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Remedies: Final Examination (Summer 1971)

William & Mary Law School

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This exam contains 5 questions of a total of 360 points. Time should be allocated to each question on the basis of 1/2 the minutes as the total points. I would suggest that you read the entire exam before beginning and allocate time carefully. All questions are intended to be factually complete. You may, however, assume traditional facts if necessary. You should respond to all legal issues raised by each question.

1. (105 points) On January 13, 1973, to the delight of John Lindsey, Norman Mailer and others too numerous to mention, New York City - State became the 51st state. Its new constitution included the following section:

Section 59: The common law of this state shall be based upon the general common law of the American legal tradition. The courts shall evolve a system of jurisprudence based upon the best and wisest of that tradition, without regard to any single jurisdiction.

On January 14, Clarence Chanticleer, owner and sole proprietor of Chanticleer's Christopher Street Candy Company (known as CCSCC) fired John Wright because of his excessive activities in the Gay Liberation Movement. The next week the Northwest Village Chapter of the Gay Liberation Movement picketed the CCSCC, as they did for a month thereafter. Wright led the picketing, painted the signs, and was overall organizer. The signs among several read, "CCSCC oppresses the people", "CCSCC equals Bon Vivant", and "CCSCC sells adulterated candy". In addition, the picketers regularly chanted, "Poison poison poison," when customers approached.

CCSCC's business fell off and profits declined for the period, with a net decline in profits of about \$3,000. This, however, may be in part because of the economic conditions which have been markedly unfavorable.

On February 21, Carr sought a preliminary injunction and \$40,000 in damages not itemized. The new New York City State Circuit Court for the Greenwich Circuit dismissed, citing Marlin Firearms Company v. Shields and Brandeth v. Lance, New York State cases, without further comment.

Considering the New York City State constitution section 59, what arguments for affirmments, modification, or reversal might be made? What rule or rules suggested? What result? Why? Consider all aspects.

2. (105 points) Jules Smitherman, 47, was the owner of three tool sharpening trucks. Each truck mounted a van with an elaborate machine fabricated by the Cosco Tool Company of Waverese, Georgia, which is vastly superior to any other sharpening equipment. (Cosco had, regrettably, gone bankrupt after manufacturing under 100 of the machines. Indeed, Jules attributed much of his success to his sagacity in purchasing equipment, the remainder to his own skills and hard work. He managed the business himself without aid, and worked 20 hours a week in evenings on one of the

vans himself servicing special customers. While doing so, on December 31, 1970, Jules was smashed from the rear by an out-of-control auto driven by Lloyd McBee, III, a wastel millionaire. He was injured, his van destroyed, the truck slightly damaged.

Jules accrued hospital and medical expenses during the next two months of \$6,700, of which \$4,000 was paid by insurance. He also suffered intensely from a severely fractured arm and shoulder. Indeed, he has since then been forced to give up tennis, his sole pasttime. However, more to the point in Jules' view were business considerations. He was forced to pay his three crews \$300 weekly for eleven weeks in overtime to cover work he would have performed as well as \$1,000 rental for a replacement van. In addition, the profits for the month of January were \$4,400, for February \$4,100 compared to a monthly average before and after the accident of \$6,300 profits of \$6,400 and \$6,200 for the same months the year before. Jules attributes the loss to poor management, which was delegated to his crews to the extent he himself could not perform the duties while in the hospital.

Additionally, he was faced with the distressing equipment replacement situation. The Cosco machines, three years old, had cost \$17,100; on advice of his tax attorney he had depreciated the machines \$4,800 annually. Now the equipment could not be bought used for less than \$40,000 nor his machines repaired for less than \$35,000; faced with an uncooperative insurance company Jules bought an entire van from Mohawks Machine Company for \$18,900 after rejecting a three-year-old van offered for \$11,000. He anticipates he will have to significantly adjust his business, although to what degree is uncertain, to be able to use his subgrade equipment.

The truck was repaired immediately for \$475. No days of business were lost because of the immediate availability of rental or replacement equipment.

Jules has set aside his upset from this misfortune and seeks maximum recovery. What is it? Discuss all prospects of the problem, including counterarguments by McBee and other possible solutions.

3. (50 points) Carson Candy Company of Chicago manufactured Dum Dum Candies. These candies are packaged in colorful wrappers corresponding to flavors, each candy and wrapper having a contrasting color stripe. They are distinctive and are marketed in distinctive boxes carrying out the color scheme. Dum Dum both sold their product directly and provided it to food stores to be labeled as a house brand. Their success was considerable.

In June, Spencer Candy Company, owned by J. C. Spencer a former employee of Carson's, with whom Carson had no contract, began marketing Pop Pops in Saint Louis, Missouri, a city where Carson's products were not distributed. Spencer utilized the same color schemes, flavors and recipes as Dum Dum but where the name appeared placed Pop Pops. They immediately realized profits of \$700 in June and of \$2,100 in July.

Carson Candy Company wishes to prevent the continuance of the situation and recover damages. Can it? If it recovers, what measure of recovery? Note all possible aspects of action.

4. (45 points) McDougal Coal Company owned a 400 acre tract (McDougal no. 1). To remove coal, they contracted with Charlie Simpson to construct a railway across land adjacent to McDougal no. 1 which he owned and to pay him \$50,000 annually for the right of transportation. The right permitted McDougal to transport coal only from McDougal no. 1 to a rail head adjacent to Simpson's land. From 1960 to 1969 McDougal shipped an average of 500,000 tons annually over Simpson's land. In 1969 McDougal opened a new mine on a 480 acre tract of the land adjacent to McDougal no. 1 which they denominated McDougal no. 2. They considered building a railway on their own land to the nearest railway. However, because of the terrain cost was prohibitive, over \$1,500,000. It is also possible to build a railhead over Jack Davis' land for under \$300,000. Davis, however, demanded \$135,000 rental. McDougal, after evaluating the situation, without notice to Simpson, transported the coal from McDougal no. 1 and McDougal no. 2 over Simpson's land so that 800,000 tons were transported of which 300,000 tons were from McDougal no. 2.

Simpson seeks recovery. What theory and how much can he expect?

5. Jacob Otis, without knowledge of his wife Lauraleen, embezzled \$130,000 from his employer over a period of years. Most of this sum was expended on horse racing. However, he did utilize \$5,500 of it for a down payment on his \$38,000 home, now worth about \$50,000 which is now completely paid for. His wife at all times during the next ten years kept the house, improved the yard, and performed diverse small repairs. With an income in excess of \$20,000 a year it is unclear whether further payments were made from the embezzled fund by Otis, although they were at all times mingled with Otis's funds.

He also purchased a life insurance policy for \$9,000 in three payments for \$3,000 each. The third only came from the embezzled funds. The policy now has a surrender value of \$19,000, a face value of \$60,000.

In addition, he purchased 200 shares of AMCO at \$3 a share, now worth \$7 a share, with embezzled funds. However, immediately upon purchase he surrendered all interests in the stock, placed it in trust for his only daughter, with a distant third cousin as trustee.

Otis has debts far in excess of assets.

What may employer do to recover?