot in a residential area. As a part of its work, Construction Company dug a trench from the partially completed laundry to the edge of a public sidewalk; waterlines were to be installed in the trench. Because of the contour of the land, the trench was dug to a depth ranging from seven to nine feet. Construction Company did not place any barriers around the trench and permitted it to lie open for almost a week while waiting for the delivery of water pipes. This was known to Wash Company, but it raised no objection.

During the time the trench was open, a series of heavy rains fell, causing five feet of surface water to gather in the bottom of the trench. While this condition existed, five-year-old Tommy, who was playing on the vacant lot with friends, stumbled and fell into the trench. Robert, an adult passerby, saw this and immediately lowered himself into the trench to rescue Tommy. However, his doing so caused the rain-soaked walls of the trench to collapse, killing both him and Tommy.

In a claim for wrongful death by Tommy's administrator against Construction Company, the most likely result is that plaintiff will:

- (A) Recover, because the defendant left the open trench unprotected.
- (B) Recover, because construction companies are strictly liable for inherently dangerous conditions.
- (C) Not recover, because Tommy was a trespasser.
- (D) Not recover, because Tommy's death was a result of the collapse of the trench, an independent intervening cause.

Question 7

Philip was a 10-year-old boy. Macco was a company that sold new and used machinery. Macco stored discarded machinery, pending sale for scrap, on a large vacant area it owned. This area was unfenced and was one-quarter mile from the housing development where Philip lived. Macco knew that children frequently played in this area and on the machinery. Philip's parents had directed him not to play on the machinery because it was dangerous.

One day Philip was playing on a press in Macco's storage area. The press had several wheels, each geared to the other. Philip climbed on the largest wheel, which was about five feet in diameter. Philip's weight caused the wheel to rotate, his foot was caught between two wheels that were set into motion, and he was severely injured.

A claim for relief was asserted by Philip through a duly appointed guardian. Macco denied liability and pleaded Philip's contributory fault as a defense.

In determining whether Macco breached a duty to Philip, which of the following is the most significant?

- (A) Whether the press on which Philip was injured was visible from a public way.
- (B) Whether the maintenance of the area for the storage of discarded machinery was a private nuisance.

- (C) Whether the maintenance of the area of the storage of discarded machinery was a public nuisance.
- (D) Whether Macco could have eliminated the risk of harm without unduly interfering with Macco's normal operations.

Question 8

Householder hired Contractor to remodel Householder's kitchen. She had learned of him through a classified advertisement he placed in the local newspaper. During the telephone conversation in which she hired him, he stated he was experienced and qualified to do all necessary work. Because of his low charge for his work, they agreed in writing that on acceptance of his job by Householder, he would have no further liability to her or to anyone else for any defects in materials or workmanship, and that she would bear all such costs.

Householder purchased a dishwasher manufactured by Elex Company from Dealer, who was in the retail electrical appliance business. The washer was sold by Dealer with only the manufacturer's warranty and with no warranty by Dealer; Elex Company restricted its warranty to 90 days on parts and labor. Contractor installed the dishwasher.

Two months after Householder accepted the entire job, she was conversing in her home with Accountant, an acquaintance who had agreed to prepare her income tax return gratuitously. As they talked, they noticed that the dishwasher was operating strangely, repeatedly stopping and starting. At Householder's request, Accountant gave it a cursory examination and, while inspecting it, received a violent electrical shock which did him extensive harm. The dishwasher had an internal wiring defect that allowed electrical current to be carried into the framework and caused the machine to malfunction. The machine had not been adequately grounded by Contractor during installation; if it had been, the current would have been led harmlessly away. The machine carried instructions for correct grounding, which Contractor had not followed.

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If Accountant asserts a claim based on strict liability against Elex Company for damages, the probable result is that Accountant will:

- (A) Recover, because the dishwasher was defectively made.
- (B) Recover, because Elex Company is vicariously liable for the improper installation.
- (C) Not recover, because he assumed the risk by inspecting the machine.
- (D) Not recover, because he was not the purchaser.

Question 9

Diner, a drive-in hamburger and ice cream stand, recently opened for business in the suburban town of Little City. Diner's business hours are from 9 a.m. to midnight. It is in an area that for 15 years has been zoned for small retail businesses, apartment buildings, and one- and two-family residences. The zoning code specifies that "small retail businesses" include "businesses where food and drink are dispensed for consumption on the premises." Diner was the first drive-in in Little City. For seven years Mr. and Mrs. Householder have owned and lived in their single-family residence, which is across the street from Diner.

On opening day a brass band played in the parking lot of Diner until midnight, and the noise of cars and the usual activity as a result of the new business prevented the Householders from getting to sleep until well after midnight, long after their usual time. Diner is heavily patronized during the day and night by high school students. The noise of cars, the lights of the cars, the lights illuminating the parking lot at Diner, and the noise from the loudspeaker of the ordering system prevented the Householders from sleeping before midnight. Paper cups, napkins, and other items from the drive-in are regularly blown into the Householders' front yard by the prevailing wind. The traffic to and from Diner is so heavy on the street in front of

their house that the Householders are afraid to allow their small children to play in the front yard.

The Householders have asserted a claim against Diner based on private nuisance.

The most likely effect of the fact that the Householders were in the area before Diner is that it:

- (A) Requires that the Householders' interest be given priority.
- (B) Is irrelevant because of the zoning ordinance.
- (C) Is irrelevant because conforming economic uses are given priority.
- (D) Is some, but not controlling, evidence.

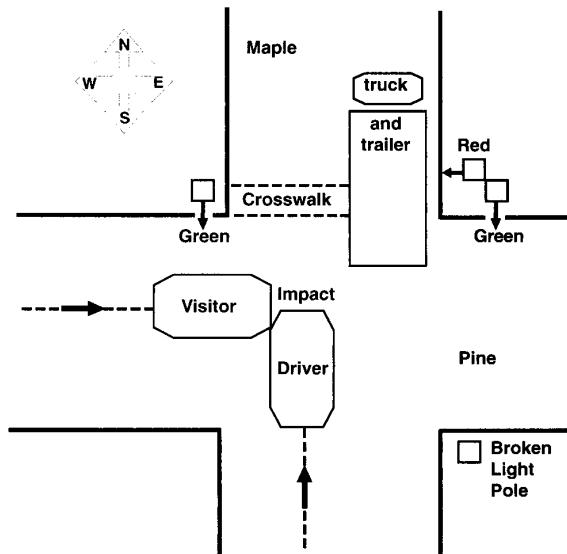
Questions 10-11 are based on the following fact situation:

In City of State Y, Maple Street is a local public thoroughfare, designated as a one-way street for northbound traffic. Pine Street is a public thoroughfare, designated as a one-way street for eastbound traffic. Maple and Pine Streets intersect at right angles. The intersection is controlled by traffic lights. There are two sets of lights, one at the northeast corner and one at the northwest corner, for traffic on Maple Street. There are two sets of lights, one at the northeast corner and one at the southeast corner, for traffic on Pine Street.

Trucker was making a delivery to a market on the east side of Maple Street, just north of its intersection with Pine Street. There being insufficient space for his truck and enclosed trailer, he parked it with the rear of the trailer extending entirely across the crosswalk on the north side of the intersection. The height of the trailer was such that it entirely obscured the traffic light on the northeast corner from the view of traffic moving east on Pine Street. Unknown to Trucker, the traffic light at the southeast corner was not functioning, because a collision 72 hours earlier had knocked down the pole from which the light was suspended.

Visitor, on his first trip to City, was driving east on Pine Street. Not seeing any traffic light or pole, he entered the intersection at a time when the light was red for eastbound traffic and green for northbound traffic. Driver, proceeding north on Maple Street and seeing the green light, entered the intersection without looking for any cross traffic and struck Visitor's car. Driver received personal injuries, and Visitor's car was damaged severely as a result of the impact.

Statutes of State Y make it a misdemeanor (1) to park a motor vehicle so that any part projects into a crosswalk and (2) to enter an intersection contrary to a traffic signal.



10. If Driver asserts a claim against Trucker and establishes that Trucker was negligent, the likely result is that Trucker's negligence is:
- A legal but not an actual cause of Driver's injuries.
 - An actual but not a legal cause of Driver's injuries.
 - Both an actual and a legal cause of Driver's injuries.

(D) Neither an actual nor a legal cause of Driver's injuries.

11. If Driver asserts a claim against City, the theory on which he has the best chance of prevailing is that City:
- Is strictly liable for harm caused by a defective traffic signal.
 - Was negligent in not replacing the broken pole within 72 hours.
 - Had an absolute duty to maintain installed signals in good operating order.
 - Created a dangerous trap by not promptly replacing the broken pole.

Question 12

Henry hated Wanda, his former wife, for divorcing him and marrying John a short time thereafter. About a month after Wanda married John, Henry secretly entered Wanda and John's rented apartment during their absence by using a master key. Henry placed a microphone behind the bookstand in the bedroom of the apartment and drilled a hole in the nearby wall, with the result that the microphone appeared to be connected with wires going into the adjoining apartment. Actually, the microphone was not connected to anything. Henry anticipated that Wanda would discover the microphone in a few days and would be upset by the thought that someone had been listening to her conversations with John in their bedroom.

Shortly thereafter, as he was putting a book on the stand, John noticed the wires behind the bookstand and discovered the hidden microphone. He then called Wanda and showed her the microphone and wires. Wanda fainted and, in falling, struck her head on the bookstand and suffered a mild concussion. The next day John telephoned Henry and accused him of planting the microphone. Henry laughingly admitted it. Because of his concern about Wanda and his anger at Henry, John is emotionally upset and unable to go to work.

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If Wanda asserts a claim against Henry based on infliction of mental distress, the fact that John was the person who showed her the microphone will:

- (A) Relieve Henry of liability, because John was careless in so doing.
- (B) Relieve Henry of liability, because John's conduct was the immediate cause of Wanda's harm.
- (C) Not relieve Henry of liability, because Henry's goal was achieved.
- (D) Not relieve Henry of liability, because the conduct of a third person is irrelevant in emotional distress cases.

Questions 13-14 are based on the following fact situation:

Peter was rowing a boat on a mountain lake when a storm suddenly arose. Fearful that the boat might sink, Peter rowed to a boat dock on shore and tied the boat to the dock. The shore property and dock were the private property of Owner.

While the boat was tied at the dock, Owner came down and ordered Peter to remove the boat because the action of the waves was causing the boat to rub against a bumper on the dock. When Peter refused, Owner untied the boat and cast it adrift. The boat sank.

Peter was wearing a pair of swimming trunks and nothing else. He had a pair of shoes and a parka in the boat, but they were lost when Owner set it adrift. Peter was staying at a cabin one mile from Owner's property. The only land routes back were a short rocky trail that was dangerous during the storm, and a 15-mile road around the lake. The storm continued with heavy rain and hail, and Peter, having informed Owner of the location of his cabin, asked Owner to take him back there in Owner's car. Owner said, "You got here by yourself and you'll have to get back home yourself." After one hour the storm stopped, and Peter walked home over the trail.

13. A necessary element in determining if Peter is liable for a trespass is whether:

- (A) Owner had clearly posted his property with a sign indicating that it was private property.
- (B) Peter knew that the property belonged to a private person.
- (C) Peter had reasonable grounds to believe the property belonged to a private person.
- (D) Peter had reasonable grounds to believe his boat might be swamped and might sink.

14. If Peter asserts a claim against Owner for loss of the boat, the most likely result is that Owner will:

- (A) Have no defense under the circumstances.
- (B) Prevail, because Peter was a trespasser ab initio.
- (C) Prevail, because the boat might have damaged the dock.
- (D) Prevail, because Peter became a trespasser when he refused to remove the boat.

Questions 15-16 are based on the following fact situation:

Dave is a six-year-old boy who has a well-deserved reputation for bullying younger and smaller children. His parents have encouraged him to be aggressive and tough. Dave, for no reason, knocked down, kicked, and severely injured Pete, a four-year-old. A claim has been asserted by Pete's parents for their medical and hospital costs and for Pete's injuries.

15. If the claim is asserted against Dave's parents, the most likely result is they will be:

- (A) Liable, because parents are strictly liable for the torts of their children.
- (B) Liable, because Dave's parents encouraged him to be aggressive and tough.
- (C) Not liable, because a child under seven is not liable in tort.
- (D) Not liable, because parents cannot be held liable for the tort of a child.
16. If the claim is asserted against Dave, the most likely result is Dave will be:
- (A) Liable, because he intentionally harmed Pete.
- (B) Liable, because, as a six-year-old, he should have known his conduct was wrongful.
- (C) Not liable, because a child under seven is not liable in tort.
- (D) Not liable, because he is presumed to be under his parents' control and they have the sole responsibility.

Questions 17-18 are based on the following fact situation:

Mrs. Ritter, a widow, recently purchased a new uncrated electric range for her kitchen from Local Retailer. The range has a wide oven with a large oven door. The crate in which Stove Company, the manufacturer, shipped the range carried a warning label that the stove would tip over with a weight of 25 pounds or more on the oven door. Mrs. Ritter has one child—Brenda, age three. Recently, at about 5:30 p.m., Brenda was playing on the floor of the kitchen while Mrs. Ritter was heating water in a pan on the stove. The telephone rang and Mrs. Ritter went into the living room to answer it. While she was gone Brenda decided to find out what was cooking. She opened the oven door and climbed on it to see what was in the pan. Brenda's weight (25 pounds) on the door caused the stove to tip over forward. Brenda fell to the floor and the hot water spilled over her, burning her

severely. Brenda screamed. Mrs. Ritter ran to the kitchen and immediately gave her first aid treatment for burns. Brenda thereafter received medical treatment.

Brenda's burns were painful. They have now healed and do not bother her, but she has ugly scars on her legs and back. Brenda's claim is asserted on her behalf by the proper party.

17. If Brenda asserts a claim based on strict liability against Local Retailer, she must establish that:
- (A) Local Retailer did not inform Mrs. Ritter of the warning on the crate.
- (B) The stove was substantially in the same condition at the time it tipped over as when it was purchased from Local Retailer.
- (C) Local Retailer made some change in the stove design or had improperly assembled it so that it tipped over more easily.
- (D) Local Retailer knew or should have known that the stove was dangerous because of the ease with which it tipped over.
18. If Brenda asserts a claim based on strict liability against Stove Company, she must establish that:
- (A) The defendant negligently designed the stove.
- (B) Stoves made by other manufacturers do not turn over with a 25-pound weight on the oven door.
- (C) The defendant failed to warn the Ritters that the stove would turn over easily.
- (D) The stove was defective and unreasonably dangerous to her.

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Question 19

Paulsen was eating in a restaurant when he began to choke on a piece of food that had lodged in his throat. Dow, a physician who was sitting at a nearby table, did not wish to become involved and did not render any assistance, although prompt medical attention would have been effective in removing the obstruction from Paulsen's throat. Because of the failure to obtain prompt medical attention, Paulsen suffered severe brain injury from lack of oxygen.

If Paulsen asserts a claim against Dow for his injuries, will Paulsen prevail?

- (A) Yes, if the jurisdiction relieves physicians of malpractice liability for emergency first aid.
- (B) Yes, if a reasonably prudent person with Dow's experience, training, and knowledge would have assisted Paulsen.
- (C) No, because Dow was not responsible for Paulsen's condition.
- (D) No, unless Dow knew that Paulsen was substantially certain to sustain serious injury.

Questions 20-21 are based on the following fact situation:

Parents purchased a new mobile home from Seller. The mobile home was manufactured by Mobilco and had a ventilating system designed by Mobilco with both a heating unit and an air conditioner. Mobilco installed a furnace manufactured by Heatco and an air conditioning unit manufactured by Coolco. Each was controlled by an independent thermostat installed by Mobilco. Because of the manner in which Mobilco designed the ventilating system, the first time the ventilating system was operated by Parents, cold air was vented into Parents' bedroom to keep the temperature at 68° F (20° C). The cold air then activated the heater thermostat, and hot air was pumped into the bedroom of Child, the six-month-old child of Parents. The temperature in Child's room

reached more than 170° F (77° C) before Child's mother became aware of the condition and shut the system off manually. As a result, Child suffered permanent physical injury.

Claims have been asserted by Child, through a duly appointed guardian, against Mobilco, Seller, Heatco, and Coolco.

- 20. If Child's claim against Seller is based on negligence, the minimum proof necessary to establish Seller's liability is that the ventilating system:
 - (A) Was defective.
 - (B) Was defective and had not been inspected by Seller.
 - (C) Was defective and had been inspected by Seller, and the defect was not discovered.
 - (D) Was defective, and the defect would have been discovered if Seller had exercised reasonable care in inspecting the system.
- 21. If Child's claims against Mobilco, Heatco, and Coolco are based on strict liability in tort, Child will probably recover against:
 - (A) Mobilco only, because the ventilating system was defectively designed by Mobilco.
 - (B) Heatco only, because it was the excessive heat from the furnace that caused Child's injuries.
 - (C) Mobilco and Heatco only, because the combination of Mobilco's design and Heatco's furnace caused Child's injuries.
 - (D) Mobilco, Heatco, and Coolco, because the combination of Mobilco's design, Heatco's furnace, and Coolco's air conditioning unit caused Child's injuries.

Question 22

Hank owned a secondhand goods store. He often placed merchandise on the sidewalk, sometimes for short intervals, sometimes from 7 a.m. until 6 p.m. Pedestrians from time to time stopped and gathered to look at the merchandise. Fred had moved into an apartment that was situated immediately above Hank's store; a street-level stairway entrance was located about 20 feet to the east. On several occasions, Fred had complained to Hank about the situation because not only were his view and peace of mind affected, but also his travel on the sidewalk was made more difficult. Fred owned and managed a restaurant two blocks to the west of his apartment and made frequent trips back and forth. There was a back entrance to his apartment through a parking lot; this entrance was about 200 feet farther in walking distance from his restaurant. Once Fred complained to the police, whereupon Hank was arrested under a local ordinance which prohibited the placing of goods or merchandise on public sidewalks and imposed, as its sole sanction, a fine for its violation.

One day, the sidewalk in front of Hank's store was unusually cluttered because he was cleaning and mopping the floor of his shop. Fred and his 15-year-old son, Steve, saw a bus they wished to take, and they raced down the stairs and onto the cluttered sidewalk in front of Hank's store, Fred in the lead. While dodging merchandise and people, Fred fell. Steve tripped over him and suffered a broken arm. Fred also suffered broken bones and was unable to attend to his duties for six weeks.

If, prior to the day of his personal injuries, Fred had asserted a claim based on public nuisance for injunctive relief against Hank for his obstruction of the sidewalk in violation of the ordinance, the defense on which Hank would have most likely prevailed is that:

- (A) Fred consented to the obstruction by continuing to rent his apartment.
- (B) The violation of the ordinance was not unreasonable.

- (C) Remedy of abatement by self-help was adequate.

- (D) There was no claim for special damage.

Question 23

The city of Metropolis has an ordinance that makes it an offense, punishable by fine, for the owner of a dog to permit the dog to run unleashed on a public way.

Smythe, a police officer, observed a small dog running loose in the street. As Smythe picked the dog up, Nelson, who was seated in her car lawfully parked at the curb, called out, "Oh, thank you, Officer, for returning Fido." Smythe asked Nelson whether the dog was hers, and when she acknowledged ownership, he asked to see her driver's license. Nelson gave her name and address, but she refused to produce a driver's license. Smythe then told her to produce her driver's license if she did not want to go to jail. Nelson responded by saying, "Isn't this ridiculous?" Smythe took her by the arm and said, "Let's go. You are under arrest."

Nelson cried out that Smythe was hurting her but he refused to release her arm, and she struck him with her free hand. Smythe then dragged Nelson from her car, forced her into his squad car, and took her to the police station.

The incident took place on the street in front of the apartment where Nelson and her aged father, Joplin, lived. Smythe did not know that Joplin had observed what took place from a window in the apartment.

If Nelson's father, Joplin, asserts a claim against Smythe for the intentional infliction of emotional distress, will Joplin prevail?

- (A) Yes, if Smythe's acts caused Joplin severe emotional distress.
- (B) Yes, if it is found that Smythe's behavior was extreme and outrageous with respect to Nelson.

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- (C) No, because Smythe did not know that Joplin was watching.
- (D) No, because Joplin was not within the zone of physical danger.

Questions 24-25 are based on the following fact situation:

Gasco owns a storage facility where flammable gases are stored in liquefied form under high pressure in large spherical tanks. The facility was constructed for Gasco by Acme Company, a firm that specializes in the construction of such facilities. After the facility had been in use for five years, an explosion in the facility started a large fire that blanketed the surrounding countryside with a high concentration of oily smoke and soot.

Farber owns a large truck farm near the facility. His entire lettuce crop was destroyed by oily deposits left by the smoke.

24. If Farber asserts a claim against Gasco for the loss of his lettuce crop and is unable to show any negligence on the part of Gasco, will Farber prevail?

- (A) Yes, because the operation of the storage facility was an abnormally dangerous activity.
- (B) Yes, because the intrusion of the smoke onto Farber's farm amounted to a trespass.
- (C) No, if the explosion was caused by internal corrosion that reasonable inspection procedures would not have disclosed.
- (D) No, if the explosion was caused by negligent construction on Acme's part.

25. If Farber asserts a claim against Acme Company for the loss of his lettuce crop, will Farber prevail?

- (A) No, if Acme did not design the storage facility.

- (B) No, because Acme was an independent contractor.
- (C) Yes, because the operation of the storage facility was an abnormally dangerous activity.
- (D) Yes, if the explosion resulted from a defect of which Acme was aware.

Question 26

Siddon worked as a private duty nurse and on occasion worked in Doctors' Hospital. The hospital called Registry, the private duty referral agency through which Siddon usually obtained employment, and asked that in the future she not be assigned to patients in Doctors' Hospital. Registry asked the hospital why it had made the request. Doctors' Hospital sent a letter to Registry giving as the reason for its request that significant amounts of narcotics had disappeared during Siddon's shifts from the nursing stations at which she had worked.

If Siddon asserts a claim based on defamation against Doctors' Hospital, Siddon will:

- (A) Recover, because the hospital accused Siddon of improper professional conduct.
- (B) Recover if Siddon did not take the narcotics.
- (C) Not recover if narcotics disappeared during Siddon's shifts.
- (D) Not recover if the hospital reasonably believed that Siddon took the narcotics.

Question 27

When Mary Weld visited Dugan's Alleys to participate in the weekly bowling league competition held there she brought her two-year-old son, Bobby, along and left him in a nursery provided by Dugan for the convenience of his customers. The children in the nursery were normally supervised by three attendants, but at this particular time, as Mary Weld knew, there was only one attendant present to care for about 20 children of assorted ages.

About 30 minutes later, while the attendant was looking the other way, Bobby suddenly started to cry. The attendant found him lying on his back, picked him up, and called his mother. It was later discovered that Bobby had suffered a skull fracture.

If a claim is asserted against Dugan on Bobby's behalf, will Bobby prevail?

- (A) Yes, because Dugan owed the child the highest degree of care.
- (B) Yes, because a two-year-old is incapable of contributory negligence.
- (C) No, unless Dugan or his employees failed to exercise reasonable care to assure Bobby's safety.
- (D) No, if Mary Weld assumed the risk by leaving Bobby in the nursery.

Question 28

Dever drove his car into an intersection and collided with a fire engine that had entered the intersection from Dever's right. The accident was caused by negligence on Dever's part. As a result of the accident, the fire engine was delayed in reaching Peters's house, which was entirely consumed by fire. Peters's house was located about 10 blocks from the scene of the accident.

If Peters asserts a claim against Dever, Peters will recover:

- (A) That part of his loss that would have been prevented if the collision had not occurred.
- (B) The value of his house before the fire.
- (C) Nothing if Dever had nothing to do with causing the fire.
- (D) Nothing, because Dever's conduct did not create an apparent danger to Peters.

Question 29

Purvis purchased a used car from Daley, a used-car dealer. Knowing them to be false, Daley made the following statements to Purvis prior to the sale:

- Statement 1. This car has never been involved in an accident.
- Statement 2. This car gets 25 miles to the gallon on the open highway.
- Statement 3. This is as smooth-riding a car as you can get.

If Purvis asserts a claim against Daley based on deceit, which of the false statements made by Daley would support Purvis's claim?

- (A) Statement 1. only.
- (B) Statement 2. only.
- (C) Statements 1. and 2. only.
- (D) Statements 2. and 3. only.

Question 30

Customer, age 20, went into Store at approximately 6:45 p.m. to look at some suits that were on sale. The clerks were busy, and one of them told him that he should wait on himself. Customer selected three suits from a rack and went into the dressing room to try them on. Signs posted on the walls of the Store state that closing time is 9 p.m.; however, because of a special awards banquet for employees, Store was closed at 7 p.m. on this day. The employees, in a hurry to get to the banquet, did not check the dressing rooms or turn off the lights before leaving. When Customer emerged from the dressing room a few minutes after 7 p.m., he was alone and locked in. Customer tried the front door but it was secured on the outside by a bar and padlock, so he went to the rear door. Customer grabbed the doorknob and vigorously shook the door. It did not open, but the activity set off a mechanism that had been installed because of several recent thefts committed by persons who

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had hidden in the store until after closing time. The mechanism sprayed a chemical mist in Customer's face, causing him to become temporarily blind. The mechanism also activated an alarm carried by Store's employee, Watchman, who was just coming to work. Watchman unlocked the front door, ran into the store, and grabbed Customer. Customer, who was still unable to see, struck out at this person and hit a metal rack, injuring his hand. Watchman then identified himself, and Customer did the same. After assuring himself that Customer was telling the truth, Watchman allowed him to leave.

If Customer is to prevail on a claim against Store based on battery from the use of the chemical spray, Customer must establish that:

- (A) He suffered severe bodily harm.
- (B) The spray mist was an offensive or harmful contact.
- (C) He suffered severe emotional distress.
- (D) His conduct was not a factual cause of the chemical's spraying him.

Question 31

Dock had been the unsuccessful suitor of Mary, who had recently announced her engagement to Paul. Angered by her engagement, Dock sent Mary the following letter: "I hope you know what you are doing. The man you think you love wears women's clothes when at home. A Friend."

The receipt of this letter caused Mary great emotional distress. She hysterically telephoned Paul, read him the letter, and told him that she was breaking their engagement. The contents of the letter were not revealed to others. Paul, who was a young attorney in the state attorney's office, suffered serious humiliation and emotional distress as a result of the broken engagement.

If Paul asserts a claim against Dock based on defamation and it is proved that Dock's statement was true, such proof will be:

- (A) A defense by itself.
- (B) A defense only if Dock was not actuated by malice.
- (C) A defense only if Dock reasonably believed it to be true.
- (D) No defense by itself.

Question 32

Auto Company, a corporation, was a small dealer in big new cars and operated a service department. Peter wanted to ask Mike, the service manager, whether Auto Company would check the muffler on his small foreign car. Peter parked on the street near the service department with the intention of entering that part of the building by walking through one of the three large entrances designed for use by automobiles. There was no street entrance to the service department for individuals, and customers as well as company employees often used one of the automobile entrances.

As Peter reached the building, he glanced behind him to be sure no vehicle was approaching that entrance. Seeing none, he walked through the entrance, but immediately he was struck on the back of the head and neck by the large overhead door which was descending. The blow knocked Peter unconscious and caused permanent damage.

Peter did not know how the door was raised and lowered; however, the overhead door was operated by the use of either of two switches in the building. One switch was located in the office of the service manager and the other was located near the door in the service work area for the convenience of the mechanics. On this occasion, no one was in the service work area except three Auto Company mechanics. Mike, who had been in his office, and the three mechanics denied having touched a switch that would have lowered the door. Subsequent investigation showed, however, that the switches were working properly and that all of the mechanisms for moving the door were in good working order.

If Peter asserts a claim based on negligence against Auto Company, Peter probably will:

- (A) Recover, because Auto Company is strictly liable under the circumstances.
- (B) Recover, because an employee of Auto Company was negligent.
- (C) Not recover, because Peter was a licensee.
- (D) Not recover, because Peter assumed the risk.

Questions 33-34 are based on the following fact situation:

Si was in the act of siphoning gasoline from Neighbor's car, in Neighbor's garage and without his consent, when the gasoline exploded and a fire followed. Rescuer, seeing the fire, grabbed a fire extinguisher from his car and put out the fire, saving Si's life and Neighbor's car and garage. In doing so, Rescuer was badly burned.

33. If Rescuer asserts a claim against Si for personal injuries, Rescuer will:
- (A) Prevail, because he saved Si's life.
 - (B) Prevail, because Si was at fault in causing the fire.
 - (C) Not prevail, because Rescuer knowingly assumed the risk.
 - (D) Not prevail, because Rescuer's action was not a foreseeable consequence of Si's conduct.

34. If Rescuer asserts a claim against Neighbor for personal injuries, Rescuer will:

- (A) Prevail, because he saved Neighbor's property.
- (B) Prevail, because he acted reasonably in an emergency.
- (C) Not prevail, because Neighbor was not at fault.
- (D) Not prevail, because Rescuer knowingly assumed the risk.

TORTS ANSWERS

Answer to Question 1

- (A) Because Steel had no notice that the product would cause eye injuries, an action against Steel must be predicated on strict liability, not negligence. The strict duty in such cases extends to any supplier in the distributive chain. Thus, if Steel, the manufacturer of the glue, is liable, then Paint Company, the retailer, may also be subject to liability. Conversely, if there is a determination that Steel did not manufacture an unreasonably dangerous product, then there will be no basis for holding the retailer liable. (B) is incorrect. It addresses Innes's status as a foreseeable victim of the fumes. However, it fails to address the basic issue of liability. Innes could be a foreseeable victim, yet she still must establish the unreasonably dangerous character of the product. (C) is incorrect because negligence is irrelevant to a strict liability action, which Innes can pursue against Paint Company as a commercial supplier. (D) is incorrect because the dangerous character of the glue emanates from its properties during use, not its packaging. The fact that Paint Company had no opportunity to inspect the product is irrelevant to its liability.

Answer to Question 2

- (D) Innes probably cannot recover against Glass. An action against Glass would have to be based on the actions of its employees. Because it was not functioning as a commercial supplier in this case, it cannot be held liable on a strict liability theory. A successful action against it must be based on negligence. The employees had no notice of the dangerous character of the glue, nor were they even aware of the common ductwork. Therefore, a cause of action for negligence will not lie against the employees, and obviously will not lie against Glass. (A) is an incorrect statement of the law. (B) is incorrect. The employees did cause the fumes to enter Innes's area of the building. However, as has been shown, they were unaware of the damage the fumes could cause, or that they were sending fumes into the other area. (C) is incorrect because use of a product for its intended purpose does not negate the possibility of liability. If Glass's employees acted negligently while using the product for its intended purpose, Glass could be held vicariously liable for their actions.

Answer to Question 3

- (C) Prout will not recover if Denton's conduct did not threaten immediate physical harm. A *prima facie* case for tortious assault requires that the defendant create a reasonable apprehension in the plaintiff of *immediate* harmful or offensive contact to the plaintiff's person. Threats of *future* harm do not give rise to an action for assault. (A) is incorrect because mere intent to place in fear of physical harm is not enough. There must be a creation of reasonable apprehension of immediate harm. (B) is incorrect; extreme and outrageous conduct is an element of intentional infliction of emotional distress, but not of assault. (D) is incorrect because it is irrelevant, and later actions would not vitiate any threat of immediate harm.

Answer to Question 4

- (A) Prout will recover if he suffered severe emotional distress. The tort of intentional infliction of emotional distress requires: (i) an act by defendant amounting to extreme and outrageous conduct; (ii) intent to cause severe emotional distress or recklessness as to the effect of the conduct; (iii) causation; and (iv) damages. If Prout suffered severe emotional distress resulting from Denton's conduct (which was extreme and outrageous and, at the very least, reckless), he can recover from Denton. (B) is incorrect because intent, without more, does not establish intentional infliction of emotional distress. (C) is incorrect because immediate threat of physical harm is an element of assault rather than intentional infliction of emotional distress. (D) is

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incorrect because, even though actual damages are required to win a case grounded on intentional infliction of emotional distress, physical injuries are not required.

Answer to Question 5

- (C) Parker will not prevail because at common law Parker's contributory negligence will completely bar his right to recover. Parker was contributorily negligent because he was operating a car with defective brakes in violation of the statute. (A) is wrong because Parker was not in the class intended to be protected by the statute. It was Parker's obligation to ensure that the brakes complied with the statute. (B) is incorrect because the existence of an emergency, presenting little time for reflection, may be considered as among the circumstances under which the defendant acted (*i.e.*, he must act as the reasonable person would act in the same emergency). Applying this criterion, Doctor was justified in moving the car. (D) is incorrect because a person who is injured while intoxicated does not automatically lose a cause of action against the person causing the injury. In addition, the harm in this case was not the type of harm which the drunk driving statute was designed to prevent.

Answer to Question 6

- (A) (A) is correct because leaving the trench uncovered was the proximate cause of Tommy's death. Generally, rescuers are viewed as foreseeable intervening forces, and the original tortfeasor will be liable for their negligence. (B) is wrong as a matter of law. Construction companies are subject to strict liability based on the same criteria applied to other companies and individuals. The activity must be deemed "ultrahazardous" or "abnormally dangerous" to subject the party performing the activity to strict liability. Leaving the trench uncovered was negligent, but it is not ultrahazardous or abnormally dangerous. (C) is wrong because under the attractive nuisance doctrine, the defendant had a duty to exercise ordinary care to avoid reasonably foreseeable harm to children caused by artificial conditions on the property. The fact that children played on the vacant lot made it possible for the defendant to anticipate infant trespassers. The defendant also knew of the dangerous condition, and the expense of covering the trench would be slight in comparison with the magnitude of the risk. (D) is incorrect, because even if the collapse of the trench was unforeseeable, Construction Company's conduct still threatened to cause injury, and most courts find liability where there is a foreseeable result of an unforeseeable cause.

Answer to Question 7

- (D) The most significant factor pertains to the burden on Macco to eliminate the danger. Under the attractive nuisance doctrine, most courts impose on a landowner the duty to exercise ordinary care to avoid reasonably foreseeable risks of harm to children caused by artificial conditions on the property. To assess this special duty on the landowner, the plaintiff must show, among other things, that the expense of remedying the situation is slight compared with the magnitude of the risk. Choice (D) most closely reflects that requirement. (A) is incorrect because most jurisdictions no longer require that the child plaintiff be lured onto the property by the dangerous condition. Thus, whether the press was visible from a public way would only be relevant to show that the trespass was foreseeable, and here the facts indicate that the landowner was already aware that children played on the machinery. (B) and (C) are incorrect because the doctrine of attractive nuisance is distinct from nuisance law. The landowner may be liable even if the danger is neither a public nor a private nuisance as to adjoining landowners.

Answer to Question 8

- (A) Accountant will recover because the dishwasher was defective. A *prima facie* products liability action based on strict liability in tort requires: (i) strict duty owed by a commercial supplier; (ii)

breach of that duty; (iii) actual and proximate cause; and (iv) damages. Accountant can make such a case because he need not prove that the defendant was at fault in selling or producing a defective product—only that the product in fact is so defective as to be “unreasonably dangerous.” The product also must have reached the user without substantial change in the condition in which it is supplied. The fact that the dishwasher had an internal wiring defect causing the machine to malfunction is a sufficient basis to impose strict liability. Any negligence by Contractor as an intermediary does not void the manufacturer’s liability. Suppliers must anticipate reasonably foreseeable uses even if they are misuses. (B) is wrong because Contractor was an independent contractor with no relationship to Elex Company that vicarious liability would support. (C) is wrong even though assumption of risk may sometimes be successfully raised in strict liability cases. Here, Accountant did not know of the risk and did not voluntarily assume it. (D) is incorrect because privity is not required to bring a strict liability action. A majority of courts extend protection not only to buyers, but also to members of the buyer’s family, guests, friends, and employees of the buyer, as well as foreseeable bystanders.

Answer to Question 9

- (D) Absent a valid defense, a defendant may not cause a substantial, unreasonable interference with a neighbor’s use or enjoyment of his property. Whether the Householders were there before or after Diner opened does not control the result; plaintiffs’ right to the reasonable use or enjoyment of their land is the test. (A) is wrong because the fact that one type of land use was entered into before another is relevant but not conclusive evidence as to reasonableness of use. (B) is wrong because a use permitted under a zoning ordinance may be shown to be unreasonable. (C) is a misstatement of law.

Answer to Question 10

- (C) Driver’s injuries were actually caused by Trucker since they would not have occurred “but for” Trucker’s negligent parking. Trucker was also the legal (proximate) cause of Driver’s injuries. It was foreseeable that an eastbound car might proceed into the intersection when the traffic signal was obstructed and possibly collide with another car possessing the right of way—a foreseeable result caused by a foreseeable intervening force. Therefore, (A), (B), and (D) are incorrect.

Answer to Question 11

- (B) Nothing in the facts indicates that City was under an absolute duty to maintain its traffic poles. Hence, (A) and (C) are incorrect. (D) states no legal theory for Driver’s claim and so is not as good an answer as (B). The best theory for Driver is that City was negligent in not replacing the broken pole within 72 hours.

Answer to Question 12

- (C) Henry intended to cause Wanda the severe emotional distress that did, in fact, result from his outrageous conduct. Hence, his conduct satisfies the *prima facie* case and (C) is the correct response. John’s conduct was a foreseeable response to Henry’s act and hence did not break the chain of causation leading to the result intended by Henry. Thus, (B) is wrong. (A) is unsupported by the facts, and (D) is a misstatement of law; if the third person’s conduct was unforeseeable, it may affect the defendant’s liability.

Answer to Question 13

- (D) Although Peter intended to go onto Owner’s property, his entry was privileged if Peter believed it was necessary to protect himself and/or his boat. Note that this privilege is qualified in that Peter

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must pay for any damage he caused to Owner's property. (A), (B), and (C) are incorrect because knowledge that the land is privately owned is irrelevant to the privilege of necessity.

Answer to Question 14

- (A) The privilege to invade land as a private necessity supersedes the occupant's right to protect the property from invasion; hence, the landowner is liable to the invader for any harm suffered if entry is denied. (C) is wrong because Owner could have recovered for injury to his dock, but had no right to resist Peter's entry. (B) and (D) are incorrect because Peter's entry was privileged.

Answer to Question 15

- (B) Parents may be liable for *negligence* for failing to prevent the tortious conduct of their children. Further, if parents know of their child's propensity to harm, they have a duty to exercise due care to control the child's behavior. Here, they did just the opposite. Hence, (D) is wrong. (C) is wrong because children are considered capable of committing torts. (A) is wrong because parents' liability is based on *negligence*.

Answer to Question 16

- (A) A child is liable for his intentional torts whether or not he knows of their "wrongfulness." Hence, (B) is incorrect. (C) is wrong because there is no minimum age for capacity to commit torts. Children generally are deemed to have the capacity to form the intent to commit intentional torts. (D) is wrong because parents are not vicariously liable for their children's torts.

Answer to Question 17

- (B) Brenda must establish the facts in (B) because to hold the commercial supplier strictly liable for a product defect, the product must be expected to, and must in fact, reach the user or consumer without substantial change in the condition in which it is supplied. (A) is wrong because warnings are only one consideration in determining whether a product is in a "defective condition unreasonably dangerous" as required for strict liability purposes. Strict liability can apply even if the customer is informed of the warnings. (C) is wrong because it goes to an issue of negligence on the retailer's part. It is unnecessary for a retailer to affirmatively contribute to the defective-ness of the product for strict liability to apply. (See the analysis of option (B), above.) (D) is incorrect because in a strict liability case it is unnecessary to prove that the defendant was at fault in selling or producing a dangerous product—only that the product is in fact so defective as to be unreasonably dangerous. Thus, plaintiff need not show that Local Retailer was aware or should have been aware of the danger. Options (A), (C), and (D) all deal with fault on Local Retailer's part, and are, therefore, wrong in a strict liability analysis.

Answer to Question 18

- (D) Brenda must show that the stove had an unreasonably dangerous defect to establish a breach of duty by the manufacturer. To establish a *prima facie* case based on strict liability in tort, the plaintiff must prove: (i) strict duty owed by a commercial supplier; (ii) breach of that duty; (iii) actual and proximate cause; and (iv) damages. To establish breach of duty for a strict liability action, the plaintiff need not prove that the defendant was at fault in selling or producing a dangerous product—only that the product in fact is so defective as to be "unreasonably dangerous." (A) is wrong because negligence need not be proven in a strict liability case. (B) is wrong because the availability of safer product alternatives is only one factor to be considered by the

courts in determining whether a product is defective. (C) is incorrect because even though the warnings may well have been inadequate because they were placed on the crate rather than on the stove itself, the role of instructions and warnings is but one of many factors the courts will consider in determining the defective nature of a given product.

Answer to Question 19

- (C) At issue is Dow's duty to Paulsen. Generally, the law imposes no duty to affirmatively act for the benefit of others. There are exceptions to this rule—*e.g.*, one who places another in a position of peril must use reasonable care to aid that person; one who gratuitously acts for the benefit of another thereby assumes a duty to act like an ordinary reasonable person. None of the exceptions is applicable to the case at bar. Therefore, (B) and (D) are clearly incorrect. The "Good Samaritan" statute, described in (A), generally exempts from liability medical personnel who voluntarily and gratuitously render emergency treatment. However, it does not *require* them to provide such treatment. Thus, (A) is incorrect.

Answer to Question 20

- (D) Under a negligence analysis, the defendant's conduct must fall below the standard of care expected of a reasonable person under like circumstances. In the instant case, Seller had a duty, at the time of transfer of possession of the home to Parents, to disclose concealed, unreasonably dangerous conditions, of which he knew or had reason to know, and of which he knew Parents were ignorant and not likely to discover on reasonable inspection. Thus, if Seller did not know of a defect in the ventilating system, and could not have discovered the defect through reasonable care, a cause of action for negligence would not lie. (B) and (C) imply that Seller would be liable in negligence merely for failure to inspect or for failure to discover the defect upon inspection. However, there must also be a showing that a reasonable inspection would have disclosed the defect. Consequently, (B) and (C) are incorrect. (A) is more appropriate to a strict liability case, since it does not even mention the necessity for knowledge or discovery of the defect. Therefore, it is an incorrect alternative.

Answer to Question 21

- (A) The issue is causation. But for Mobilco's defective design of the ventilating system, the injury to Child would not have occurred. Since Child can trace the injury to a defect in the ventilating system that existed when it left Mobilco's control, cause in fact is established. The same concepts of proximate cause which govern negligence actions are applicable to strict liability actions for defective products. Child's injury is the direct result of Mobilco's defective design, which is the cause in fact of the injury. Thus, proximate cause is established. Heatco's furnace and Coolco's air conditioning unit contained no defects and did not cause injury to Child. As the facts make clear, both units were controlled by a thermostat independent of the units themselves. Thus, (B), (C), and (D) are incorrect.

Answer to Question 22

- (D) Hank would prevail in the absence of a claim for special damage. Public nuisance is an act that unreasonably interferes with the health, safety, or property rights of the *community*. Recovery is available for public nuisance only if a private party has suffered some unique damage not suffered by the public at large. Thus, without a claim of special damage by Fred, Hank would be able to defend against Fred's public nuisance suit. (A) is wrong because it is a form of the largely

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discredited “coming to the nuisance” defense. Fred is entitled to the reasonable use and enjoyment of his leasehold. Remaining in the apartment does not constitute “consent.” (B) is incorrect because the ordinance is enforceable against Hank even if his violation is “reasonable.” This option is a “distractor,” designed to lure you into wrongfully applying the “unreasonable interference” test from *private* nuisance cases. (C) is incorrect because only one who has suffered some unique damage has a privilege to abate a public nuisance by self-help. In the absence of such unique damage, a public nuisance may be abated or enjoined only by public authority.

Answer to Question 23

- (C) Where the defendant intentionally causes severe physical harm to one person, and another person suffers severe emotional distress because of that person’s relationship to the injured party, problems of intent and causation arise. To sustain a claim for intentional infliction of emotional distress under such circumstances, the plaintiff generally must show: (i) he was present when the injury occurred to the other person; (ii) he is a close relation of the injured person; and (iii) the defendant knew that the plaintiff was present and a close relation to the injured person. In the case at bar, we do not know that Nelson suffered severe physical harm. However, we do know that Smythe was unaware that Joplin observed the incident. (A) and (B) are incorrect, because they ignore the issue of whether Smythe knew that Joplin was watching. (D) is incorrect, because the term “zone of physical danger” is more appropriate to an action for *negligent* infliction of emotional distress.

Answer to Question 24

- (A) An activity may be characterized as ultrahazardous if it (i) involves a substantial risk of serious harm to person or property; (ii) cannot be performed without risk of serious harm no matter how much care is taken; and (iii) is not a commonly engaged-in activity in the particular community. In such cases, the duty owed is an absolute duty to make safe the ultrahazardous condition. Liability will be imposed for any injuries to persons or property resulting from the condition. Pursuant to the foregoing criteria, Gasco’s operation of the storage facility constitutes an abnormally dangerous activity, subjecting Gasco to liability for damage caused by the explosion, regardless of any negligence on the part of Gasco. Thus, (C) is incorrect. (D) is incorrect because any negligence on the part of Acme will not absolve Gasco of liability for maintenance of an ultrahazardous condition. (B) is incorrect because where, as here, no physical object enters the plaintiff’s land, a court will generally treat the matter as a nuisance case or one involving strict liability if ultrahazardous activity is involved, rather than as a trespass case.

Answer to Question 25

- (D) Acme, as the manufacturer of the facility, owed a duty of due care to any foreseeable plaintiff. Farber, whose farm is located near the facility, is a foreseeable plaintiff. Therefore, if the explosion resulted from a defect of which Acme was aware, Acme would be liable to Farber for the resultant loss of his lettuce crop. (B) is incorrect because Acme’s status as an independent contractor relative to Gasco has no bearing on the duty owed by Acme to Farber. (A) is incorrect because Acme will be liable for manufacturing the facility with knowledge of a defect, regardless of the identity of the facility’s designer. (C) is incorrect because Acme was the *manufacturer*, rather than the *operator*, of the facility.

Answer to Question 26

- (D) In a defamation action, a defendant may assert a claim of qualified privilege for statements made in the interest of the publisher of the statement, the recipient of the statement, or both. The

privilege will be lost only if the statement is not within the scope of the privilege or if it was made with malice (*i.e.*, knowledge of falsity or reckless disregard of truth or falsity). In this case, Hospital's response to Registry on a matter of common interest was within the scope of the privilege. Thus, (D) is correct because Hospital's reasonable belief would negate any malice on its part. (A) is incorrect, because the accusation alone does not establish defamation when a claim of qualified privilege is raised. (B) is incorrect, because the falsity of the statement does not dispose of the question of qualified privilege. (C) is incorrect, because the disappearance of the narcotics does not, by itself, establish a reasonable belief on the part of the hospital that Siddon was responsible for the disappearance.

Answer to Question 27

- (C) (A) is incorrect because Dugan owed the child the duty to act as an ordinary, prudent, reasonable person—not the “highest degree of care.” (B) is incorrect because, even if a two-year-old were incapable of contributory negligence, the plaintiff could prevail only if the defendant or his employees were negligent—*i.e.*, failed to exercise reasonable care to ensure the plaintiff’s safety. Because (C) reflects this principle, it is the correct answer. (D) is incorrect because, even if Mary assumed the risk, the mother’s assumption of risk will not be imputed to the plaintiff-child.

Answer to Question 28

- (A) In negligently causing the collision with the fire engine, it was foreseeable that Dever’s actions could cause injury to someone else (*e.g.*, a local resident who the fire engine would be unable to reach because of the accident). Peters, whose house was located only 10 blocks from the scene of the accident, falls within the foreseeable zone of danger. It follows that (D) is incorrect. (C) is incorrect because, even if Dever was not involved in causing the fire, his negligence caused the delay in the arrival of the fire engine. In turn, this delay may well have caused all or part of the damage suffered by Peters. (B) is incorrect because it assumes, without a factual basis, that Dever’s negligence caused the entire loss. (A) is correct because it recognizes that Dever breached a duty of due care owed to Peters, and that Dever will be liable for that part of Peters’s damages that was actually and proximately caused by Dever’s breach of duty.

Answer to Question 29

- (C) A cause of action for deceit requires: (i) a false representation of a material past or present fact; (ii) scienter; (iii) intent to induce reliance; (iv) causation; (v) justifiable reliance; and (vi) damages. Generally, reliance upon false statements of opinion, value, or quality is unjustified. Here, Daley’s statements regarding the car’s not having been involved in an accident and the gasoline mileage constitute knowingly false representations of material fact that will form the basis of a cause of action for deceit. Thus, statements 1. and 2. are correct. Statement 3., regarding the smooth ride of the car, is an opinion, upon which Purvis would not be justified in relying. Consequently, statement 3. would not support Purvis’s claim for deceit. Therefore, (C) is correct, and (A), (B), and (D) are wrong.

Answer to Question 30

- (B) In order to establish a *prima facie* case for battery, Customer must show (i) an act by the defendant Store that brings about harmful or offensive contact to Customer’s person, (ii) intent by Store to bring about such contact, and (iii) causation. (B) is correct since this is one of the elements necessary to establish a battery. (A) is wrong because there need not be severe bodily harm for a battery to occur. The contact may be merely offensive without causing any bodily injury.

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(C) is wrong because there need not be any emotional distress for a battery to occur. (D) is wrong because Customer's conduct of vigorously shaking the door was indeed the factual cause of the spray. However, there was causation on the Store's part in the sense of the Store having set in motion a force that would bring about a harmful or offensive contact to Customer's person where there was any attempt to open the door.

Answer to Question 31

- (A) Truth is an absolute defense to a claim of defamation. (B) is wrong because it is irrelevant whether Dock made the statement out of malice as long as the statement was in fact true. (C) is wrong because it is equally irrelevant whether Dock reasonably believed the statement to be true. The fact that the statement is true is the only requirement for the defense to prevail. (D) is wrong for the reason that (A) is correct. Note that Paul's claim is based on defamation. Even though Dock can defend the defamation action by showing that the statement is true, Paul might nonetheless be able to successfully assert a cause of action based on intentional infliction of emotional distress.

Answer to Question 32

- (B) (B) is correct because res ipsa loquitur applies. When the facts are such as to strongly indicate that the plaintiff's injuries resulted from the defendant's negligence, the trier of fact may be permitted to infer the defendant's liability. The circumstantial evidence doctrine of res ipsa loquitur requires the plaintiff to show: (i) the accident causing his injury is of the type that would not normally occur unless someone was negligent; (ii) the negligence was attributable to the defendant; and (iii) the plaintiff was free from negligence. All of these elements are satisfied from the facts of this case. Because the switches and the doors were found to be in good working order, the injury can reasonably be inferred to be attributable to one of Auto Company's employees, because they had access to the switches. (A) is wrong because strict liability applies to ultrahazardous or abnormally dangerous activities that cannot be performed without risk of serious harm no matter how much care is taken. The operation of the door cannot be characterized as ultrahazardous or abnormally dangerous. (C) is incorrect because the owner has a duty to exercise reasonable care in the conduct of "active operations" (such as opening and closing the door) for the protection of licensees known to be on the property. (D) is incorrect because to have assumed the risk, the plaintiff must have known of the risk and voluntarily assumed it. Peter had no reason to know of any risk involving the overhead door and consequently could not assume it.

Answer to Question 33

- (B) It is foreseeable that where a defendant's wrongful conduct places him in a position of peril, a rescuer may suffer injuries while reasonably attempting to aid him, *i.e.*, "danger invites rescue." Hence, (B) is correct and (D) is incorrect. (C) is wrong because a rescue is not a "voluntary" assumption of the risk. (A) is not a reason for imposing liability.

Answer to Question 34

- (C) Since Neighbor's conduct did not endanger Si, Neighbor owed no duty to Si or his rescuer. Generally, there is no duty owed to an undiscovered trespasser such as Si, whose conduct was unforeseeable. (A) and (B) are wrong because the facts that Rescuer acted reasonably or saved Neighbor's property are irrelevant to the issue of Neighbor's duty. (D) is wrong because an act of rescue is not an assumption of the risk.

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DRILLS & RELEASED QUESTIONS



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