

MODEL ANSWER - QUESTION I - FEBRUARY 2009

PLEASE NOTE: QUESTION I was a "Multistate Performance Test" (MPT) will not be answered here.

MODEL ANSWER - QUESTION II - FEBRUARY 2009

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MODEL ANSWER - QUESTION III - FEBRUARY 2009

1. What claims against Dan are available to Paul?

Paul can bring a claim against Dan for negligence.

a. What are the defenses to those claims?

Dan can defend the negligence claim based on contributory negligence, assumption of the risk and Paul's status as a trespasser on his property.

b. What is Paul's likelihood of success on his claims against Dan?

It is uncertain if Paul will succeed on his negligence claim against Dan Farmer. To prove negligence, Paul must show that Dan owed him a duty of care, failed to perform that duty, and injury resulted from the breach of that duty. A landowner generally owes no duty of care to a trespasser, except to avoid willful or wanton misconduct. *Baisley v. Young*, 167 Vt. 473 (1998). A trespasser, according to the restatement as one "who *enters* or remains upon land in the possession of another" without consent or other privilege. Restatement (Second) of Torts § 329 (1965) (emphasis supplied). The reasons for the no-duty rule are: (1) the presence of a trespasser on the land is not foreseeable, see *Trudo v. Lazarus*, [116 Vt. 221](#), 224--25, [73 A.2d 306](#), 308 (1950); (2) a duty of care would impose an unreasonable burden on the use of land, see F. James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 Yale L.J. 144, 151 (1953); and (3) the trespasser is a wrongdoer, see *id.* at 152; W Keeton, et al, *Prosser & Keeton on the Law of Torts* § 58, at 394 (5th ed. 1984). Unless Paul can prove that Dan engaged in willful or wanton misconduct, Paul is unlikely to succeed on his negligence claim if he is found to have been a trespasser on Dan's property.

Paul may argue that when Dan told him he “might as well make himself useful” and stack some wood, Paul’s status changed from trespasser to invitee. A person, including a child, who has permission to enter the property of another for a specific purpose is an *invitee* and is owed certain duties of care by the owner as long as the invitee confines his conduct within the limits of the consent. *Robillard v. Tillotson*, [118 Vt. 294](#), 299--300, [108 A.2d 524](#), 528 (1954). But when an invitee exceeds the permission given, and either effects an entry for purposes other than that for which the permission was granted, or, after entering, engages in activities beyond the scope of his permission, whatever duty may be owed to him comes to an end. "The duty to an invitee as such is only coextensive with the invitation and when the limits of the invitation are exceeded the duty ceases." *Id.* The owner or occupant is under no obligation to a trespasser, whether adult or child, to protect him from injury by reason of the unsafe and dangerous condition of the premises." *Trudo v. Lazarus*, [116 Vt. 221](#), 223, [73 A.2d 306](#), 307 (1950). In this case, Paul was a trespasser, or at most an invitee who exceeded the scope of his invitation.

Also, Dan can assert that Paul assumed the risk of his behavior and was contributorily negligent. In Vermont a plaintiff cannot recover if they are more than fifty-percent responsible. 12 V.S.A Section 1036. Paul’s actions in attempting on to hurdle the PTO shaft may well exceed the 50% threshold requirement of contributory negligence. However, the fact that Paul was a minor at the time of the accident may make a difference. Under Vermont law, the contributory and comparative negligence of a minor is a question of fact that "depends upon the circumstances of the particular case, especially the mental development and previous training and experience of the child." *Johnson's Adm'r v. Rutland R.R. Co.*, 93 Vt. 132, 106 A. 682 (1919).

2. What claims against International Elk are available to Paul?

Paul can bring a product liability claim against International Elk.

a. What are the defenses to those claims?

International Elk can defend the product liability claim saying the product (the tractor shaft) is not unreasonably dangerous and that, even if it is, the defect did not cause Paul’s injury.

b. What is Paul’s likelihood of success on his claims against International Elk?

Paul is unlikely to prevail on a product liability claim against International Elk. In order to prevail under this theory, Paul must show that the product was marketed in a defective condition that is unreasonably dangerous. The defect may be a manufacturing defect, design defect or a

failure to warn. Paul must also prove causation between the defendant's conduct and the harm he suffered.

A design is defective if the foreseeable risk of harm posed could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders that product unreasonably safe. This is most likely a defective design case as the facts indicate that the plastic guard had become brittle and broken and that International Elk has since replaced the plastic guard with a metal guard.

The test used to determine whether the design of the product is unreasonably dangerous is the risk-utility test. This test weighs the danger of the design against its benefits. Here, the risk of an accident is certainly foreseeable and a different type of guard could lessen the likelihood of injury.

In order to prevail under a strict liability theory, Paul must show an injury in fact and a causal connection between the injury and the design defect. Even though Paul is not in contractual privity with International Elk, he is still entitled to recovery. As a bystander, he qualifies as a user or consumer of the product and is protected under a strict liability theory. Paul must also show that International Elk breached its duty to use ordinary and reasonable care.

In *Zaleski v. Joyce*, [133 Vt. 150, 333 A.2d 110](#) (1975), the Vermont Supreme Court adopted the doctrine of strict product liability set forth in the Restatement (Second) of Torts, the elements of which are as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Id. at 154, 333 A.2d at 113 (emphasis added).

Paul will probably not prevail against International Elk, however, because he will not be able to prove a causal connection between his injury and the design defect. International Elk is likely to succeed in claiming that Paul's injury was caused by his improper use of the product and not by any design defect.

3. What claims against Jack Slack are available to Paul?

Paul can bring a malpractice claim against Attorney Jack Slack.

a. What are the defenses to those claims?

Attorney Slack can defend saying that his failure to take further steps on Paul's behalf did not cause Paul any harm.

b. What is Paul's likelihood of success on his claims against Slack?

Paul will also not prevail in a malpractice claim against Attorney Slack. Although the attorney's failure to return Paul's calls or take further action on his claims may subject the attorney to professional conduct charges, Paul will not be able to show any actual harm. If, for example, the statute of limitations had run, Paul might prevail in a malpractice claim. However, although approximately six years has passed since the injury and injury claims must normally be brought within three years, Paul's claims were tolled until he turned 18 so he is only two years into his three year statute of limitations. 12 V.S.A. Section 551.

MODEL ANSWER - QUESTION IV - FEBRUARY 2009

1. Analyze whether Ms. Able's federal constitutional rights have been violated. Include in your analysis a discussion of the scope of the right in this particular case, as well as an analysis of whether and how it has been violated.

The First Amendment to the United States Constitution, applicable to the states through incorporation through the 14th Amendment, applies to this question.

a. Nature of the Forum

The standard for evaluating a free speech claim on public property varies depending on whether the forum for the proposed speech is a public or private forum. *Perry Educ. Assoc. v. Perry Local Educ. Assoc.*, 460 U.S. 37, 44 (1983). The designation of "public forum" applies to streets and parks, which "have immemorially been held in trust for the use of the public, and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," as well as public property opened for use by the public as a place for expressive activity. *Perry*, 460 U.S. at 45.

Public property which is *not* by tradition or designation a forum for public communication is governed by different standards. The U.S. Supreme Court has recognized that the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” *Perry*, 460 U.S. at 46.

In this case, because it is a public space that has historically been open to the public for assembly, communication, and discussion, the Statehouse lawn is clearly a public forum.

b. Applicable Standard

In a public forum like the Statehouse lawn, the state may regulate the time, place, and manner of expression as long as its regulations are **content-neutral**, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Perry*, 460 U.S. at 45.

In order to enforce a **content-based exclusion**, on the other hand, the State “must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Id.*.

So, the next step is to determine whether the regulation at issue is content-neutral or content based. A content-based statute is one that restricts speech based on the content of the speech. *Field Day v. County of Suffolk*, 463 F.3d. 167, 174 (2d. Cir. 2006). As the Supreme Court has noted, “the principal inquiry in determining content neutrality, in speech cases generally, and in time, place or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Given that the regulation at issue prohibits speech based precisely on its content—in particular, its perceived “offensive or violent” character, it is a content-based regulation and therefore subject to the strictest standard of review.

c. Application of Strict Scrutiny

Under the applicable strict scrutiny standard, the government must show that the regulation is narrowly tailored to promote a compelling government interest. *U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 831 (2000). If a less restrictive alternative will suffice to achieve those same purposes, it must be used. *Id.*

The regulation appears to be designed to protect the sensibilities of the public. The general rule is that “where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners ... the right of expression prevails, even where no less restrictive alternative exists. We are expected to protect our own sensibilities “simply by averting [our] eyes.” *Id.* at 831 (objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative).

Less restrictive means could be used to achieve the government’s objective in this case, such as posting signs that the presentation will be inappropriate for young children. In addition, the state could require that the performers announce that the play contains mature content before each

performance. Although “no one suggests the Government must be indifferent to unwanted, indecent speech,” it may not issue a blanket prohibition of such speech when less restrictive means are available. *Id.* at 814. As it has done so in this case, its regulation impermissibly violated Ms. Able’s right of free speech and cannot stand.

d. Alternative Analysis: Prior Restraint

Alternatively, this case could be evaluated as a ‘prior restraint’ on speech. “A ‘prior restraint’ on speech is a law, regulation or judicial order that suppresses speech – or provides for its suppression at the discretion of government officials – on the basis of the speech’s content and in advance of its actual expression.” *United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005).

“It has long been established that such restraints constitute ‘the most serious and the least tolerable infringement’ on our freedom[] of speech.” *Id.* (quoting *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976)). The United States Supreme Court has characterized “the elimination of prior restraints as “‘the chief purpose’” of the First Amendment. *Id.* at 309-310.

Thus, two initial elements must be present for this doctrine to apply: (1) protected “speech” under the First Amendment, *see Commodity Futures Trading Comm’n v. Vartuli*, 228 F.3d 94, 110-11 (2d Cir. 2000), and (2) pre-expression restraint of protected speech by a governmental actor. *Ward v. Rock Against Racism*, 491 U.S. 781, 795, n.5 (1989).

Ms. Able’s speech is protected speech, as it advances her political or social views. The courts have recognized that protected speech often promotes the “pursuit of truth, the accommodation among interests, the achievement of social stability, exposure and deterrence of abuses of authority, personal autonomy and personality development or the functioning of the democracy.” As in Ms. Able’s case, protected speech attempts to convey information or to assert values. *Commodity Futures Trading*, 228 F.3d at 111 (citation omitted).

The State’s regulation, which requires Ms. Able to get a permit prior to expressing her views in a performance, is a pre-expression restraint of protected speech by a government actor. Thus, the regulation does constitute an impermissible prior restraint on Ms. Able’s right of free speech.

2. Does your analysis of Ms. Able’s constitutional rights pursuant to the Vermont Constitution differ from your analysis under the United States Constitution? Discuss.

The Vermont Constitution is an independent source of constitutional protections with respect to individual rights such as free speech. The Vermont Constitution can provide *greater* rights and protections for individual liberties than the federal constitution, but cannot take away or reduce the constitutional protections available under the United States Constitution.

To date, Article 13 of Vermont’s Constitution is largely undeveloped in Vermont cases. The few decisions that mention it suggest that its reach is coextensive with the First Amendment to the United State Constitution, *Shields*, 163 Vt. at 226. At present, therefore, it safe to conclude that

the federal constitutional analysis would apply equally to Ms. Able's Vermont constitutional law claim. As explained above, Ms. Able's First Amendment claim has merit. Therefore, it appears that Ms. Able would be able to successfully pursue a federal *and* a state free speech claim under the facts.

3. Pursuant to the Vermont Constitution, can Ms. Able pursue a private cause of action against the State for money damages? Discuss.

Under the Vermont Constitution, a two-step inquiry is necessary to determine if a private cause of action for money damages exists under a provision of the Vermont Constitution. *Shields v. Gerhart*, 163 Vt. 219 (1995).

First, is the particular constitutional provision self-executing? That is, does it support an action against the state or its agents without implementing legislation? The Vermont Supreme Court has explained that a self-executing provision should do more than express only general principles; it may describe the right in detail, including the means for its enjoyment and protection; ordinarily, a self-executing provision does not contain a directive to the legislature for further action; legislative history may be particularly informative as to the provision's intended operation; a decision for or against self-execution must harmonize with the scheme of rights established in the constitution as a whole. *Shields*, 163 Vt. at 224.

Second, if a provision is self-executing, the next step is to determine whether monetary damages are available as a remedy for a violation. The Vermont Supreme Court has held that "it may be appropriate to imply a monetary damages remedy to enforce constitutional rights where the Legislature has fashioned no other adequate remedial scheme. Where the Legislature has provided a remedy, although it may not be as effective for the plaintiff as money damages, we will ordinarily defer to the statutory remedy and refuse to supplement it." *Shields v. Gerhart*, 163 Vt. 219 (1995).

Article 13 is self-executing because, as the Vermont Supreme Court found in *Shields*: 1. It sets forth a single, specific right of the people to make themselves heard; 2. the absence of a legislative directive supports a conclusion that the provision is self-executing; 3. Recognizing a self-executing right to free speech and to seek redress for its infringement comports with the general constitutional scheme. *Shields*, 163 Vt. at 227. In this case, Ms. Able's "speech" is her performance art, which is clearly expressive communication. Under the ruling in *Shields*, her right to free speech is protected under Article 13 and therefore her performance art is protected speech.

Ms. Able also would likely survive the second step of the analysis, as it is not apparent from the facts as described that the Legislature has fashioned an alternate remedial scheme under which she may seek relief for a violation of her free speech rights in this instance. If that's the case, then Ms. Able could bring a cause of action under the Vermont Constitution. (This conclusion does not speak to whether such a cause of action has merit.)

MODEL ANSWER - QUESTION V - FEBRUARY 2009

1(A). **The property taxes.** To determine whether the property taxes are dischargeable, one must first determine whether they are a priority claim. See 11 U.S.C. § 523(a)(1); 11 U.S.C. § 507(a)(8). Property taxes qualify for priority under §507(a)(8)(B). Given the facts here, it is likely that only the 2008 property taxes will qualify for the priority, but only if incurred before the case was filed and if last payable without penalty within a year of filing the petition. As a priority claim, then, they are excepted from discharge. That is, Bart's bankruptcy discharge will have no effect on the 2008 property taxes (i.e., he will still be personally liable for them). As to the 2007 property taxes, they will probably not qualify as a priority claim. Without any priority claim to except it from discharge, this liability will be grouped with all of Bart's other general unsecured claims. Thus, it is likely the bankruptcy discharge will free Bart from any personal responsibility for the 2007 property tax debt. Note: Despite Bart being relieved of personal liability on some of the property taxes, the municipality will still have a lien against the property.

1(B). **The state and federal income taxes.** Like the property taxes, one must first determine whether Bart's income tax liabilities garner priority status. See 11 U.S.C. § 523(a)(1); 11 U.S.C. § 507(a)(8). The relevant Bankruptcy Code section for this analysis is § 507(a)(8)(A). Here, Bart's income tax liabilities for 2006 and 2007 qualify for priority because they are (a) income taxes, (b) for taxable years before Bart's bankruptcy filing date, (c) for which tax returns were required and due within the three years before Bart's bankruptcy filing date. § 507(a)(8)(A)(I). These taxes will be excepted from discharge under § 523 because they are taxes for which returns are required but have not been filed. See § 523(a)(1)(A), (B)(I). Therefore, Bart's 2006 and 2007 state and federal income tax liabilities are excepted from discharge. That is, Bart's bankruptcy discharge will not wipe out his liability on the 2006 and 2007 state and federal income tax liabilities (i.e., the bankruptcy discharge has no effect on this debt).

1(C). **The IRS tax lien.** Since the IRS is recorded in the land records, it is likely a secured claim. However, the extent to which the lien is secured depends on the value of Bart's house and the mortgagee's secured claim (assuming it has first position on the house). If, after the mortgagee's claim, there is equity in the house, the IRS's lien will attach to it, even if Bart can exempt the equity from the bankruptcy estate. See I.R.C. § 6321. Again, it will be secured up to the amount of available equity. The IRS's lien could be partially secured and partially unsecured, depending upon the available equity. If, however, there is no equity available after satisfying the mortgagee's claim, then the IRS will have an unsecured claim. It will then be necessary to determine whether the claim is a priority claim or a general unsecured claim to determine whether Bart's bankruptcy discharge will have an effect on the IRS's claim as against

him personally. Note: Since the IRS recorded its lien, as long as it is valid, the lien runs with the land.

2(A). **Why Bart will want to file under Chapter 13** Chapter 13 is a reorganization chapter; it allows an individual with regular income to develop a plan to repay all or part of his/her debts. The Chapter 13 plan will span from three (3) to five (5) years depending on a debtor's currently monthly income. Under Chapter 13, creditors are to receive at least as much as they would if a debtor files under Chapter 7.

The reason Bart will want to file under Chapter 13 is to keep his house since he has non-exempt equity in it (that is available to creditors) and he is behind on his mortgage payment. If Bart doesn't file for bankruptcy protection, the bank can bring a foreclosure action against him. By filing under Chapter 13, Bart will be able to cure his delinquent mortgage payment over the life of his Chapter 13 plan, in addition to staying current on his regular monthly payments. The same is true of any delinquent car payments; he can cure the delinquency over the life of the plan while making his regular monthly car payments. Plus, Bart may be able to reduce the amount of the loan (depending when the car was acquired) and renegotiate its interest rate. He cannot do that with the mortgage, though; principal due and interest rates remain the same (unless the lender agrees otherwise). Though not applicable here (given the limited facts provided), Chapter 13 also contains a special automatic stay provision that protects co-debtors; that is, a creditor may not seek to collect a "consumer debt" from any individual who is liable along with the debtor. And, many find having a monthly Chapter 13 payment advantageous since it is like having a consolidated loan in that the debtor usually makes only one monthly payment to the Chapter 13 trustee who will then distribute the payment to the debtor's creditors. (Note: A debtor may make his/her *regular* monthly mortgage and/or car payments directly to the lender(s) or "outside the plan".)

2(B)(i). **The state and federal income taxes.** Since Bart is in Chapter 13, he will have to propose a confirmable plan of repayment. Under the Bankruptcy Code, to be confirmable, the Chapter 13 plan must provide for the full payment of all priority claims. See 11 U.S.C. § 1322(a)(2). Bart's state and federal income tax liabilities are priority claims (see, supra, Model Answer 1(B)); therefore, he will have to provide for full payment of those liabilities in his Chapter 13 plan in order for the plan to be confirmed. Only upon the successful completion of his Chapter 13 plan, which will require him to pay all his priority tax obligations for the 2006 and 2007 income taxes, will Bart receive a discharge. Filing under Chapter 13 will not effect Bart's liability for the 2006 and 2007 state and federal income tax liabilities.

2(B)(ii). **The IRS tax lien.** To the extent the IRS's lien is secured, it will pass through the bankruptcy unaffected. In his Chapter 13 plan, Bart must provide for full payment of the secured portion of the lien. For any portion of the tax lien that is unsecured, it must then be determined whether the unsecured portion has priority status. For any unsecured portion determined to have priority status, Bart's Chapter 13 plan must provide for full payment of that portion. To the extent any unsecured portion is determined to be a general unsecured claim, it will receive the general unsecured creditors' dividend, as provided in the Chapter 13 plan. Regardless of Bart's personal liability for the tax lien, it remains an incumbrance on the property until fully satisfied.

MODEL ANSWER - QUESTION VI - FEBRUARY 2009

1. Bill has a claim to enforce a contract for the twenty-acre woodlot. There was an agreement made between Alice and Bill that was supported by the exchange of consideration (the promise to convey for the promise to perform labor).

Agreements for the conveyance of land are subject to the provisions of Vermont's Statute of Frauds, which requires such agreements to be in writing to be enforceable. Oral agreements for the conveyance of land can be enforced, however, if they meet the following standards:

[T]he court may enforce an oral agreement for the transfer of land where the plaintiffs can show that (1) there was an oral agreement (2) upon which they reasonably relied (3) by changing their position so that they cannot be returned to their former position, and (4) the other party to the agreement knew of such reliance.

In re Estate of Gorton, 167 Vt. 357, 362, 706 A.2d 947, 951 (1997). See also *Quenneville v. Buttolph*, 2003 VT 82, 175 Vt. 444, 833 A.2d 1263 (2003).

Bill has substantially, though not completely, performed the agreement. While Bill's partial performance may raise contract law questions concerning the remedy he can obtain, his substantial performance is sufficient to overcome the Statute of Frauds defense.

There may be defenses to Bill's claim based on the assertions that he did not finish by the deadline and that he did not complete his performance. As a general rule, delays in contractual performance do not bar a claim for enforcement of the contract unless the parties specified that time was of the essence in performance and that delay bars enforcement of the contract. *Colony Park Assocs. v. Gall*, 154 Vt. 1, 572 A.2d 891 (1990). In this case, Bill's delay would be a factor in the remedy he could obtain, but would not bar enforcement of the contract.

Contracts for the purchase of land are subject to the remedy of specific performance. If Bill proposes to complete his performance in a reasonably timely manner, he can obtain specific performance of his agreement. *See id.* Even if Bill is unable to complete his performance in a reasonably timely manner, however, he would still have a claim for monetary damages for the work he has already performed.

In the alternative, if the court declines to enforce Bill's contract, Bill could obtain monetary relief under a quasi contract claim. Bill could recover for the value of the work that he has already performed under a theory of unjust enrichment (i.e., the law implies a promise to pay when one party receives a benefit and the retention of the benefit would be inequitable) or quantum meruit (a party providing services receives the reasonable value of those services if she or he reasonably relied on the defendant's request for services, regardless of whether the defendant benefited from the services). *In re Estate of Elliott*, 149 Vt. 248, 252, 542 A.2d 282 (1988).

2. Current Vermont law requires that a will be signed by the testator in the presence of two others who must each sign the will as witnesses. 14 V.S.A. § 5. While the law in effect in 2003 required three witnesses, the will is valid because it meets the current requirements of Vermont law. Dave and Cathy's interest in the will they witnessed does not invalidate the will, but it does affect Cathy's rights to the twenty acre parcel. Vermont law provides that if a person who is not an heir at law witnesses a will, the bequest to that person is void but the will is otherwise recognized. 14 V.S.A. § 10. In this case, Dave, as an heir at law, would receive the bequest of the twenty acre property, subject to the rights of Bill.

3. Vermont law vests jurisdiction over wills and estates in the probate courts. Bill must present a claim to the estate, which must be made within four months of the publication of a notice to creditors of the estate in compliance with probate court rules. 14 V.S.A. § 1203. If the executor or administrator disallows the claim, then Bill may bring an action in Superior Court within sixty days of the disallowance of the claim. 14 V.S.A. § 1204. Alternatively, Bill can file a petition for allowance of his claim in the probate court, which would then decide whether to allow Bill's claim. Any decision by the probate court decision allowing or disallowing Bill's

claim could be appealed to the superior court, and then through an appeal to the Vermont Supreme Court. 14 V.S.A. § 117.

4. The probate court would need to determine the validity of the will and the bequests. A proceeding to prove the validity of the will would be initiated by the executor or administrator of the will in the probate court in Rutlington county. The probate court would then enter orders allowing or disallowing the will. If allowed, the probate court would, following the resolution of all claims, enter an order of distribution in which it would resolve the competing claims of Cathy and Dave. Any party interested in the estate could contest a probate court decision allowing or disallowing the will and the decree of distribution in superior court, and then through an appeal to the Vermont Supreme Court. 14 V.S.A. §117.

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