NEW YORK STATE BAR EXAMINATION
FEBRUARY 1998 QUESTIONS AND ANSWERS

Question-One

Sid, a young doctor, inherited Greenacre, a home in Glens Falls, New York, from his father. In June 1996, Sid duly entered into a contract to sell Greenacre to Purch. In pertinent part, the contract provided for a purchase price of $300,000, a down payment of $30,000, which Purch paid upon execution of the contract, and a closing date of September 1, 1996. In late August 1996, Purch advised Sid that he was having difficulty raising the balance of the funds for the purchase and would need until October 9, 1996 to pay the balance and close. Sid responded with a letter which stated that he would agree to the extension, but that if Purch did not close on October 9, 1996, he would declare Purch in default and would retain Purch's down payment.

On October 9, 1996, Sid appeared at the place fixed for the closing, ready, willing and able to close. Purch appeared, but announced that he could not close because he needed an additional three days to complete his financial arrangements. Sid thereupon refused the additional extension, declared Purch in default, and retained Purch's $30,000 down payment.

Sid was an ``at will'' employee of another doctor, Surg, who in January 1996, sold his practice to Doc. The practice drew most of its patients from the city of Glens Falls, which has a population of about 15,000. Shortly thereafter, Doc asked Sid to sign a document which read:

"Sid agrees that in the event his employment with Doc is terminated, voluntarily or involuntarily, Sid will not, for three subsequent years (i) solicit any of Doc's patients, or (ii) establish a medical office or practice medicine within the city of Glens Falls."

Sid signed the document because he was dependent on the job for the support of his family. A year later, after a disagreement between Sid and Doc concerning the conduct of the practice, Doc terminated Sid's employment.

A few weeks later, Sid leased space and opened his own medical practice in Glens Falls. Some of Doc's patients started to use Sid as their doctor, and Sid prepared a mailing announcing the opening of his new office to prospective patients, including some of Doc's patients. Upon learning of Sid's actions, Doc threatened to sue Sid for damages and for an injunction restraining Sid from violating their agreement.

In anticipation of a lawsuit by Doc, Sid spoke with his brother, Bob, and Sid suggested that he convey Greenacre, his only significant asset, to Bob in order to attempt to insulate it from any judgment Doc might obtain against Sid. Bob said that he would reconvey Greenacre to Sid on request, and the transfer of Greenacre was then made.

True to his threat, Doc promptly commenced an action against Sid for damages and to enforce their agreement. Upon papers which recited the foregoing facts, the court granted Doc a preliminary injunction prohibiting Sid from soliciting Doc's patients and from practicing medicine for three years within the city of Glens Falls. Following a trial at which the foregoing facts were established, the court granted Doc a permanent injunction containing the same relief as the preliminary injunction, and awarded Doc damages of $50,000.

After Sid borrowed $50,000 from an uncle and satisfied Doc's judgment, Sid asked his brother, Bob, to reconvey Greenacre to him. Bob refused.

Sid has consulted you as his attorney and asks you the following questions:

(1) Is Sid entitled to retain the $30,000 down payment he received under the contract for the sale of Greenacre?

(2) Was the court correct in granting Doc a preliminary injunction?

(3) Does Sid (i) have any action to compel Bob to reconvey Greenacre to him, and (ii) does Bob have any valid defense to Sid's action to compel the reconveyance?

ANSWER TO QUESTION 1

1. $30,000 down payment.

Sid is entitled to retain the $30,000 downpayment. The issue is whether it is permissible to retain a downpayment as liquidated damages in a real estate sale contract.

Under New York law, a seller of real estate may retain the buyer's downpayment as liquidated damages in the event of a breach if the downpayment does not exceed 10 percent of the purchase price.

A real estate contract is valid if it is in writing and includes a description of the property and the purchase price. Normally, the time for performance is not an essential term of the contract and any delay by the buyer will not be considered a breach. However, if the contract contains a clause stating that time is of the essence, it will be strictly construed and delay will constitute a breach.

Here, the contract between Sid and Purch is valid because it includes the purchase price ($300, 000). There is no indication that the description is inadequate, since the parcel known as ``Greenacre'' is readily identifiable.

The modification to the contract is also valid and enforceable. A modification to a contract is valid if there is consideration. If the contract as modified must be in writing, the modification must be in writing. Here, the modification is in writing because Sid wrote a letter to Purch agreeing to the modification. There is also consideration because Purch got an extension on the closing date. Therefore, the time is of the essence clause is enforceable.

Purch breached the contract because it contained a time is of the essence clause. On October 9, 1996, the date set for closing, Sid was ready, willing and able to close. Purch said he could not close. Because time is of the essence clauses are strictly construed, Purch's refusal constitutes a breach of contract. Because his down payment ($30,000) equaled 10 percent of the purchase price ($300,000), Sid is entitled to keep it.

2. Doc's preliminary injunction.

The court was correct in granting a preliminary injunction. The issue is when a noncompetition clause in an employment contract can be enforced.

A noncompetition clause contained in a valid contract will be enforceable if (1) the employee's services are unique; (2) the clause is reasonable as to time and geographic scope; (3) it is necessary to protect the employer; and (4) it does not harm the public. New York law considers a non-compete clause reasonable as to time and geographic scope if it is limited to a duration of 5 years and a radius of 5 miles.

Here, the non-compete clause is valid. Sid's services are unique because of the special time and training that goes into becoming a doctor. The clause is reasonable as to time because it is for three years. The clause is presumably reasonable as to geographic scope because it is limited to the city of Glens Falls. (If Glens Falls is bigger than five miles, the court could include that limit in the injunction). The clause is necessary to protect Doc because Sid prepared a mailing announcing the opening of his new office to prospective patients, including some of Doc's patients, some of whom started to use Sid as their doctor. Finally, the clause does not harm the

public because Sid could open an office elsewhere and therefore patients who wish to see him are not prevented from doing so.

Doc can get a preliminary injunction enforcing the noncompete clause. The issue is when a court will grant a preliminary injunction.

A court will grant a preliminary injunction when the moving party shows that he has no adequate remedy at law, the injunction is enforceable, the balance of hardships favors him and there are no equitable defenses. He must also show that he will suffer irreparable harm if the injunction will suffer irreparable harm if the injunction is not granted, and post a bond.

Here, as discussed above, Doc will suffer irreparable harm if the injunction's not granted because he is losing patients. The injunction is enforceable because Sid is subject to the court's jurisdiction. The facts do not indicate that any equitable defenses -- laches, unclean hands -- apply. Therefore, the court was correct in granting the injunction.

It should be noted that the non-compete clause is not invalid because Sid signed the contract because he needed the job. Economic duress will not invalidate a contract. Also, the clause not to solicit patients will not be enforceable as unfair competition because the names are presumably readily available from phone books. Sid did not send his mailing only to Doc's patients.

3(i) Reconvey Greenacre.
Sid can't compel Bob to reconvey Greenacre. The issue is when a conveyance of land to a party in confidential relationships, coupled with a promise to reconvey, can be enforced.

When someone conveys land to someone in a confidential relationship based on the other party's express promise to reconvey, that promise to reconvey is specifically enforceable via constructive trust in order to prevent unjust enrichment. However, there must be no defenses. Here, Bob is in a confidential relationship with Sid because he is his brother. Sid conveyed Greenacre to Bob because Bob agreed that he would reconvey it to Sid on request. Sid relied on Bob's promise, therefore Bob normally will not be permitted to profit from his false promise. A constructive trust, where Bob's only duty is to reconvey Greenacre to Sid, would be imposed. However, as noted below, Bob has the defense of unclean hands.

(ii) Bob's defenses.

Bob can raise the defense of Sid's unclean hands to prevent the reconveyance of Greenacre. The issue is what defenses can be raised against Sid's action to compel reconveyance.

Equity will not act when one who seeks a remedy has also acted improperly in the same transaction. This is the doctrine of ``unclean hands.'' Because Sid conveyed Greenacre to Bob in order to attempt to insulate it from judgment and therefore defraud his creditor (Doc), he will not be able to force Bob to reconvey.

ANSWER TO QUESTION 1
Conclusions:

(1) Yes, Sid is entitled to retain the $30,000 down payment.

(2) While the court might have been correct to issue a preliminary injunction, it should not have subsequently issued a permanent injunction and damages.

(3)(i)Sid can seek to compel Bob to reconvey as a constructive trust.

(ii) Bob can defend with Sid's intent to defraud by the initial conveyance.

Analysis:

(1) Sid is entitled to retain the $30,000 down payment as a result of Purch's effective breach of the sales contract for the purchase of Greenacre.
Sid and Purch had entered into a valid sale for the purchase of real property. The contract listed the essential terms for such a contract of sale: the purchase price, the property in question, ``Greenacre,'' and indicated the parties and a closing date. Since a contract for the sale of real property must be in writing to satisfy the Statute of Frauds and indicate these essential terms, the contract would appear to satisfy this requirement.

Even though a contract may specify a closing date, this time for performance may be changed if requested by one of the parties unless ``time had been made of the essence.'' This contract did not do so. Thus, Purch could request a later date for performance.

Sid responded to Purch's request for an extension in writing at which time Sid made the new date, which Purch himself had selected, to be of the essence. Courts in new York will allow time to be made of the essence where the time set for performance is reasonable (Purch set the new date which was over five weeks from the original date), there is notice given (Sid's notice was in writing), and it is clear and unequivocal that time is now of the essence (Sid informed Purch he would hold him in default if he did not appear).

Thus, when Sid appeared on ``law day,'' as a ready, willing and able Seller, Purch was in default when he failed to appear, ready, able and willing to conclude the bargain. In such cases, New York law allows the Seller to retain the defaulting buyer's entire deposit. Sid was entitled to the $30,000 down payment.

(2) The court was correct in issuing a preliminary injunction.
While Sid had at first been an at-will employee which in New York means that an employer may terminate that employee for any reason or no reason, upon his employment with Doc, Sid signed a ``non-compete'' agreement. These agreements are closely scrutinized because they limit an employee's ability to seek future employment and act as a restraint on trade. New York courts will look to the following factors in assessing such agreements:

(1) The scope of the agreement -- this refers to the geographic limits of the agreement and whether it was reasonable.

(2) The duration -- how long a period of time the employee will be restricted.

(3) The employees' services and whether they were special, unique or extraordinary.

In this instance, Sid signed an agreement without much choice since he needed to support his family and one might argue he was not on equal bargaining terms with Doc. In any event, the agreement limited him from employment as a doctor for three years following a dismissal with or without cause. Three years might well be considered too long a restriction to be upheld.

Sid was also restricted from practicing in the entire city of Glens Falls. This too seems unreasonable since there are 15,000 citizens in the city.

While Sid is a doctor and doctors like to think their services are unique, extraordinary and

special, Sid was not a particular specialist and to be denied pursuit of his livelihood for three years anywhere in the city could well be unreasonable.

Nevertheless, the court could grant a preliminary injunction to Doc if it determined that, pending suit, Doc would have a reasonable likelihood of success on the merits, that if an injunction were denied he would suffer irreparable harm which would be hard to measure with money damages (loss of patients -- Sid was actively soliciting patients) and that when balancing the equities, the loss to Doc would be greater than the loss to Sid. The court might so find Doc could lose patients (some were already using Sid) and thus could enjoin Sid pending the final determination.

However, upon the finding of the facts and a review of the restrictive covenant, the court should not have issued the permanent injunction and the damages because as early reasoned, the terms of the covenant were unreasonable and beyond the scope of usual limitations placed on employment.

(3)(i) Sid can seek to compel Bob to reconvey Greenacre by claiming that Bob was holding it as a constructive trust.
A constructive trust of property is created where a transfer of property is made on reliance of a promise between those in a confidential relationship, and to allow the transferee to retain the property would be an unjust enrichment to that transferee.

Here, Sid transferred the property to his brother with the understanding that Bob would later reconvey it to him. Bob paid no consideration for Greenacre, a property valued at $300,000. Bob would be enriched to this extent.

(ii) Bob will argue that Sid is not coming into the court with ``clean hands." Since constructive trust is an equitable remedy, Bob can raise the equitable defense of ``unclean hands" and assert that Sid only transferred the property to him to avoid its possible attachment and loss in a pending civil suit. The reason for the transfer was to secrete the property and make it unavailable to satisfy a possible money judgment. The court should not sanction this type of fraudulent conveyance and generally will not aid a wrongdoing in upholding such a claim. Bob has a solid defense on this issue.

Question-Two

Pete lived in an apartment building in New York City. Late one evening, Pete went to the basement apartment of his landlord, Nick, to request a receipt for the month's rent. Bill, Nick's cousin, was at Nick's apartment when Pete arrived. Pete, Nick and Bill left the apartment and went outside to the front steps of the building where an argument ensued. In the course of the argument, Pete punched Nick in the face. Nick shouted to Bill, ``I think he has a gun," and Bill ran back into the apartment building. Pete then left the steps, went to his van parked down the block but, still angry, returned to the steps to continue the argument. Nick immediately pulled a gun and shot Pete, killing him instantly. On hearing the shot, Bill ran back outside and saw Pete lying on the sidewalk. Bill, believing that Pete was still alive, pulled a gun from his pocket, walked over and shot Pete in the head.

After firing the shot, Bill saw Ann, who had witnessed everything from a doorway across the street. Bill and Nick then pointed their guns at Ann and ordered her into Bill's car. Bill drove three blocks to a vacant lot where Nick told Ann, ``You better keep quiet," and then pushed Ann out of the car. Bill and Nick drove away, and Ann immediately called the police, reporting the entire incident.

Nick and Bill were arrested the next day by Detective Johnson, who had previously arrested Bill on a drug charge. Detective Johnson was aware that the drug case was still pending, and that Bill

was represented by counsel on that charge. At the police station, both Nick and Bill received their Miranda warnings, but neither made a request for counsel. Several hours later, Detective Johnson was able to locate Ann so that she could view a lineup. Just before the lineup was held, Nick and Bill refused to participate and Nick asked for an attorney. Detective Johnson informed them that they had no choice, and the lineup then proceeded. At the lineup, Ann identified Nick and Bill as the people who shot Pete and forced her into the car.

Later that night, Nick and Bill were arraigned. Nick was subsequently indicted for the crimes of Murder in the Second Degree and Kidnapping in the Second Degree. Bill was indicted for the crimes of Murder in the Second Degree, Attempted Murder in the Second Degree, and Kidnapping in the Second Degree. Prior to the joint trial, both Nick and Bill moved to suppress the identifications made by Ann, each asserting that he had been forced to participate in the lineup and denied his right to counsel. The court (1) denied the motion of each of the defendants. At trial, the prosecution established the foregoing facts and Nick asserted the defense of justification.

(a) Was the court's ruling correct as to each defendant?

(b) Can Nick successfully assert the defense of justification?

(c) Can Nick and Bill be found guilty of the crimes charged against them?

ANSWER TO QUESTION 2
2(a) Was the court's ruling correct as to each defendant?

The court's ruling was correct as to each defendant. May a suspect in police custody after an arrest refuse to participate in an identification lineup is the issue here.

The rule is that a suspect in custody after an arrest may not refuse participation in a lineup. Here, the defendants, Nick and Bill, refused and Nick asked for an attorney. The Right to counsel under the 6th Amendment attaches at all critical stages in a criminal case. The Supreme Court and New York courts have held that lineups are not critical stages. New York follows Arthur Hobson Rule.

Although Bill was represented by counsel on a different charge unrelated t this case he was not denied his right to counsel here.

Nick's requesting counsel would not affect the court's decision. A request for counsel while defendant is in custody and read his Miranda Rights only relates to custodial interrogation. The police were not interrogating Nick here. The court's ruling to deny the Motion was therefore correct.

2(b) Can Nick successfully assert the defense of justification?

Nick cannot successfully assert the defense of justification.

At issue here is what is the duty of a person when faced with force in self defense.

In New York, an individual faced with force, may use reasonable force to defend himself and others. If faced with deadly force, he has a duty to retreat if it's possible except under special circumstances (i.e. in home). Here, Nick was not justified to use deadly force because according to the facts, after he was punched in the face, his assailant Pete left. When Pete returned, Nick shot and killed him with a gun, thereby using deadly force. Pete did not threaten Nick with deadly

force. He only returned to continue the argument. The fact that Nick shouted to Bill, ``I think he has a gun'' was a mistake of fact that will not justify his use of deadly force.

2(c) Can Nick and Bill be found guilty of the crimes charged against them?

Nick may be found guilty with Murder in the Second Degree and Kidnapping in the 1st Degree.

Murder in the Second Degree is the intentional killing of another with malice aforethought. Here, Nick intended to kill Peter and did so by shooting him with his gun. To lower this to manslaughter (voluntary) would require mitigating factors of heat of passion without time reasonably to cool off. This is usually found were a husband finds his wife in bed with another and kills them. Here, Nick had time to cool off when Pete went to his car and later returned to argue.

Nick may be charged with Kidnapping in the First Degree. The issue is was Ann kidnapped and were there aggravating facts to rise to first degree kidnap. Kidnapping is the taking of a person against her will to another location without consent. Here, Nick took Ann against her will even though it was only three blocks away. Nick and Bill's kidnapping by pointing loaded guns will be the aggravating factor.

2(c) Bill may not be convicted of Murder in the Second Degree.

Bill may be convicted of attempted murder 2nd degree and kidnapping 2nd degree.

Kidnapping 2nd degree -- same analysis as for Nick. He took Ann by force against her will to another location.

Bill won't be convicted for Murder 2nd Degree. Can one be convicted of intentional murder of another already dead. Because of legal impossibility, one will not be convicted of 2nd degree murder which is intentional killing of another with malice. Because Pete was already dead, he would not be convicted of that.

Bill may be convicted of Attempted Murder 2nd Degree. May one be convicted of attempted murder even if factually and legally impossible. Attempted 2nd degree murder requires specific attempt to commit intentional murder, i.e. the target crime. Here, Bill intended to kill Pete as evidenced by his shooting him in the head. Therefore, he's guilty of Attempted 2nd Degree Murder and 2nd Degree Kidnapping.

ANSWER TO QUESTION 2

(a) Nick -- The courts ruling was correct. The issue is whether a defendant has a right to refuse to participate in a lineup. Generally, under the 5th Amendment, a defendant has a right against self-incrimination. This applies to testimony and conduct that can be construed as testimony. However, lineups do not fall under the category of testimony. Certain things like blood tests, finger prints, voices, and identifications fall outside the 5th Amendment. In this case, Nick was forced to be in a lineup. Since there is no 5th Amendment protection for lineups, the court was correct in denying the motion to suppress on this ground.

The second issue is whether the identification should be suppressed due to a violation of Nick's 6th Amendment right to counsel (due process). A defendant has no right to counsel at a pre-charge lineup because right to counsel only attaches to major proceedings after the defendant has been charged . The identification that Nick is trying to suppress was a pre-charge lineup and

therefore, Nick had no 6th Amendment right to an attorney for this proceeding, and the court was correct in denying the motion.

Bill -- The analysis and conclusion with regard to Nick also apply to Bill. However, Bill has another issue with regard to right to counsel. Generally, if the police officer is aware that defendant is represented by counsel, the defendant cannot waive rights or be interrogated without counsel being present. However, when the defendant has counsel, but it's on another case, the police are not required to have counsel there, even if they know of counsel's existence. In this case Bill has an attorney but it is in an unrelated drug case. Therefore, his representation by counsel does not affect his motion to suppress the identification. And even if he were represented by counsel in this case, he would not have a right to counsel for a pre-charge lineup.

(b) Nick cannot successfully assert the defense of justification. The issue is whether Nick's actions were justified by Pete's actions. Was Nick justified by using deadly-force in ``self-defense.'' The rule in New York is that a person may use deadly force to protect himself, if he is in immediate danger of death or grievous bodily harm. In this case, Pete punched Nick in the face and then walked down the block to his van, and then returned to continue the argument. There is nothing in the facts to show that Pete was carrying any weapon. Nick shouted to Bill that ``he thinks Pete has a gun'' but it is not apparent that he really believed this. Nick immediately pulled a gun and shot Pete. From the facts, it does not seem that Nick was in immediate danger of death or grievous bodily harm and so was not justified in the shooting.

In addition, in New York there is a duty to retreat if it is possible to do so before using deadly force unless you are in your own house or are a police officer. In this case Nick could have retreated while Pete went to his van. He did not, and therefore cannot use the defense of self-defense.

Nor can Nick use the justification of provocation to reduce the charge of Murder 2 to Manslaughter 1. Any action done under provocation must be done in the heat of the moment. In this case Pete walked away and came back. There was some time to cool down though this could be argued either way. The provocation must also be enough to justify the homicide. Pete merely punched Nick in the nose. This is not enough provocation that a reasonable person would be justified in using deadly force.

(c) Nick -- Nick was indicted for the crimes of Murder in the 2nd Degree and kidnapping in the 2nd Degree. Nick can be found guilty of these crimes. The elements for Murder in the Second degree is (1) the killing of another, (2) intentionally, (3) with malice. In this case Nick's shooting of Pete was the proximate cause of his death, it was done intentionally and with malice. Therefore he can be found guilty of Murder 2. As stated above, he does not have a defense of justification so Murder 2 is the proper charge.

Nick can also be found guilty of kidnapping in the 2nd Degree. Kidnapping 2 is (1) the restraint of someone (2) without their consent (3) with their knowledge or to their detriment (4) by threat of force (5) and the conveyance of that person any distance. In this case Nick's actions to Ann satisfy these elements. Bill and Nick pointed guns at her, put her in a car without her consent and drove her three blocks. She was aware that she was being imprisoned.

Bill -- Bill can be found guilty of 2nd degree attempted murder and kidnapping in the Second but not of Murder in the 2nd Degree.

Bill can be found guilty of kidnapping under the facts and analysis re Nick above.

The issue is whether Bill's actions satisfy the elements of Murder in the 2nd which were stated above. Bill satisfied all elements except causation. He did not kill Pete, he was already dead when

Bill shot him, therefore he cannot be found guilty of his murder. There was no other felony occurring to which Bill could be found guilty for Nick (his co-conspirator's) actions.

However, Bill's actions were sufficient to be found guilty of Attempted Murder 2. Attempted Murder 2 is a specific intent crime, not a crime of malice. Bill shot Pete in the head with the intent to kill him. Bill has no defense as to his intent. There was no self-defense because Pete was already dead when Bill shot him, so he was obviously not presenting any immediate danger to Bill.

Question-Three
In early 1982, Al purchased Greenacre, a ten-acre unimproved parcel of land in Warren County, which was bounded on the east by the Hudson River and on the west by a public highway. Because the western boundary of Greenacre was hilly and rocky, an access road would have been expensive to construct. Al therefore improved an abandoned logging road which ran from the public highway to Greenacre, crossing a corner of Whiteacre. Whiteacre, which was immediately to the north of Greenacre, was owned by Bill. Al constructed a vacation cottage on the northern half of Greenacre. Despite repeated objections from Bill, Al used the road crossing Whiteacre to reach his cottage every weekend during the months of June through October of each year from May 1982 through May 1988.

On June 1, 1988, Al sold Greenacre to Cate. Cate, a professor, spent the summer months at Greenacre and visited Greenacre on weekends during the spring and autumn of each year until September 1993. From time to time, Bill objected to Cate's use of the road.

In October 1993, Cate accepted an appointment at an overseas university and did not visit Greenacre again until June 1996. On July 1, 1996, Cate sold Dot the southern half of Greenacre, together with a right-of-way over the northern half of Greenacre and over the road running to the public highway. The deed from Cate to Dot contained the following:

"Each parcel of Greenacre shall be subject to the following restrictions:

1. No more than one single-family residence may be constructed.

2. No utility buildings may be constructed. 3. No external television antenna of the ``dish'' type may be installed or maintained."

That summer, Dot constructed a small cottage on the premises.

In May 1997, Cate moved overseas permanently and sold the northern half of Greenacre to Ed, together with a right-of-way over the road to the public highway. The deed made no reference to restrictive covenants. All of the foregoing deeds were duly recorded.

Ed, an ardent sports fan, learning that cable television was not available, installed a large dish antenna on his property in plain view of Dot's cottage. Dot complained to Ed without avail, and then commenced an action against him. The complaint alleged the foregoing pertinent facts and sought to compel Ed to remove the antenna and to permanently enjoin such an installation. Ed promptly moved to dismiss the complaint for failure to state a cause of action, arguing that he was not bound by the covenant recited in Dot's deed. Two months after the motion was made, the court (1) denied the motion.

One week later, Ed served an answer containing a general denial and asserting a defense of lack of personal jurisdiction based on defective service of process. Dot moved to strike the answer as

being untimely served or, in the alternative, to dismiss the jurisdictional defense. The court (2) denied the motion in its entirety.

In October 1997, Bill conveyed Whiteacre to Fran. When Fran discovered that Dot and Ed were using the road crossing Whiteacre, she erected a barrier to prevent such use. Despite their disputes over the dish antenna, Dot and Ed promptly joined in duly commencing an action against Fran.

The complaint alleged the foregoing pertinent facts and sought an injunction compelling Fran to remove the barrier, and a declaratory judgment that Dot and Ed have a prescriptive easement over Whiteacre or, in the alternative, that they have an easement by necessity. Fran timely served an answer denying that a prescriptive easement had been established and denying that the plaintiffs have an easement by necessity. The answer also included the further defense that if a prescriptive easement had been established, it had been abandoned. A non-jury trial was held at which the foregoing pertinent facts were proven.

(a) Were rulings (1) and (2) correct?

(b) What should the court's decision be with respect to:

(i) the establishment of a prescriptive easement;

(ii) abandonment of that easement; and

(iii) the existence of an easement by necessity?

ANSWER TO QUESTION 3

A. 1. The court correctly denied Ed's motion.

Dot's complaint does state a claim, and therefore Ed cannot get it dismissed for failure to state a claim.

Dot's claim is properly based upon a restrictive covenant in her deed.

In order for one property owner to restrict the uses of another's property, several facts, present here, must exist.

First, the land must once have been held by one owner. That owner here was Cate, who conveyed a piece of her entire land to Dot along with the restrictive covenant. By retaining the northern portion of Greenacre and by having the restriction apply to both Cate's and Dot's parcel, the restriction is reciprocal, meaning either party can claim its rights against the other.

Additionally, the restriction must be in the deed (or in another public document on which a party could rely, such as a brochure in a subdivision showing a common scheme). Because the deed was recorded properly by Dot, it is in the Greenacre chain of title.

Ed is charged with notice of the restriction because of constructive notice through the proper recording of the deed. Ed should have examined the records of conveyances of Greenacre -- he is entitled to have on ``legal blinders'' during a title search to exclude conveyances before or after Cate came into possession of Greenacre, but this conveyance of a parcel of Greenacre is charged to his knowledge.

The reciprocal restriction on servitude can probably be enforced against Ed.

2. The court was incorrect in denying Dot's motion.
Ed had already entered a motion in the case to dismiss, but this does not prevent him from filing an answer asserting a general denial. In fact in New York, the answer can be served any time up to rendering of the judgment. It was correct for the court to deny Dot's motion to strike the general denial.

However, the court was wrong to deny Dot's motion to dismiss Ed's lack of personal jurisdiction claim. Ed made an ``appearance" in this action by the filing of his first motion to dismiss for failure to state a cause of action. By not raising the jurisdictional defense at that time, Ed effectively waived it. Thus, Dot's motion to dismiss the jurisdictional defense was correct and should have been granted. the court erred by not doing so.

(b)

(i) Dot and Ed can claim a prescriptive easement. In order to establish a prescriptive easement, there must have been adverse possession of the roadway. Such adverse possession requires that there be use of the roadway that is open or known to the rightful owner, Bill. Since Bill knew of Al's and Cate's use of the road this element is met.

The use must also have been hostile to the true owner -- since Bill objected to both Al and Cate about the use, this element is met.

The use must have been lasting and continuous for the adverse possession period in New York of 10 years. Al used the road from 1982 to 1988 and Cate, who took Al's full interest by conveyance for value and can tack her time onto that of Al, used the road from 1988 to 1993. This eleven year period satisfies the 10 year adverse possession period. The fact that Al and Cate used the property only part of the year still satisfies the continuity requirement because the cottage was for seasonal use; such use is consistent with the property type.

Al and Cate together have probably met the requirements of ``adversely possessing" the roadway establishing a prescriptive easement for themselves over the road over Bill's property. Dot and Ed can take that easement by conveyance from Al and Cate because once the possession period has run, title to the easement vests in Al/Cate and can be conveyed as part of the property.

(ii) In order to abandon an easement, the dominant estate which holds the easement must cease use of the easement and engage in an overt act of abandonment. Here, while Cate left for three years, the adverse period had run and the prescriptive easement had vested in her right to use of the roadway. Her non-use of it alone is not enough for abandonment, she must have done an act as well, such as blocking it off with a chain or rocks. She (Cate/Dot/Ed) did not engage in an additional act and has not abandoned the easement.

(iii) In order to establish an easement by necessity, the access which the easement provides must be essential to the use of the property and no other ingress or egress available.

The hills which border the west side of Greenacre may be such an impediment. (The river on the east certainly is.) However, access to the highway is not impossible over the hills just, very expensive and thus only impractical. Thus, it is unlikely that an easement by necessity could be established.

The land which has the need for easement must also have been part of an original single estate which helps Dot and Ed as to each other but since Bill and Al never had privity, the easement by necessity cannot arise over Bill's property.

ANSWER TO QUESTION 3
(a) Were Rulings (1) and (2) Correct?

Ruling (1)

The court was correct in denying Ed's motion to dismiss because he may be subject to the covenant in Dot's Deed. For a Covenant to run with the land-in New York there are several requirements: (1) Notice, (2) writing-valid, (3) Intent between original parties for the covenant to run, (4) Touch and concern the land, (5) vertical privity, (6) and horizontal privity. (For burden only).

Here, the issue is whether the burden on Ed, not to put up antenna, runs with the land because he is a subsequent owner of the burdened land. There is notice because the deed from Cate to Dot is recorded -- constructive notice and constructive notice that the two parcels used to be one owner -- one parcel. There is intent for burden to run because deed says ``each parcel of Greenacre'' . . . rather than naming the grantor/grantee. The burden/benefits touch and concern because the restrictions have to do with what a party can or cannot do with his land. There is vertical privity because Ed and Cate are in grantor/grantee relationship. There is horizontal privity because Cate originally owned both parcels of Greenacre and she was in grantor/grantee relationship with Dot. Therefore, the covenant is enforceable against Ed and his motion to dismiss was properly denied.

(2) Dot's motion to strike the answer as untimely was properly denied.

Under NY CPLR, a defendant has 30 days from completed service to respond or 20 days if served personally. Although Ed's answer was outside this period of time, his time to answer was suspended by the filing of Motion to Dismiss. Motion to Dismiss was timely filed according to the facts. After ruling on that motion, under NY CPLR, the defendant has an additional period of time to answer the complaint, which Ed did in a week.

As to the jurisdictional defense, this defense was waived by the filing of a motion to dismiss for any grounds enumerated in CPLR including for not stating Cause of Action. Under NY CPLR the filing of any Motion to Dismiss waives jurisdictional objections unless reserved by objecting in the Motion to Dismiss.

Ed waived his jurisdictional objections. Ed, by filing motion to dismiss appeared in the matter and therefore consented to personal jurisdiction, regardless of any defense to jurisdiction he may have had. Also, it is important that Ed received proper notice of the action. Under the CPLR due process and jurisdiction requires a basis and notice to defendant. Assuming there's a basis -- because of property location in the county, there was notice if served properly -- here, even if improper Ed responded and waived right to object and notice must have been enough to allow him to respond. As to the motion to dismiss that defense the court's ruling on the motion was improper and should have granted dismissal of jurisdiction defense.

(b) Easement by Prescription.

The court should rule that Ed and Dot have a prescriptive easement across Whiteacre. A prescriptive easement under New York Property Law is created when the owner of the land fails to bring an action against the users for the period of the Statute of Limitations for real property actions -- 10 years under NY CPLR. Several Conditions must be met to satisfy the requirements for prescriptive easements: (1) the use must be open and notorious, (2) must be continuous use for the statutory period, (3) must be hostile -- without permission from the owner of the land. Here, the issue is whether these requirements are satisfied.

The use was open and notorious. Bill could always see the owner of Greenacre driving down the road across his land the road in plain sight. The use was hostile -- without Bill's permission because he periodically objected and never gave permission. The important issue is whether the use was continuous for the statutory period. Al's use of the road across Whiteacre was periodic -- seasonal use in summers 1982-1988. Although periodic, the Rule in New York is that seasonal use on regular basis is continuous. In New York CPLR the statute of limitations for real property actions is 10 years. Al used the land continuously for only six, then sold it to Cate who also used the land from 1988-1993. The issue is whether Cate can tack the period of Al's use and thereby acquire a prescriptive easement. The rule under New York property law is that a subsequent owner may tack an adverse possession or prescriptive easement period of use if there is privity between them -- here there is because Al sold Cate the land so they are in privity of contract.

Because all the requirements are satisfied, at that point, 1993, a prescriptive easement was created -- and under New York property law it runs with land to successive owners.

(2) Abandonment of Easement

The court should rule that the easement was not abandoned. Under New York Property Law abandonment of an easement occurs when the owner of the easement affirmatively does something indicating an intent to never use the easement again. Although Cate did not use the right of way from October 1993 -- June 1996, the rule is that mere non-use does not constitute abandonment. So, Cate did not abandon the prescriptive easement.

(3) Easement by necessity.

The court should rule that there is no easement created by necessity. In New York, easement by necessity is created if: (1) the original piece of land owned by one owner is subdivided and if (2) it is strictly necessary to have access to one parcel that an easement or right of way be granted across the other parcel.

There was never unity of ownership of Greenacre and Whiteacre as one parcel, nor is there strict necessity. A road could be built to give the owner of Greenacre access to the Highway. There is only added expense, so the parcel is not completely locked in. Strict necessity requires more than simple added expense. Therefore, no easement by necessity arose.

Question-Four
In May 1997, Own, a domiciliary and resident of Ontario, Canada, invited Pas, also a domiciliary and resident of Ontario, to take a ride in Own's new automobile. Own and Pas drove across the border into New York and had several drinks in a Buffalo tavern. On leaving the tavern, they met their friend, Fri, who accepted Own's invitation to ride back to Canada with them. While still in Buffalo, Own lost control of the car, which went over a curb and hit a telephone pole. Pas and Fri were both seriously injured.

Fri, a domiciliary and resident of Buffalo, duly commenced an action against Own in the United States District Court, seeking $100,000 in damages. Fri's complaint alleged that the accident was caused solely by Own's negligence. Own was personally served with a summons and complaint in Buffalo while he was visiting friends. After a trial, the jury rendered a verdict in favor of Fri for $25,000. Own moved to set aside the verdict on the ground that the amount of the verdict failed to satisfy the jurisdictional requirement of the court. The court (1) denied the motion and entered judgment for Fri against Own for $25,000.

Thereafter, Pas commenced an action against Own in New York Supreme Court to recover $150, 000 in damages. Pas' complaint alleged that the accident was caused solely by Own's negligence. Own was personally served with a summons and complaint in New York. Own's answer, in addition to a general denial, asserted the Ontario Guest Statute as an affirmative defense. Under that statute, a guest passenger cannot recover damages for personal injuries arising out of an automobile accident against the host owner, unless the host owner was grossly negligent. Pas duly moved to dismiss Own's affirmative defense on the ground that such defense was insufficient as a matter of law. Own duly cross-moved to dismiss Pas' complaint on the ground of forum non conveniens. The court (2) granted Pas' motion and (3) denied Own's cross-motion.

Thereafter, Pas duly moved for summary judgment, asserting that the prior judgment in favor of Fri conclusively established Own's liability to Pas. Own opposed the motion on the grounds that (a) the prior judgment did not have such effect, and that (b) in any event, the question of fact as to Pas' damages precluded summary judgment. The court (4) denied Pas' motion on both grounds.

Were the numbered rulings (1) through (4) correct?

ANSWER TO QUESTION 4
(1) The court correctly denied Own's motion and entered judgment in favor of Fri.

The court had valid diversity jurisdiction over Own because (a) this was a suit brought by a citizen of one state (New York) against a citizen of a foreign country (Canada); and (b) Fri alleged (evidently in good faith and without any indication that he could not recover this amount of damages as a matter of law) damages against Own in excess of $75,000. The fact that the jury's ultimate verdict for Fri was less than $75,000 is immaterial to this conclusion; the salient jurisdictional fact is that Fri alleged damages in excess of $75,000. (Because, however, the verdict was for only $25,000, Own may be able to recover his costs from Fri, though, again, he is liable for the $25,000 in damages.)

(2) The court incorrectly granted Pas's motion to dismiss Own's affirmative defense.

This case presents a choice-of-law issue as to whether Ontario or New York law should be applied to Pas's claim. Because neither party to this action is a New York domiciliary, a New York court should apply the law of the situs of the accident (New York) unless another jurisdiction is found to have a greater interest in seeing its law applied. Here, Ontario does have such a greater interest. Both of the parties to the suit are Ontario residents, Own's automobile is presumably insured in Ontario, and the fact that this accident took place in another jurisdiction is entirely fortuitous. In addition, the likely purposes behind the Ontario Guest Statute -- to encourage motorists to provide transportation to guests without undue fear of liability and/or to discourage collusion between drivers and passengers in filing fraudulent insurance claims -- are implicated just as strongly here as they would be if the accident had occurred in Ontario. (Again, Own's insurer, which would likely have to indemnify him against Pas's claim, is presumably situated in Ontario.)

By contrast, New York has no apparent connection to Pas's claim against Own other than the fact that the accident took place in New York, and this is outweighed by the factors described above. (Notably, this case appears quite similar to the Court of Appeals 1963 Babcock decision, in which the Court applied New York tort law to a suit arising out of an out-of-state car accident between two New York domiciliaries. Although this is the converse situation, the same reasoning would likely be applicable).

Finally, it would clearly be constitutionally proper for the Court to apply Ontario law in light of that jurisdictions many important contacts to the accident. Accordingly, the Court should have applied Ontario law to Pas's claim, and because Pas alleged only ``ordinary'' -- as opposed to gross -- negligence on Own's part, the Ontario statute was a valid defense to Pas's claim, and the court should have denied Pas's motion to dismiss this affirmative defense.

(3) The court was correct to deny Own's motion to dismiss on the ground of forum non conveniens. Although both parties are from Ontario, they apparently reside very close to New York and, as indicated by their friendship with Fri of Buffalo, enter New York with some regularity. Moreover, because the accident occurred in New York, both any physical evidence resulting from the accident and any additional witnesses who might have seen the incident would very likely be located in New York. (And if the case were dismissed on forum non conveniens grounds and Pas were obligated to refile in Ontario, any such witnesses who were not New York residents likely could not be compelled to travel to Ontario to testify in the action.) Thus, New York is indeed the most convenient forum for this suit, and the court correctly denied Own's cross-motion to dismiss.

(4)(a) The court was incorrect to deny Pas's motion for summary judgment on this ground. The doctrine of collateral estoppel applies to establish Own's liability to Pas as a matter of law because (i) the issue of Own's negligence was actually litigated in the course of Fri's lawsuit against Own; (ii) Own was a party to this suit and had a full and fair opportunity to litigate this issue; and (iii) this issue is the same one as lies at the heart of Pas's claim against Own. (Note that there are no facts indicating that either Pas or Fir was contributorily negligent in connection with the accident, so Own must have been equally at fault with respect to each of them.) Moreover, because mutuality of estoppel is no longer applied by New York courts, Pas can benefit ``offensively'' from this prior judgment even though he was not a party to Fri's action against Own.

It should be noted that because, as set out above, Pas's claim should have been dismissed under the Ontario statute, Pas should not have had the opportunity to move for summary judgment at all. Because this question assumes that this argument was correctly rejected, however, it is clear that the court should not have denied Pas's motion on this basis.

(4)(b) The court was likewise mistaken in denying Pas's motion on this basis. Although Pas's damages are indeed distinct from those of Fri and must be proven specifically, Own's liability to Fri did, as described above, conclusively established his liability to Pas as well. Thus, the court should have granted Pas's summary judgment motion with respect to the issue of Own's liability to Pas, and let the case proceed to trial on the issue of Pas's damages alone. (As in the prior paragraph, this conclusion is altered by the applicability of the Ontario Statute, but, once again, this question assumes that Own's motion to dismiss on that basis was properly denied.)

ANSWER TO QUESTION 4

(1) Denial of Own's motion to set aside verdict.

The court correctly denied Own's motion to set aside the verdict in favor of Fri for $25,000. The issue is whether the $75,000 minimum amount in controversy requirement for federal diversity jurisdiction acts as a floor on the amount of a valid recovery.

The $75,000 minimum bears no relation to what a plaintiff may actually recover. Jurisdiction of a federal court is determined at the filing of the claim. For subject matter jurisdiction in diversity,

the parties must be citizens of different states or of a state and a foreign country as they are here. Furthermore, there must be a good faith allegation of damages of at least $75,000.

Here, Fri's complaint sought $100,000 in damages and there is no indication that this demand was in bad faith. Thus, the court has subject matter jurisdiction and the subsequent verdict for $25, 000 did not affect such jurisdiction.

It should be noted that this is not a case in which a defect in subject matter jurisdiction was discovered after trial. Subject matter jurisdiction is not waivable and a defect can be raised at anytime. However, the determination of whether there is subject matter jurisdiction is based upon the damages alleged, not those actually awarded. Therefore, the court was correct.

(2) Pas' motion to dismiss Own's affirmative defense based on the Ontario guest statute.

The court incorrectly granted Pas' motion to dismiss Own's guest statute affirmative defense as a matter of law. The issue is whether, applying New York's Newmire analysis in this choice of law question, Ontario's guest statute should apply to this suit between two domiciliaries of Ontario.

Under the former ``vested rights'' approach to choice of law questions, New York generally applied the law of the situs of the tort. However, New York has replaced ``vested rights'' with a governmental interest analysis that seeks to evaluate which jurisdiction has the greatest interest in having its law applied. New York has further refined this analysis in the case of Newmire.

Under this approach, if the parties to the suit are domiciliaries of the same jurisdiction, New York will apply the law of that jurisdiction when it is a law regulating liability, not conduct. The Ontario guest statute does apportion liability among drivers and passengers rather than regulating driver conduct. (If the issue was one of driver conduct, such as a speed limit, New York would have a greater interest in applying its law to an accident that occurred within its borders.) Thus, because the guest statute apportions liability and because both parties are domiciled in Ontario, the guest statute will apply.

A court will dismiss an affirmative defense as insufficient as a matter of law, upon motion, under the CPLR, when there is no way in which the affirmative defense could apply to the case even if all of the facts alleged by the party advancing the defense are true. Here, because the governmental interest and Newmire analysis mandates the application of the guest statute, its use as a affirmative defense was not insufficient as a matter of law and the court erred in its ruling.

(3) Own's cross-motion to dismiss for forum non coveniens grounds.

The court was correct in denying Own's motion to dismiss on the ground of forum on coveniens. The issue is whether an action in a New York court is of such manifest inconvenience to Own, an Ontario domiciliary, that the court should, in its discretion, dismiss the case and allow it to be commenced elsewhere.

When a party seeks dismissal on forum non coveniens grounds, the court must assess whether the jurisdiction's connection to the suit, despite the existence of valid jurisdiction is so tenuous that in the interest of justice, the case should be dismissed.

Here, the parties are domiciliaries of Ontario, which supports dismissal. Yet the accident occurred in New York -- giving this jurisdiction substantial ties to the case. As Own visits friends in New York frequently and has already litigated one case in U.S. District Court in New York, it cannot be said that this forum is so inconvenient as to inflict an injustice upon Own. Thus, the court was correct in denying Own's cross-motion.

(4)(a) Pas' motion for summary judgment -- effect of prior judgment.

The court was correct in denying Pas' motion for summary judgment, despite the prior judgment in which Own was held liable to Fri in negligence. The issue is whether the two suits are so similar as to conclusively establish that if Own was negligent toward one passenger, he was as a matter of law negligent toward the other.

The standard for awarding summary judgment, under the CPLR, is whether, making all inferences in favor of the non-moving party, there are no material issues of triable fact.

Here, the finding of negligence in the prior case against Own would be sufficient to grant summary judgment if the two cases involved identical legal claims. However, because of the applicability of the Ontario guest statute, which requires a finding of gross negligence to hold the owner of a car liable, the legal issues in this case differ. Pas would have to demonstrate gross negligence and there is no showing that the prior jury made a finding that Own was grossly negligent. Therefore, the court was correct in denying Pas' motion.

(4)(b) Does the question of fact as to Pas' damages preclude summary judgment?

The court was incorrect in denying summary judgment to Pas on the grounds that a question of fact as to damages existed. The issue is whether a court may, pursuant to the CPLR, award summary judgment on the issue of liability but not on damages.

A court, when appropriate, may award summary judgment on part of a claim while denying it on another part. If liability is conclusively established, the court may award summary judgment on that issue and order a trial on the sole issue of damages.

Here, if summary judgment was appropriate on liability, the court should have granted it. A separate trial could have commenced on damages. A question of fact as to damages should not defeat the whole motion. Thus, the court could have ordered summary judgment on liability and denied summary judgment on damages.

Question-Five

Win and her husband, Hal, were passengers in an automobile which collided with a truck. Both were killed, and there was no evidence sufficient to determine that one died before the other. Win and Hal were survived by their two children, Eli and Meg.

Win's will left her entire estate to Hal if he survived her and, if not, two-thirds to Eli and the remainder to Meg. Eli was one of the two witnesses to the will, and he was named as executor.

Hal's will left his entire estate to Win if she survived him and, if not, to his brother, Joe. When Hal's will was found in his desk after his death, it had been cut in two.

Neither will made reference to the death of both simultaneously or close in time.

Win and Hal, at the time of their deaths, owned their family home as tenants by the entirety.

A year before her death, at a large birthday party for Meg, Win announced to the 20 assembled guests that she had that day transferred to Meg a summer home which Win had inherited from her parents. She stated that the transfer was an advance against Meg's inheritance. A week before Win's death, she wrote letters to Eli and Meg, confirming her previous declaration that the transfer of the summer home was an advance to Meg.

Both wills were offered for probate. Eli and the second witness testified to Win's due execution of her will. Two independent witnesses testified to the due execution of Hal's will. Two close friends of Hal testified that they had been with Hal when he told them he had accidentally cut his will in half the night before, but that he did not intend to revoke it.

The Surrogate admitted both wills to probate. Following probate, the Surrogate received uncontradicted testimony from four of the party guests, all of whom testified that Win had declared the summer home to be an advance against Meg's inheritance. Eli testified to the letter he had received from his mother concerning the advance. The Surrogate ruled that the transfer of the summer home was not an advance against Meg's inheritance. The time to appeal the Surrogate's rulings has expired.

(1) Did the Surrogate correctly admit Hal's will to probate?

(2) Did the Surrogate correctly admit Win's will to probate?

(3) What, if anything, should Eli receive as his inheritance from Win?

(4) Did the Surrogate rule correctly with respect to the advance?

(5) Who should inherit the family home?

ANSWER TO QUESTION 5

(1) Hal's will was correctly admitted to probate. The issue is whether evidence is admissible to rebut the presumption of revocation.

The general rule is that, where a will is found mutilated and was last in the testator's possession, the testator intended to revoke the will by physical act. A will may be revoked by: (1) execution of a new will which in turn states that it revokes all prior wills, or (2) by physical act. Physical act includes any mutilation, physical destruction, or alteration of the testators signature. This does not include minor physical alterations such as writing in the margins.

Although in the scenario given above, there is a presumption that the testator intended to revoke his will, evidence is admissible to rebut this presumption. However, this evidence cannot be in the form of testimony of interested witnesses who would stand to gain from the will's admission to probate.

In this case, because the will was found cut in two amongst the testator's possessions, there would be a presumption that Hal intended to revoke it by physical act. However, because Hal's friends do not stand to gain from the will's probate, their testimony will be allowed to rebut the presumption.

As such, Hal's will was properly admitted to probate.

(2) Win's will was properly admitted to probate. The issue is whether the existence of an interested attesting witness will make a will inadmissible to probate.

The general rule is that to be valid a will must be witnessed by two individuals who can later attest to its execution. If one or more of the witnesses is interested (stands to gain from the will's probate), this will not affect the validity of the will.

Instead, the interested witness's gift under the will shall be affected. The interested witness will receive the lesser of either his intestate share or the gift under the will. The exception to this rule is if there are two separate uninterested attesting witnesses -- then the interested witness's gift will not fail.

As such, win's will was properly admitted to probate. Eli will simply receive the lesser of either his intestate share or the gift under the will. The exception to this rule is if there are two separate uninterested attesting witnesses -- then the interested witness's gift will not fail.

As such, win's will was properly admitted to probate. Eli will simply receive the lesser of either his intestate share or the gift under the will (2/3 of Win's estate).

(3) Eli should receive 1/2 of Win's estate (in addition to his fees and Commissions as executor of the estate). Because Eli was an interested witness his gift shall be reduced to his intestate share (as stated above).

When two people die in a fashion such that there is no evidence that they died other than simultaneously, each person's estate will be distributed as though the other had predeceased.

As such, Win's estate will be distributed as though Hal had predeceased her. Her will calls for 2/3 to Eli and the remainder to Meg. But because Eli was an interested witness he will take his intestate share (the lesser of the two amounts). Eli then gets 1/2 of Win's estate after deduction of fees, commissions, expenses and creditors payments.

Intestate distribution is accomplished by per capita shares at each generation. As such, Eli's intestate share is 1/2. Meg takes the remainder (1/2) which just happens to be the same as her intestate share.

It should be noted that the interested witness statute only applies to the bequests of gifts not to the name of executors, so Eli may still serve as an executor (and collect commissions and fees).

Given the above, Eli will inherit 1/2 of Win's estate after appropriate deductions.

(4) The surrogate ruled correctly with respect to the advance. The general rule in New York is that an advance against an inheritance must be in the form of a contemporaneous writing and signed by either the donor or donee.

In this case, although Win made an announcement of the alleged advance, the writing was not made at the same time as the transfer. The writing would have had to have been made upon the conveyance of the summer home and signed by either Win or Meg. Here, it was not made until almost one year later. This is not sufficient.

As such, the court's ruling was correct -- the conveyance by Win to Meg of the summer home was not an advance against Meg's inheritance.

(5) The family home should be inherited as follows: 1/4 to Meg, 1/4 to Eli, and 1/2 to Joe. The issue is who inherits the tenancy by the entirety when both tenants die simultaneously.

The tenancy by the entirety is a special form of co-tenancy available only to husband and wife. It contains a right of survivorship that cannot be defeated. Normally, upon one tenant's death, the estate simply passes to the other spouse. A tenancy by the entirety can only be created in a very specific way. Both parties must take from the same title, in the same interest amount, with a right of survivorship.

When the husband and wife die in a manner deemed to be simultaneously, the tenancy by the entirety is severed, and the land in effect passes as though they had held a tenancy in common (with no right of survivorship). Both Win and Hal's estates will be distributed as though the other predeceased each other.

As such Eli and Meg will share in the 1/2 passing through Win's estate. Joe will take the 1/2 passing through Hal's estate. The three will hold the land as tenants in common.

ANSWER TO QUESTION 5

(1) No. The surrogate court did not correctly admit the will to probate. Issue is whether a will last seen in the control of the testator and is found mutilated, is revoked by physical act. Under New York Wills Law, a will may be revoked by a subsequent will meeting wills formality or by a physical act. There is a rebuttable presumption that when a will is last seen within the testator's control and is then found mutilated, it is revoked by physical act. However, this is a rebuttable presumption and can be overcome. Here, there is a strong presumption that Hal's will was revoked by physical act. The will was under Hal's control because it was found in his desk. The will was destroyed by physical act because it had been cut in two. New York does not allow this presumption to be overcome by testimony of third parties stating that the testator told them he didn't intend to revoke his will by accidentally cutting it. In New York, more evidence is required to rebut this presumption. Therefore, Hal's will was revoked by physical act and the surrogate court should not have admitted it.

(2) Yes, the Surrogate court correctly admitted Win's will to probate. The issue is whether a will can be validly admitted to probate when there is an interested witness. An interested witness is a devisee under the will who served as a witness. In New York, a will may be admitted to probate if an executor serves as a witness and even if a devisee serves as a witness. The executor is not considered interested because he is not entitled to a will. Instead, he is entitled to statutory compensation. If a devisee under the will witnesses the will, he will not be able to take under the will unless there is a third witness and he was deemed an extra witness or he would be entitled to receive under intestacy law. However, the will can still be admitted to probate. Here, the will is valid because having an interested witness will not invalidate the will under New York law. Under New York law, for a will to be admitted to probate, the burden is on the proponent who wants the will to be admitted to probate. In the absence of a self-declaring affidavit, the will must be proved by the two witnesses and if it can't be proved by the two witnesses, the testator's signature and one of the witness's signature must be proven. Here, in this case the burden is on Eli and Meg to prove the will so it can be admitted to probate. Here, the will is properly proved because Eli and the second witness testify to Win's due execution. Therefore, the surrogate Court correctly admitted the will to probate.

(3) Eli should receive. The issue is what should an interested witness be entitled to under the will. In New York, if a husband and wife die simultaneously, in order to execute the wife's estate it is as if her husband died before her. To execute the husband's estate, it is as if the wife predeceased the husband. In New York, the antilapse statute (which allows children of the sister, brother or issue of the testator to take if their respective parent dies before the testator) doesn't apply in the case of a conditional bequest (i.e. to Hal if he survives me). Under New York law, an interested witness generally will not be able to take anything under the will. However, if the witness was entitled to take under testacy, he can take the lesser of his intestacy share or the bequest under the will. Here, Hal will not take under Win's will because they died simultaneously. In executing Win's estate, Hal is deemed to have died before Win. The antilapse statute will not apply in favor of Eli and Meg because Hal's survival was conditioned on taking under the will. Here, Eli is an interested witness because he witnessed the will and is a devisee (individual who takes under a

will). Eli will take the lesser of his intestate share or his bequest under the will because although he is an interested witness, he is entitled to take under intestacy. Eli will take a 1/2 share under the will because that is his intestacy share which is less than the 2/3 bequest from the will. Eli will receive 1/2 of Win's estate.

(4) The Surrogate Court ruled properly with respect to the advance. The issue is whether an advance intended to be an early gift from the will is valid or is it deemed a gift under New York law.

In New York, for an advancement to qualify against an inheritance, there must be a contemporaneous writing signed by the donor or donee. In this case, Meg received a gift from her mother because her mother transferred a summer home one year before her death to Meg. The summer home is not an advance because there was no contemporaneous writing signed by the donor or donee. Win's letters to Eli and Meg were not contemporaneous because the letters were written almost a year later. Furthermore, the fact that there is uncontradicted testimony from four witnesses of Win's intention will not satisfy the statute. To be an advance, there must be a contemporaneous writing signed by the donor or donee. Since Win's writing was not contemporaneous, the gift was not an advance. Therefore, the Surrogate ruled properly.

(5) The issue is who should inherit the family home held by the parents as tenants by the entirety when both parents die simultaneously. In New York, if tenants in the entirety (a husband and wife who own property with rights of survivorship) die simultaneously, New York treats the property as transformed to tenants in common. When a husband and wife die simultaneously, each estate is executed as if the other died before the testator. Therefore, New York will treat the property held as a tenancy in entirety as if it were a tenancy in common and it will pass under each individual's will or by intestacy. Here, the 1/2 portion owned by Win will pass under her will because she died simultaneously with her husband while owning property as tenants in the entirety. Here, the 1/2 portion of the family home will pass under Win's will and Eli will take 1/2 of the 1/2 and Meg will take 1/2 of the 1/2. N.B. Eli takes only 1/2 of the 1/2 (or 1/4) because he was an interested witness and can only take his intestacy share as discussed above. Meg receives the other 1/4 (1/2 of 1/2) because she is entitled to the remainder. The other 1/2 of the property belonging to Hall passes by intestacy because his estate is distributed as if Win died before him. Because Hal's will was revoked by physical act, his 1/2 share passes through intestacy. Therefore, 1/2 of the 1/2 (or 1/4) share belongs to Eli and the other 1/2 of the 1/2 share (1/2 x 1/2 = 1/4) belongs to Meg. The family home is owned 1/2 by Meg and 1/2 by Hal as tenants in common.

It should be noted under New York law if a parent dies intestate without a wife and leaves two children each child takes 1/2 of the intestate estate.

Question-Six
Cap, the senior partner in the law firm in which you are an associate, just met with Bill, one of the firm's clients. Cap has prepared a summary of the meeting and has asked you to draft a memorandum addressing certain issues raised at the meeting. Cap's summary states:

"Three years ago, Bill decided to establish and incorporate a construction business. At Bill's request, I determined that the name `Walden Builders, Inc' was available for incorporation, and I so advised Bill.

The following day, although the corporation was not yet formed, Bill located a suitable office for his new business and executed a four year lease, which he signed as follows: `Walden Builders, Inc, by /s/ Bill Walden, Pres.' Thereafter, the rent was paid from a checking account in the name of Walden Builders, Inc.

A week later, Bill came in to see me again. After deciding that the venture would be too big for him to handle alone, he invited Jess, a friend with experience in the building industry, to be a full-time participant in the business. Bill also decided to hire Al, a young carpenter, as an apprentice. Bill told me that he and Jess would receive equal compensation from the corporation, that the corporation would have four directors, two chosen by him and two chosen by Jess, and that the corporation would issue 100 shares of common stock, of which Bill would receive 51 shares, Jess would receive 44 shares, and Al would receive 5 shares.

On the basis of my conversation with Bill, I prepared a certificate of incorporation and by-laws for the new corporation. The by-laws, but not the certificate of incorporation, provide for four directors. The by-laws alone require an affirmative vote of the holders of 75 percent of the corporation's shares to amend the by-laws. The certificate of incorporation alone provides that newly created directorships resulting from an increase in the number of directors shall be filled by vote of the holders of a majority of the corporation's shares. The certificate of incorporation was executed by Bill and was filed with the Secretary of State two weeks later. The by-laws were adopted by Bill as sole incorporator and shares in the corporation were issued in accordance with Bill's prior instructions. At the first meeting of shareholders, Bill and his wife, and Jess and his wife, were elected directors. The directors elected Bill president of the corporation and elected Jess secretary and treasurer. The by-laws were ratified by the directors and shareholders.

Everything worked smoothly for the first two years, with Bill and Jess receiving equal compensation. Recently, however, business has fallen off, and Bill and Jess have been unable to agree on management of the business. The office rent has fallen into arrears, and the landlord is threatening to bring a lawsuit against Bill, individually, and the corporation. Bill sees his only salvation in down-sizing the corporation. He proposes to call a meeting of the shareholders at which, as majority shareholder, he will vote to amend the corporation's by-laws to provide for a board of directors of five. With the election of a friendly fifth director, Bill believes he will then be able to terminate Jess' employment by the corporation, avoid compensating Jess, and thereby keep the corporation viable. Jess is threatening to seek an injunction prohibiting Bill from amending the by-laws without a 75 percent shareholder vote.

Please prepare a memorandum for my next meeting with Bill addressing the following issues:

(a) Does Bill, individually, and the corporation, have any potential liability to the landlord for the rent arrears?

(b) At a meeting of shareholders, can Bill alone properly cause the by-laws to be amended to provide for a board of directors of five?

(c) If Bill acquires control of the board of directors, can Jess be terminated as an employee of the corporation?

(d) If Jess can be terminated, does he have any remedy as a shareholder of the corporation?"

ANSWER TO QUESTION 6

(a) The Corporation does and Bill should have liability on the rent. The issue is whether or not a pre-incorporation agreement is binding on and enforceable against the corporation and whether the incorporator becomes liable and under what condition he ceases to be liable.

Under BCL (Business Corporation Law), where an incorporator enters into an agreement for the benefit of the corporation prior to its being incorporated, the incorporator is liable unless there is

a subsequent post incorporation novation between the corporation and the contracting third party. The corporation will be liable, if post incorporation, it accepts the benefits of the agreement. Acceptance of the benefits is deemed acceptance and ratification of the agreement. As to Bill, the agreement was executed, pre-incorporation by the corporation and signed by Bill as an ``agent'' of the corporation in his agency capacity. If the third party and the corporation ``ratify'' the agreement following incorporation, they will be deemed to have accepted the agreement as being binding as between themselves. Bill should have no liability in such event. Concurrently, by continuing to have its offices under the lease and to pay rent, the corporation is deemed to have accepted the lease.

(b) Yes. Bill can vote his majority of shares to increase the number of Board seats. The issue is whether the requirement of a 75 percent majority vote is binding and valid. Under the BCL, a provision which dictates a super majority voting restriction is not valid unless it is contained in the corporation's certificate of incorporation. Therefore, the super majority requirement in the by-laws is not valid nor binding. That being the case, in the absence of a contrary provision, a simple majority vote of shareholders is held to be sufficient in the increase of board membership -- that would be a majority of shares voting at the shareholders meeting.

(c) Yes. The issue is whether the board can terminate Jess as an officer/employee of the corporation. Under the BCL, the Board being the entity which hired Jess as an officer, has the power, in the absence of contrary provisions in the by-laws adopted by the shareholders, to terminate Jess. This may be accomplished by a majority of directors present and voting if a quorum, without counting the interested directors. Since there will be three directors, a majority -- all disinterested -- can vote for Jess' dismissal.

As to terminating Jess as a director, if without cause, can only be done by the shareholders and only if provided in the certificate of incorporation. If with cause, either the Board or shareholders if such provision is in the certificate or by-laws.

(d) Yes. Jess could petition the court for an involuntary dissolution of the corporation, since he is holding more than 20 percent of the shareholder interest on the ground that he is being oppressed by the majority. One way for the corporation to stop the dissolution proceedings is to buy Jess out as a shareholder paying him the fair market value for his shares.

ANSWER TO QUESTION 6

To: Partner

From: Associate

Re: Walden Builders, Inc. (The ``Corporation'' or ``Walden'')

(a) Liability under the lease.

Both Bill individually and the Corporation are potentially liable to the landlord for rent.

First Issue: Is an incorporator liable for a preincorporation contract.

Rule: Under New York BCL, a person who enters into a contract on behalf of a corporation prior to its incorporation is personally liable under that contract unless the contract provides otherwise, and continues to be liable unless and until by further agreement (i.e. novation) with the party to that contract, the corporation is substituted as a party to the contract (i.e. novation). Here, Bill will be liable under the lease because the lease was entered into prior to Walden's incorporation, the

lease does not provide to the contrary and there was no subsequent novation agreement substituting the Corporation for Bill as a party.

Second Party/Issue: Is the Corporation liable under the lease?

Rule: Under New York BCL, a corporation is liable under a preincorporation contract entered into for its benefit, if the corporation expressly or impliedly adopted the contract. A contract is impliedly adopted where the corporation makes use of or derives the benefits of the contract.

Application: Here, Walden will be liable because it has impliedly adopted the contract by taking possession of the premises for two years and because the rent was paid from Walden's checking account.

Both Bill and Walden are liable under the contract.

(b) By-Laws

Bill may alone properly cause the by-laws to be amended. The issue is whether the super majority shareholder vote to amend the by-laws properly adopted.

Rule: Under the New York BCL, shareholders may amend by laws (or take other ordinary resolutions) by a majority vote of the votes cast on a resolution. While a supermajority restriction of 75 percent of the share may be adopted, that restriction must be adopted and placed in the certificate of incorporation and may not be placed in the by-laws.

Application: Here, the supermajority restriction is not valid because it appears in the by-laws and not in the certificate of incorporation, as required.

Rule: The number of directors of a corporation may be determined by ordinary resolution of the shareholder or in the by-laws. As the shareholders did not vote to place a supermajority restriction in the certificate, Bill may alone, by voting his 51 shares (51 percent of 100) cause the by laws to be amended to add another director.

(c) If Bill acquires control over the Board, Jess could be terminated as an employee. The issue is whether the directors may terminate employees of the corporation, specifically Jess as secretary and treasurer.

Rule: Under New York BCL, officers/ employees that are appointed by directors may only be terminated by the directors. If shareholders appoint an officer, then the shareholders only may terminate the officer (except that directors may terminate an officer appointed by the shareholder for cause).

Application: Here, Jess was appointed treasurer/secretary/employee by the directors and not the shareholders, hence Jess may be terminated by the directors. Moreover, the directors may terminate employees of the corporation in general because the directors are charged under New York BCL with the duty to manage and supervise the affairs/business of the corporation.

(d) If terminated, Jess may have a remedy as a shareholder of the Corporation as he has been oppressed by a majority shareholder.

Issue: Does the termination of Jess constitute a breach of a fiduciary duty owed by Bill (majority shareholder) to Jess (minority shareholder).

Rule: Under New York law, in a closely held corporation a majority shareholder owes a fiduciary duty to minority shareholder and in particular may not oppress a minority shareholder.

Application: Here, Bill's actions as a majority shareholder are designed to exclude Jess and may not be considered for a proper purpose (i.e. in the best interest of the corporation). If Bill is in breach of his fiduciary duty to Jess, then Jess will have a remedy against Bill and the Corporation. Specifically, he can bring an action to dissolve the Corporation as he does own at least 20 percent of the outstanding shares and Bill has action in an oppressive manner. The court may, however, not dissolve the Corporation but rather instead Jess's share may be purchased at fair value by Bill upon the court's order, instead of dissolution of Walden.