CALIFORNIA BAR PAST EXAMS

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⑩ REAL PROPERTY

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Real Property

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2001 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

QUESTION 2

Artist owns a workshop in a condominium building consisting of the workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople. The covenants, conditions and regulations (CC&Rs) of the building provide for a board of managers (Board), which has authority to make "necessary and appropriate rules." Board long ago established a rule against the sale within the building of items not created within the sellers' workshops.

Artist accepted a three-year fellowship in Europe and leased the workshop to Weaver for that period. The lease prohibited an assignment of Weaver's rights. Weaver used the workshop to produce custom textiles.

A year into the term, Weaver transferred her right of occupancy to Sculptor for one year. Sculptor moved into the workshop with his cot, electric hotplate, and clothes. He also brought several works of art that he had created during a stay in South America and offered them for sale along with his current works. Sculptor mailed his rent checks every month to Artist, who accepted them. Both Weaver and Sculptor knew the terms of the CC&Rs and Board's rules when they acquired their interests in the workshop.

Three months after Sculptor moved in, Board told Sculptor to stop selling his South American pieces. He refused to do so and thereafter withheld his rent and complained that the regulation was unreasonable and that the building's heating was erratic.

1. What action, if any, may Board take against Artist to enforce the rule against the sale of Sculptor's South American pieces? Discuss.
2. Can Artist recover from Weaver the rent that Sculptor has refused to pay? Discuss.
3. Can Artist evict Sculptor from his occupancy? Discuss.

ANSWER A TO ESSAY QUESTION 2

1. Action Board may take to enforce rule against sale of South American pieces

Whether the Board may enforce the rule against the sale of Sculptor's South American pieces depends on whether the covenant contained in Artist's lease runs to Sculptor. First, it must be determined if Sculptor ("S") is properly occupying the workshop. If S is not allowed to be in the workshop because of A's lease with the Board, the Board may be able to evict S.

Assignment/Sublease of A's workshop to S

An assignment occurs when a tenant transfers the complete tenancy in a lease to another party. The original tenant has no right to reoccupy the leased premises under an assignment. A sublease occurs when a tenant leases the premises to another tenant for a period of time less than the complete lease that the original tenant has with the Board. Artist had a three-year lease from Weaver in the workshop. Because A only transferred a right of occupancy for one year to S, this is a sublease, and not an assignment. The Board will argue that the lease expressly prohibits these types of transfers. However, the lease only prohibits assignments and does not mention subleases. When the lease is silent as to one or the other, the courts will strictly construe the lease as only prohibiting that which is named in the lease. Therefore only assignments are leased since that is all that is named in the lease. Furthermore, the fact that A accepted rent checks may prohibit the Board from taking any action.

Enforcement of Covenant -- Equitable Servitude

The Board will argue that the covenant agreed to by A when he purchased the workshop should also govern any interests between those that are using the workshop in place of A. Because this covenant is being enforced as an injunction (to stop S from selling South American art), it will be easier for the Board to enforce than if they were trying to recover damages. Because the covenant will stop A from selling South American art, it is being enforced as a burden against A. For the burden to be enforced against A, there must be intent between the original parties, there must be a writing satisfying the Statute of Frauds, notice between the parties, and the covenant must touch and concern the land.

Intent between original parties

The Board and Artist intended that the covenant be binding. The Board has the authority to make "necessary and appropriate" rules that are binding on those occupying the building. Since the Board established the rule "long ago" the original parties, A and the Board, intended the covenant to be followed.

Statute of Frauds

As long as there is a written agreement signed by S, the Statute of Frauds is satisfied. This appears to be satisfied since there are no facts suggesting a written agreement was not entered into. Also, since the transfer between A and W is for more than one year, it had to be in writing. Because a tenancy is an interest in land, the Statue of Frauds must be met.

Notice between the Parties
Both Weaver and S knew about the terms of the CC&Rs when they acquired their interests in the workshop. Therefore, all parties were on notice of the restriction.

Touch and Concern
The most challenging requirement for a burden to run with the land between occupiers the Board must meet is that the covenant touches and concerns the land. Here, a promise not to sell items not created within the sellers' workshops does not seem to touch and concern the land. In order for a covenant to touch and concern the land, the land must be benefitted in some way. The only people that are benefitted from such a covenant are those that own workshops in the building. They may argue that such a covenant does touch and concern the land because it makes their workshops more valuable. If this is the case, then the Board may have satisfied all the requirements to enforce this restrictive covenant. By not selling artwork not created in their workshops, the artists that own workshops there may have a protective interest. If selling only local work increases the value of their units, the covenant touches and concerns the land. It seems likely that purchasers of artwork would like (sic) to be able to buy a variety of work, so it is unlikely (sic) that this covenant actually increases the value of the workshops. Therefore, this covenant does not touch and concern the land and therefore does not run with the land.

Breach of Covenant -- Damages
The Board may also attempt to recover damages against A for failing to abide by the covenant. In addition to the elements discussed above, in order to enforce a covenant and recover damages there must also be vertical privity between the parties. This means that the parties must share an interest in land. The Board is just responsible for managing the complex, and does not appear to own the building. Therefore, no interest in land is shared, and there is no vertical privity.

Estoppel
S will argue that the Board is estopped from enforcing the covenant since they have waited three months after he moved in before requesting S to stop selling his South American pieces. S will argue that because they did not do anything, he assumed it was okay to sell that art.

Laches
S will also argue that too much time has elapsed for the Board to enforce the covenant. They waited three months before asking him to stop, and therefore should be barred from enforcement because of laches (defense that occurs when [sic] passage of time).

2. Ability of Artist to recover rent
Artist will be able to recover rent from Weaver if Weaver remains liable under the lease between A and W. As discussed above, the lease between A and W only prohibited assignments. Courts strictly interpret such provisions, and therefore will allow a sublease. S's

interest in the workshop is a sublease since he did not take the full term of the original lease, but only took a one-month occupancy. Although W may not be in privity of estate with A during the time that S is in possession of the workshop, he is in privity of contract. A will argue that W is in privity of estate as well as contract. Privity of estate is present when two parties share an interest in land. Because this is only a sublease, A will argue that W still shares an interest in the workshop with A and that there is privity of estate. Privity of contract between A and W exists because A and W signed the original lease. W remains liable for any defaults of his subleasees since he is still in privity of contract with A. S has a duty to pay rent, and W has a duty to pay rent to A. Therefore A should be able to recover from W the rent S has refused to pay.

There is a duty to pay rent imposed on all tenants, unless this duty has been excused. S will argue that A breached an implied warranty of habitability by providing better heating to the condo. However, because this condo is being used for commercial purposes, A does not owe a duty of habitability. While A must maintain basic utilities, such as heat, it is understandable that the heating [will] be erratic in a commercial building. Heat is often turned down at night and during the weekend in order to save energy. Therefore, it is not a breach of habitability, and S must still pay rent.

3. Ability of Artist to evict Sculptor

Artist may evict S if S was not in rightful possession of the workshop, or if S has breached any duty owed to A. As discussed above, S is in rightful possession of the workshop, as a subleasee. Therefore W owes a duty to pay rent unless A has breached any of his duties owed to tenants.

Implied Warranty of Habitability

The implied warranty of habitability only applies to premises that are leased for residential purposes. It appears that this workshop was not leased for a residential purpose, and therefore no duty of habitability is owed. Although the workshop is located in a condominium, which is traditionally regarded as a residential property, the fact that all the other units in the condominium are used as workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople suggests that the condominium was not rented for residential purposes. Furthermore, the fact that S moved into the workshop, bringing with him his cot and electric hotplate, suggests that the condo did not contain a stove and therefore was not intended to be used as a residence.

Unreasonableness of Regulation

The covenant was agreed to by the owners of the building and the Board has the authority to enforce it. If the covenant was properly instituted by the Board it is not unreasonable. Although the authority that gives the Board the power to pass such covenants, "necessary and appropriate rules," seems vague, the covenant is clear. Only items created in the building are offered for sale. This is probably an appropriate rule considering the interests of the other artists that work in the building. The fact that W and S knew of the terms before accepting the

lease implies that they consented to the covenant.

Erratic Heating

When a property is to be used as a residence, the landlord is under an implied warranty of habitability. One of the warranties is that heat be provided to a building so that it is liveable. However, as discussed above, it does not appear that this workshop was intended to be used as a residence. It would make sense that the heat would be erratic in a commercial office space. In normal office space, heating is often turned off at night and weekends, times when workers are not usually there. This would be appropriate in this case. Even [if] A is found to owe a duty of habitability, the fact that there is erratic heat does not excuse the tenant from withholding rent. If anything, the tenant will be allowed to abate the rental price by the amount it costs to repair the heater. The landlord should repair the heater first, but if the landlord has been notified and fails to repair, the tenant is allowed to repair and abate the purchase price. Therefore, S was still owed a duty to pay rent.

Breach of Quiet Enjoyment

S will also argue that there was a breach of quiet enjoyment when A did not provide constant heat to the building. As discussed above, this was probably not breached since erratic heat can be expected in commercial buildings. It would also be helpful, though, to know if erratic means the heat is not working during the day (times when it is expected that people would be using the building). Even so, S should only be allowed to abate rent, not discontinue payment of rent.

Privity of Contract

S will argue that he only owes rent to W, and not A, because he is a subleasee and therefore not in privity of contract with A. However, he is in privity of estate, and therefore owes the owner of the property rent. If W is also not paying rent (assuming this is the case, since S is not paying rent), then A can evict W, which would also have the effect of evicting S. If W continues to pay the rent to A, despite the fact that S is not paying rent to W, then A will not be able to evict S on the grounds that he is not paying rent.

Breach of Covenant

As discussed in part one, the covenant not to sell art not created in the workshop probably does not extend to S, since it does not touch and concern the land. If the court does find the covenant to extend to S, such that he is bound by the covenant, A will have grounds for eviction based on the fact that S is violating the covenant.

ANSWER B TO ESSAY QUESTION 2

1. What actions, if any, may Board (B) take against Artist (A) to enforce the rule against the sale of Sculptor's (S) South American pieces?

B, as a representative body of the condominium, has been granted the authority to make necessary and appropriate rules. B also presumably has the authority to enforce the CCRs of the condominium on behalf of the individual owners. The rules regarding sale of items not created in Seller's workshops are long established. Where the board of a condominium has established rules under proper authority for a condominium (i.e. under authority in the CCRs, which are generally recorded), the board may enforce these rules as either a restrictive covenant or an equitable servitude if the proper requirements are met.

Artist's liability for Sculptor's (S) acts

A, as the owner of S's workshop may be liable for S's violation of the CCRs. The B may seek to enforce the CCRs as either a restrictive covenant or equitable servitude if proper conditions are met.

Real Covenant

In order to enforce a restrictive covenant against a party (enforce the burden), the burdened party must have notice, the parties creating the restrictive covenant must have intended the restrictive covenant to continue indefinitely and against successor parties, the restrictive covenant must touch and concern the land, and both horizontal privity and vertical privity must exist.

Where these conditions are met, the party seeking to enforce may seek a money judgment.

Intent

When the B created the rule, they likely intended it to continue and to bind successor parties. The condominium has established an identity and enforcement of this rule is an important part of maintaining that identity.

Notice

Where the party creating a condominium has established CCRs, the parties purchasing units in the condominium may be determined to have constructive knowledge if the CCRs are recorded or included or provided as part of the purchase transaction.

Here, A had notice of the terms of the CCRs when he acquired his interest in the condo. So, he had constructive notice.

Touch and Concern

Real covenants that touch and concern the land are those that generally relate physically to the property in a way that increases its value. Here, the rule relates to what may or may not be sold on the property. While this is not necessarily physically related to the property, it is part of the overall function of the condo as a location for artisans. While A may argue that this does not touch and concern the land, a court would likely view it as being closely related to the purpose and function and therefore find that the rule touches and concerns the land.

Vertical Privity
Vertical privity exists where the party is a recipient of the same possessory interest as the person who agreed to the restriction. A owns the workshop and is therefore in vertical privity with whatever party originally agreed to the rule.

Horizontal Privity
For horizontal privity to apply, the party agreeing to the restriction must have had a common property interest with the other party. Here, the original purchaser would have received property from the owner of the condominium. Also, all owners of workshops possess an interest in property that was once a single ownership interest.

Therefore horizontal privity is present.

The B may enforce the rule as a restrictive covenant and sue A for money damages.

Equitable Servitude
A party may enforce a restriction as an equitable servitude against a burdened party when the restriction touches and concerns the land, the parties creating the restriction had intent that it run against subsequent parties, and the burdened party had notice.

As discussed above, the rule touches and concerns the land, was intended to burden subsequent parties, and A had notice.

The B may enforce the rule against A as an equitable servitude and seek to enjoin the sale of South American goods on the premises.

2. Can Artist (A) collect from Weaver (W) the rent that Sculptor has refused to pay?
As the landlord, A may collect rent from a party with whom he is in privity of estate or privity of contract.

The duty to pay rent runs with the land and is an independent covenant of the tenant.

Here, although W has sublet his property, he is still in privity of contract with A and has a duty to pay rent. W would only be able to avoid this obligation if A agreed to a novation, which has not occurred.

W may try to argue that he is not obligated to pay rent because he has been constructively evicted (he would argue this based on the assertions of his sublessee) from the workshop due to the unreasonableness of the regulation and the erratic heating. However, in order for a tenant to assert constructive eviction under the landlord's covenant of quiet enjoyment, the tenant must move out of the premises within a reasonable time. Both W and S would also likely fail on the basis of the reasonableness of the regulation since it is being enforced by a third party. Finally, both W and S may be estopped from asserting the unreasonableness of

the rule because they had notice when they accepted their interests.

In sum, A will be able to recover from W because they are in privity of contract, the tenant has a duty to pay rent, and W's defenses would not likely succeed.

3. Can Artist evict Sculptor from his occupancy?

A will likely attempt to evict S based on the prohibition against assignment and the violation of the rule on sale of outside goods. Both of these are likely to fail and so A will have to attempt to terminate his lease with Weaver or evict Weaver in order to retake possession.

Prohibition Against Assignment

Prohibitions against assignment are enforceable. However, courts construe these prohibitions narrowly and will not interpret a prohibition against assignment to prohibit a sublease. A court will also be quick to find a waiver of a prohibition against assignment.

Here, the lease with W prohibited assignments, not subleases. W has subleased his property to S since W will retake possession for the last year of his own lease. In addition, A accepted rent checks from S and thereby likely waived any right he might have had. A will not be able to evict S due to the prohibition against assignment.

As a sublessee, S is not subject to restrictive covenants and so A may not evict S on this basis either. A sublessee is not viewed as being in either privity of estate or privity of contract.

If A attempts to evict S based on nonpayment of rent, he will also likely lose for the same reason that a landlord is not viewed as being in privity of estate with a sublessee.

A will likely have to sue W for damages and attempt to evict W. An eviction of W would also evict S since all rights of a sublessee are derivative of the sublessor.

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QUESTION 2

Able owned Whiteacre in fee simple absolute. Baker owned Blackacre, an adjacent property. In 1999, Able gave Baker a valid deed granting him an easement that gave him the right to cross Whiteacre on an established dirt road in order to reach a public highway. Baker did not record the deed. The dirt road crosses over Whiteacre and extends across Blackacre to Baker's house. Both Baker's house and the dirt road are plainly visible from Whiteacre.

In 2000, Able conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants but did not mention Baker's easement. Mary paid Able $15,000 for Whiteacre and recorded her deed.

Thereafter, Mary borrowed $10,000 from Bank and gave Bank a note secured by a deed of trust on Whiteacre naming Bank as beneficiary under the deed of trust. Bank conducted a title search but did not physically inspect Whiteacre. Bank recorded its deed of trust. Mary defaulted on the loan. In 2001, Bank lawfully foreclosed on Whiteacre and had it appraised. The appraiser determined that Whiteacre had a fair market value of $15,000 without Baker's easement and a fair market value of $8,000 with Baker's easement. Bank intends to sell Whiteacre and to sue Mary for the difference between the sale price and the loan balance.

The following statute is in force in this jurisdiction:

Every conveyance or grant that is not recorded is void as against any subsequent good faith purchaser or beneficiary under a deed of trust who provides valuable consideration and whose interest is first duly recorded.

1. What interests, if any, does Baker have in Whiteacre? Discuss.

2. What interests, if any, does Bank have in Whiteacre? Discuss.

3. What claims, if any, may Mary assert against Able? Discuss.

ANSWER A TO ESSAY QUESTION 2

1. Baker's Interest in Whiteacre

Easement

An easement is an interest in land that grants someone a right to use the land of another. An easement can be created in a number of ways. One way an easement can be created is by express writing. Here, Able gave Baker a valid deed granting the easement for the right to cross Whiteacre to reach the public highway. Therefore, the easement was created at that time.

An easement will be perpetual in duration unless otherwise specified in the instrument creating it. Here, Able did not include any termination date for the easement. Therefore, the easement to Baker was to be perpetual in duration.

There are two types of easements: easements appurtenant and easements in gross. An easement appurtenant is one that involves two adjacent parcels of land where one piece of land is used to benefit the other. The benefited estate is called the dominant estate, while the burdened estate is called the servient estate. Here, Blackacre is the dominant estate and Whiteacre is the servient estate.

An easement, even though perpetual, can be terminated by the parties. A dominant estate can release the servient estate from the easement by writing. The writing would have to meet deed formalities to satisfy a valid release. The easement can also be abandoned. However, it cannot simply be an oral abandonment. The oral abandonment must be coupled with some action by the dominant estate showing that they are abandoning the

easement. The servient estate can also terminate the easement by prescription. Here, none of these actions of termination have occurred. So, at first glance, Baker's easement across Whiteacre should still be in existence.

Recordation

An interest in land can be protected by recodation. At common law, an interest in land was protected by the first in time, first in right doctrine. The problem with the doctrine was that it did not protect bona fide purchasers. Modern law has produced recording systems and recording statutes that spell out the protection afforded to those that record their interests. At common law, since Baker was first in time the easement, then his interest would be protected against subsequent purchasers. But, as we are told, there is a statute in this jurisdiction that controls.

An important concept in recordation is the concept of the bona fide purchaser ("BFP"). BFPs are granted special status in many recordation statutes. A bona fide purchaser is one who purchases for value and without notice of any other interests. There are three types of notice. Actual notice is, of course, characterized by the actual knowledge on the part of the purchaser of the previous interest. Constructive notice is that which comes about by there being a deed or interest recorded in the buyer's direct chain of title. Finally, there is inquiry notice. Inquiry notice comes about whenever an inspection of the property or title records would lead a reasonable purchaser to launch a further inquiry. Here, we are told that Baker did not record his deed granting the easement. Therefore, we know that Mary and Bank could not have had constructive notice of easement. However, we are also told that the easement road leading to Baker's house on Blackacre was plainly visible from Whiteacre. This visibility is enough to put a subsequent purchaser on inquiry notice. Therefore, Mary and Bank are not BFPs.

There are three types of recordation statues. There is a race statute which will protect the first person to record their deed or interest regardless of their status. There is a notice statute which will protect any bona fide purchaser who records against any subsequent purchaser who is also not a bona fide purchaser. There is also [a] race-notice statute which will protect a bona fide purchaser, but only if he is the first to record. Notice and race-notice statutes give protection only for BFPs; therefore, we know that if the statute in this jurisdiction is a notice or race-notice statute, then Mary and Bank will not be

protected against Baker's easement. Baker's easement, rather, will protected [sic] by the common law rule of first in time, first in right. The statute here a race statute [sic]. It will protect any good faith purchaser for value or beneficiary under a deed of trust as long as they recorded first. Here, we know that Mary was a good faith purchaser for value. We are also told that Mary recorded her deed. Therefore, the statute will protect her interest in Whiteacre and will make Baker's deed void as against Mary.

Necessity

An easement can arise by necessity. Necessity arises when one parcel of land is cut off from any viable road or passageway. If the land is cut off, an easement by necessity will arise across an adjacent piece of land for right of way to the highway or other means of travel. The servient estate has the right to place the easement anywhere on the property as long as it is reasonable. Here, if the voiding of Baker's deed of easement will cut off Blackacre from any public highway, then an easement of necessity will arise and he will still be able to cross Whiteacre. However, the holder of Whiteacre will be able to place the easement wherever they wish as long as it is reasonable.

2. Bank's Interest in Whiteacre

Deed of Trust

A deed of trust acts like a mortgage. The title is held by a trustee until such time as the loan is paid back and then title reverts back to the landowner. Because this acts like a mortgage, courts will treat it like a mortgage and will require the procedures of a mortgage. These procedures will include a judicial proceeding (foreclosure) before a sale of the property to satisfy the loan. The deed of trust will also be a recognized interest in property, as is the mortgage. Therefore, it can be recorded and protected like a mortgage.

BFPs

As stated earlier, we know that a BFP is a purchaser for value that takes without notice of a previous interest. Here, we are told that Bank does not make a physical inspection of Whiteacre before making the loan and taking their interest. If they had done so, as a reasonable party would have, then

they would have seen the dirt road leading to Bakers' house. Therefore, Bank was inquiry notice and is not a BFP.

Shelter Rule

Under the shelter rule, a subsequent purchaser can be sheltered under a BFP's protection. This means that if a jurisdiction has a statutory scheme that only protects BFPs, that there is still a loophole that will allow a non-BFP to get protection. The subsequent purchaser must take in a line descending from the BFP. If the subsequent purchaser takes from BFP, he can use the BFP's protection under the statute for himself. The purpose of the rule is protect [sic] the alienability of the property for the BFP. Here, we know that Mary is not a BFP. We also know that the statutory scheme does not require that one be a BFP. However, if we did have a notice or race-notice statute, then Bank would not be protected under the shelter rule because Mary is not a BFP.

Recordation

As stated above, one who holds an interest in land can protect that interest by recording it pursuant to the recording statutes of its jurisdiction. Here, we know that the recording statute applies to the beneficiary of deeds of trust. Here, Bank was the beneficiary of the deed of trust on Whiteacre. The statute requires valuable consideration be paid for the interest. Here, Bank loaned Mary $10,000 for its interest in the deed of trust. Bank also recorded its interest. When Bank recorded its interest, it made Baker's deed of easement void as to Bank's interest. Therefore, Bank has an interest superior to Baker's.

Foreclosure

Bank's deed of trust was secured by Mary's interest in Whiteacre. As stated before, the deed of trust acts like a mortgage so it will be treated as such by the courts. This will require a foreclosure proceeding. Once the proceeding has been established, Bank will be able to force the sale of Whiteacre to satisfy its claim. Because Baker's easement will be void as to Mary and Bank, there will be no deficiency against Mary.

3. Mary v. Able

Easement

An easement on a servient estate passes with the servient estate. Therefore, when Whiteacre passed from Able to Mary, Mary took subject to the easement. However, the recordation statute has saved Mary from this.

At common law, a seller of land did not have to disclose anything to the buyer. The buyer took at his own peril under the doctrine of caveat emptor. However, a general warranty deed did require disclosures.

General Warranty Deed

Able passed Whiteacre to Mary on a general warranty deed. A general warranty deed comes along with six covenants of title. There are three present covenants and three future covenants. The present covenants are the covenants of: seisin, right to convey, and against encumbrances. These present covenants are breached, if at all, at the time that title is passed. The future covenants are the covenants of: warranty, quiet enjoyment, and further assurances. The future covenants are breached, if at all, at some later time when another party makes a claim of paramount title.

Covenant Against Encumbrances

The covenant against encumbrances basically says that the title will be free of any encumbrances not previously disclosed by seller. Encumbrances include easements, restrictive covenants, and mortgages, among other things. Here, Able did not disclose the easement held by Baker. This was a breach of the covenant against encumbrances at the moment that title passed. Therefore, Mary can sue for this breach and can collect any damages that she suffered as a result.

ANSWER B TO ESSAY QUESTION 2

Baker's interest in Whiteacre:

Easements:

An easement in a non-possessory interest in land that allows the easement holder to use the property of the true owner. Baker's easement can be described as an easement appurtenant. Whiteacre is the servient estate. Blackacre is the dominant estate. As the holder of the easement appurtenant, Baker can use the road over Whiteacre to travel from Blackacre to the public highway.

Unless they qualify as easements by necessity or by prescription, easements must be in writing to be valid, and must satisfy the statute of frauds. Here, Able granted Baker a valid deed, which will satisfy the writing requirements. Therefore, it appears that Baker has a valid express easement to use the road over Whiteacre for access to the public highway.

Additionally, easements are presumptively perpetual. They are terminated by the terms of the instrument themselves, by express writing, by abandonment, by condemnation of the servient estate, or by merger of the servient and dominant estate. None of those things appear to have occurred here, so Baker's easement has not been terminated.

Failure to record:

Although Baker appears to have a valid easement, his failure to record may affect his rights here. Recording statutes, such as the one in this jurisdiction, are primarily for the purpose of protecting subsequent BFPs. They do not effect the validity of land transfers themselves. Thus, despite his failure to record, Baker had a valid easement when Able conveyed the deed to him, assuming it was properly delivered and accepted.

Mary as a BFP

The next issue is whether Baker's easement fails against a challenge by Mary, because she purchased the dominant estate, Whiteacre, after Baker did not record his deed to the easement. There is a recording statute in this jurisdiction. The recording statute can best be described as a race-notice

statute. This means that in order to be protected under the statute, the subsequent purchaser must take the property without notice and record their deed first. Because Mary recorded her deed, and Baker never recorded his, the race component of the race-notice statute has been satisfied, as Mary recorded first.

The issue then becomes whether or not Mary satisfies the requirement of being a subsequent good faith purchaser, which I will refer to a[s] BFP for short. A BFP is a purchaser who pays valuable consideration and who takes without notice of the other interest in the property. Mary paid $15,000, so she did pay consideration.

Notice:

The main issue is whether Mary took without notice.

Subsequent purchasers are not good faith BFPs if they have either actual notice, constructive notice, or inquiry notice. Here, there are no facts that suggest that Mary in fact know about the easement, so we cannot simply conclude that she had actual notice. Constructive notice is the type of notice that comes from recording. Because Baker did not record his deed, Mary did not have constructive notice. Inquiry notice comes from physical inspection of the land. Here, the facts indicate that both Baker's house and the dirt road were plainly visible from Whiteacre. This indicates that upon inspection of Whiteacre, Mary could have discovered the easement and inquired about it before purchasing Whiteacre from Able. Thus, it can be said that Mary did indeed have inquiry notice. As such, Mary fails as a BFP, and cannot defeat Baker's interest in Whiteacre. Therefore, it appears that Baker's easement over Whiteacre is valid.

Bank:

Moreover, the race-notice statute also protects mortgagors, such as the Bank. The bank also satisfies the recording first component of the statute, but did not physically inspect the land before taking its security interest in it. Therefore, the Bank also had inquiry notice, and cannot simply defeat Baker's easment.

Bank's interests in Whiteacre

Bank v. Baker

The race-notice statute in this jurisdiction protects beneficiaries under a deed of trust. The bank is a beneficiary under a deed of trust, and therefore the bank is protected by the recording statute. As discussed above, the Bank satisfies the"race" component of the recording statute, as it recorded the deed of trust and Baker never recorded his easement, therefore the Bank recorded first.

Also as discussed above, the Bank did not inspect the land, but if it had it would have discovered the easement. Therefore, the Bank had inquiry notice of the easement and cannot defeat Baker's interest in Whiteacre.

Bank v. Mary

The Bank lent Mary $10,000. In exchange, the Bank received a note secured by a deed of trust in Whiteacre. In a title theory jurisdiction, this would have meant that Bank held title to Whiteacre at equity. In a lien theory jurisdiction, this would have meant that Bank simply had a lien on Whiteacre. In any case, when Mary defaulted on the loan, Bank had a right to foreclosure on the property. Mortgage law requires that a valid foreclosure sale takes place, and the facts state that the Bank lawfully foreclosed.

Following foreclosure, the Bank became the owner of Whiteacre. Thus, the Bank owns whatever interest in Whiteacre Mary owned, which means it owns Whiteacre in fee simple absolute, subject to Baker's easement.

The issue then is whether the Bank has a valid claim against Mary for the $2000 difference between the loan amount and the value the land has been appraised [at] first. Before the Bank can actually bring an action against Mary for the difference, it must sell Whiteacre. Only after it sells Whiteacre on the market can the Bank actually assert a deficiency judgment against Mary. Had the Bank had the property appraised before granting the security interest, the Bank likely would have discovered the easement and would have discovered that the land was not worth $10,000. For this reason, Mary will argue that the Bank assumed the risk of this deficiency.

Mary's claims against Able

Abel conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants, but did not mention Baker's easement. Although land sale contracts contain implied warranty of marketable title, the land sale contract merges into the deed at closing, therefore Mary's only claims against Able must be based on the deed, and Mary must proceed under the principles of real property law. The issue here is what actions Mary has against Able based on the deed.

Deed covenants:

Warranty deeds contain present and future covenants. The present covenants can only be breached at the time of the conveyance, and are therefore not an issue here. However, the future covenants can be breached later. Here, at a time following the conveyance, Mary took a mortgage out on Whiteacre based on the value of the land without Baker's easement. This occurred after conveyance, and therefore Mary can bring an action against Able under the future covenants. The future covenants are for quiet enjoyment, further assurances and warranty.

These covenants represent guarantees made by Able that Mary owns the land outright, free from encumbrances and from challenges to her ownership interests by third parties. Here, the bank is threatening to sue Mary for the $2000 deficiency between what she thought she owned and the value of Whiteacre with Baker's easement on it, as with the easement, the value of Whiteacre is insufficient to pay off the $10,000 mortgage. Mary can sue Able for the $2000 different [sic] under the future covenants, and she should prevail because Able failed to inform Mary about the easement and the easement was not mentioned in her deed. The facts regarding inquiry notice and Baker's failure to record are irrelevant here, as recording statutes do not affect the validity of the deed conveyances.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

QUESTION 2

Olga, a widow, owned Blackacre, a lakeside lot and cottage. On her seventieth birthday she had a pleasant reunion with her niece, Nan, and decided to give Blackacre to Nan. Olga had a valid will leaving "to my three children in equal shares all the property I own at my death." She did not want her children to know of the gift to Nan while she was alive, nor did she want to change her will. Olga asked Bruce, a friend, for help in the matter.

Bruce furnished Olga with a deed form that by its terms would effect a present conveyance. Olga completed the form, naming herself as grantor and Nan as grantee, designating Blackacre as the property conveyed, and including an accurate description of Blackacre. Olga signed the deed and Bruce, a notary, acknowledged her signature. Olga then handed the deed to Bruce, and told him, "Hold this deed and record it if Nan survives me." Nan knew nothing of this transaction.

As time passed Olga saw little of Nan and lost interest in her. One day she called Bruce on the telephone and told him to destroy the deed. However, Bruce did not destroy the deed. A week later Olga died.

Nan learned of the transaction when Bruce sent her the deed, which he had by then recorded. Nan was delighted with the gift and is planning to move to Blackacre.

Olga never changed her will and it was in effect on the day of her death.

Who owns Blackacre? Discuss.

Answer A to Question 2

Olga owned Blackacre and had a valid will leaving to her three children "in equal shares all the property I own at death." If the terms of the will were to take effect while Olga owned Blackacre, her three children would share in Blackacre equally. However, she had a reunion with her niece Nan, and had decided to make a present conveyance of Blackacre. She drew up a deed with the help of her friend Bruce, gave the deed to Bruce, and, without Nan's knowledge, instructed Bruce to "record it if Nan survives me." Later, Olga attempted to revoke her alleged gift to Nan by destruction of the deed, however, Bruce did not destroy the deed. When Olga died, Bruce conveyed the deed to Nan. In order to determine who owns Blackacre, the central question to answer is whether Olga made a valid conveyance to Nan. A second question is whether Olga appropriately revoke[d] the conveyance to Nan. If Olga is found to have appropriately conveyed Blackacre [to] Nan, the three children would not take any share of Blackacre under the terms of the will. On the other hand, if Olga did not appropriately convey Blackacre to Nan, the three children would take Blackacre in equal shares, and Nan would not get anything. A final consideration is whether there was any reliance on Nan's part that would allow Nan to take Blackacre.

Did Olga make a valid conveyance of Blackacre to Nan?

In order to find that Olga validly conveyed Blackacre by deed to Nan, three elements must be present. First, there must be an intent by the grantor, Olga, to convey Blackacre to the grantee Nan. Secondly, there must be a valid delivery of the deed to Nan. And thirdly, Nan must validly accept the deed and Olga's conveyance.

Did Olga have an intent to convey Blackacre to Nan?

In order to possess valid intent, Olga must have intended to convey Blackacre to Nan at the moment she made delivery. It is not enough that Olga possess the requisite intent to convey Blackacre to Nan years before delivery is made. The intent must match the moment of delivery.

Here, the facts indicate that Olga intended to "effect a present conveyance." This wording implies that her intent was to convey Blackacre at that precise moment. Olga therefore had Bruce draw up a deed which complied with deed formalities of description of property, names involved, and Olga's signature. Olga then handed the deed to Bruce, stating, "Hold this deed and record it if Nan survives me." When Olga handed the deed to Bruce, the facts state that she intended to transfer Blackacre to Nan at that precise moment. However, her conduct does not match the wording of "present

conveyance." Instead, Olga wanted Bruce to "hold this deed, and record it if Nan survives me." This language is indicative that Olga did not want to make a precisely present conveyance of Blackacre. Instead, Olga wanted Nan to receive Blackacre upon the happening of a condition, that Nan survive Olga. Olga manifested the intent that should Nan not survive Olga, Nan should not get Blackacre. Olga intended that at that moment, Nan was to receive a contingent remainder in Blackacre, and was not intended to be a present conveyance. Instead, Olga intended to remain holder of the deed to Blackacre, and leave open whether her children should take under her will.

This contingent remainder should be distinguished from a fee simple determinable. A fee simple determinable transfers an interest in land; however, should a condition occur, then the land will revert back to the grantor through possibility of reverter. Here, a court will most likely find that Olga did not intend to convey any type of defeasible fee, but instead wanted to convey a contingent remainder.

Nan would disagree with the characterization that Olga intended to convey a contingent remainder. Instead, Nan would argue that Olga intended to make a present possessory conveyance of Blackacre to Nan when she handed the deed to Bruce. However, the language which Olga used, indicating that there was a condition before the deed should be recorded, indicates that there was also a condition before the deed was to become possessory in Nan. This characterization will also depend on whether Bruce is an agent for Nan, or an agent for Olga as shall be discussed later.

Olga's children will argue alternatively that the intent does not match the delivery at all, that Olga's intent was to make a present possessory transfer of Blackacre, that her actions do not match, and therefore, the whole transaction should be invalidated. However, courts are unwilling to invalidate a transaction simply on technicalities. Instead, courts will try to look at the transferor's intent in giving effect to a transaction, use that for guidance, but still rely on legal principles, justice, and fairness in coming to a decision. Therefore, most likely, a court will not invalidate Olga's attempt to convey Blackacre to Nan, solely because her words do not match her actions. Instead, a court will construe her intent reasonably.

Did Olga make a valid delivery of the deed to Nan?

Conveyance of a deed also requires valid delivery of the deed from the grantor to the grantee. Such conveyance does not have to be a precise handing of the deed from the grantor to the grantee. Instead, there can be a constructive conveyance. The grantor could hand the deed to a third party, who could in turn hold the deed for the grantee. A finding of whether there was a valid delivery in such a situation rests upon which party

the third party is an agent for.

In the present case, Olga handed the deed to Bruce, with precise instructions to record the deed should Nan survive Olga. It is clear that there was a valid delivery from Olga to Bruce. But the question is whether Bruce is an agent for Nan, or Olga.
The facts support the conclusion that Bruce is an agent for Olga. The facts describe Bruce as a "friend" of Olga, and a person whom Olga could turn to for help in drafting a deed. Furthermore, Bruce helped Olga draft the deed with a form, and for all purposes, seems to be on Olga's side. The facts also indicate that Bruce was to act on behalf of Olga. Bruce was to convey the deed to Nan, and record the deed, should Nan survive Olga. T[he]se actions on behalf of Olga and other aid to Olga are indicative of an agency relationship. A court will most likely find that Bruce is an agent for Olga.

The facts do not support a finding that Bruce is an agent for Nan. The facts do not show that Nan even knew Bruce, and for all purposes, seems to have first heard from Bruce when Bruce sent her the deed. Because Bruce is not acting on behalf of Nan, but rather on behalf of Olga, a court w[il]l most likely find that Bruce is Olga's agent, and not Nan's.

A finding of this sort is significant. If Bruce is an agent for Olga, then when Olga gave the deed to Bruce, delivery was not yet made. Delivery would happen upon the occurrence of the specified condition, and Bruce would transfer the deed to Nan, using the power which Olga granted to Bruce to act on Olga's behalf. On the other hand, if Bruce is an agent for Nan, then delivery was complete upon Olga's delivery to Bruce. All that would remain is for the deed to be accepted.

Because a court will most likely find that Bruce is an agent for Olga, a court will also most likely not find that there was a valid delivery made to Nan at the moment Olga gave the deed to Bruce. Instead, a court may find that a valid delivery was made when Bruce, acting as agent for Olga, transferred the deed to Nan, because Olga empowered Bruce to act in her interest.

Was there a valid acceptance by Nan?

In addition to an intent to deliver by the grantor and a valid delivery by grantor to grantee, there must also be a valid acceptance by the grantee in order for a valid conveyance of a deed to take place. As indicated above, Bruce will most likely be found to be an agent for Olga. Thus Bruce cannot accept on behalf of Nan. If Bruce had been an agent for Nan, Bruce could accept the deed on behalf of Nan. Instead, the facts indicate that Nan did not even know of anything of the transaction. Nan could not accept until Bruce sent the letter to Nan.

When Bruce did send the letter to Nan, Nan accepted the transfer. This is indicative as Nan "was delighted" and intended to move to Blackacre. Thus, if there was not an effective revocation of Bruce's power to transfer the deed to Nan, then the deed should be effective in favor of Nan.

Significance of Olga's revocation

These findings are significant because of the revocation which Olga made. A revocation is valid anytime up to the moment of acceptance. In the present case, there was not even a valid delivery, let alone a valid acceptance at the moment Olga handed the deed to Bruce. A court MAY find that there was a valid delivery and acceptance when Bruce transferred the deed to Nan, but only if Bruce was st[il]l empowered to transfer the deed to Nan. Nan would argue that Bruce remained empowered to transfer the deed because Bruce did not use substantially the same instrument and means to revoke her gift as she did to make it. Generally, such transfers are terminable by any reasonable means. Olga's children would argue that even if there was not a valid delivery or acceptance, the revocation was effective upon the phone call, that is, was reasonable to revoke her offer by telephone rather than in writing because Olga and Bruce were friends.

A court will probably hold that the revocation was not effective. Although this is a scenario for the transfer of land thus subject to the statute of frauds, a finding that a person can revoke or reinstate a transfer simply on a whimsical phone call would invite the danger of too much fraud. If Olga could effectively terminate her transfer by a phone call, then she could just as easily reinstate her offer. Such ease in a transfer of something as substantial as a transfer of land would invite too much danger of abuse and fraud. Hence, a court will probably hold that Olga's revocation was invalid.

Conclusion

A court will most likely hold that Olga had an intent to deliver land to Nan. Although her intent may not coincide precisely with her actions, a court will construe a reasonable intent to deliver. Olga conveyed the property to Bruce as her agent who in turn was empowered to deliver the deed to Nan. Olga's revocation was ineffective because it did not comply with the statute of frauds. Hence, when Nan accepted the deed, a court will probably find an effective conveyance.

Should the court not find an effective conveyance, Nan could also pursue a theory of reliance. However, the facts do not support too much of a finding of reliance, as Nan did not take any substantial action, and instead, "planned" to move to Blackacre. A plan

is not sufficient to justify a finding of reliance. There must be also a significant manifestation of intent to possess.

Answer B to Question 2

The issue is whether the deed form was sufficient to pass title to Nan and make her the owner of Blackacre, or whether the deed was invalid, which would mean that Olga was owner of Blackacre upon her death and the property would pass through her will to her three children in equal shares.

1. Deed

In order for a deed to be valid there must be: (1) a writing that satisfies the statute of frauds; (2) delivery; and (3) acceptance.

A. Statute of Frauds

When conveying an interest in land, the conveyance must be contained in a writing that satisfies the statute of frauds. A deed is sufficient to satisfy the statute of frauds if it: (1) identifies the parties to the conveyance; (2) sufficiently describes the property to be conveyed; (3) and is signed by the grantor. In this case, Blackacre is a piece of real property that consists of a lakeside lot and cottage, and a sufficient writing must exist in order for the conveyance to be enforceable.

Here, the deed form is a written memorandum which identifies the parties to the conveyance. The deed names herself as grantor and Nan as grantee. The deed also sufficiently identifies the property to be conveyed. The deed designates that Blackacre is the property being conveyed and the deed includes "an accurate description" of Blackacre. Also, Olga, as grantor, signed the deed. In general, the signature of a deed does not have to be notarized; however, in this case the deed was notarized by Bruce after Olga acknowledged her signature. Therefore, it appears that the deed form was a written memorandum that is sufficient to satisfy the statute of frauds requirement for conveying an interest in land.

B. Delivery

To determine whether a grantor has sufficiently delivered a deed so as to affect a conveyance of real property, the focus of the inquiry turns on the grantor's intent. If the grantor intends to pass a present interest in the property, then delivery is complete. Actual physical delivery of the deed is not required, nor is knowledge of the delivery by the grantee, so long as the grantor possessed the requisite intent.

Here, Nan would argue that at the time Olga executed the deed form she had the

present intent to convey Blackacre to her. Olga and Nan were family members and had just had a "pleasant reunion" for Olga's seventieth birthday. In addition, Olga did not want her children to know that she was leaving Nan Blackacre while she was alive. Thus, this shows that Olga has the present intent to pass title to Nan while she was alive. Moreover, the deed form by its terms would effect a present conveyance of the property.
On the other hand, Olga' s children may argue that Bruce merely provided Olga with the deed form, and Olga did not know that it would effect a present conveyance. Even though the terms were sufficient, Olga's children would argue that she lacked the requisite present intent as evidenced by Olga handing the deed to Bruce and telling him to hold the deed and only record it if Nan sur[v]ived her. Olga's children would argue that this demonstrates that Olga did not intend for the deed form to pass to present title and therefore Olga never 'delivered the deed' to Nan. Olga's children would also note that Olga's intent not to pass present title to Nan is shown by Olga's telephone call to Bruce in which she instructed Bruce to "destroy the deed".

On balance, because at the time of the conveyance Olga executed the deed sufficient to convey title and she wanted to make a gift of the property to Nan at that point, even though she didn't want her children to know about it, a court would likely find the deed was sufficient to convey title to Nan at the point it was executed by Olga. Olga did not state that she only intended the deed to be effective upon the occurrence of an event, rather Olga merely stated that she wanted Bruce to record the deed if Nan survived her. A deed does not have to be recorded in order to be valid. Therefore, Olga likely delivered the deed.

C. Acceptance

A grantee must accept the deed of conveyance. In general, acceptance is presumed unless the grantee has specifically indicated an intent not to accept the conveyance. Instead, it is immaterial whether Nan knew about the conveyance or not when Olga "delivered" the deed. Therefore, Nan's lack of knowledge would not prohibit a finding that she "accepted" the deed. In fact, as further evidence of her acceptance, Nan "was delighted" with the gift and planned on moving to Blackacre. Thus, there was sufficient acceptance.

As a result, because there is a sufficient writing to satisfy the statute of frauds, and Olga intended to make a present transfer of the Blackacre when she executed the deed and Nan's acceptance can be presumed, Nan owns Blackacre. Because the property is not part of Olga's estate at the time of her death because she did not own it anymore, her three children would not receive Blackacre in "equal shares" pursuant to Olga's will. A

testator may not devise property which she does not own at her death.

However, if the court found that Olga did not possess the requisite intent to deliver Blackacre to Nan, Nan could still argue that Olga's deed form constituted a valid disposition by will and therefore she would still take the property.

2. WILL - Is the Deed Form a Valid Will?

In general, a will is valid if the testator is at least 18 years old and of sound mind, possesses the requisite testamentary intent, signs the will in the joint conscious presence of 2 witnesses that understand the document is the testator's will and who sign the will. Some jurisdictions recognize the validity of holographic wills. To be valid, a holographic will must be signed by the testator, the testator must possess testamentary intent, and the material provisions of the holographic will must be in the testator's handwriting. Material provisions of the will consist of identifying the beneficiaries and the property to be devised.

In this case, the deed form would not be a valid formal will because Olga executed the document in the presence of only 1 witness, Bruce. Thus, even though Olga was over 18 and appears to be of "sound mind", and she signed the deed, the deed form does not qualify as a valid formal will.

Nan could argue that the deed form constitutes a valid holographic will. The deed form was signed by Olga, and it appears that "Olga completed the form" by naming herself as grantor and Nan as grantee, and by including the property to be conveyed, Blackacre, and accurately described the property. Thus, the [the] "material terms" of the will appear to be in Olga's handwriting. It does not matter that the document was a "form" so long as the material terms were in Olga's handwriting. Therefore, the court may conclude that Olga executed a valid holographic will if it concludes that at the time Olga possessed the necessary testamentary intent.

Nan would argue that Olga's statement to Bruce instructing him to hold the deed and record it if "Nan survives me" evidences a testimony intent that Nan only take the property upon Olga's death. Thus, Nan would not have an interest in the property until Olga dies, which is consistent with disposing of one's property by will. A court would likely conclude that the deed form constitutes a valid holographic will.

3. Revocation of Holographic Will

In general, wills are freely revocable during the testator's lifetime. A will may be revoked by a physical act or by execution of a subsequent instrument.

In order to revoke a will by physical act, the testator must (1) have the intent to revoke, and (2) do some physical act such as crossing out, destroying, obliterating which touches the language of the will. A testator may direct another person to destroy the will, however, the destruction must be at the testator's direction and in the testator's presence.
Here, Olga's children could argue that the deed form, which constitutes a holographic will, was revoked by Olga before her death. Olga intended to revoke the will when she called Bruce and told him to "destroy the deed". Olga's children may argue that even though Bruce did not actually destroy the deed, the court should still find that Olga possessed the intent to revoke. However, because Bruce was not in Olga's presence and did not do anything to the language of the holographic will, it is likely that Olga did not sufficiently revoke the holographic will before her death.

4. Revocation of Earlier Will

If the court found that Olga did not revoke the holographic will, then the issue becomes whether the holographic will is sufficient to revoke the earlier valid will leaving all of Olga's property to her three children equally. A testator may revoke a prior will by executing a subsequent instrument. In general, a subsequent written instrument that qualified as a will must be construed, to the exent possible, as consi[s]tent with the prior instrument. However, to the extent that a subsequent instrument is inconsistent with prior will, the prior will is revoked.

Here, the holographic will leaves Blackacre, which was part of Olga's "property" to Nan. Olga's original will left "all the property that I own at my death" to her three children. If the court finds that the deed form was insufficient to pass title to Nan during life because Olga lacked the necessary intent, she would "own" Blackacre at her death. If the deed form constitutes a valid holographic will, it disposes of Blackacre. Thus, this disposition would work a revocation of the original will to the extent that it is inconsistent. Therefore, Nan would take Blackacre under the holograph will, and Olga's children would take the rest of Olga's property since that would not be inconsistent with the original terms of the will.

Olga's children may argue that Olga never dated the holographic will, and therefore, when a testator is found to have a formal will and a holographic will that is undated, a

presumption exists that the holograph was executed before the holograph [sic]. Thus, the formal will would be inconsistent with the undated holograph, and the formal will would, to the degree of inconsistency, revoke the undated holograph. In that case, Olga's children would own Blackacre equally, and Nan would take nothing.

In sum, Nan likely own[s] Blackacre because the deed form was sufficient to pass present title to her, and therefore Olga did not own Blackacre at her death. As such, her original will would not pass Blackacre to her children since she did not "own" it at her death. In addition, even if the court finds that Olga lacked the requisite intent for a valid delivery, the deed form likely qualifies as a valid holographic will which Olga did not revoke in her lifetime.

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Question 4

Lori owns a small shopping center. In April 1999, Lori leased a store to Tony. Under the lease Tony agreed to pay Lori a monthly fixed rent of $500, plus a percentage of the gross revenue from the store. The lease term was five years. In part the lease provides:

> Landlord and Tenant agree for themselves and their successors and assigns:
>
> * * *
>
> 4. Tenant has the right to renew this lease for an additional term of five years, on the same terms, by giving Landlord written notice during the last year of the lease.
> 5. Tenant will operate a gift and greeting-card store only. Landlord will not allow any other gift or greeting-card store in the center.
>
> * * *

In July 2000, Tony transferred his interest in the lease in writing to Ann. Ann continued to operate the store and pay rent.

In February 2003, a drugstore in the shopping center put in a small rack of greeting cards. Ann promptly complained, but Lori did nothing.

Beginning in March 2003, Ann stopped paying the percentage rent, but continued to pay the fixed rent alone. Lori took no action except to send a letter in April 2003 requesting payment of the percentage rent that was due.

In January 2004, Ann sent a letter to Lori requesting that Lori renew the lease according to its terms. Lori denied that she had any obligation to renew.

1. Is Ann entitled to a renewal of the lease? Discuss.

2. Is Lori entitled to the past-due percentage rent from:

    a. Ann? Discuss.
    b. Tony? Discuss.

Answer A to Question 4

Ann's Right to Renew the Lease

Statute of Frauds

The statute of frauds requires that a lease for possession of property for longer than one year must be evidenced by a writing, signed by the party to be charged. Here, the lease was for a period of 5 years. So to be enforceable it must comply with the statute of frauds. The facts imply that a written lease was drawn and the lease stated the amount of rent[,] the lease term, a right to renew, and a restriction on landlord[']s lease to a competitor and tenant[']s type of use. The Statute of Frauds has been met.

Sublease vs. Assignment

When a lessee purports to transfer less than its entire term, or entire rights and remedies under a lease, the resultant transferee shall be considered a sublesee and the transfer shall be considered a sublease. In this case, the sublessee would not be considered a successor or assignee of the original lessee and would not be in privity of contract with the landlord. Thus, a sublessee may not enforce lessee's rights under the original lease, against the landlord. Conversely, a landlord may not enforce its right to collect rent from a sublesee.

The facts indicate simply that "Tony transferred his interest in the lease in writing to Ann". Because this transfer was in writing, the Statute of Frauds is satisfied. Because it appears that Tony's entire interest in the lease was transferred to Ann, Ann's is an assignee and the transfer shall be considered as assignment.

Does the covenant for tenant's right to renew the lease for an additional five years, on the same terms, by giving landlord written notice during the last year of the lease run with the land?

In order for Ann to be able to enforce her right to renew the lease, she will need to establish that the covenant runs with the land. A covenant is said to run with the land when four criteria are met:

1. The original parties intended that future takers be bound.

Here, the express terms of the lease state "landlord and tenant agree for themselves and their successors and assigns". This language clearly indicates that landlord and tenant intended their successors to be bound.

2. The successor must have knowledge of the covenant.

Ann has actual knowledge of the covenant as it is expressly stated in the original lease and she is seeking to enforce the covenant.

3. There must be horizontal and vertical privity between the parties.

Ann is in horizontal and vertical privity of estate with landlord by virtue of the assignment from Tony, thus, this criterion is met.

4. The covenant must "touch and concern" the land.

A covenant will be held to touch and concern the land if it burdens the land. Here, a 5 year possessory interest in the demised premises, touches and concerns the land.

Because the covenant to renew the lease "runs with the land," unless Ann is in material breach of the lease, she will be entitled to enforce the covenant upon her satisfaction of the "notice during the last year of the lease" requirement. Ann gave written notice to Landlord (Lori), in January of 2004, the last year of the lease. She has met this requirement & is entitled to renew the lease. (She may have waived the non-competition covenant and the renewed lease may not include this covenant - see below.)

[②a.] Did Ann's failure to pay the percentage rent constitute a material breach of the lease, discharging Lori's duties under the lease and permit Lori to collect the percentage rent from Ann?

The facts indicate that begin[n]ing in March 2003, Ann stopped paying the percentage rent. Lori took no action except to send a letter requesting payment of the percentage rent. The covenant to pay percentage rent is enforceable against Ann by Lori since this covenant "runs with the land" (supra). Ann will argue that Lori's breach of the restriction on leasing space to a competitor discharged her duty to pay percentage rent. At common law, the duty to pay rent was held to be an "independent covenant" and was not discharged by a breach of the landlord in regard to improvements on real property. The modern trend is to find that the covenants under a lease for real property are mutually dependant. If Ann can prove that the landlord's (Lori['s]) breach of the covenant "not to rent to a competitor" gave rise to a claim that the amounts of rent she withheld comprised a reasonable "set off" of damages from Lori's breach, her failure to pay the percentage rent may be discharged.

Waiver:

Ann will also argue that Lori's failure to enforce the percentage rent constituted a "waiver" which Ann then reasonably relied upon to continue her tenancy without paying percentage rent. The facts indicate that Lori's only response to Ann's failure to pay

percentage rent was to write one letter requesting rent in April 2003. On these facts, Lori may have waived the covenant to collect percentage rent.

Conversely, Lori may argue that Ann waived the covenant to not to [sic] lease to a competitor greeting card store by merely complaining in February 2003 and then taking no further action under the lease. If Ann would have claimed that Lori's breach of the covenant caused her business to be economically impacted to the point where she had to close shop, she might be able to present an argument for "constructive eviction". Since this did not occur, Ann may have waived her right to enforce the covenant.

Therefore, while the right in Lori to collect percentage rent from Ann may have arisen under the lease, as this covenant "ran with the land", a court might not enforce this covenant against Ann based upon the "mutually dependent" nature of this covenant with Lori's duty not to lease to a competitor, which Lori breached. In the alternative, a court may find that both parties waived their rights to enforce the respective covenants. It should be noted that as Tony's assignee, under the lease, Ann could raise any of Tony's rights and defenses against Lori - provided the covenants run with the land, as they do here.

[②b.] Lori vs. Tony:

Lori's right to collect past due percentage rent.

The assignment of Tony's interest in the lease to Ann did not discharge Tony's duties under the lease. In the facts presented Tony will remain in "privity of contract" with Lori and will therefore be bound by the contractual duties imposed by the lease. The proper method for Tony to have discharged his liability under this contract would have been for Tony & Lori to effect a novation of the contract. A novation occurs when the two parties agree to substitute in a stranger, in this case Ann, and discharge the original party to the contract. No novation occurred in the facts presented. Tony remains liable for the past due percentage rent owed to Lori, subject to the defenses which Ann could have raised, waiver, breach of mutually dependent covenant. For the reasons stated above, Tony will be subject to a claim for unpaid percentage rent based on his contractual liability to Lori, but he will likely be able to successfully defend this claim as set forth above.

Answer B to Question 4

4)

1. Lori's obligation to renew the lease

Validity of the Assignment

The first issue in this case is whether a valid contract exists between Lori and Ann. A lessee may assign his interest in a rental property to a third party unless the lease expressly forbids it. In this case, the lease between Lori and Tony did not forbid an assignment. Therefore, Tony had the right under the contract to assign his interest in the lease to Ann, and a valid contract existed between Lori and Ann. Furthermore, Lori accepted rent from Ann, which further indicates that the assignment was valid.

Terms of the Lease

The second issue is whether Ann has a right under the contract to enforce the provision in the lease that Tenant has the right to renew the lease for an additional term of five years on the same terms by giving the landlord notice. Under the terms of the contract, Ann will argue that Tony agreed for himself and his assigns (Ann) to the term of the lease allowing Ann to renew. Therefore, Ann would have the right to renew the lease, as long as she was not in breach of contract.

Lori would argue that there is no privity of contract between herself and Ann. The contract that Tony made with Ann was not expressly assumed by Lori. Therefore, any covenants that do not run with the land are not binding between Ann and Lori, because there is no privity of contract between them. Lori will further argue that the term of the lease requiring Lori to allow the tenant to renew does not run with the land: there is nothing about the agreement to allow the renewal that touches and concerns the property. Therefore, Lori will argue that her promise to Tony is not binding. However, because the terms of the contract are specifically binding on Tony's successors and assigns, Lori will lose this argument. Under the terms of the original contract, Ann is entitled to renew the lease.

Lori will further argue that Ann breached her covenant to pay rent. The duty to pay rent is an obligation that runs with the land: Ann is in privity of estate with Lori, and her failure to pay rent constitutes a material breach of the contract. Though Lori chose not to evict Ann for her failure to pay rent, she could evict her any time and may refuse to renew the lease at the end of the term.

Ann will will [sic] argue that the duty to pay rent in the form of the percentage check has been excused by Lori's breach of contract. The contract contained a provision that Lori would not allow any other gift or greeting card store in the center. Ann can correctly argue that that [sic] a restriction of this type is a covenant that runs with the land: The restriction

touches and concerns the leased property, because it has the effect of making Ann's gift store more valuable. Furthermore, as mentioned above, the contract expressly states that the covenants in the lease would be binding upon each party's assignees, and Ann as Tony's assignee, can sue under the terms of the contract.

The next issue is whether Lori's decision to allow the drug store to put up a small rack of greeting cards constituted a breach sufficient to allow Ann to stop paying the rent. If Lori's decision constituted a material breach, Ann would be excused from her duty to pay rent. Because Lori would be in breach, Ann could suspend her performance of her rent obligations. Furthermore, as the non-breaching party, she would be entitled to renew the lease under the terms of the agreement between the parties. However, Lori did not breach the terms of the contract. The facts indicate that the contract required Lori not to allow "any other gift or greeting-card store in the center." The facts indicate that the store that sold the cards was a drug store, and that the cards it sold were contained on one small rack. Therefore, under the terms of the contract, Lori will be successfully be [sic] able to show that she was not in breach of the contract. Because Lori did not breach the contract with Ann, Ann was not relieved of her obligation to pay the percentage rent. Ann's material breach of contract, her failure to pay the percentage rent, excused Lori from her obligation under the contract to renew the terms of the lease according to Ann's request.

In the alternative, Lori will argue that even if her decision not to stop the drug store from selling greeting cards did constitute a breach of contract, the breach was minor. A material breach occurs when one party fails to pe[r]form in such a way that the value of the contract is substantially destroyed. Ann may argue that allowing even one card rack in one other store expressly breached the lease and should therefore be considered material. However, Ann will lose this argument: the facts indicate that the drug store primarily sold other things, and that it carried one small rack of card[s]. Allowing the drug store to sell card[s] did not substantially impair the value of the contract for Ann. Therefore, if a breach occurred at all, it was a minor breach. A minor breach does not excuse the other party from performing its obligations under the contract. In this case, Ann had no right to cease paying the percentage rent, because the breach was minor. On the other hand, the failure to pay the full amount of rent owed constituted a material breach, and Lori would have been entitled to evict Ann or sue for damages. Lori's rights concerning the rent itself are more fully discussed below: with regards to the obligation to renew the contract, Lori was excused because of Ann's material breach.

2. The Past Rent

Ann's Obligations

The next issue is whether Lori is entitled to recover for the percentage rent from Ann. As mentioned above, because the covenant to pay rent runs with the land, and because the contract expressly states that the obligations of the lease would be bi[n]ding on assignees such as Ann, Ann was obligated to pay rent. For the reasons discussed above, she will

lose her argument that Lori breached the contract.
Ann's duty to pay rent is a covenant that runs with the land. Since Ann is the tenant in possession of the property, she is in privity of estate with the [sic] Lori. Lori may sue Ann to recover for the value of the rent that she is owed.

Ann may try to argue that Lori is estopped from suing her for the rent. She will argue that, although Lori requested the rent, she allowed Ann to continue occupying the premises for 8 months after requesting the percentage rent. She will argue that Lori's acceptance of the rent constituted a waiver of her right to collect the percentage rent. However, Ann will lose this argument as well. Although Lori had the option of evicting Ann and suing for the rent, she also had the option of letting Ann stay and suing for damages. Ann's obligation to pay rent has therefore not been discharged. Lori clearly did not waive this right, because she sent Ann a letter requesting the percentage rent to be paid.

Tony's Obligation

The next issue is whether Lori may sue Tony to recover the percentage rent that Ann has not paid. The rule is that when two parties sign a contract, and one party assigns its interests in the contract to a third party, the assignor remains liable to the obligee on the or[i]ginal contract. The landlord may collect rent from any party with whom she is in privity of contract or privity of estate.

In this case, Tony and Lori signed the or[i]gnal contract. Tony assigned his interests to Ann. As an assignor, Tony is not relieved of his duty to ensure that the contract is fully performed. Lori may sue Tony for his obligation to pay rent and to pay the percentage of revenues that the story [sic] earned. Tony will have the same defenses available to him that Ann had: he can argue that Lori was in breach and that this breach relieved Ann of her duties to pay. However, for the reasons discussed above, these defenses will not be successful. Because Ann remains liable for the percentage rent, Tony is also liable.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2005 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

Question 5

Alice and Bill were cousins, and they bought a house. Their deed of title provided that they were "joint tenants with rights of survivorship." Ten years ago, when Alice moved to a distant state, she and Bill agreed that he would occupy the house. In the intervening years, Bill paid nothing to Alice for doing so, but paid all house-related bills, including costs of repairs and taxes.

Two years ago, without Alice's knowledge or permission, Bill borrowed $10,000 from Lender and gave Lender a mortgage on the house as security for the loan.

There is a small apartment in the basement of the house. Last year, Bill rented the apartment for $500 per month to Tenant for one year under a valid written lease. Tenant paid Bill rent over the next seven months. During that time, Tenant repeatedly complained to Bill about the malfunctioning of the toilet and drain, but Bill did nothing. Tenant finally withheld $500 to cover the cost of plumbers he hired; the plumbers were not able to make the repair. Tenant then moved out.

Bill ceased making payments to Lender. Last month, Alice died and her estate is represented by Executor.

1. What interests do Bill, Executor, and Lender have in the house? Discuss.

2. What claims do Executor and Bill have against each other? Discuss.

3. Is Tenant obligated to pay any or all of the rent for the remaining term of his lease, including the $500 he withheld? Discuss.

Answer A to Question 5

What interests do parties have in the house?

The court must decide between competing claims by Bill (B), Executor (Exec)[,] and Lender (L).

Joint Tenancy

Alice and B originally took title as joint tenants with the right of survivorship. Joint tenancy required the existence of four unities – time, title, interest, and possession. Assuming these unities were present, the distinguishing feature of a joint tenancy, the right of survivorship, will apply.

Under the right of survivorship, on the death of one joint tenant, his/her interest automatically passes to the surviving tenant(s). Thus, if a joint tenancy existed between Alice and B, B would automatically get Alice's interest at her death.

The issue here, though, is whether any actions by the parties changed the joint tenancy before Alice's death.

Severance/L's mortgage

A unilateral act of mortgaging the property may sever a joint tenancy, depending on the type of jurisdiction.

Lien Theory

A lien theory jurisdiction holds that a unilateral mortgage does not automatically sever a joint tenancy. Therefore, if this is a lien theory jurisdiction, normal survivorship rules would apply, and at Alice's death the following would occur:

Alice's interest would pass to B through the right of survivorship. B would thus be left with a fee simple absolute, subject to L's mortgage. Exec gets nothing.

Title theory

However, in a jurisdiction which follows the title theory, a unilateral mortgage by a joint tenant is held to sever the joint tenancy. The result is that joint tenants become tenants in common, with the mortgagee the equitable owner of the undivided portion legally belonging to the mortgagor.

In a title theory jurisdiction, the following would occur:

Immediately upon B's mortgaging the property, the joint tenancy was destroyed. Alice and B were then tenants in common, each with an undivided ½ interest. B's interest was subject to L's mortgage[.]

At Alice's death, her undivided ½ interest passes through her estate. It will thus be held in trust by Exec to be distributed per the provisions in Alice's will. B will continue to hold his undivided ½ interest. L will have an equitable ownership interest in B's undivided share by virtue of its mortgage.

2. Claims of Exec and B against each other

Exec, as the executor of Alice's estate, may be legally able to assert any claim against B that Alice had during her life. B could counter with any claims he had against Alice.

Exec's claims - Rent

A tenant has a duty to account to co-tenants for any rents or profits received from use of the land. Exec will claim interest in ½ of the rents B received from Tenant.

B rented out the basement apartment to Tenant for $500/month. B received rent for seven months, a total of $3,500. Since Alice had a right to ½ of the rents, Exec will lay claim to $1,750.

B's claims against Exec

B will counter for claims for Alice's share of house-related bills, repairs, and taxes.

House-related bills

The house[-]related bills may or may not be subject to partial reimbursement from Alice's estate. Mortgages or loan payments are generally apportioned between the tenants according to their interest. Since Alice and B had equal interests, B may claim compensation for Alice's half of any such payments made by him.

Some bills, however, are the sole responsibility of the tenant in possession, since they are based on his use or enjoyment of the property. Therefore incidental expenses or use charges such as utility bills will not be subject to reimbursement.

Repairs

Tenants in possession may receive contribution from non-posessory tenants for regular repairs (distinguished from improvements). Thus B may receive reimbursement from Alice's estate for ½ of the regular repairs B had done to keep the property in good condition.

Taxes

Tenants out of possession are also liable for their respective share of taxes levied upon the property. B may therefore claim reimbursement for ½ of the taxes he has paid.

3. Tenant's obligation to pay remaining rent?

B and Tenant (T) entered into a one-year lease. After seven months, T refused to pay rent and has moved out. T will try to get out of his duty to pay rent for the remaining term.

Warranty of habitability

Generally at common law, a tenant's duty to pay rent was considered independent of the landlord's duty to provide the premises. Tenants took the premises as they were; "caveat emptor" was the rule of the day.

Because the harshness of application to tenants, courts have modernly considered residential leases (commercial leases are not protected). Thus, if a landlord provides premises that are not inhabitable, tenant's duty to pay rent may be excused.

"Uninhabitability" has been fairly strictly construed by courts. Property is typically considered "uninhabitable" only if it fails to provide the barest essentials - four walls, a roof, and running water/plumbing.

Here, T will claim that the malfunctioning toilet and drain render the premises uninhabitable. A court will probably find for T, because the lack of working plumbing would result in a possible health hazard. T may thus be excused from paying rent until the problem is repaired.

Many courts allow the tenant, in cases where the landlord has failed to repair, to contract himself to have the repairs done and deduct that amount from the rent due.

Here, T did notify B of the need for repairs, and B never responded. T was therefore eligible to engage in "self-help" by contracting for the needed repairs himself. He did so, and withheld the amount from the rent owed to B. He was within his rights to do so.

Constructive eviction

At issue is whether T can avoid the five months remaining on his lease with B.

If the problem with the toilet and drain render the premises completely uninhabitable,

forming a nuisance to T, then upon proper notice to B[,] T can quit the premises. He will be relieved of his obligation to make future rent payments by virtue of the doctrine of constructive eviction.
Here T notified L of the nuisance conditions. T's own plumbers were unable to repair. Because the condition was a nuisance - a health hazard - T could quit the premises. Since he did so, he can claim constructive eviction.

Therefore T is not liable for any rents remaining on his contract with B.

Answer B to Question 5

5)

1.____Interests of Bill, Executor and Lender

Joint Tenancy

Alice and Bill took title as "joint tenants with rights of survivorship." The creation of a joint tenancy requires the presence of the four unities. Joint tenants must take by the same title instrument, at the same time, with identical interests and rights to possession. A and B took title at the same time and by the same deed and apparently had identical interests and rights to possession and thus a valid joint tenancy was created. Joint tenants have rights of survivorship that entitle surviving tenants to automatic ownership of the interests of deceased joint tenants. Thus a joint tenant's interests are not devisable or descendible. As a consequence, as long as B did not sever the joint tenancy by mortgaging his interest, B became sole owner of the house upon A's death.

Title Theory v. Lien Theory of Mortgages

A joint tenancy is severed, i.e., survivorship rights cease and the tenancy becomes that of tenants in common, when, without the permission of the other joint tenant(s) one joint tenant transfers his or her ownership interest in the property. There are two conflicting theories regarding the consequences of one joint tenant mortgaging his or her interest in a joint tenancy without permission. The title theory of mortgages deems the tenancy terminated once the property is unilaterally mortgaged because it treats title as passing from the mortgagor to the mortgagee[,] thus severing the unity of title. The lien theory of mortgages holds that the joint tenancy remains intact despite the mortgage, concluding that the mortgagee only holds a lien on the property so the unity of title is not disrupted. Thus, the effect of B's mortgage to Lender on his joint tenancy with A will depend on which theory the jurisdiction applies. If it applies the title theory, then the tenancy was severed and A's interest became devisible and descendible and is thus now part of her estate. If the lien theory is applied, then the tenancy was not severed and B automatically took title to the house upon A's death.

Equitable Conversion

Lender certainly has an interest in the one-half share of the house that was B's at the time he mortgaged the house. Lender's rights to the other half depends on whether B took title to the entire property upon A's death as discussed above. B only had the power to encumber what he owned – an undivided one-half interest – and thus at the time of the mortgage L only had a security interest in B's half of the house. Whether L will have a security interest in the entire property, assuming the lien theory of mortgages applies, depends on the application of the doctrine of equitable conversion. Under this doctrine

equity deems done that which ought to be done. Thus, if B represented to L that he owned the house alone and thus L thought his security interest was in the entire property, then the doctrine of equitable conversion could apply to L's mortgage and give L an interest in the entire house.

No Adverse Possession

If the title theory of mortgages applies and thus B does not take A's share of the house, he may argue that his uninterrupted possession of the house for the past ten years gives him title by adverse possession. Adverse possession operates to give title to one who occupies property under certain circumstances for a statutorily prescribed period (i.e., the statute of limitations on trespass). To make out a valid claim of adverse possession to possessor mush [sic] show the [sic] his possession was continues [sic] for the prescribed period, that his possession was open and notorious (such that the rightful owner would have notice of the trespass), that possession of the property claimed was actual (no constructive possession) and that the occupation of the property was hostile (i.e., not with permission of the owner). B's possession of the house likely satisfied the first three requirements as he openly lived in the house[;] however, his claim will fail because occupation by a joint tenant is not hostile absent an ouster of the other tenants. A and B agreed that B would occupy the house after she moved away and thus there was no ouster and no hostility.

2. Claims of Executor and Bill

Executor's Claims – Rents

The general rule is that joint tenants are not entitled to rents from other joint tenants even if one tenant has sole possession of the property unless their [sic] has been an ouster (i.e., exclusion of one tenant of another who [h]as a right to possession). Thus, Executor will not be entitled to any rent claimed for B's occupation of the house because B had not ousted A from the house. However, joint tenants are entitled to their pro rata share of any rents collected from non tenants. Thus, Executor has a claim to half of the rents received by Bill from Tenant, i.e., $1750.

Bill's Claims – Repairs and Taxes

Joint tenants are responsible for their pro rata share of taxes and repair costs absent and [sic] agreement to the contrary. Joint tenants are not responsible for expenses related to another's use of the property. Here B paid for taxes and repairs with no contribution from A for the ten years that he was in sole possession of the house and thus under the general rule A's estate could be held liable to B for her half of these expenditures. Executor would argue that B was obligated to give A notice of any necessary repairs prior to making expenditures that she would be responsible for. Executor would also argue that A and B had an implied agreement that B would make

these payments in return for having exclusive use of the house. That B had never requested payment from A during the ten year period indicates that this was indeed the case. Finally, A's estate would not be liable for "house-related bills" that were incident to B's use of the property as joint tenant's obligations extend only to repairs and taxes.

3. Tenant's Obligations

Covenant of Quiet Enjoyment – Constructive Eviction

Every lease includes an implied covenant of quiet enjoyment. This convent [sic] obligates a landlord to do and refrain from doing whatever is reasonably necessary to enable a tenant's quiet enjoyment of the leased premises. This obligations [sic] includes landlord[']s duty to make repairs to the premises if a condition is interfering with the tenant's quiet enjoyment. A continued refusal to comply with this obligation can give rise to a claim of constructive eviction. A constructive eviction will be found when 1) a condition causes a substantial impairment of the tenant's quiet enjoyment, 2) the tenant gave adequate notice to the landlord of the condition and the landlord failed to take appropriate remedial measures[,] and 3) as a result the tenant gave up the lease and moved out. A malfunctioning toilet and drain could certainly cause a substantial impairment of one's enjoyment of an apartment. This is especially true here where the premises consisted of a small basement apartment that likely had only one bathroom and not much ventilation. Tenant gave landlord notice of the problem and even attempted to have the problem fixed himself. Finally, tenant promptly moved out. Thus, tenant has a valid claim for constructive eviction and is thus not liable for the remaining term of the lease. Tenant could also recover damages from B for breach of contract.

Implied Warranty of Habitability – Standard and Remedies

Also implied in every residential lease is the implied warranty of habitability. This warranty requires landlords to provide property that is fit for basic human habitation. The standard can be based on housing code but generally extends to basic amenities such as running water, electricity, heat in cold climates, etc. A malfunctioning toilet that is apparently beyond repair would very likely be found to be a breach of the implied warranty of habitability. Among a tenant's remedies for breach are 1) move out, 2) withhold rent (may be required to keep in escrow), 3) repair and deduct the cost from the rent[,] and 4) remain and sue for damages. Tenant availed himself of the third option by seeking to have the toilet and drain repaired, however the repair was beyond the abilities of the plumbers. As long as tenant's efforts were in good faith he should be entitled to repayment for the $500 he spent to repair the conditions despite the fact that conditions were not capable of being repaired. The continuing breach also gave tenant the right to vacate and terminated his obligations under the lease.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2005 CALIFORNIA BAR EXAMINATION

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Question 2

Developer acquired a large tract of undeveloped land, subdivided the tract into ten lots, and advertised the lots for sale as "Secure, Gated Luxury Home Sites." Developer then entered into a ten-year, written contract with Ace Security, Inc. ("ASI") to provide security for the subdivision in return for an annual fee of $6,000.

Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

> Purchaser(s) hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an annual fee of $600 for 10 years to Ace Security, Inc. for the maintenance of security within the subdivision.

Developer promptly and properly recorded all ten deeds.

One year later, ASI assigned all its rights and obligations under the security contract with Developer to Modern Protection, Inc. ("MPI"), another security service. About the same time, Cora's next-door neighbor, Seller, sold the property to Buyer. Seller's deed to Buyer did not contain the above-quoted clause. Buyer steadfastly refuses to pay any fee to MPI.

MPI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full $6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than $600 a year.

On what theories might Cora reasonably sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses might Buyer reasonably assert, and what is the likely outcome on each of Cora's theories and Buyer's defenses? Discuss.

Answer A to Question 2

2)

Question 2

Cora (C) will assert three different theories: (1) that there was a covenant, the burden of which ran to Buyer (B), and the benefit of which runs to C, (2) that there was an equitable servitude, the burden of which runs to B, and the benefit of which runs to C, and (3) that a negative reciprocal servitude can be implied from a common scheme initiated by Developer (D). C will sue under a covenant theory to obtain damages in the form of the series of $600 payments, or will sue under an equitable servitude theory to require B to pay the $600.

C will assert that he had no notice of either the covenant, equitable servitude or common scheme, and therefore should not have to pay. He will also allege that even if he did have notice, that the assignment of the contractual rights from Ace Security (ASI) to Modern Protection[,] Inc. (MPI) extinguished any obligation he had or notice of an obligation to pay for maintenance of security services.

Cora's Theories of Recovery

1. Covenant

Cora will assert that the original deed between Developer and Seller created a covenant, the burden of which ran to B, and the benefit of which ran to C. A covenant is a non-possessory interest in land, that obligates the holder to either do something or refrain from doing something related to his land. For the burden of the covenant to run, there must be (1) a writing that satisfies the statute of frauds, (2) intent of the original contrac[t]ing parties that the covenant bind successors, (3) Horizontal privity between the original parties, (4) Vertical privity between the succeeding parties, (5) the covenant must touch and concern the burdened land [,] 5 [sic] Notice to the burdened party. For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

Running of the burden

Writing

For the burden to run to B, there must be a writing that satisfies the statute of frauds. Here, the original deed was properly written and recorded. Developer inserted the clause covenanting payment in all of the deeds given to the original 10 purchasers. Therefore, there is a writing satisfying the statute of frauds.

Intent

For the burden to run, the original contracting parties must have intended that the benefit run to successor in interest to the land. Here, the deed on its face evidences an intent that the burden run. It specifically says that the "heirs, successors and assigns" of the deed will be bound to pay the security fees. Therefore the[re] is an intent that the successors– such as B – be bound by the covenant.

Horizon[t]al Privity

For the burden of a covenant to run, there must be horizontal privity between the parties. This requires that the parties be successors in interest – typically this is satisfied by a landlord-tenant, grantor-grantee, or devisor-devisee relationship. Here, the relationship is one of seller-buyer. D was the original seller of the land, and S was the purchaser. S was a successor in interest in the land of D. Therefore there was horizontal privity between the original contracting parties.

Vertical Privity

Vertical privity requires that there be a non-hostile nexus between the original covenanting party and a later purchaser. It is not satisfied in cases in which title is acquired by adverse possession or in some other hostile way. Here, however, S sold the property to B. A sale relationship is a non-hostile nexus, and therefore the requirement of vertical privity is met.

Touch and Concern

Defense by C: B may argue that the covenant here does not touch and concern the land. For the burden to run to a party, the covenant must touch and concern the land, that is, it must burden the holder, and benefit another party in the use and enjoyment of their own land. C will argue that this is not the case here.

B will argue that personal safety of house occupants is not necessarily related to the land. Contracts for security services often are used in matters outside of the home. However, this argument will likely fail. C can argue that the safety services are needed to keep the neighborhood safe. In fact, C and others specifically bought homes in the community because of representations that there would be security services available to keep the land safe. The use an[d] enjoyment of the land would be difficult, if not impossible, without the knowledge that the parties will be safe in their homes. Therefore, C can show that the covenant does in fact touch and concern the land.

Notice

Defense by C: B's primary defense will be that he was not given notice of the covenant. The burden of a covenant may not run unless the party to be burdened has notice of the

covenant. Notice may be (1) Actual, (2) by inquiry, or (3) By Record. The latter two types of notice are types of constructive notice.

–Actual Notice

B will argue that he did not have actual notice of the covenant. Actual notice occurs where the substance of the covenant is actually communicated to the party to be burdened, either by words or in writing. Here, there is no indication that B was told of the covenant in the deed. Therefore, he did not have actual notice.

–Inquiry Notice

A party may be held to be on inquiry notice, if it would be apparent from a reasonable inspection of the community that a covenant applies. C will argue that B was on inquiry notice of the covenant. However, this argument will likely fail.

A reasonable inspection of the community would not have revealed the covenant to pay $600. B might have discovered that the community was protected. There were advertisements claiming that the community was gated and secure. There were probably fences or other signage. However, this notice would be inadequate to tell B that the homeowners themselves were obligated to pay for the security service. The payments for security services may have simply been imputed to the home price, or the funds may have come from elsewhere. Either way, a reasonable inquiry would not have informed B of the existence of the covenant.

–Record Notice

C will argue that B was on record notice of the covenant. Record notice applies where a deed is recorded containing covenants. The burdened party is said to have constructive notice of the covenant that is recorded in his chain of title.

B will argue that he is not on record notice because the covenant was not in his specific deed. This argument will probably fail. A party taking an interest in land, or an agent of theirs, will typically perform a title search. Therefore, they will be held to be on constructive notice of any covenants, easements or other obligations. A simple title search by B would have revealed that the deed from P to S contained a covenant binding successors to pay for the security services.

Therefore, B was on record notice of the existence of the easement.

Running of the Benefit

For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

The analysis here will be the same as for the running of the burden, except that horizontal privity will not be required (even though it is present). The original agreement was in writing. The original contracting parties intended that the benefit run. The benefit arguably touches and concerns the land. Furthermore, D and C were in a non-hostile nexus, therefore the requirement of vertical privity is satisfied.

Conclusion: Because the requirements for running of the burden and running of the benefit are present, C can enforce the covenant against B, and will be entitled to damages for B's failure to pay for the security services.

2. Equitable Servitude

C may also attempt to enforce the requirement in the deed as an equitable servitude against B. The requirements for an equitable servitude are less stringent than those required for a covenant – for the burden of an equitable servitude to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties to bind successors, (3) the servitude must touch and concern the land, and (4) notice to the party to whom the covenant is being enforced. If the equitable servitude is enforced, it will allow the party enforcing it to obtain a mandatory injunction. In this case, enforcement of the servitude would require B to make the $600 payments to MPI.

The analysis for an equitable servitude will be the same as that for the running of the burden of a covenant. There was a writing, there was intent by the original parties, the servitude touches and concerns the land, and arguably, there was notice to B. Therefore, given the forgoing [sic] analysis, C will be able to enforce an equitable servitude against B, and obtain a court order compelling him to pay the fees (subject to any defenses: see below).

3. Reciprocal Servitude Implied from Common Scheme

C may also attempt to enforce the payment of the security fees as a reciprocal servitude based on the original common scheme. A reciprocal negative servitude can be implied from a developer's actions where a developer develops a number of plots of land with a common scheme apparent from the development, and where the development party is on notice of the requirement.

C can argue that there was a common scheme to create a secure and gated community. There were advertisements at the time that the land was developed indicating that a major selling point of the development was that the development would be secure. To that end, the developer entered into a contract with ASI. It is apparent from developer's actions that a common scheme, including maintenance of security in the development, was intended.

The analysis for notice of the common scheme is the same as above – it may have been predicated on actual or constructive notice. Here, B was on record notice of the scheme. Therefore, C can successfully hold B to payment of the security fees on an implied

reciprocal servitude theory as well.

Buyer's Defenses

Notice

As noted above, one of B's primary defenses will be that he was not given notice of any covenant or servitude. This argument will fail in most courts, because of the fact that B was on record notice of the covenant, based on a deed in his chain of title.

Touch and Concern

As noted above, B may argue that the covenant at issue does not touch and concern that land. This argument will fail, because the security arrangement will clearly benefit the homeowners in their use and "peace of mind" concerning their homes and personal safety.

Assignment of the Contract from ASI to MPI

B will allege that even if he was obligated to pay ASI based on notice in his deed, he was under no obligation to pay MPI, because of the assignment of the contract. This argument will fail.

Here, ASI has engaged in both an assignment of rights and a delegation of duties. All contract duties are delegable, if they do not change the nature of the services to be received by the benefitted party (here, B). Unless B can show that the security services received from MPI will be materially different from those he would receive from ASI, then he cannot allege that the delegation and assignment excuses his duty to pay. There is no reason to think that MPI is any less capable of performing security services than MPI.

Furthermore, once contract rights are assigned and delegated, a party must pay the new party to the contract once he receives notice of the assignment. B knows that he has to pay MPI, therefore he cannot allege that he is not making payments because he doesn't know who to pay.

Answer B to Question 2

2)

What theories might Cora sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses could Buyer raise, and what is the likely outcome on each theory?

Cora will argue that the Buyer is bound by a covenant that runs with the land. Cora will further argue that this covenant requires Buyer to pay MCI the $600 per year.

Covenants

A covenant is a promise relating to land that will be enforce[d] at law. Enforcement at law usually gives rise to money damages. Equitable servitudes, which will be discussed later, are enforceable in equity, which often means with an injunction.

Cora will argue that a valid covenant was created when each lot owner signed the deed with Developer that contained the clause that each purchaser, including heirs, successors, and assigns, will have to pay an annual fee of $600 to Ace Security. This covenant was in writing[;] Developer recorded all the deeds.

Will the burden of the covenant run?

Cora will argue that even though Seller was the person who initially signed the deed containing the covenant, the burden of the covenant should run to Buyer. The burden of a covenant will run to a successor in interest if 1) the initial covenant was in writing, 2) there was intent from the initial people creating the covenant that it would run to successors, 3) the covenant touches and concerns land, 4) there exists horizontal and vertical privity, and 5) the successor in interest had notice of the existence of the covenant.

Writing:

The initial covenant was in writing because it was included in the deed that each lot purchaser signed in the contract with Developer. Therefor, this requirement has been met.

Intent:

There also appears to be intent that the covenant bind successors in interest. This is because the deed which Developer and Seller signed contained the phrase “hereby agree on their own behalf and on behalf of their heirs, successors, and assigns.” This is clear evidence that the original parties intended the burden to run.

Touch and Concern:

A covenant will be considered to touch and concern land if it relates to the land and affects each covenant holder as landowners. Here, the covenant was to provide security and maintenance within the subdivision. This probably will be considered to touch and concern land because the safety and maintenance of the subdivision has a clear impact on each landowner's use and enjoyment of his or her lot. The covenant was not to provide personal security to the landowners, but rather to secure the land that was conveyed in the deed. Therefore, the covenant likely will be considered to touch and concern land.

Horizontal and Vertical Privity:

There must also be horizontal and vertical privity in order for a successor in interest to be bound by the burden of a covenant. Horizontal equity deals with the relationship between the original parties. Here, the original parties are Developer and Seller. There must be some connection in this relationship, such as landlord-tenant, grantor-grantee, etc. Here, Developer owned the large tract of undeveloped land that was eventually turned into the ten lots. Then, Developer conveyed one of the lots that it owned to Seller. This will satisfy the requirement of horizontal privity.

Vertical privity relates to the relationship between the original party and the successor who may be bound by the covenant. Vertical privity will usually be satisfied so long as the relationship between the two parties is not hostile, such as when the new owner has acquired ownership by adverse possession. Here, Seller sold the property to Buyer. Therefore, this will satisfy the vertical privity requirement.

Notice:

The final requirement for the burden of a covenant to run to successors is notice to the successor in interest. A successor will be deemed to be on notice of the covenant if there is 1) actual, 2) inquiry, or 3) record notice of the covenant. Actual notice is if the successor was actually aware of the covenant. Inquiry notice is where the successor would have discovered the existence of the covenant had she inspected the land as a reasonable person would have. Record notice occurs when the successor would have discovered the covenant if an inspection of the records had taken place.

Here, there is no evidence that Buyer had actual notice of the covenant at the time that she bought the land from Seller. Also, it is unclear whether Buyer was on inquiry notice. If Buyer had inspected the land prior to purchase, Buyer may have noticed that the land was being maintained and secured by a company. If Buyer had seen this, she should have also probably concluded that each landowner was partially paying for this maintenance and security service. Therefore, Buyer may be deemed to be on inquiry notice.

Even if Buyer did not have actual or inquiry notice, Buyer clearly had record notice of the covenant. This is because the covenant was in writing and was included in the deed of

each of the original purchasers from Developer. Furthermore, Developer promptly recorded all of these deeds. Therefore, if [B]uyer had went [sic] to the record office and looked up the land that she was buying, she would have discovered the covenant.

Therefore, Buyer will be considered to be on notice of the covenant.

Buyer's possible defenses to enforcement of the covenant:

Buyer may argue that [s]he should not be bound by the covenant because the covenant does not touch and concern land, she was not on notice of the covenant, and that she should be excused from performing under the covenant because of Ace Security's assignment to MPI.

Touch and concern:

As discussed earlier, the covenant will likely be considered to touch and concern land. Buyer may argue that the duty to provide security to the landowners is primarily there to protect the landowners personally rather than to protect the actual land. Buyer will further argue that because the covenant relates to personal protection of the landowners, it does not relate to land and therefore should not be deemed to touch and concern land. If the covenant is deemed not to touch and concern land, the covenant will not bind successors in interest.

However, because the contract with Ace Security was for the security and maintenance of the subdivision, Buyer's claim will likely be rejected. Even if Buyer can convince the court that the Ace Security had promised to protect the individual landowners rather than the land, Ace Security's promise to maintain the property clearly related to land. It would not make sense for Buyer to argue that Ace Security's duty to maintain relates to maintenance of the landowners rather than maintenance of the land.

Therefore, Buyer's argument that the covenant does not touch and concern land will be rejected.

No Notice:

As discussed earlier, Buyer may argue that she did not have notice of the covenant and, therefore, should not be bound by the covenant. Buyer will point to the fact that the deed between Seller and Buyer did not mention the covenant to pay for security services. However, this argument will fail because Devel[o]per properly recorded each of the deeds which contained the covenants. As a result, if Buyer would have checked the records she would have discovered the covenant.

Thus, this argument by Buyer will also fail.

Contract Defenses:

Buyer may also make some contract arguments.

What law governs?

The contract between Developer and Ace Security will be governed by the common law because it is a contract for services, not goods. Even though the contract cannot be performed within 1 year (because the contract is for 10 years) the statue of frauds has been satisfied because the contract was in writing between Developer and Ace Security.

Third Party Beneficiary

Cora can claim that he [sic] is a third party beneficiary of the original contract between Devel[o]per and Ace Security. Cora will point out that in the initial contract between Devel[o]per and Ace Security, it was clearly Developer's intent that performance of the security services go to the purchasers of the land rather than to Developer. He will also claim that his rights under the contract has [sic] vested because he has sued to enforce the contract. Because Cora can show that all of the landowners are third party beneficiaries, Cora will have the ability to use under the contract.

Invalid Assignment to MPI:

Buyer may also argue that even if the original covenant runs to her, she should no longer be bound by the covenant because of Ace Security's assignment of the contract to MPI.

An assignment can include all of the rights and obligations of the original contracting party. In general, an assignment and/or delegation will be valid unless 1) the original contract specifically says that all attempted assignments or delegations will be void, or 2) the assignment or delegation materially changes the risks or benefits associated with the original contract.

Here, there is nothing in the original contract between Developer and Ace Security that states that assignments will be void. Furthermore, there is nothing in the covenant that Seller signed with Developer that limits the covenant only to performance by Ace Security. Therefore, this will not be a valid reason for invalidating the assignment and excusing Buyer's need for performance.

Also, it does not appear that Ace Security's assignment to MPI will in any way impact that obligations [sic] to Buyer or the benefits that Buyer will receive. Ace Security was originally required to provide security and maintenance for the subdivision. This is not a personal service that only Ace Security can effectively provide. Rather, security service is a task that any competent security company can handle. Therefore, the fact that performance will now be coming from MPI rather than Ace Security will not negatively impact Buyer's benefits from the contract.

Moreover, the assignment will not effect [sic] Buyer's obligations under the contract either. Under the initial contract with Ace Security, Buyer was required to pay $600 per year. After the assignment to MPI, Buyer is still required to pay only $600 per year. Therefore, Buyer's obligations after the assignment will not be changed in any way. Therefore, the assignment from Ace to MPI will be considered valid and Buyer will not be excused from performing as a result of this assignment.

MPI's threat to suspect [sic] service unless it receives assurances that it will be paid the full $6,000 each year for the balance of the contract

Buyer may also argue that even if they are bound by the covenant, MPI is not entitled to assurances that it will be paid the entire value of the contract for the remainder of the contract term. As common law, a suit for breach of contract could not be brought until the date for performance has passed. Cora will argue, on behalf of MPI, that they are entitled to assurances of future performance because of Buyer's anticipatory repudiation.

Anticipatory Repudiation

Generally, a suit for breach of contract can only be brought when the date for performance has passed. However, is [sic] a party to a contract unambiguously states that he cannot or will not perform under the contract, a suit may be brought immediately for breach of contract.

Here, Buyer has steadfastly refused to pay any fee to MPI. It is unclear whether the time has passed in which Buyer was required to pay MPI. Regardless, Buyer's clear statement that it will not pay MPI will be considered an anticipatory repudiation. Thus, Buyer will be able to immediately bring suit.

Also, because of the anticipatory repudiation, Cora or MPI would be entitled to immediately bring suit. Because they could immediately sue Buyer if they so chose, it only makes sense to allow MPI to seek assurances that Buyer and the other landowners will continue to perform under the contract.

Equitable servitude

An equitable servitude is much like a covenant except that an equitable servitude is enforceable in equity, rather than at law. Here, Cora may prefer to have the court declare an equitable servitude, so that the court will enjoin Buyer to pay the $600 each year for the 10 year length of the contract. This will ensure that Cora will not have to pay more than $600 in any year.

In order for the burden of an equitable servitude to run with the land, there must be 1) a writing, 2) intent, 3) touch and convern[sic], and 4) notice to the successor in interest. All of these have been discussed earlier and have been satisfied. Therefore, this could be

considered to be an equitable servitude.

Cora may wish to get an injunction requiring Buyer to pay $600 per year for the 10 year length of the contract. Cora will first need to show that Buyer has breached his obligations under the contract.

Under an equitable servitude, the court may require Buyer to pay $600 per year for the remainder of the contract.

Buyer's defenses

Buyer could make the same defenses as in the covenant situation. As stated earlier, all of these defenses will likely be rejected.

Common Scheme Doctrine

Even if Cora's other attempts to enforce a covenant or equitable servitude fail, Cora may be able to show that Buyer should be bound by the common scheme doctrine. Cora would need to show that the original developer had a common scheme for the entire subdivision and that this scheme was clear to anyone who inspected the area and the records. Cora's argument may succeed because of the fact that Developer recorded the covenant between all of the original purchases from Developer.

Conclusion/Likely Outcome:

Cora will likely succeed in showing that there was a covenant between all of the original landowners. Cora will also be able to show that the burden of this covenant should run to Buyer. Cora will also be likely able to show the existence of an equitable servitude.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

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The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

Mike had a 30-year master lease on a downtown office building and had sublet to others the individual office suites for five-year terms. At the conclusion of the 30-year term, Olive, the building's owner, did not renew Mike's master lease.

When Olive resumed control of the building, she learned that Mike had failed to comply with the terms in the 30-year lease that required him to renew an easement for weekday parking on a lot between the building and a theatre. The theatre, which, in the past, had always renewed the easement, used the lot for its own customers on evenings and weekends.

Olive also learned that a week before the end of the 30-year lease Mike had renewed for another five years the sublease of one tenant, Toby, at a rate much below market. Toby ran an art gallery, which Mike thought was "classy." Upon signing the renewal, Toby purchased and installed expensive custom lighting and wall treatments to enhance the showing of the art in his gallery.

Because of Mike's failure to renew the parking easement, the theatre granted it to another landowner. As a result, Olive had to request a variance from the town ordinance requiring off-street parking. The Board of Zoning Appeals (BZA) denied the request because a nearby parking-lot operator objected. The off-street parking requirement, combined with the loss of the parking easement, meant that several offices in Olive's building would have to be left vacant. The BZA had recently granted a parking variance for a nearby building under very similar circumstances.

Olive commences the following actions:

1. A suit against Mike to recover damages for waste resulting from Mike's failing to renew the parking easement.

2. An action for ejectment against Toby and to require him to leave the lighting and wall treatments when he vacates the premises.

3. An appeal of BZA's denial of Olive's variance request.

What is the likelihood that Olive will prevail in each action? Discuss.

Answer A to Question 3

3)

A lease or "leasehold estate" is an interest in land whereby the landholder ("landlord") grants another person (the "tenant") the exclusive use of the land for a limited period of time, subject to certain terms and conditions, if any, set forth in the lease. The lease between Mike and Olive was a lease "for years," which means that it was for a specific period of time, after which the lease would automatically terminate. Therefore, here, Mike's lease terminated automatically at the conclusion of 30 years, in favor of Olive.

1. Olive v. Mike

Waste is an action initiated by a person with an interest in land (usually a holder in fee or a remainderman), against the occupier of the land, for harm to the land caused by the occupier's actions. Here, Olive is arguing that Mike's failure to renew the parking easement harmed the downtown office building [and] constituted waste, since this action set off a chain of events leading to Olive's inability to rent out all of the office spaces, thus decreasing the value of the office building.

Typically, an action for waste lies when the occupier's action is physically damaging the land - such as where the occupier removes trees or minerals for commercial use. Therefore, Olive's claim for waste based on Mike's failing to renew the easement is unusual. However, the existence of an easement appurtenant, as exists here, is in fact an interest in land that is "attached to" the office building itself. Thus, a court could find that loss of the easement is tantamount to harm to the land, and allow Olive to proceed with the waste action. It seems, however, that this would be highly unusual and therefore it is most probable that, since Mike's failing to renew the easement did no physical harm to any land, Olive is not likely to prevail on this theory. (She should try a breach of lease theory, since the facts state that the renewal requirement was a term of the lease.)

2. Olive v. Toby

Ejectment is an action at law whereby one claiming a superior interest in a parcel of land seeks to have the present occupier removed. (Modern courts, including California, use the unlawful detainer action to accomplish substantially this remedy.) Olive's ejectment action against Toby can only succeed of [sic] Toby is not entitled to occupy his office.

Sublease

Absent any provision in the lease to the contrary, a lease is freely alienable, meaning that it may be freely assigned and subletted. A sublease is an interest in land created when a tenant transfers part of his leasehold interest to another party. Here, Mike subletted Toby's office for 5-year renewing terms. However, the last time that Mike renewed Toby's sublease, there were less than five years remaining in Mike's term. An estate can never last longer than the estate on which it depends, which is why an assignment or sublease can never be for a longer period of time than the sublessor has remaining in his term. Therefore, while earlier subleases to Toby may have been proper, the last sublease, made

only a week before Mike's lease terminated, was improper. Accordingly, Tony's sublease automatically extinguished upon the termination of Mike's lease. At that point, Olive was entitled to possession of Toby's office.

Therefore, Olive is likely to succeed in her action to eject Toby.

Fixtures and Merger
Under the doctrine of fixtures and merger, when an occupier of land affixes any object to the land, or to any structures built upon the land, those items merge into the land. The general rule is that an occupier is not entitled to remove fixtures from the occupied property when the estate terminates. Therefore, under this general rule, Toby should not be permitted to remove the expensive custom lighting and wall treatments he added to his office space. However, some courts will permit a tenant to remove trade fixtures (equipment used in carrying out a specific business or occupation) if the circumstances suggest that the tenant intended to be able to keep them and if they can be removed without significantly harming the property. Here, since: (1) the lighting and wall treatments that Toby installed were custom-made for him; (2) the items were expensive; and (3) Toby had installed them very recently (which means that he probably has not received the benefit of buying them), a court will probably allow Toby to remove these items, if this can be done without significantly harming the building.

3. Olive v. BZA
Zoning ordinances are laws restricting the use of land, and are a valid exercise of the police power inherent in the states and their political subdivisions.

It is important to note here that Olive is requesting a variance to a zoning ordinance requiring off-street parking, and not simply a permit to which she has an entitlement if certain requirements are met (as may be defined by statute with respect to some kinds of permits). Therefore, the BZA was free to deny her permit, and that denial will be deemed lawful unless it was: (1) arbitrary or capricious in violation of the Fourteenth Amendment to the United States Constitution; (2) an unlawful taking of her property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution; or (3) otherwise illegal (e.g., unlawfully discriminatory or otherwise violative of state or federal law).

Arbitrary and capricious. Olive will argue that the denial of the permit based solely on the fact that the nearby parking lot owner objected was arbitrary and capricious, especially in light of the fact that the BZA had recently granted a parking variance for a nearby building under very similar circumstances. While these are factors that the court will consider in determining whether the denial of the permit was improper, Olive will have the burden of proof here, and if the court can find rational basis for upholding the denial of the permit, it will do so. It is likely that the court will be able to find such a rational basis for the denial of the application - as just about any valid reason will do.

Taking. Olive may argue that the denial of the variance requests is causing her so much harm that it amounts to a taking of her property without just compensation, in violation of the Fifth Amendment to the United States Constitution as incorporated against the states and their political subdivisions through the Fourteenth Amendment. It is true that if the BZA's exercise of its police power in executing the zoning ordinances created such a severe economic harm to Olive, that is not justified by the denial of the permit, this could constitute a taking, which would be invalid unless the city paid Olive just compensation. However, even though it appears that Olive did incur economic harm because she was not able to obtain the permit, this "taking" argument will still be a stretch given the fact that Olive was never entitled to the permit in the first place, and thus never had a property interest in it.

Otherwise unlawful. The facts do not indicate that BZA's denial of the permit to Olive was in violation of any other laws or the federal Constitution.

Based on the above, Olive is not likely to prevail in her appeal of the BZA's denial of her variance request.

CONCLUSION

Based on the foregoing, Olive should not prevail in her action against Mike for waste. She should be successful in her action to evict Toby, but the court will probably allow him to remove the lighting equipment and wall coverings if he can do so without harming the property. Finally, Olive is unlikely to succeed in her appeal of the BZA's denial of her variance request.

Answer B to Question 3

3)

Olive v. Mike

A landlord can sue a tenant for "waste" where the unreasonable acts of the tenants cause a diminution in value of the leased property. Normally the issue of waste involves physical property damage, but it can involve a loss of a right such as an easement. Certainly the loss of the occupancy permit greatly diminished the value of the property. It was also arguably "unreasonable" for Mike to fail to renew the lease, particularly in light of the fact that the Theatre was apparently willing to grant such a renewal.

A cause of action for "waste" would require Olive to prove that Mike caused a diminution of the value of the office building. Here, she could most probably prove the loss of the easement diminished the value of the office building. The easement was an "easement appurtenant" that benefited the office building (the dominant estate), as opposed to the easement in gross, which would only benefit an individual person. An easement appurtenant can increase the value of land and is a real interest.

As a defense, Mike can argue that there was no guarantee that the lease would be renewed and that, since Olive had no real interest in the easement past its original term, the loss of the easement was not "waste" because it did not diminish the value of the leased property. The value of the property was that of an office building with an easement that was set to expire. An anticipated right (such as the optional renewal of an easement) is not part of the "value" of the property, since there was no guarantee that the easement would be renewed at all.

Olive would most probably be better off suing Mike under a contract theory for a breach of his lease agreement.

Olive v. Toby

Toby's Sublease

Modern law generally favors the assignability of leases. An assignment of an entire leasehold is called "an assignment," whereas the partial assignment of a leasehold is considered a sublease. An assignment novates the lease wher[e]as a sublease does not absolve the original lessor of liability.

Even though assignability is favored, a tenant can never assign or sublease any more than his or her interest under the master lease. In this case it appears that, at a point when he only had a week left on his master lease, Mike attempted to grant Toby a 5 year sublease. This sublease would be invalid because Mike only had one-week's worth of interest left under his master lease. Because Mike cannot sublease out an interest greater

than he possesses, the sublease to Toby is invalid (at least insofar as it extended past a week).

Ejectment

The owner of real property has the right to eject any person on the property without a legal right to be there. Toby has no valid lease or sublease, because Mike couldn't grant him a lease that extended beyond the ma[s]ter lease's 30-year term. Accordingly, Olive can bring an action for Toby's ejectment.

Retention of Improvements

Absent a contrary provision in a valid lease, the owner of real property is not entitled to retain possession of fixtures installed by a tenant or a third-party (in this case a third party with an invalid sublease). The landlord is only entitled to retain the improvements if they are "permanently affixed" to the real estate.

It would be a question of fact as to whether Toby's improvements are "permanently affixed." The custom lighting, if it is track lighting that can be removed without damaging the structure, is probably not a "permanently affixed" item that the landlord has a right to retain. A "wall treatment" might be something that is permanently affixed, depending on its size and how it was attached to the structure. This would be a matter for the finder of fact to determine.

Of course, if Olive is owed any unpaid sums due to Toby's use of her real property, she would probably be entitled to a lien on any of Toby's property within the office building, including the fixtures and wall treatment.

Olive v. BZA

A local government has the authority to pass zoning ordinances under general police power to legislate for the well-being of citizens. This power, however, cannot be employed in a way that violates a citizen's right to due process or equal protection, or that amounts to an "unauthorized taking" of private property.

BZA is a government entity and, therefore, any actions by BZA constitute "government activity" implicating the U.S. Constitution.

It appears that Olive was given the opportunity to be heard and notice of any proceedings, therefore her procedural due process rights were most probably not violated. No fundamental rights are implicated by the BZA's decision to deny a variance for lack of parking, so it appears unlikely that any substantive due process rights were violated. Olive can argue that the failure to provide her with a variance when a similar variance had been recently granted to a similarly situated applicant violated her substantive due process rights because the action was not "rationally related to a legitimate state purpose." The BZA,

however, will res[p]ond that requiring parking for office space rationally related to the legitimate state purpose of a unified zoning scheme, and that granting variances to all applicants would diminish the uniformity and purpose of that scheme. Olive will argue that the zoning ordinance gives the board unfettered authority to grant or deny variances, which might be a problem for the BZA if they can't establish that the[y] follow guidelines or standards in determining what variances to grant. Olive will most likely fail in her attempt to argue that the refusal to grant her a variance was so "irrational" as to constitute a due process claim.

In this case, Olive's best argument would be that the denial of the variance was a violation of equal protection. Unless a fundamental right or a suspect classification is implicated, a zoning regulation or determination by a zoning board will be evaluated under the rational basis test and will be upheld if the regulation is reasonably related to a legitimate state purpose. In this case Olive can argue that the government created a classification by treating her differently from the other applicant who was granted the variance, and that the disparate treatment was irrational. The burden would be on Olive to demonstrate that the BZA's action in treating her differently was not reasonably related to a legitimate state purpose. In this case, Olive will argue that the different treatment could not possibly be rational because the applicants were so sim[i]lar. The BZA will most likely respond that it can only grant a limited number of variances, and therefore classifying among applicants in[h]erently requires some degree of discretion and they often grant variances on a "first come first served" basis.

Because the "rational basis" test is so deferential to the government, Olive is unlikely to succeed in her due process or equal protection claims.

Citizens are also protected from any "takings" of property without just compensation. Olive can argue that the refusal to allow her to use her property for offices if she does not secure parking amounts to a "taking." She is also unlikely to prevail on this claim. A property owner can sue for "reverse condemnation" if a government agency enacts regulations that preclude virtually any reasonable use of the real estate, but here the BZA has not denied Olive any use. She can still rent out some of the offices, and she is free to continue to seek commercial parking elsewhere so she can regain the use of the offices that she currently can't use. Accordingly, Olive's claim of an "unjust taking" will most likely fail.

THURSDAY MORNING
FEBRUARY 23,2006

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2007 California Bar Examination and two selected answers to each question.

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Question 1

Builder sold a shopping mall to Owner. The recorded deed from Builder to Owner conveyed the mall and parking lot where the parking spaces were numbered 1 to 100. The deed reserved to Builder the exclusive right to use parking spaces 15 through 20 as a place to set up a stand to sell sports memorabilia and sandwiches on Sundays. The shopping mall was located adjacent to an existing residential neighborhood.

Owner entered into a written 30-year lease with Lois leasing to her a store in the mall and parking spaces 1 through 20. Under the lease, Lois agreed to pay rent monthly and not to assign the lease without Owner's prior written approval. After occupying the leased premises for five years, Lois subleased the store and parking spaces to Fast Food for a term of ten years without first having obtained Owner's written approval.

Fast Food occupied the premises and paid rent to Owner. Fast Food, which operated a take-out restaurant on the premises seven days a week, used state-of-the-art equipment and operated in compliance with all local health ordinances. Notwithstanding this, on warm days when Fast Food was particularly busy, unpleasant cooking odors were emitted from Fast Food's kitchen. The unpleasant odors caused discomfort to many of the homeowners living in the adjacent neighborhood.

On the first Sunday after Fast Food opened its take-out restaurant, Builder set up his memorabilia and sandwich stand in parking spaces 15 through 20. Fast Food, not aware of the provision in the deed, complained to Builder about the competition of Builder's sandwich sales and the occupancy of parking spaces allocated to Fast Food. Builder ignored Fast Food's complaints. Fast Food then informed Owner that it would cease paying rent until Owner took steps to prevent Builder from using the parking spaces. Owner explained to Fast Food that there was nothing he could do about it, but Fast Food insisted that it would not pay further rent until Owner stopped Builder from setting up his stand. Thereupon, Owner hired a locksmith, who changed the locks on the space occupied by Fast Food, thus denying Fast Food access to the premises.

1. Did Lois violate the "no-assignment" provision in her lease with Owner? Discuss.

2. If Fast Food brings an action in trespass against Builder for his use of parking spaces 15 through 20, is Fast Food likely to prevail? Discuss.

3. Did Owner have the right to change the locks on Fast Food's premises? Discuss.

4. Can the homeowners establish a claim for nuisance against Fast Food? Discuss.

Answer A to Question 1

1)

1) No Assignment Provision

"No assignment" provisions in leases are enforceable; however, they are strictly construed as restraints on alienability. An assignment is the transfer by a tenant of all their remaining interest in a leasehold, whereas a sublease is a transfer of something less than the full interest remaining. In this case, Lois and Owner entered into a 30-year term of years lease, which, at the time of sublease, had 25 years remaining. Lois's sublease to Fast Food was therefore not an assignment, but a sublease, because Lois only subleased to FF for 10 years, and Lois and Owner remained in privity of estate and privity of contract. Owner would therefore be entitled to seek damages against Lois (who could then look to Fast Food for indemnification), but since the clause at issue was a "non-assignment" clause, the sublease of the premises to Fast Food did not violate the clause.

Owner will argue that the power to prevent an assignment includes the power to prevent a lesser transfer of interest, in this case the sublease. Although Owner is correct that an assignment confers a greater interest than an assignment, this argument is unlikely to be persuasive because of the fact that the court will strictly construe the non-assignment clause as prohibiting only assignments and not subleases.

Lois will be able to advance another argument in defense of her assignment to Fast Food: she will claim that Owner is estopped from arguing that an actionable violation occurred. Generally, a party who could otherwise assert a claim for violation of an agreement will be estopped from bringing the claim where he or she acquiesced in the violation. Here, even if Owner had a right to bring an action for damages or eviction based on violation of the non-assignment clause, he likely forfeited that right by accepting rent from Fast Food. Acceptance of Fast Food's rent indicates acquiescence and waiver of the right to enforce the clause, and since Fast Food (and, by extension, Lois) likely reasonably relied on Owner's acquiescence, Owner should be estopped from bringing an action for breach of the non-assignment.

2) Fast Food v. Builder

Fast Food's rights against Builder depend on whether the covenant in the original deed created an express easement in favor of Builder.

An easement is an interest in land that allows the holder to use the land for some designated purpose. Easements can arise from proscription, by express writing, or by implication. In this case, the deed form Builder to Owner expressly reserved the right of Builder to use spaces 15 through 20 for his commercial activities on Sundays. Since this easement benefits Builder alone, separate from his interest in land, it is an easement in gross rather than an easement appurtenant. Easements in gross generally do not run with

the land, except when the easement relates to economic or commercial activity. In this case, the use of the parking spaces for selling merchandise and food on Sundays relates to economic activity, and will therefore be valid even as against subsequent owners or interest-holders.

FF can bring an action against Builder for trespass, which is the physical invasion of one's land by another without consent or privilege to do so, but Builder will assert that he has been expressly granted the right to do so in the deed to Owner. Although FF was not a party to this deed, he will be bound by the easement so long as the easement has not been extinguished. Extinguishment of an easement can occur by several different means, including condemnation, proscription, express agreement, estoppel, end of necessity out of which the easement was created, merger of two parcels of land where an easement appurtenant is involved, and abandonment combined with physical actions indicating intent to never use again. None of these circumstances seem present here, and thus FF will be bound by the easement. Binding FF to this easement will not be unjust, as he had notice of Builder's reservation of his rights in the original deed. The deed was recorded, and even if FF did not have actual notice of the easement, he will nonetheless be bound because easements run with the land and FF had record notice of the easement.

3) Owner's Changing the Locks

_____Owner's rights against FF are determined by landlord-tenant law. The issue is whether a landlord may engage in self-help and evict a tenant who has breached a duty.

A tenant has a duty to pay rent. If FF actually refused to pay rent (rather than simply stating that it would not pay), FF is in breach of his duty. However, the remedies for a landlord with respect to a tenant in possession that has breached a duty are limited to a) initiating eviction proceedings, and b) allowing the tenant to remain while suing for damages. Self-help is strictly prohibited. By changing the locks, landlord has evicted FF without engaging in the required formalities of eviction proceedings, and therefore did not have the right to change the locks.

Whether Owner had a right to evict or sue FF for damages isn't clear from the facts of the question. If FF merely stated that he would not pay rent (but was otherwise current with his rental payments and had breached no other duty), Owner's rights as against FF would not have ripened. Owner would be required to wait until an actual breach occurred prior to initiating eviction proceedings or suing for damages. On the other hand, if FF was in actual present breach of his duty to pay rent, Owner would be permitted to seek relief in one of the two ways mentioned above, but never by engaging in self-help by causing the actual eviction of FF.

4) Homeowners v. FF

_____A public nuisance is defined as activity by the defendant in the use of his land that

causes interference with the health, safety, or well-being of the public at large. A private individual may only bring action based on a theory of public nuisance if he has suffered some particular injury to his property as a result of defendant's conduct. Since the facts indicate discomfort, but not threats to health or safety, public nuisance doctrine is not likely applicable to the claims of homeowners.

Private nuisance claims can be brought where defendant's activity in connection with the use of his land create a substantial and unreasonable interference with plaintiff's use and enjoyment of his land. Unpleasant odors might create a close factual case as to whether the interference with the use of homeowners' land was "substantial" enough, especially because they only emanated from FF on warm days when FF was particularly busy; that question would be for the trier of fact. While it seems pretty questionable that the interference was substantial enough, assuming for the purposes of this question that it is, homeowners would also be required to show that the interference with their land was unreasonable.

That inquiry involves weighing the utility of FF's conduct, as well as considering the general neighborhood conditions. Another factor the court would consider is FF's compliance with the local health ordinances, although that evidence would not be conclusive. A final factor the court would consider is FF's investment in the property, which in this case seems substantial. In total, this presents a close case. The utility of a restaurant located close to a residential neighborhood is high. FF's conduct has been approved by local health codes, and only occasionally interferes with homeowners' use of their land. FF has invested in the restaurant by obtaining state of the art equipment, a factor that also indicates that this cooking cannot be performed in any less annoying or interfering manner. However, if the court were to determine that the hardships balanced in favor of the homeowners, they could obtain (under the strict minority view) an injunction against FF's cooking conduct that created the odor, and would further be entitled to damages for the interference with their use and enjoyment of their land. But given that this is a close call, and the high utility of FF's conduct to the residential community, homeowners would likely be required to compensate FF for the expense of relocating their operations.

Answer B to Question 1

1)

Assignment

Lease is valid. Under the Statue of Frauds, a contract such as a lease, that conveys an interest in land for a period longer than a year must be in writing and signed by the person to be charged. Therefore, in order for O to enforce the lease provisions against L, the lease between O and L must have been in writing and signed by L. We know that L and O entered into a 30-year lease. Therefore the SOF applies. Further, we know that the lease was in writing. However, it is unclear if the written lease was signed by L. If the lease is signed by L then the written terms of the lease are enforceable against L.

Assignment is valid. As a general matter, a lease is assignable unless the lease agreement specifically states that the lease cannot be assigned. Courts do not favor complete limitations on assignments so these provisions are interpreted narrowly. In this case, the term is not a complete limitation on assignment. The lease term permits assignment with the prior written consent of the owner. In this case, the limitation is in the written lease and allows for some flexibility. Therefore, upon reviewing the lease in an action between L and O, the limitation is [sic] in the written lease will be enforced by the court.

Sublease v. Assignment - An assignment occurs where a tenant assigns his rights and obligations to a subtenant for the entire term of the lease. A sublease occurs where the tenant transfers his rights and obligations to a subtenant for a portion of the term of the lease. The important difference between the two types of agreement is that the T has remaining rights to the property when an [sic] sublease occurs and does not have remaining rights when an assignment occurs. In this case, T entered into a lease agreement with FF for a period of 10 years. T had only occupied the property for 5 of the 30 years of the lease term. Therefore after the 10 years given to FF is [sic] completed, T will still have the rights under the lease for 15 more years. Therefore, T entered into a sublease with FF.

The lease agreement specifically stated that an assignment of the lease is prohibited without the consent of the landlord. However, the lease was silent as to subleases. The lease agreement in this matter involved commercial vendors likely with business experience. In such cases, the court would be unlikely to imply that the prohibition against assignments prohibited subletting. Therefore, because the agreement between L and FF is a sublease (as discussed above) the prohibition does not apply and L is not in breach of the lease agreement.

Estoppel - However, an L can be found to have approved an assignment/sublease where the owner accepts rent from the subtenant without objection. This is true even where the lease requires that the lease is in writing. In this case, the L accepted rent from

FF. Therefore, L is estopped froom alleging breach of the assignment provision by L. Essentially, by taking the rent, L approved the sublease.

Trespass

In order to bring an action for trespass, the landowner of the person with exclusive right to the land brings an action against a person who without permission physically invades the land. In this case, FF will assert that B is invading the land by erecting the Sunday business on the property. However, a landholder cannot bring an action for trespass where the alleged trespasser has a right to use the land under an easement. Therefore, in this case, if B has a right to use the land, FF cannot bring an action for trespass.

Express Easement - In this case, B and O entered into an express easement as part of the deed when B sold the property to O. An express easement occurs where the owners of the benefited land and the owners of the burdened land expressly agree in writing giving a property interest in the other. In this case, the deed expressly conveyed the right to use parking spaces 15-20 for a once a week shop. This is an express easement because it was recorded in the deed.

Easement in Gross/Easement Appurtenant - An easement in gross occurs where a person grants an easement to another landowner that is specific to the person and not specific to the land of that person. An easement appurtenant is an easement that is granted by the owner of one parcel of land to another land owner that specifically relates to the land. In this case, the property right owned by B and held by deed is an easement in gross. Generally, an easement in gross is not transferable by the holder. However, the easement burden will transfer.

Notice - An express easement is enforceable against future owners when it is properly recorded. In this case, O leased the land to L. L's lease included the right to spaces 1-20. L occupied the property for 5 years. Presumably, B operated his shop on 15-20 during this time period. Therefore, L had notice of the operation. L then sublet the property to FF. Apparently, FF took the lease without notice of the easement. However, because the easement is recorded, FF cannot sue for trespass.

Change the Locks

Duty to pay rent - When a sublease occurs, the original T remains obligated to pay the rent unless there is a written agreement with L stating otherwise. In this case, L remained obligated to pay rent to O even though there was a valid sublease. As a result of the sublease, FF was also liable to pay rent to O. In this case, FF refused to pay rent to O.

Constructive Eviction - Constructive eviction occurs where a (a) the tenant notifies the landlord of a condition on the property that constitutes a substantial interference with

tenants' use and enjoyment of the property, (b) the landlord does not fix the problem after notice, and (c) the tenant leaves the premises. A constructive eviction eliminates a tenant's obligation to pay rent. In this case, FF was not subject to a constructive eviction. FF did notified [sic] B of the problem; there was no indication that he notified either O or L. Second, FF did not leave the premises. Therefore, constructive eviction did not release FF from its obligation to pay rent.

Self-Help Eviction - A L cannot evict a T through self-help eviction. Self-help eviction occurs where the L takes action to limit the T's ability to access or use the property without going through the judicial process. In this case, FF was subject to eviction for failure to pay rent. O changed the locks and evicted the tenant without going through the legal process. O did not have the right to change the locks without going though the judicial process.

Nuisance

A nuisance occurs where a person/entity ("offender") uses their land in such a manner that unreasonably interferes with another landowner's ("injured") quiet enjoyment of their land. A nuisance is different from a trespass. A trespass involves the physical invasion of the property: a nuisance involves no invasion. There are two types of nuisance: Private and Public. A private nuisance is where the activities of the offender's use interferes with one or a small number of injured's specific use of their land. A public nuisance occurs where the offender's activities unreasonably interferes with the property rights of the general public. In order for a person to recover damages for a public nuisance, the injured must show actual damages. In this case, the homeowner's [sic] are complaining of a private nuisance because they are complaining about an injury that is occurring to a [sic] identifiable group of individuals. While the alleged conduct effects [sic] "many of the homeowners" the result is a private nuisance because it does not effect [sic] the public at large.

In order to state a claim for nuisance the injured must make two showings: (a) that the conduct of the offender interferes with some property right, and (b) that the conduct is unreasonable. An interference occurs where the offender uses their property in a manner that is an annoyance and would be considered offensive or burdensome to a reasonable person. In this case, the nuisance complained of is that on warm days offensive cooking odors are emitted from the FF business and those odors cause discomfort to many of the homeowners in the adjacent neighborhood. A nuisance will not be found if the injured is hypersensitive. In this case, we know that many of the homeowners are effected [sic]. Because there is a large group that find the conduct offensive, the injured in this case is not hypersensitive. Further, in order to determine whether or not this conduct constitutes an interference, it would be important to know how many "warm" days there are in a given year. If there are only a few, then this is not likely to be a nuisance. However, if there are more than a few days in which the homeowners are subjected to the offensive smell, it is likely that a court would find that a reasonable person would be offended by the smell of unpleasant odors involved in this case.

However, even where the offender's conduct is found to interfere with the property right of the injured, the court must determine if the interference is unreasonable. Unreasonableness is determined by balancing the hardships - balancing the interests and needs of the homeowners against the interests in having the business continue operating. During this process, the court will look at many factors including: whether the homeowners purchased their land at a discount because of its near location to the shopping center (coming to the nuisance), the offender's right to use his property as he wishes, the value of the business to the community including the number of employees, whether the nuisance can be abated by modifications of the offender's business, the length of time the offender has been in business, the possibility of using the property for some other purpose, the offender's investment in the business, etc.

In this case, certain factors indicate that the use by FF will be considered unreasonable. The offender has only been in business for a short period of time. It is unclear from the facts whether HO purchased at a discount based on nearness to the shopping center, but because the business is new the court is unlikely to find that HO came to the nuisance.

However, other factors indicate that the use by FF will not be considered unreasonable: FF has a right to use his property as he sees fit; FF has a right to use the shopping center property for a restaurant. Further, FF has put considerable investment into the operation as a FF establishment by purchasing top of the line equipment. This is not an unusual use for such a property. Further, it does not appear that the business could be abated. We know that FF is complying with all health ordinances and that the business is operated using the best equipment.

While the facts of this case will present a close call, the court is unlikely to find that there is a nuisance that should be abated. This is particularly true if there are a few number of warm days. The interest in allow [sic] FF to operate its business outweighs the interest of the homeowners for the reasons discussed above. As such, the court will not grant an injunction. However, if the court finds that there is some level of nuisance, the court may require FF to pay some measure of damages to HO to compensate them for their injuries arising from their nuisance.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 1

Larry leased in writing to Tanya a four-room office suite at a rent of $500 payable monthly in advance. The lease commenced on July 1, 2006. The lease required Larry to provide essential services to Tanya's suite. The suite was located on the 12th floor of a new 20-story office building.

In November Larry failed to provide essential services to Tanya's suite on several occasions. Elevator service and running water were interrupted once; heating was interrupted twice; and electrical service was interrupted on three occasions. These services were interrupted for periods of time lasting from one day to one week. On December 5, the heat, electrical and running water services were interrupted and not restored until December 12. In each instance Tanya immediately complained to Larry, who told Tanya that he was aware of the problems and was doing all he could to repair them.

On December 12, Tanya orally told Larry that she was terminating her lease on February 28, 2007 because the constant interruptions of services made it impossible for her to conduct her business. She picked the February 28 termination date to give herself ample opportunity to locate alternative office space.

Tanya vacated the suite on February 28 even though between December 12 and February 28 there were no longer any problems with the leased premises.

Larry did not attempt to relet Tanya's vacant suite until April 15. He found a tenant to lease the suite commencing on May 1 at a rent of $500 payable monthly in advance. On May 1, Larry brought suit against Tanya to recover rent for the months of March and April.

On what theory could Larry reasonably assert a claim to recover rent from Tanya for March and April and what defenses could Tanya reasonably assert against Larry's claim for rent? Discuss

Answer A to Question 1

Larry v. Tanya

In the lawsuit between Larry and Tanya regarding their lease of the office building that commenced on July 1, 2006, the following are the salient points that Larry will assert and Tanya will defend.

First, the lease was a tenancy for years. Second, there were no Breach of Covenants to give rise to a right of termination. Third, the termination was ineffective because it was not in writing.

Each of these points and defenses are addressed in detail.

I. The Tenancy

The first issue is to determine the tenancy created.

Tenancy by Years

Under this type of tenancy there is a fixed date of termination with no notice required to end the arrangement. It expires at a specified time.

In this case, the lease between Larry and Tanya simply stated that a rent was to be paid monthly in advance. There is no mention of a fixed date of termination.

Therefore, a tenancy by years was not created.

Periodic Tenancy

A periodic tenancy is one that continues for a specific period – week/week; month/month – until it is effectively terminated.

Termination requires written notice of at least one month prior in case of a month-month lease and the lease must end at a natural lease period.

In this case, a periodic tenancy was created since the lease called for payment of a monthly rent of $500 in advance and did not have a fixed termination date.

Therefore, the lease is a periodic tenancy.

II. Termination

The next issue is to determine whether the termination of the lease by Tanya was effective on February 28. If it was then she will not be liable for rent for March and April.

Tanya can assert termination based on 1.) Valid notice, 2.) Breach of Covenants, 3.) Constructive education.

Valid Notice

To terminate a month-month lease valid notice of at least one month is required in writing. The lease must also end at a natural lease period.

In this case, Tanya orally told Larry she was terminating her lease on February 28. She did this on December 12. While the length of the notice was sufficient because it was given at least a month prior to the termination, Larry will argue that it was effective since it was not given in writing.

As such, Larry will argue that since the notice was ineffective to terminate the lease Tanya could not have moved out on February 28 and remains liable for the rent of March and April.

In conclusion, there was no valid notice.

Surrender

Surrender occurs when a tenant abandons the tenancy and the landlord takes possession and control of the premises.

However, a landlord may move in and attempt to relet the premises on behalf of the tenant, which will not result in a surrender.

In this case, Tanya will argue that Larry accepted surrender due to his delayed attempt in finding a substitute tenant. Larry did not move in and try to relet the premises immediately, but let six weeks elapse, after which he decided to relet.

However, Larry will argue that he did nothing to accept surrender since he did not exercise control enough and was simply reletting on Tanya's behalf.

In conclusion, surrender will not likely work.

Constructive Eviction

Constructive eviction occurs when:

1. there is a condition on the premise that makes it uninhabitable.
2. the landlord knows or should have known about the condition.
3. the landlord fails to remedy the condition.
4. the tenant moves out within a reasonable time.

Conditions

In this case, Tanya will point out to the following conditions that made habiting the premises unreasonable.

First, interruption of water. This is an essential service that Larry agreed to provide that was interrupted frequently. This happened once in November and during the week between December 5 and December 12 the interruption lasted for one entire week.

Second, interruption of elevator service. Tanya is on the 12th floor of a 20 story office building which makes the elevator service essential to the lease since trekking twelve floors is an unreasonable condition in a commercial building.

Third, interruption of heat and electricity. These services were interrupted frequently and once for as long as one whole week.

These constant interruptions of services made it impossible for Tanya to conduct her business.

Larry's Knowledge

Additionally, Tanya informed Larry immediately about the conditions and he admitted he was aware about them and doing everything he could to repair.

Larry Remedied the Situation?

However, Larry will argue that he fixed the problems and therefore Tanya no longer had a claim to constructive eviction. Ever since December 12 up to February 28, for an entire six weeks there were no longer any problems in the leased premises.

Did Tanya move out in a reasonable amount of time?

Furthermore, Larry will point out that Tanya did not move out within a reasonable time since she waited six weeks.

She gave herself this amount of time to give herself ample opportunity to locate alternative office space.

This behavior is contrary to the contention that the premises were in such bad condition and that Tanya moved out within a reasonable time.

Implied Warranty of Habitability

This doctrine only applies to residential leases. Under this doctrine a landlord warrants that the premises are suitable for human habitation.

However, the lease between Tanya and Larry is for an office suite, which is commercial in nature, and as such this doctrine is inapplicable.

Breach of Covenants – Right to Termination of Lease

Tanya could also possibly terminate the lease if the breach of any covenants gives her the right to do so under the terms of the lease.

Usually, the covenants between the landlord and tenant are independent, making the breach by one giving rise simply to damages, and not a right to terminate.

However, in this case, Larry breached his covenant to provide essential services, by failing to supply running water, heat, electricity for a period as long as one week. Therefore, under the terms of the lease Tanya may have a right to terminate.

III. Damages

Finally, if Tanya is unsuccessful in arguing that she had a right to terminate the lease she will try and lessen her damages by pointing that Larry did not mitigate his damages.

A landlord has a duty to mitigate damages by promptly reletting the premises.

In this case, Larry knew that Tanya was going to be gone by February 28. However, he did nothing to relet the premises until April 15, which is a duration of six weeks.

It only took Larry two weeks to find a new tenant when he decided to relet.

If he had done so earlier he could have relet the premises for April.

Therefore, Tanya should not be liable for rent for April.

Answer B to Question 1

1. Larry's claim against Tanya for March and April rent

Rental Agreement

Larry and Tanya entered into a written lease agreement. A periodic tenancy is a lease agreement in which the tenancy is for periods of time as determined by the cycle of payments. A periodic tenancy can be created expressly, by written agreement, or by implication. Moreover, a periodic tenancy can be terminated by providing the landlord with notice of intent to terminate the lease, in which the notice is given to the landlord at least one period in advance.

Here, Larry and Tanya entered into a lease agreement for a month-to-month lease, with rent payable at $500 monthly. Moreover, although the landlord need not assume general repairs for the tenancy space, here Larry agreed to provide essential services to Tanya's suite. This lease agreement is valid.

Tanya's proper termination?

To terminate a periodic tenancy, the tenant must provide a reasonable period of notice, at least one period in advance. The termination notice must be in writing. Larry argues that Tanya's attempt to terminate the lease was improper because she orally terminated the lease, rather than provided written notice of her intent to terminate the lease. As a result, if the termination notice should have been in writing, Tanya's termination was improper.

Failure to pay rent – Abandonment

Larry will argue that he is entitled to the rent. A tenant has a duty to pay rent. Where a tenant fails to pay rent and abandons the premises, a landlord my treat the abandonment as a subrent, relet and sue the tenant for damages, and in some minority jurisdictions can ignore the abandonment and sue for damages without attempting to relet the apartment. Here, Tanya failed to pay the rent for the months of March and April. Therefore, Larry will claim that Tanya breached the lease agreement.

2. Tanya's Defenses

Implied warranty of habitability

Tanya may first attempt to argue that the landlord has breached the implied warranty of habitability. The implied warranty of habitability warrants that the premises are suitable for human habitation and basic needs. Where this warranty has been breached, the tenant can choose to move out, repair and deduct the rent from future payments, remain on the premises and sue for damages, or reduce the rent payments. However, the implied warranty of habitability has been held to apply only to residential leaseholds. Here, Tanya is renting a four-room office suite on a 20-story office building. As a result,

because this is clearly not a residential lease but instead a commercial lease, this defense will not resonate with the courts.

Implied warranty of quiet enjoyment

Constructive Eviction

Tanya will argue that Larry breached the implied warranty of quiet enjoyment. The implied warranty of quiet enjoyment is an implied warranty that the landlord will not interfere unreasonably with the tenant's use and possession of the premises. This warranty can be breached by both an actual and a constructive eviction. To make a claim for a constructive eviction, and for this warranty to be breached, there must be substantial interference caused by the landlord (or of which the landlord had noticed but failed to act), the tenant must provide notice of the interference and problems, and then the tenant must move out immediately. Where this warranty is breached and a constructive eviction has occurred, the tenant may leave immediately and terminate all future payments of rent.

Here, Larry's failure likely reached to the level of substantial interference with Tanya's use. Tanya for many days did not have running water, clearly an essential service. In fact, this occurred at least more than once and occurred for periods of up to one week. Moreover, Tanya was deprived of heat during the winter months of November and December, making it difficult to use the premises without Tanya making substantial sacrifices for warmth. The electrical services were interrupted on three occasions, sometimes lasting for a week: in a commercial office building, failure to have electrical services clearly makes running an office or other commercial space difficult. She would likely have been unable to run the computers, printers, and other important office equipment necessary for the functioning of a viable office environment. As a result, it is likely that there was substantial interference with Tanya's use and possession. Larry may attempt to point out that Tanya did not leave the apartment until months after these problems, suggesting that Tanya was okay with the interference and that it did not disrupt her business substantially. Nevertheless, on this prong, it is clear that weeks without heat and services are clearly substantial interference.

Here also Tanya made complaints to Larry. They were timely: she made them immediately. And she made them in each instance after each particular problem. Larry was clearly on notice. Although Larry will attempt to claim that he "was doing all he could to repair them," and that he was therefore not responsible for the failures, the facts nevertheless suggest (as in the paragraph before) that Larry's failure to take action or improve the situation resulted in a substantial interference.

As mentioned above, the tenant must move out immediately. Here, Larry may attempt to claim that Tanya did not move out within a fast enough period of time. Tanya was apparently fed up with the failures to provide essential services on December 12, yet she failed to leave her office suite until February 28, 2007. This suggests that perhaps the interference was not that substantial. Moreover, it also suggests that there was not indeed a constructive eviction. However, Tanya will point to the need to find alternative office

space. She will argue that, although there was substantial interference with her ability to use her commercial space, still having some space was better than not having any at all. Nevertheless, Larry may have a good claim that this was not indeed a constructive eviction because this element was not met. Tanya did not leave her apartment immediately, and therefore cannot claim a constructive eviction.

As a result, given Tanya's failure to move out immediately, a court may find that Tanya cannot defend that she was constructively evicted.

Breach of Contract

Tanya will claim that by failing to provide essential services, Larry breached his lease agreement, which is a breach of contract. A landlord and his tenant are in contractual privity. Although a landlord at common law did not have duty to repair the leased office space, a landlord can specifically contract to provide such repairs. Where the landlord provides such repairs, he will be liable for any unreasonable failures to do so. Where the express promise to repair does not occur, the failure will be deemed a breach, especially where the tenant to receive her benefit of the bargain.

Here, Larry contractually agreed in the lease agreement to provide essential services to Tanya's suite. Larry failed to provide essential services as required. Given that Tanya was on the 12th floor of the office building, clearly elevator service would be essential to running an office in a commercial space. Moreover, heat (especially in the winter months of December and November) and running water are essential services, as they are necessary for mere basic human habitation. These failures occurred regularly and for extensive periods of time. As a result, Tanya will be able to claim a breach of the contract.

Independent Conditions?

However, promises in the lease agreement are deemed to be independent. As a result, a breach of one condition generally does not relieve the tenant or landlord of the other obligations in the rental agreement. Here, Larry will argue that although he may have failed to provide some of the essential services, this does not in and of itself relieve Tanya of her obligation to pay rent. Instead, Larry will argue, Tanya had a responsibility to continue to pay rent and sue for any damages she may have suffered.
If Larry is successful on this argument, and indeed Tanya should have continued to pay rent, then Tanya will claim that Larry failed to mitigate his damages.

Failure to Mitigate

Tanya will claim that, even if she had a duty to continue to pay rent, Larry failed to mitigate his damages. Damages for failure to pay rent will be awarded where the damages are foreseeable, causal, unavoidable, and certain. Unavoidable requires that the non-breaching party take reasonable steps to mitigate any losses he may have suffered. Where a person has abandoned the premises and fails to pay rent, the landlord must

attempt to relet the apartment. Then, it will be appropriate for the landlord to sue for the difference between the initial lease payments and the payments made by the reletter, as well as any incidental damages.

Here, Tanya will claim that Larry failed to take reasonable steps to mitigate. Although Larry was aware on December 12 that he would need to find a new tenant on February 28 – more than a month and a half away – Larry still failed to attempt to relet Tanya's vacant suite until mid-April. Therefore, although Larry had substantial lead-time, he waited more than a month after Tanya vacated to even attempt to find someone else. Moreover, the second he attempted to find someone else, he was able to, as evidenced by the fact that between April 15 and May 1, he had already found a new occupant. Given the immediacy with which he was able to find a new tenant, and given the fact that he also had a month and a half of lead time before Tanya moved out, Tanya will win on her claim that Larry failed to mitigate his damages.

As a result, even if Tanya is liable for some of the rent on the arguments above, Tanya will not be required to pay the full rental price.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

Ann, Betty, and Celia purchased a 3-bedroom condominium unit in which they resided. Each paid one-third of the purchase price. They took title as "joint tenants, with right of survivorship."

After a dispute, Betty moved out. Ann and Celia then each executed a separate deed by which each conveyed her respective interest in the condominium unit to Ed. Each deed recited that the conveyance was "in fee, reserving a life estate to the grantor." Ann recorded her deed and delivered the original deed to Ed. Celia also recorded her deed and left the original deed with Ann in a sealed envelope with written instructions: "This envelope contains papers that are to be delivered to me on demand or in the event of my death then to be delivered to Ed." Celia recorded the deed solely to protect her life estate interest. Ann, without Celia's knowledge or authorization, mailed a copy of Celia's deed to Ed.

Subsequently, Ann and Celia were killed in a car accident. Betty then moved back into the condominium unit. She rented out one bedroom to a tenant and used the other bedroom to run a computer business. Betty paid all costs of necessary repairs to maintain the unit.

Ed commenced an action against Betty, demanding a share of the rent she has collected. He also demanded that she pay rent for her use of the premises.

Betty cross-complained against Ed, demanding that he contribute for his share of the costs of necessary repairs to maintain the unit.

1. What are the property interests of Betty and Ed, if any, in the condominium unit? Discuss.

2. What relief, if any, may Ed obtain on his claims against Betty for past due rent for her use of the condominium unit and for a share of the rent paid by the tenant? Discuss.

3. What relief, if any, may Betty obtain on her claim against Ed for contribution for the costs of maintaining the condominium unit? Discuss.

Answer A to Question 5

Betty and Ed's Interests

Ann, Betty, and Celia originally took title to the condo as "joint tenants with right of survivorship." A joint tenancy is characterized by the four unities of time, title, possession, and interest, and expressly stating the right of survivorship. The title that they all took when purchasing the unit together satisfies the four unities (they all took by the same instrument, as joint tenants, paid 1/3 of the purchase price, and have the right to possess) and expressly states that a joint tenancy with a right to survivorship is created. Hence, A, B, and C all owned an undivided interest in the property, were entitled to possess it, and if any of them died, the survivors were entitled to succeed to the decedent's interest, unless they severed the joint tenancy.

B's Interest

Joint tenants all have an equal right to possess the whole property, but they may choose not to exercise that right. B moved out after a dispute. Hence, although B is out of possession, that does not alter her interest or sever the joint tenancy as to her.

E's Interest Taken from A

A conveyed her interest to E by a deed that conveyed to A a life estate followed by a remainder to E in fee simple. A recorded this deed and delivered to E. An inter vivos conveyance will sever a joint tenancy because it destroys the unities of time and title, resulting in the grantee holding as a tenant in common with the others. Hence, if A's conveyance was valid, A severed her 1/3 interest and gave it to E as a tenant in common. A deed is valid if it describes the interest conveyed and is validly delivered and accepted. Delivery is a matter of the grantor's intent. Recordation gives rise to presumption of intent to presently transfer an interest, and acceptance is generally presumed absent some action by the grantee to reject delivery. Here, by conveying her interest in the condominium unit to E in a deed that she recorded, A had the intent to transfer, and E received the deed and did not reject it. Hence, there was a valid delivery and acceptance and A's transfer of the remainder after her life estate to E was valid. When A died, Ed's remainder vested and he now has possession of his 1/3 interest as a tenant in common.

E's or B's Interest Taken from C

C executed a deed like A did to give herself a life estate and the remainder to E. If this effectuated a valid inter vivos conveyance, then C's interest is also severed from the joint tenancy and C's 1/3 is held by C for life, remainder to E as a tenant in common with A's life estate, remainder to E, and B. If the inter vivos conveyance was invalid, however, then C's interest was not severed and C remained holding in joint tenancy with B up until C's death. In that case, B takes the entire 2/3 held by B and C in joint tenancy. The issue, then, is whether there was an inter vivos conveyance by C. If there was no effective conveyance, B takes as the survivorship of B and C, but if there was an effective inter vivos conveyance that severed the joint tenancy, E takes C's 1/3 upon C's death because C's death extinguishes C's life estate and the remainder vests.

A conveyance is valid if the deed accurately describes the property, is delivered and accepted.

The deed describes that E is to take the remainder in the condo (the condo is known and provides a good lead), presumably, so the deed itself describes enough to be effective if validly delivered. Delivery is a matter of grantor's intent. Here, it is unclear what C intended. When a party records a deed, intent to deliver is presumed, but here, C recorded solely to protect her life estate interest rather than to convey. However, C would have no need to protect her life estate interest if she did not intend to transfer the remainder to E, so a court might well infer that she intended the delivery to be immediately effective without conditions. Acceptance is presumed absent some action indicating rejection. When C received the deed from A, he did not reject it, so C would be deemed to have accepted, making the conveyance effective and severing the joint tenancy as between C and B. Hence, C will argue there was intent to deliver and so delivery and acceptance, making the inter vivos conveyance good. On the other hand, B will argue there was no intent because C merely recorded to keep her life estate and that A's act of sending the papers without C's consent could not create present intent to transfer, making the conveyance only meant to be a testamentary transfer which would fail because C has no interest to pass by will (joint tenancy interests are not devisable or descendible).

Further, C gave the deed to Ann with instructions that the papers were to be delivered to Ed on the event of her death, or returned to her on demand. This action evidences a different intent than a present transfer. A transfer of a deed to a third party for a donative transfer without instruction is generally deemed to be an effective delivery and present intent to transfer. But when the grantor gives to a third party rather than the grantee, written instructions not on the face of the deed itself are valid to create a conditional delivery. Further, if the grantor expressly reserves for herself the right to revoke, such a reservation of interest indicates lack of intent to presently transfer. Additionally, if there are instructions only to deliver upon death, that does not evidence present intent to transfer and instead evidences a will substitute. Here, C reserved a right to revoke. B will argue this evidences a lack of present intent to deliver. Further, C gave the deed to a third party (A) with instructions not to deliver until C's death. On these facts, B will argue that there was no present intent to deliver and only an intent to make a testamentary transfer because of the condition of delivery upon death (which is valid because, although not in the face of the deed, it was contained in instructions to a third party who was to deliver the deed upon happening of the condition). On the other hand, C will argue that once a donative transfer is made and delivered to a third party to deliver upon death, many jurisdictions consider this irrevocable (even if grantor tries to revoke) and therefore, effectuates a present transfer.

Ultimately, several actions indicate C's lack of intent to presently transfer an interest, such as her instructing A not to give the deed to E until her death. However, C did record the deed to preserve her life estate, indicating a present intent to at least have the remainder transferred to E, and E did receive the deed and accept it without instructions or conditions. Although it is close, a court will probably find that C intended

to make a present, inter vivos transfer; the recordation of the deed was sufficient evidence of intent, and that therefore E succeeds to C's 1/3 as the remainderman.

Hence, E owns A and C's 1/3, giving his 2/3 held as a tenant in common with B (if the court doesn't find intent to make an inter vivos transfer, however, then B will take as the survivor and will have 2/3 with C's 1/3 as tenants in common).

Ed's relief against Betty

Cotenants have a right to possession of the premises, and are not responsible to each other for rent. However, when a cotenant rents out the property to a third person, she must account for the rents to the other cotenants. Additionally, when a cotenant allows the property to earn profits from a third person, the cotenant must account.

Here, B was using one room for her own computer business, and rented out the other room to a tenant. B, as a 1/3 (or 2/3) owner of the condo as a tenant in common with E is entitled to use the property to run her own business, and is not responsible to E for rents. E might argue that use of the business creates profits, and a tenant is responsible to her cotenants for accounting for profits earned from third parties, but here, because any profits come to B as a result of her running her own business rather than allowing another third party to run a business out of the unit, she is not responsible to E for rents or profits for use of the room as an office.

On the other hand, B rented out one room to a tenant. Because that constitutes renting to a third party, B is liable to E to account for his share of the rents paid (either 1/3 or 2/3, depending on whether C's deed was delivered).

Betty's relief against Ed

An in possession cotenant has an obligation to keep the premises in good repair. The cotenant may not commit voluntary, permissive, or ameliorative waste. The cotenant is only entitled to contribution for repairs that are necessary if she notifies the other cotenants of the need for the repairs, and she is entitled to contribution for improvements only upon sale (and if the improvements decreased rather than increased the value of the property, she bears 100% of the loss).

Here, Betty is responsible for ensuring that necessary repairs were made so she was not liable for permissive waste, and she is entitled to contribution from E if the repairs were necessary and she notified him of the need for repairs in advance. Here, the repairs Betty made apparently were necessary, but it is unclear whether she notified E of the need to make them in advance. If she did, then E must contribute his share (either 1/3, or 2/3, as described above).

Answer B to Question 5

1. **Property Interests of Betty and Ed**

Betty has 2/3 interest in the condominium as a tenant in common, and Ed has a 1/3 interest.

Joint Tenancy

Ann ("A"), Betty ("B"), and Celia ("C") originally purchased the condominium as "joint tenants" because they took title at the same time and by the same instrument as "joint tenants with rights of survivorship." The "four unities" appear to be present. A joint tenancy gives each tenant an undivided interest in the property with a right of survivorship, which means that if one of the other joint tenants dies, that tenant's interest automatically becomes part of the surviving tenants' interests.

The joint tenancy, however, may be severed when one of the tenants conveys her interest to another party. That other party then takes an interest in the property as a tenant in common.

Tenants in Common

While A and C were originally joint tenants, A and C severed the joint tenancy by conveying their interests in the condominium to Ed ("E"). Generally, when a joint tenant conveys her interest in a joint tenancy to another party, that other party takes the property as a tenant in common. In this case, however, E took the property as a remainderman.

Life Estates and Remainders

Both A and C reserved for themselves life estates in the condominium. They did this by deeding the property interest to E "in fee, reserving a life estate for the grantor." E now has a vested remainder in fee simple, and A and C have life estates. Therefore, while E has a property interest in the condominium, his interest does not become possessory until the death of A or C -- i.e., at the termination of their life estates.

Effect of Deaths of A and C

As noted above, when a joint tenant dies, the surviving joint tenants automatically take her interest. A joint tenancy interest may not be devised by will. E will argue that when A and C died, their life estates were terminated, and that E as the remainderman now has an undivided 2/3 interest in the condominium, while B has the other 1/3 interest.

However, because the attempted [conveyance] from C to E was ineffective (as discussed below), C did not sever the joint tenancy vis-à-vis B. As a result, when C died, her 1/3 interest automatically passed to B, the surviving joint. Thus, B has a 2/3 interest, and E only has a 1/3 interest.

Deed Formalities and Delivery

To be valid, a deed must be both (1) executed, and (2) delivered. If either requirement is not met, the property interest is not conveyed from the grantor to the grantee.

Delivery is generally regarded as solely a question of the grantor's intent. Courts have held that the delivery of a deed in which the grantor reserves a life estate is effective, even though the grantee's interest does not immediately become possessory.

In this case, A executed the deed, and both recorded and delivered the deed to E. Thus, the deed and conveyance from A to E is valid. C executed and recorded the deed. However, C did not physically deliver the deed to E. Instead, she left the original deed in an envelope with A.

Recording a deed creates a presumption of delivery. Thus, E may argue that by recording the deed, the delivery requirement is met. However, B will argue that the presumption in this case may be rebutted. While it is true C recorded the deed, she did this to protect her life estate interest, not to satisfy the delivery requirement. Furthermore, the deed was in a sealed envelope with written instructions, providing that the papers in the envelope be delivered to A on her request. These instructions suggest that C did not intend to deliver the deed to E. Instead, she wanted to have the power to take the deed back at any point during her life.

E will argue that the instructions also provided that in the event of C's death, the deed was to be delivered to E. The problem with this argument is that delivery is only effective if there is a present intent to deliver. An intent to deliver a deed in the future is not effective. Alternatively, E may argue that the written instructions are a last will and testament, devising C's property interest to E. However, there is no indication that the Statute of Wills has been complied with. Therefore, there was no delivery to E, and C retained her interest in the condominium at her death.

2. **Relief Ed May Obtain for Past Rent Due and Rent by Tenant**

As a general rule, one cotenant does not have to share profits earned from the property with other cotenants, unless there is an agreement to the contrary. However, cotenants are obligated to share profits that they receive by renting the property to third parties.

In this case, B rented one bedroom to a third party, and used another bedroom to run a computer business. Because B rented the bedroom to a third party, E has a right to demand an accounting for his share of the profits earned from the third-party rent.

On the other hand, while B is using one of the bedrooms to run a computer business. E has no right to demand a share of the rent for the use of the bedroom as a business office. This is true even though B is clearly saving money by not having to lease commercial space from someone else. B is also not obligated to pay rent to E for her personal use of the condominium.

3**. Relief Betty May Obtain for Contribution of Maintenance Costs**

Cotenants are required to make contributions for necessary repairs, taxes, and mortgage payments (if the cotenant signed the note). Cotenants are not required to make contributions for non-necessary repair or improvements, although there may be a right of reimbursement upon partition. In this case, B made necessary repairs to

maintain the unit. As a result, B is entitled to contribution from E for his share of the cost of repair.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
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Question 5

Paula has owned and farmed a parcel consisting of 100 acres for many years. Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, had to be left undeveloped to protect certain endangered species. On that basis, County denied the development application.

Paula brought an action claiming that County's denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. It was stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not.

The trial court ruled that County's denial of Paula's development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County's denial of Paula's development application did not constitute:

1. A total taking? Discuss.

2. A partial taking? Discuss.

Answer A to Question 5

1. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a total taking?

The Fifth Amendment of the Constitution prohibits the government from taking private property for public use without just compensation.

Taking

There are two types of takings: permanent physical occupation and regulatory takings. The former is not at issue because Paula's complaint contends the County is liable for a regulatory taking.

A regulatory taking is considered a "per se" taking if it deprives the owner of 100% of all economic viable use of the owner's property. Here, Paula owned 100 acres and 10 of those acres bordered a small lake in which she [was] seeking to develop to construct 30 homes thereon. However, the County denied Paula's application to develop the 10 acres on the basis that the 10 acres constituted protected wetlands. Thus, Paula owned 100 acres but only 10 of it was denied development. Because the County did not deny development of the entire 100 acres owned by Paula (rather, the County only denied development of 10 acres), Paula was not deprived 100% of all economically viable use of her property.

Denominator Problem

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned "for many years") 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be $4,000,000 because Paul lacks a vested right to develop.

Vested Rights

A private property owner has a vested right to develop when a government body has specifically approved, by individualized action, the development of a particular piece of property.

Here, although Paula has expended a substantial amount of expenditures in determining the feasibility for developing the 10 acres, she nonetheless has no "vested" right to develop because she lacks the requisite government approval. There are no facts indicating the government issued Paula any type of building permit or other individualized action specific to her property that would vest her rights to develop. Thus, because she has no vested right to develop the 10 acres, the value of the 10 acres is tantamount to its value as undeveloped wetlands, i.e., $200,000.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a total taking has not occurred is correct because Paula was not deprived of 100% of all economic viable use of the owner's property.

2. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a partial taking?

Taking

A regulatory taking does not have to be a "per se" taking to implicate the 5th Amendment. A regulatory taking is also considered a "taking" under the 5th Amendment if it does not pass the Penn Central Balancing Test. In the Penn Central case, the U.S. Supreme Court analyzed three factors in determining whether a "taking" has occurred: (1) the nature of the government action, (2) the private property owner's reasonable investment-backed expectations, and (3) the level of diminution in the owner's private property value.

1. Nature of Government Action

Here, a state law was enacted to protect wetlands to protect certain endangered species. It was not enacted to punish Paula. And it's probably safe to presume the state law is also applicable [to] other properties alongside the lake and that it was not similar in form to that of "spot zoning" – where the government singles out a piece of property and changes its use in a way that's distinct from other adjacent properties. Because the nature of the state law was to protect endangered species and not to single out Paula's property, this factor weighs in favor of the trial court's decision that a partial taking has not occurred.

2. Private Property Owner's Reasonable Investment-backed Expectations

Last year, Paula expended a "substantial amount" of money in determining the economic feasibility of developing 10 acres of the parcel. Thus, she invested a considerable amount in her expectation to develop eth property. The County may argue, however, that Paula's level of investment was not reasonable under the circumstances because she had no "vested right" (see heading Vested Rights under question 1 above) to develop her 10 acres. The County would argue she should not have spent a substantial amount at a point in time when the probability of her being able to develop her property was so speculative.

However, the facts state Paula did the economic feasibility study "in compliance" with County regulations. Thus, Paula has a strong argument that her investment was reasonable because the County required her to do an economic feasibility study. On balance, Paula's expenditure of a "substantial amount" was probably reasonable under the circumstances.

3. Level of Diminution in Value

Here, the parties stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not. Thus, Paula would likely argue that the level of diminution in the value of her property is great because of the difference in what her

property would be worth if the state did not prohibit her from developing her property. However, the $4,000,000 figure is a "would be" value and not an "as is" value. The court may weigh this factor differently if it was the case that Paula owned property worth $4,000,000 and, due to a state law, it is now worth $200,000. However, that is not the case. Here, Paula's property is worth $200,000 as it sits right now, undeveloped. Because Paula's property has not diminished in value, this factor weighs heavily in favor of the trial court's decision that a partial taking has not occurred.

Denominator Problem

A court's review of the trial court's decision that a partial taking has not occurred would have to grapple with the same denominator issue (as analyzed above and repeated below) as they would regarding the trial court's decision that a total taking has occurred.

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned "for many years") 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be $4,000,000 because Paula lacks a vested right to develop.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a partial taking has not occurred is correct because the factors under the Penn Central balancing test weigh in favor of the trial court's decision.

Answer B to Question 5

1. DID THE TRIAL COURT CORRECTLY RULE THAT COUNTY'S DENIAL OF PAULA'S DEVELOPMENT APPLICATION DID NOT CONSTITUTE:

A. A TOTAL TAKING?

TAKINGS CLAUSE

The 5th Amendment of the US Constitution states that the government may not take private land for public use without paying just compensation. Through the Doctrine of Selective Incorporation, this is made applicable to the states via the Due Process Clause of the 14th Amendment. In this case since the County is a state municipality Paula will challenge under the 14th Amendment clause.

A taking can either be physical, where the government physically occupies the land, or a taking can be regulatory, where a government regulation renders the land economically unviable. In either case, if there is indeed a "taking" and the taking is for public use the government will be required to pay just compensation.

PHYSICAL TAKING

As mentioned above, a physical taking occurs when the government physically occupies the land either in part or in total. If there is actually any "physical" occupation in any way, it will constitute an official taking. If the taking is for public use the government will be required to pay just compensation.

In this case the only governmental action is a regulatory statute preventing Paula from developing the 10 acres. There is no actual physical occupation, but rather a regulation affecting Paula's use.

Therefore, there is no physical taking.

REGULATORY TAKING-TOTAL

A regulatory taking occurs when a government regulation renders property economically unviable. For there to be a taking under the takings clause through, and unlike a physical taking, the regulatory taking must leave no economically viable use of the property.

Here the court concluded that there was no total regulatory taking of Paula's property when they rejected her application. Let's explore this further to see if indeed there was a total taking.

Paula owns 100 acres of land and had done so for many years. Paula has farmed the land, but the facts don't state how much of the land she actually farms. Presumably Paul also lives on the farm as well.

In this particular case, Paula is seeking to build 30 homes on 10 acres of her land sitting next to a small lake. The government is claiming that due to a state law the 10 acres is protected land and Paula is not able to build. It should be immediately noted that only 10 of Paula's 100 acres is being negatively affected by the government's regulation. Paula is still free to use the remaining 90 acres as she sees fit. She can continue to farm it, or even build the 30 homes on any of those remaining 90 acres. It's presumed that Paula's intentions in building the homes is for business purposes. Moreover, since the 10 acres abuts a small lake, Paula will likely be able to make a bigger profit on selling the homes as she'll be able to advertise that they are "waterfront property". The facts don't specifically state what type of condition the remaining 90 acres is. 90 acres is a lot of land and perhaps there is another equally viable place for her to build the 30 homes.

However, the government regulation is not a total taking here since there appears to be a lot of economically viable use of the land remaining. First, Paula has possession and can make use of 90 of the 100 acres presumably as she sees fit. The government regulation only affects 10% of Paula's land. Paula still has a lot of remaining of which [it] has tremendous economical use. Paula can continue farming the 90 acres of land,

and even perhaps the 10 acres in question. Additionally, she may even be able to move her development plans to those 90 acres as well. In this case the government regulation may not even affect her that much at all.

Since the regulation only affects 10% of the land, and there is still considerable economical use of the remaining 90 acres of land, the government regulation is not a total taking.

B. A PARTIAL TAKING

PARTIAL REGULATORY TAKING

A partial regulatory taking occurs where the government regulation affects some economic use of the land, but there still remains a sufficient amount of economic use.

Here, Paula will argue that by preventing her from building the 30 homes on the 10 acres the government regulation is rendering those 10 acres economically unviable. She will further argue that while in relation to the total 100 acres 10 acres is only 10%, but in relation to the 10 acres in question, the government regulation is preventing her from making any economic use of the land. By not allowing Paula to build the 30 homes on the 10 acres the government is preventing her from making a profit from her use of the land. The state law in question requires the 10 acres to be undeveloped, meaning Paula cannot build any structures on the land, or make any profitable use of it.

INVESTMENT BACKED OPPORTUNITIES

Paula will argue that the government regulation destroys her investment backed opportunity since she's invested a substantial amount of money in determining the economic feasibility of developing the 10 acres. While the facts don't say, Paula has perhaps entered into contracts with prospective buyers of the homes and/or even contractors to build the land. Further, Paula will argue that she complied with County regulations the entire step of the way in her pursuit of this endeavor.

The government will argue that she should not have invested that much money before researching if her prospective use was legal. In doing so she created her own detriment and will suffer the burdens of it.

BALANCE OF INTEREST

Finally, the court will likely balance the interest of both parties to determine if there is a substantial partial regulatory taking of which compensation should be paid.

Here, Paula's interests are obvious. She wants to be able to build 30 homes on the 10 acres of land so she can make a profit on them. Also Paula can argue that by building the homes she's providing adequate housing for the public. Alternatively, the government wants to protect endangered species from becoming extinct. Weighing the two factors, given the fact the Paula's interests are purely pecuniary, the government will likely prevail in this battle. Their interest protects more of the public at large while Paula's merely protects a few, if any.

In conclusion there appears to be [not] any total or partial taking. However, in the event the court finds that there was, the taking must be for public use.

PUBLIC USE

The government may only take land if is for public use. Here, the government regulation is to preserve endangered species. This is a benefit for the public at large since it preserves the wildlife for all to enjoy.

JUST COMPENSATION

Finally, in the event that there is a taking for public use, the government must pay just compensation. This is the market value of the land to the owner at the time of the taking.

In this case, if there is a taking the government will have to pay Paula $4,000,000 since the taking prevents her from developing her land as she wants to.

STATE LAW INVALID

Paula may try to argue that the state law guiding the government's decision is invalid.

10th AMENDMENT & PREEMPTION

Under the 10th Amendment, powers not reserved to the federal government are reserved to the states.

Here the state law protects certain wetland and endangered species. Paula will argue that the state law is preempted by federal law since under the federal property power, the federal government is in control of preserving the land.

In conclusion, the court did not err in ruling that the County's denial of Paula's development application did not constitute a total or partial taking.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2011 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 3

Leo owned three consecutive lots on Main Street. At one end, Lot 1 contained an office building, The Towers, leased to various tenants; in the middle, Lot 2 was a lot posted for use solely by the tenants and guests of the other two lots for parking; at the other end, Lot 3 contained a restaurant, The Grill, operated by Leo.

In 2008, Leo leased The Grill to Thelma for 15 years at rent of $1,000 per month under a written lease providing in relevant part: "Tenant shall operate only a restaurant on the premises. Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease. Tenant and his or her guests shall have the right to use Lot 2 for parking."

In March 2009, Thelma assigned the lease to The Grill to Andrew after he had reviewed it. The lease did not contain any provision restricting assignment. Although Leo did not express consent to the assignment, he nevertheless accepted monthly rental payments from Andrew.

In April 2010, Leo sold Lot 1 and Lot 2 to Barbara after she had inspected both lots. Barbara immediately recorded the deeds. Leo retained ownership of Lot 3.

In June 2010, Leo informed Andrew that, within a month, he intended to open a restaurant across the street from The Grill.

Also in June 2010, Barbara announced plans to close the parking lot on Lot 2 and to construct an office building there. There is no other lot available for parking within three blocks of The Grill.

1. Andrew has filed a lawsuit against Leo, claiming that he breached the provision of the lease stating, "Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease." How is the court likely to rule on Andrew's claim? Discuss.

2. Andrew has filed a lawsuit against Barbara, claiming that she breached the provision of the lease stating, "Tenant and his or her guests shall have the right to use Lot 2 for parking." How is the court likely to rule on Andrew's claim? Discuss.

Answer A to Question 3

1. ANDREW (A) V. LEO (L)

Applicable Law

Service contracts, including leases, are governed by the common law. These contracts involve a lease of land, which is a service. As such, the common law will govern these transactions.

Validity of Lease from L to T - Statute of Frauds

The Statute of Frauds prevents the introduction of a contracts for services that takes more than one year to complete, unless the statute of frauds has been satisfied by a writing, performance, or a judicial assention. In this case, the lease between L and T [was] for a sum of 15 years, but it was in writing and presumably signed by both parties. Therefore, the Statue of Frauds has been satisfied. Therefore, there was a valid lease from L to A.

Assignment from T to A

An assignment occurs when a person who is in rightful possession of property transfers all of her rights to another person. An assignment will be presumed valid, unless there is a no-assignment provision in the lease which is valid and has not been waived. Once rights have been assigned, the original assigning party, the assignor, remains in privity of contract with the lessor and the new assignee is not in privity of estate. As such, both the assignor and the assignee may assert their rights against the landlord, and the landlord may similarly assert his rights against both assignor and assignee.

In this case, A will easily be able to show that T assigned the lease to him since she transferred all of her rights in The Grill to him. Additionally, the original lease between L and A did not contain a 'no assignment' provision. T transferred all of her rights in Lot 3 to A for the balance of 14 years on her lease, which falls within the statute of frauds. Accordingly, A and T's assignment needs to be in writing. Because A and L both

“reviewed” the assignment, it is likely that the assignment was indeed in writing and is therefore valid under the Statute of Frauds.

Therefore, the assignment will be deemed valid.

Equitable Servitude

An equitable servitude (ES) is a promise in relation to land that does not necessarily burden one party's land, but it will concern the land of the other party. The benefit of an ES will be deemed to run with the benefitted land if the following are found: (i) generally, a writing; (ii) intent of the parties that the benefit run; (iii) touch and concern of the land; and (iv) notice. The recovery of an equitable servitude is equitable relief, rather than damages.

In the present action, the lease between T and L contained a promise by L not to open a restaurant within 5 miles of Lot 3, which contained The Grill that T leased. That lease was then validly assigned to A. In order for A to enforce the contract provision against L, he will need to show that the promise was an equitable servitude that was intended to “run with the benefitted estate”, in this case Lot 3.

Writing

Generally, a writing is required for an ES to run with the benefitted land. In this case, there was a writing between L and T, which included the covenant. Additionally, the assignment from T to A was also in writing, as discussed above. Therefore, this requirement is met.

Intent

However, L will argue that he did not intend for the ES to run with the land, since it is not evidenced "to successors or assigns" in the lease. However, because there was a valid assignment and because it is very likely that a 15-year lease will be assigned at some point, A will argue that the fact that a non-assignment provision did not appear in the lease is sufficient to show intent to run. Additionally, A will argue that because L

accepted monthly rental payments from him, that he was well aware that the lease had been assigned and had made no efforts to refuse the assignment or show his intent not to let the ES run with Lot 3.

Touch and Concern

The ES must also directly affect the benefitted party's use of the land. Here, A will argue that the ES concerns his ability to use Lot 3 as a restaurant, which was the purpose of his taking over the lease. L will argue that the provision only refers to restaurants and only inhibits A's ability to run the restaurant, which may be located on land, but does not directly affect the land. However, because A took the land as a restaurant and it is likely that he took it as a restaurant, the fact that the provision goes to preventing L from opening a restaurant within 5 miles directly affects his use of Lot 3. Therefore, the ES does touch and concern the land.

Notice

Finally, the parties must have had notice. L will argue that the assignment between T and A did not contain the provision restricting assignment, and therefore the benefited land did not have notice. However, notice can be gotten by looking to the record and inspecting the previous documents in the chain of leases. As such, A did have valid notice by looking to the lease between L and T. Additionally, L will be deemed to have notice because he was a party to the first lease between him and T. Therefore, this element is met.

Conclusion

It is most likely that A will want to seek equitable relief in the form of an injunction, to enforce the provision preventing L from opening a restaurant within 5 miles of Lot 3. For the reasons stated above, A will likely be able to show that the ES was validly formed and runs with Lot 3. Accordingly, the court will likely order an injunction against L to enforce the ES and prevent him from opening a restaurant within 5 miles.

Covenants to Run with Burdened Land

A may also argue that the provision is a covenant. A covenant is a contractual provision in a writing whereby one promises not to do something in relation to land. It is very similar to an ES, described above. However, money damages can be awarded, which A won't want.

2. ANDREW V. BARBARA (B)

Easements

An easement is a non-possessory interest in the use of someone else's land. An easement appurtenant involves the two properties, a dominant (the benefitted land) and a survient (the burdened land) tenement. An easement is created a number of ways, including by grant (which is a writing), prescription, implication, and necessity. It can be terminated, generally by release or abandonment, which takes a physical act. An easement will pass to a burdened estate so long as the new owner has notice of the easement, which is found by record (looking to previous conveyances), inquiry (looking to the land), and actual notice (being informed of the easement).

In this case, there was a provision in the original lease between L and T that allowed T and her clients to use the parking lot that was located in Lot 2, next door [to] T's leased premises. Because there were two lots, one burdened (lot 2), and the other benefitted (Lot 3), this is an easement appurtenant. Additionally, because the easement was granted in the writing between L and T, this was a valid easement by "grant". L then sold his property to B, who took the property and recorded the deeds. B will argue that because she was not informed of the easement by L and because her deeds did not include the provisions from L to A, since that was simply a lease and B's deeds were actually recorded conveyance documents, that she did not have notice. However, she did inspect both lots, Lot 1 and Lot 2, before purchasing them. In this regard, she most likely noticed that there were many people walking from Lot 2, where they parked their cars, to Lot 3 where they dined at The Grill. Additionally, she would have noticed that there were most likely more cars present in Lot 2 than would normally be for Lot 1

alone. This should have led her to inquire as to whether an easement or agreement existed to allow Lot 3 to use the Lot 2 parking lot. As such, the Court will likely find that B had inquiry notice of the easement and the easement will pass with the burdened Lot 2.

Therefore, B had inquiry notice of the easement and A will most likely be successful in enforcing the easement against her.

Answer B to Question 3

Thelma=T

Leo=L

Andrew=A

Barbara=B

1) Restrictive Covenant/Equitable Servitude

A covenant is a promise to do or not do something on or near one's land. Here L promised in his lease to T that "landlord shall not open a restaurant with 5 miles of the premises during the terms of the lease." Since it is a promise not to do something near his land, it is a covenant.

Equitable Servitude

Whether a covenant is a restrictive covenant or an equitable servitude depends on the types of damage that the plaintiff seeks. If A is seeking money damages, then it is a restrictive covenant. If he is seeking injunctive relief, then it is an equitable servitude. Here, A is suing to prevent L from opening a restaurant, which he said he would do in one month. Since he is seeking injunctive relief, it is an equitable servitude.

Here, the issue is whether the benefit and burdens of the equitable servitude run to A, who is a successor to the original tenant, T. For the benefit to run, the original agreement 1) must have been in writing, 2) parties intended the benefit to run to future successors, 3) the agreement touches and concerns the land, and 4) the parties had notice.

Here, the original equitable servitude was from a written lease signed by L and T in 2009. Therefore, the writing requirement is satisfied.

Here, L could argue that there was no intent by the original parties that the benefit would run to future successors because there is nothing said in the lease about the

benefit running to future successors. However, A could argue that because it said that the agreement would last "for the term of the lease" and the term was 15 years, it was intended that the benefit would be valid for the entire period of the 15 years. There was no clause restricting assignment and under the common law a tenant is free to assign her rights under the lease unless the lease or the landlord objects. Because the benefit was to last 15 years and T was free to assign her rights to another, it can be said that the parties intended that the benefit would run to future successors of the lease.

Touches and concerns the land means that whether the agreement affects the parties as landowners, not just community members. Here the agreement affects the tenant because the Grill is a restaurant and the previous owner of the restaurant opening up a new restaurant within five miles of the old restaurant brings along competition and hurts the tenant. It affects the landlord as a landowner because it prohibits him [from] doing something on his land.

Here A had notice of the agreement because it was in the lease and he reviewed it. L could argue that he did not have notice that the agreement was going to be able to [be] used to T's assignee, L. A could argue that L did have notice because he accepted rental payments from A, which presumably were checks written by A and should have then alerted L that A has taken over for T.

Restrictive Covenant

If L brought a claim for money damages, then it would have to be analyzed as a restrictive covenant. All the elements are the same except the original parties must have had horizontal privity and the assignor-assignee would have had to have vertical privity. Vertical privity is any nonhostile nexus. Here T (assignor) and A (assignee) have an assignment relationship which qualifies as nonhostile vertical privity. Horizontal privity means that the original parties must have had a relationship apart from the covenant. Here, T and L were landlord-tenant apart from the covenant. Therefore, horizontal privity is established. A would also prevail under a restrictive covenant theory.

2) Easement

An easement is the nonpossesory property interest to use another's land for one's benefit. Using another's land for the use and enjoyment of one's land is an easement appurtenant.

Here, the agreement that tenants should have the right to use lot 2 for parking is an easement because it gives the tenants a nonpossesory property interest to use lot two for their benefit. It is an easement appurtenant because it is for the using [of] another's land for the use and enjoyment of one's land. Lot 3 is the dominant tenement and lot 2 is the servient tenement.

Here, an express easement was created because it is written in a lease between T who was the tenant for lot 3, dominant tenement, and L who was the owner of lot 2, the servient tenement.

The benefit to an easement appurtenant runs with the land passes automatically with the transfer of the dominant tenement. Here, T, the original leasee of lot 3, assigned her rights under the lease to A. When an assignment of a lease happens, the new assignee and the landlord are in privity of estate and can enforce covenants that run with the estate/estate. Here, A, the assignee, would be able to enforce the easement because it runs with the land.

The burden of an easement appurtenant also passes automatically with the transfer of the servient tenement. Here, the servient tenement, lot 2, was sold by L to B. Therefore, the burden of the easement passes to B. However, the burden would not pass if B was a bona fide purchaser without notice (BFP). A BFP is someone who pays valuable consideration for the land and takes the land without notice of the burden. Here, B did pay valuable consideration for the land by buying it. However, she is not a BFP if she had notice of the easement.

One form of notice is record notice. A buyer is on record notice of what a record search of the grantor-grantee index would reveal. However, in this case L did not sell the land to T but instead leased it. Therefore, the lease containing the easement would not be found through a record search.

Another form of notice is inquiry notice. A buyer has a duty to inspect the land she buys and is on inquiry notice of reasonable inquiries that she should have made. Here, lot 2 was a parking lot of tenants of lot 3 before B bought it and it would have been obvious if she went there and saw that there were cars parked there. She should have asked L why there were cars there. Therefore, she is on inquiry notice of what L would have told her, which is that there is an easement on lot 2.

Easement by implication

Even if the easement from the lease is not enforced, it could be argued that when L sold the land to B he created an easement by implication. This requires a prior use that was reasonable [and] necessary to the owners of the dominant tenement and that this was reasonable [and] apparent when the land was bought. Here, when B bought the land it was apparent that lot 2 was being used as a parking lot. Also, it is reasonable [and] necessary for owners of the dominant tenement because other than lot 2 there is no parking available within three blocks of lot 3.

FEBRUARY 2011
ESSAY QUESTIONS 4, 5, AND 6

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 5

Prior to 1975, Andy owned Blackacre in fee simple absolute. In 1975, Andy by written deed conveyed Blackacre to Beth and Chris "jointly with right of survivorship." The deed provides: "If Blackacre, or any portion of Blackacre, is transferred to a third party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

In 1976, without the knowledge of Chris, Beth conveyed her interest in Blackacre to Frank.

In 1977, Beth and Frank died in a car accident. Frank did not leave a will and his only living relative at the time of his death was his cousin Mona.

In 1978, Chris and Andy learned that Beth had conveyed her interest in Blackacre to Frank. When Mona approached Chris a day later to discuss her interest in Blackacre, Chris told her that he was the sole owner of Blackacre and she had no interest in Blackacre. Chris posted "No Trespassing" signs on Blackacre. He also paid all of the expenses, insurance, and taxes on Blackacre. Andy and Mona have never taken any action against Chris' possession of Blackacre.

1. What right, title, or interest in Blackacre, if any, did Andy initially convey to Beth, Chris, and himself? Discuss.

2. What right, title, or interest in Blackacre, if any, are held by Andy, Chris, and Mona? Discuss.

Answer A to Question 5

1. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE DID ANDY INITIALLY CONVEY TO BETH, CHRIS, AND HIMSELF?

Andy owned Blackacre in fee simple absolute, which indicates absolute ownership and means he had the full right to convey Blackacre.

Joint tenancy

In 1975, Andy by written deed conveyed Blackacre to Beth and Chris "jointly with right of survivorship."

A conveyance of land requires that the deed be lawfully executed and delivered. A conveyance to multiple parties can create a tenancy situation. A conveyance creates a joint tenancy when the four unities are present: possession, interest, time and title. The unity of possession means the joint tenants have the equal right to possession; interest means they have an equal ownership interest in the land; time means they received their ownership interest at the same time; and title means they received their ownership interest via the same instrument (such as a deed).

When a joint tenancy is created, it carries a right of survivorship (ROS), which usually must be expressed in the conveyance itself. The ROS means that when one joint tenant dies, the other succeeds to her entire interest in the land. In a situation involving two joint tenants, this means the surviving joint tenant would succeed to the entire ownership interest in the property. However, a joint tenancy can be severed by a sale, partition, or mortgage (in title theory jurisdictions). The severance of a joint tenancy typically results in a tenancy in common.

Here, Andy created a joint tenancy between Beth and Chris. This is because the deed expressly contained the words "jointly with a right of survivorship," and the four unities were present: Beth and Chris each have a 1/2 interest in Blackacre, right to possess the whole, and received their interest at the same time (1975) and by the same instrument (the deed from Andy).

Thus, there was a joint tenancy between Beth and Chris.

Fee Simple Subject to Condition Subsequent

However, the deed also contained another provision which potentially affects the parties' rights in Blackacre: the deed provided "If Blackacre, or any portion of Blackacre is transferred to a third party, either individually or jointly by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Through this language, Andy purported to create a fee simple subject to a condition subsequent (FSCS). A FSCS is an ownership interest in land whereby the present possessor owns the land until a specified condition occurs, whereby the grantor then has the option of exercising his right of reentry and re-taking possession of the land. To create a FSCS, the grantor must use express conditional language in the conveyance and reserves a right of reentry, using words such as "but if" and "the grantor shall have the right to re-enter." In other words, the express conditional language must indicate that the interest conveyed is subject to the grantor's right of reentry if the specified condition occurs subsequent to the conveyance.

Here, the specified condition is the transfer of Blackacre or any portion thereof, either individually or jointly by Beth and Chris. Andy carved out the right of reentry by stating "Andy shall have the right to immediately re-enter and repossess Blackacre." Thus, Andy purported to create an arrangement where he could cut off Beth and Chris' rights in Blackacre, reenter the land and possess it, if any portion of the land was transferred. This constitutes a FSCS.

Thus, under Andy's purported conveyance, Beth and Chris would be joint tenants with respect to their interest in Blackacre: a fee simple subject to a condition subsequent.

Restraint on Alienation

However, Andy's purported conveyance is problematic because it is a restraint on alienation. A restraint on alienation occurs when the grantor attempts to restrict the alienability (e.g. transferability) of the land. A grantor may impose certain conditions in connection with his conveyance of the land, such as restrictions on what purpose the land may be used for. However, when the grantor attempts to impede the grantee's

ability to transfer the land to others, the courts will classify that as a restraint on alienation.

The law will uphold reasonable restraints on alienation, but not unreasonable restraints on alienation because of the public policy favoring the free transferability of land. When there is an unreasonable restraint on alienation, the court will simply strike the restraint from the conveyance and declare that the grantee holds the property without the restraint. A restraint is generally reasonable if the restriction lasts only for a specified period of time, such as a restriction during the grantor's life. It is generally unreasonable if the restriction continues indefinitely and applies even to the grantee's heirs and assigns.

Here, there is a restraint on alienation: the conveyance completely restricts Beth and Chris' rights to transfer the property because it provides that Blackacre or any portion thereof may not be transferred. This is probably an unreasonable restraint on alienation because there is no time limit to this restriction - Beth and Chris are indefinitely prohibited from transferring Blackacre; presumably, even their heirs/devisees could not transfer the land. Moreover, the prohibition is not for a reasonable time, such as for a set period of years.

Andy may argue the restraint is reasonable because it does not expressly apply to Beth and Chris' "heirs and assigns" -- he may argue that this restriction does not apply indefinitely, but rather only during the period of Beth and Chris' lifetime. He may argue their heirs and assigns are free to transfer the land. He may also argue that the creation of a joint tenancy restricts their ability to transfer anyway because doing so will sever the joint tenancy. However, these are weak arguments. The restraint is still probably unreasonable because it is a total restriction during the tenants' lifetimes, which is a significant amount of time. Beth and Chris may not even transfer a portion of Blackacre. While they would lose joint tenant status by a transfer, they still have the option of doing so in the absence of the restraint. Thus, the restraint is unreasonable.

Accordingly, the court would likely strike the condition Andy included in the deed. This would mean that Beth and Chris hold Blackacre in fee simple as joint tenants.

Conclusion: initial conveyance

Thus, the initial conveyance means Beth and Chris held Blackacre in fee simple as joint tenants.

2. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE ARE HELD BY ANDY, CHRIS, AND MONA?

1976: Beth's conveyance - severance of joint tenancy

In 1976, Beth conveyed her interest to Frank.

A joint tenant may sell her interest, but as indicated above, the sale of her interest severs the joint tenancy because it destroys the unity of time/title. When a joint tenancy is severed, the new tenants hold as tenants in common (TIC) with each other. TIC have no right of survivorship, which means that upon death, their interests in the property pass to their devisees/heirs through a will/intestate succession.

Here, Beth's sale to Frank severed the joint tenancy because it destroyed the unities: Frank and Chris do not have their interests conveyed by the same instrument and at the same time. So Frank became a TIC with Chris, and Beth no longer had any ownership interest. As of 1976, Frank and Chris both had a 1/2 interest in Blackacre. This is the case even though Chris did not know about the sale to Frank--the sale severed the joint tenancy nonetheless.

1977: Beth and Frank's death

In 1977, Beth and Frank died. Beth no longer had any interest in Blackacre. Frank's 1/2 interest as a TIC with Chris would pass via will or intestacy. Because Frank did not have a will, his interest would have to pass through intestate succession. Frank's only living relative was his cousin Mona, so she would be his heir under the principles of intestate succession. Thus, Mona would get Frank's 1/2 interest in Blackacre via intestate succession, and continue to hold Blackacre as a TIC with Chris.

Thus, as of 1977, Mona and Chris each had a 1/2 interest in Blackacre as TIC; Andy had no interest in Blackacre.

1978: Chris' ouster

In 1978, Chris learned about Mona. The issue is whether he deprived her of her ownership interest in Blackacre through his actions.

Chris and Mona were co-tenants (and specifically TIC) which means each had certain rights and duties. Each tenant has a right to possess the entire premises, so one tenant in exclusive possession has no duty to pay rent to the other. Moreover, the tenants are jointly responsible for paying ordinary expenses associated with the property, such as property taxes and maintenance expenses.

Moreover, because each tenant has the right to exclusive possession of the property, a tenant in exclusive possession cannot claim ownership of the entire property through adverse possession unless he commits an ouster. An ouster is when one tenant expressly excludes the other from possession of the premises, by preventing the tenant from possessing the premises and/or through words/conduct indicating they have no right to possess the premises.

Here, Chris probably committed ouster of Mona. As a co-tenant, she was entitled to possession of the premises, but Chris would not let her have possession. Chris told her he was the sole owner of Blackacre and she had no interest in Blackacre, which constitutes an expression that she had no right to possess Blackacre. Moreover, Chris put "no trespassing signs" on Blackacre, and also paid all of the expenses, insurance and taxes on Blackacre (he never sought compensation from Mona). Thus, his exclusive possession of Blackacre was notwith Mona's consent--even though she did not take any action against Chris' possession of Blackacre, that does not indicate that Chris and she consented to this arrangement whereby he would have exclusive possession. Rather, he clearly indicated that she could not possess the premises, thus committing an ouster and entitling him to claim adverse possession if he meets the elements discussed below.

Adverse possession

A person in possession of land may have the possession ripen into title through the application of adverse possession (AP). A tenant must meet several elements to show they have acquired title through AP: continuous possession of the land for the statutory period, open and notorious possession, exclusive possession, actual possession, and hostile possession.

Continuous:

The possession must be continuous throughout the statutory period. It is unclear what is the statutory period in this jurisdiction, but Chris has possessed the property for such a long time that it is likely he has met the statutory period. Since his ouster occurred in 1978, it has been 32 years that he has possessed the property. The statute of limitations usually ranges from 10-20 years, so he likely has met the element of continuous possession.

Open and notorious:

The possessor must possess the property as the true owner would--in other words, his possession must be open and notorious such that a reasonable inspection of the property would reveal the possession. Here, Chris took ample actions to make his possession open and notorious; not only did he live on Blackacre, but he also posted no trespassing signs, paid the upkeep, and informed Mona that she had no interest in Blackacre. Thus, his possession would put a true owner on notice.

Exclusive:

Chris' possession was exclusive because he alone lived on Blackacre.

Actual:

Chris actually possessed the whole of Blackacre because he presumably lived on it.

Hostile:

Finally, the possession was hostile (i.e. without the true owner's consent) because Chris committed ouster, as described above.

Thus, Chris can probably meet the elements of adverse possession and claim title to Blackacre entirely (he already had 1/2 interest in Blackacre, and acquired the other 1/2 of Mona's interest through AP). Andy and Mona have never taken action against Chris' possession of Blackacre, so they did not defeat his claims and he likely owns it all via adverse possession. Note that he would have to file an action to quiet title before he could convey Blackacre to a third party.

Conclusion:

Thus, the final rights, title and interest in Blackacre are as follows: Chris owns all of Blackacre; Andy and Mona own nothing.

[Alternative analysis re restraint on alienation]

If the restraint on alienation analyzed above in Andy's original deed was valid, and Andy did in fact have a right to re-enter and repossess Blackacre, the final outcome would be the same because Andy never exercised that right of re-entry, and Chris succeeded to ownership of the whole property by adverse possession. (Of course this might be problematic because Andy could argue that the "hostility" element of AP was met because he allowed Chris to possess the property because he did not try to exercise his right of reentry). Nonetheless, the better analysis is that the restraint on alienation was invalid.

Answer B to Question 5

1. **Andy's Initial Conveyance of Blackacre / What interest was Conveyed?**

Joint Tenancy Discussion

Andy (A) conveyed Blackacre by written deed, thereby satisfying the Statute of Frauds, to Beth (B) and Chris (C). The language of the deed was to B and C "jointly with right of survivorship." On this language alone, B and C have a joint tenancy.

Joint tenancies are created when two or more people receive land under circumstances such that the four unities, possession, interest, time, and title, are met. Here, both B and C took possession at the same time (from A's grant), they have the same interest (they both own an undivided one-half interest in Blackacre), they have the same right to possess the whole, and the title they have in Blackacre will be the same (although exactly what title they own will be discussed further here).

Additionally, to create a valid joint tenancy, express language concerning the right of survivorship should be used. The right of survivorship means that when one joint tenant dies, he or she may not pass their share via will or intestacy; it passes automatically to the remaining joint tenant or tenants. Express language is required, because this automatic passing on an interest bypassing the probate system, which is generally "frowned up." Thus, courts will infer a tenancy in common (to be discussed further below) if express language is not used. Here, express language was used, as A conveyed to B and C "jointly with right of survivorship." As such, the requirement for a valid joint tenancy were met.

Attempt at Fee Simple Subject to Condition Subsequent

A's deed to B and C also contained language that "if Blackacre, or any portion of Blackacre, is transferred to a 3rd party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Here, A was attempting to create a fee simple subject to a condition subsequent. Unlike a fee simple absolute, where the recipient has full ownership and control of the land indefinitely, and which is alienable, descendably, and devisable, a fee simple

subject to a condition subsequent means that the takers ownership is conditioned upon a certain occurrence either being met or avoided. A fee simple subject to a condition subsequent is similar to a fee simple determinable in that both reserve an interest in the grantor, here A. However, a fee simple determinable uses express durational language (To A, for so long as....) where as a fee simple subject to a condition subsequent conveys the interest in full, but then conditions it upon a certain occurrence or non-occurrence. Another important distinction is that a fee simple determinable creates a possibility of reverter in the grantor, which means that the grantor's right vests automatically as soon as the occurrence takes place (without any action needed on the part of the grantor) while a fee simple subject to a condition subsequent creates a right of re-entry, which does not occur automatically and requires that the grantor affirmatively exercise his or her right to retake the land if the condition is met. Here, A attempted to create a fee simple subject to a condition subsequent, retaining a right of re-entry in himself. He did not use durational language, but instead conveyed to B and C as joint tenants, but then he added a condition. He also used the words "right to immediately re-enter" which indicate a right of re-entry rather than a possibility of reverter.

Restraint on Alienability

Though A attempted to reserve for himself a right of re-entry, the condition on the land amounts to a total restraint on alienation. A restrain on alienation is when a grantor attempts to make it so that the grantee cannot sell the land. The right to sell land, however, is one of the rights inherent in property ownership, such that restraints on alienation are not viewed favorably. Reasonable restraints of alienation may be tolerated. For example, a condition that the grantee cannot sell the land for 15 years, until a cloud on the title will be resolved, may be tolerated. Similarly, other restraints are possible, such as those that affect the appearance of the land, or the purpose for which the land is used. Total restraints on alienation, on the other land, will be stricken as void. Here, the condition that A attempted to include will amount to a total restraint on alienation, as it stated that B and C could not transfer Blackacre or any portion of it, and it was an indefinite condition. Therefore, the condition will be considered to be void, and it will be stricken from the deed.

Conclusion

Because this was a fee simple subject to a condition subsequent, the effect of the stricken clause will be that B and C have a fee simple absolute (discussed above). A's future interest will be eliminated. Thus, A initially conveyed to B and C a joint tenancy with right of survivorship in fee simple absolute.

2. **Rights, Titles, and Interests in Blackacre of Andy, Chris, and Mona**

Andy's Interest

As discussed above, Andy's interest in Blackacre terminated when he included a total restraint on alienation in his deed to B and C. Because the condition will be stricken, there is no stated occurrence that can cause A to be able to validly exercise his "right to immediately re-enter and repossess Blackacre" though that was his intent and desire. Because his right to re-entry is impossible, it too will be stricken and A has no remaining interest in Blackacre.

Mona's Interest

In order to discuss what interest Mona has in Blackacre, it is necessary to first discuss Beth's conveyance to Frank and Frank's subsequent death.

Beth's conveyance to Frank

B conveyed her interest in Blackacre to Frank without the knowledge of C. When one joint tenant conveys his or her interest in the joint tenancy, the result is that the joint tenancy is severed. The reasoning is that the grantee who receives the conveyance will not share the four unities with the remaining tenant, thus they cannot be joint tenants with respect to one another. However, this does not mean that B cannot convey her interest in Blackacre - she can - it simply means that the person she conveys to will be a tenant in common with her former joint tenant.

A tenancy in common is when two or more people each own an undivided interest in land. An undivided interest means that each has the right to possess the

whole. The four unities are not required, so that one tenant in common may own a larger interest in the land, but each will still have the right to possess the whole.

Here, when B conveyed to Frank, the joint tenancy was severed as between B and C, and C and Frank became tenants in common, each with an undivided one half share in Blackacre. There will be no remaining right to survivorship, as tenants in common do not have this right. The fact that B did not give notice to C of her conveyance is irrelevant - joint tenants do not need the consent of one another to convey their individual interests in the land.

Frank's Death

Frank died in a car accident after he received his interest in Blackacre. He did not leave a will, meaning that he died intestate. The facts indicate that his only living relative was his cousin Mona, which means that Mona will receive all of Frank's real and personal property via intestacy.

Mona's Interest

Mona thus received Frank's undivided one-half interest in Blackacre via intestacy, and became a tenant in common with C. This means that at the time of Frank's death, Mona HAD the right to possess Blackacre with C. However, as will be discussed further below, Mona may have lost this interest via adverse possession. More facts are needed as to the passage of time since Chris told Mona that she had no interest in Blackacre and posted "no trespassing" signs, thereby ousting Mona and initiating a hostile possession of Blackacre. If the statutory length of time has passed, Mona will have lost her interest in Blackacre, because (as discussed below) the other requirement for adverse possession will have been met. If, however, the requisite amount of time has not passed, Mona can exercise her undivided one half interest in Blackacre and remain a tenant in common with Chris. She would be advised to bring an action to quiet title in order to do this.

Chris's Interest

As discussed above, C was initially a joint tenant with B, and then became a tenant in common with Frank when B conveyed to him. Subsequently, he became a tenant in common with Mona when she inherited Frank's interest via intestacy.

C, though, may now possess all of Blackacre in fee simple absolute via adverse possession. When C told Mona that she had no interest in Blackacre, he effectively ousted her, basically meaning affirmatively kicked her off the property, thereby starting the adverse possession clock running. The requirement of adverse possession are a continuous, adverse, open, and hostile possession for the required statutory period of time. Here, C's possession was continuous for however long it's been since he ousted Mona - the facts do not indicate that C ever stopped possession Blackacre. His possession is open - he lives there and posted a No Trespassing sign for all to see. It is hostile and adverse, because it is not with Mona's consent. For this prong, it doesn't matter if C thinks that he is entitled to full ownership or not as subjective good or bad faith is irrelevant. The fact that C paid the insurance and taxes is not required by a majority of jurisdictions, but it certainly does not pose a problem for C that he did pay them, as indicated in the facts. Therefore, as long as the statutory time period is met, C will possess all of Blackacre via adverse possession.

Finally, it should be noted that although C may have acquired title via adverse possession, it will not be marketable. In order to convey the land in fee simple to someone else, and not just convey his one half interest, C will have to bring an action to quiet title against Mona.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Question 6

Donna was looking for a place to live. Perry owned a two-story home, with the second story available to lease.

Donna and Perry signed a two-year lease that provided, in part: "Lessee may assign the leased premises only with the prior written consent of Lessor."

Upon moving in, Donna discovered that the water in her shower became very hot if Perry ran water downstairs. When Donna complained to Perry about the shower and asked him to make repairs, Perry refused, saying, "I'll just make sure not to run the water when you are in the shower."

Perry soon adopted a new diet featuring strong-smelling cheese. Donna told Perry that the smell of the cheese annoyed and nauseated her. Perry replied: "Too bad; that's my diet now."

After constantly smelling the cheese for three weeks, Donna decided to move out and to assign the lease to a friend who was a wealthy historian.

Donna sought Perry's consent to assign the lease to her friend. Perry refused to consent, saying, "I've had bad experiences with historians, especially wealthy ones." Thereafter, every time Donna took a shower, Perry deliberately ran the water downstairs.

After two weeks of worrying about taking a shower for fear of being scalded and with the odor of cheese still pervasive, Donna stopped paying rent, returned the key, and moved out. At that time, there were twenty-two months remaining on the lease.

Perry has sued Donna for breach of the lease, seeking damages for past due rent and for prospective rent through the end of the lease term.

What defenses may Donna reasonably raise and how are they likely to fare? Discuss.

QUESTION 6
Answer A

As set forth below, Donna can raise the following defenses (1) material breach of lease, (2) constructive eviction, (3) breach of the warranty of habitability, and (4) failure to mitigate damages. Donna is likely to succeed on all four defenses.

1. Material Breach of Lease.

Tenancy for Fixed Term.
A fixed term tenancy is a pre-agreed term by the landlord and tenant.

Here, Donna and Perry signed a "two-year lease." As such, the term of the lease is fixed at two years.

Therefore, Donna is obligated to pay rent for the full two years of the lease, unless otherwise excused.

Duty to Repair.

Generally, a tenant has a duty to keep the premises in good order and repair, unless otherwise agreed to by the parties. The landlord, however, has a duty to repair common areas of use.

Here, there was something wrong with the plumbing in Perry's home. Each time Donna took a shower, she was scalded if Perry was taking a shower at the same time. She notified Perry of the problem, but her [sic] refused to fix it — stating only that he would not take a shower while she did. The leased premises is [sic] part of Perry's home. It is not a separate apartment, did not have separate plumbing or other utilities. Even if Donna wanted to fix the problem herself, she would have not have the ability to do so since she did not lease or control the areas of the home that were the source of the

problem. Perry controlled these items. The plumbing was, in essence, a common area under Perry's control.

Therefore, Perry, as landlord, had the duty to repair the plumbing issue and breached his duty to Donna by failing to repair it.

Duty re Nuisance.

A landlord owes a duty of quiet enjoyment to his tenant, including the abatement of nuisances to the extent within his control. A nuisance is something that would be offensive to a person of ordinary sensibilities.

Here, Donna was "annoyed" and became "nauseated" at the smell of Perry's new diet of strong-smelling cheese. However, this appears to be something unique to Donna. She was perfectly willing to assign the lease to her friend the wealthy historian - who would have been subjected to the same smell. A friend would not do this to a friend, unless she knew that the problem with the smell was due to her being ultra-sensitive to that particular cheese. As such, this ultra sensitivity does not arise to the level of being a nuisance.

Therefore, Perry did not breach his duty to Donna by failing to stop eating the cheese.

On the other hand, however, Perry began intentionally annoying Donna. After their dispute regarding the cheese and the possible lease assignment, he began to deliberately turn on the water whenever Donna tried to take a shower. This meant that Donna was not able to take a shower for nearly two weeks. Most anyone of normal sensibilities would be annoyed by this behavior.

Therefore, Perry did breach his duty to Donna by deliberately running the water while she took a shower.

Duty to Pay Rent Despite Material Breach.

At common law, a tenant's duty to pay rent is not relieved by the landlord's material breach of lease. Modernly, a material breach of lease that goes to habitability relieves the tenant's obligation to pay rent.

Here, Perry breached the lease by failing to repair the plumbing. He further breached it by deliberately running the water each time she took a shower. Nevertheless, Donna still owed a duty to pay rent to Perry, despite the breach. Under modern statutes, however, Donna will likely be relieved of the obligation to pay rent because the breach went to her use, enjoyment, and habitability of the leased premises.

Conclusion re #1 Breach of Lease.

As such, Perry breached the lease by failing to repair the plumbing. Therefore, Donna can reasonably raise this as a defense and is likely to succeed.

2. Constructive Eviction.

A landlord owes a duty of quiet enjoyment to his tenant. In the event of (a) a substantial interference with the use and enjoyment of the premises, the tenant may (b) give notice to the landlord, and (c) leave the premises, thereby being excused from any further obligations under the lease.

Here, re (a) there was something wrong with the plumbing in Perry's home. Each time Donna took a shower, she was scalded if Perry was taking a shower at the same time. She notified Perry of the problem, but her [sic] refused to fix it — stating only that he would not take a shower while she did. What's more, Perry began intentionally annoying Donna. After their dispute regarding the cheese and the possible lease assignment, he began to deliberately turn on the water whenever Donna tried to take a shower. This meant that Donna was not able to take a shower for nearly two weeks. Most anyone of normal sensibilities would be annoyed by this behavior. Not being able

to take a shower in your own apartment is a substantial interference with the use and enjoyment of the apartment.

Therefore, element (a) is met.

Here, re (b) Donna had notified Perry about the problem. At first he said he would simply not run water while she took a shower. However, in the end, he did so deliberately. As such, Perry had notice of the plumbing problem.

Therefore, element (b) is met.

Here, re (c) after two weeks with no shower, she turned stopped paying rent, returned the key and moved out.

Therefore, element (c) is met.

As such, elements (a), (b), and (c) are met. Therefore, Donna is relieved of her obligations under the lease through Perry's constructive eviction.

Conclusion re #2 Constructive Eviction.

Therefore, Donna can reasonably raise a defense of constructive eviction and is likely to succeed with this defense.

3. Breach of Warranty of Habitability.

A landlord of residential property, which includes commercial in California, owes a duty to his tenant to keep the premises fit for normal habitation. This duty is breached when the landlord fails to fix a condition that impacts the habitability of the premises or violates building codes.

Here, Donna was being scalded each time she took a shower. This started out being an unintentional problem, but grew into an intentional problem when Perry used the defect to intentionally annoy Donna. In the end, Donna was unable to take a shower at all for fear of being burned or scalded. The plumbing issue is likely a building code violation as well. Building codes typically set standards for the temperature of water coming from hot water heaters to avoid burning and scalding, as was happening here. Nevertheless, Perry refused to fix it.

Here, regarding the cheese, Donna was "annoyed" and became "nauseated" at the smell of Perry's new diet of strong-smelling cheese. However, this appears to be something unique to Donna. It does not go to the building code or other habitability issues.

Therefore, Perry breached his warranty of habitability to Donna by failing to fix the plumbing.

Remedies for breach of warranty of habitability.

When a breach of the warranty of habitability occurs, a tenant has several option;, the tenant can (a) stay in the premises, deduct rent and repair the issue, (b) stay in the premises and abate rent until the issue is repaired, or (c) stop paying rent and move out.

Here, Donna chose option (c). She stopped paying rent, returned the keys and moved out. Therefore, she is relieved from any further obligation under the lease.

Conclusion re #3 Breach of Warranty of Habitability.

Therefore, Donna can reasonably raise a defense of breach of warranty of habitability and is likely to succeed with this defense.

4. Failure to Mitigate damages.

A landlord has a duty to mitigate his damages in the event of a breach by the tenant.

Here, Donna tried to find another solution for Perry. She wanted to move out and assign the lease to her wealthy historian friend. The lease required consent for this assignment, and Donna was seeking such consent. However, Perry decided he really did not want to live with a wealthy historian because of his prior bad experiences with them. Due to the nature of this [sic] leased premises, that it was a part of Perry's actual home that required the sharing of space, it is not necessarily unreasonable for Perry to be a little picky about this. Nevertheless, Perry did not even agree to meet with the wealthy historian. Being wealthy and [a] historian does not automatically place someone in an annoying class. Perry's prior experience was probably on a personal level with an individual and had nothing to do with him being a wealthy historian. Perry should have, at a minimum, met with the person, interviewed him, sought references, and otherwise done his due diligence before turning down the opportunity. By failing to do this, he failed to mitigate his damages.

Mitigation as limitation on damages.

A landlord has a duty to use reasonable efforts to re-let the premises. Damages will be reduced by an amount found [that] could have been reasonably avoided.

Here, no, after Donna has left the premises, Perry is under a continuing duty to mitigate his damages by using reasonable efforts to re-let the premises. He must advertise it and seek a reasonable replacement for Donna. Perry is not automatically entitled to full rent for the remaining 22 months without first trying to re let the premises. He already knows at least on [sic] prospective tenant — the wealthy historian — who would take Donna's place.

Therefore, Perry's award for damages, if any, will be reduced by the amount that is shown could have been avoided by mitigating his damages.

Conclusion re #4 Failure to Mitigate.

Therefore, Donna can reasonably raise a defense for failure to mitigate damages and is likely to succeed — at least in part — on this defense.

Overall Conclusion.

In conclusion, Donna can raise the following defenses: (1) material breach of lease, (2) constructive eviction, (3) breach of the warranty of habitability, and (4) failure to mitigate damages. Donna is likely to succeed on all four defenses.

QUESTION 6
Answer B

Statute of Frauds

A contract which cannot, by its terms, be completed or fully performed within one year must be in writing in order to be enforceable. Furthermore, a contract conveying an interest in land must be in writing in order to be enforceable. In order to satisfy the statute of frauds, a contract that comes within its purview must be signed by the party to be bound. Here, Donna and Perry have entered into an agreement to lease the second story of Perry's home for two years. Donna has "signed" the lease, meaning it must have been in writing, and she is the party to be bound. Therefore, the statute of frauds will not be an effective defense to enforcement of the contract against Donna.

Valid Assignment

If Donna validly assigned the lease to her friend, then she would only be secondarily liable based on privity of contract with the original leasor, Perry. The original lessor must seek payment from a valid assignee before seeking payment from the assignor.

Lack of Privity of Estate

If the assignment from Donna to her friend is valid, then privity of estate is destroyed between Perry and Donna. However, privity of estate is not required if there is privity of contract between the landlord and previous tenant. Therefore, the lack of privity of estate will not protect Donna from a lawsuit following a valid assignment because, as the original lessee, she still has privity of contract with Perry.

Restriction on Alienation/Assignment

Restrictions on alienation of property are disfavored. As a consequence, lease clauses restricting a tenant's right to assign or sublease will be strictly construed. For example, a prohibition on assignment absent consent will not prohibit sublease without consent and vice versa. Here, the lease prohibits assignment without consent and would not bar sublease. However, Donna sought to assign her interest to her friend. The language is not controlling. The difference between assignment and sublease is whether the whole remainder of the term is conveyed to the new tenant. If the whole remainder of the lease term is conveyed, then the transfer is an assignment. If only part of the remaining term is conveyed, then the transfer is a sublease. Here, Donna sought an assignment.

Landlord's Unreasonable Refusal to Consent to Assignment

Under the terms of the lease, an assignment requires the landlord's prior written consent. Donna sought Perry's consent and he refused because he had "bad experiences with historians, especially wealthy ones." Donna may argue that Perry's refusal was unreasonable and that the assignment should be valid.

In residential leases of a single family dwelling, a landlord's refusal of consent need not be reasonable so long as it is not based on an unlawful form of discrimination--such as race. In commercial leases or residential leases for large apartment complexes, most jurisdictions require the landlord's refusal to be objectively reasonable, but not so with small residential leases such as the second story of Perry's home. Perry discriminated on the basis of Donna's friend's occupation and wealth which are not unlawful bases. Therefore, Perry's refusal is permissible and Donna will not be permitted to avoid liability by assigning her lease to her friend.

Implied Warranty of Habitability

Every residential lease contains an implied warranty of habitability which requires the leased premises to be fit for basic human dwelling. Housing code violations and serious problems such as lack of heat in a cold winter, lack of running water, flooding, etc. would constitute violations of the implied warranty of habitability. A tenant has several

options when the implied warranty of habitability has been violated. After giving the landlord reasonable notice, the tenant may repair the problem and deduct the cost from rent payments, may repair the problem and sue for the cost in damages, may remain in possession and sue for damages, or may move out and avoid liability for the remaining rent. Here, Donna wishes to move out which she may do if the alleged violation is sufficiently serious.

Stinky Cheese

The smell of Perry's cheese, though annoying and nauseating, is problably not enough to make the leased premises unfit for basic human dwelling. If Donna's nausea is so severe that the smell constitutes a health risk to her, then her claim would be significantly strong, but that does not appear to be the case here.

Hot Shower

The hot shower water definitely constitutes a safety hazard, but may not, by itself, be enough to make the premises unfit for basic human dwelling. This is a close call. In conclusion, Donna will probably not be successful on a claim for violation of the implied warranty of habitability. She has a strong claim for constructive eviction anyway.

Constructive Eviction

If, by a landlord's act or omission, a tenant is constructively evicted from premises, then the tenant is relieved of any obligation to pay rent. In order to satisfy the requirements for a constructive eviction, there must be (1) substantial interference with the tenant's use and enjoyment of the leased premises, (2) reasonable notice and time to fix or repair, and (3) tenant must vacate within a reasonable amount of time.

(1) Substantial Interference

Meanness--"Too bad; that's my diet now"

As a landlord, Perry is very mean and refuses to express any concern for Donna's comfort. Just because a landlord is mean does not constitute substantial interference with a tenant's use or enjoyment of her property. Therefore, Perry's meanness will not be sufficient to satisfy the substantial interference requirement.

Landlord's Duty to Repair--Hot Shower

A landlord generally does not have a duty to repair defects in leased premises with several exceptions such as a duty to keep common areas reasonably safe and a duty to make safe furnished, short-term leased premises. If there is a risk of serious harm from a latent defect inside leased premises on a long-term lease, however, a landlord has a duty to repair the problem. The tenant must give the landlord notice of the problem. If the tenant gives notice and the landlord refuses or fails to repair the defect, then the landlord has violated his duty. Here, Donna faces a serious latent defect by virtue of the shower being so hot that it could seriously burn her. She notified Perry and Perry refused to repair. He took steps to avoid injury (at first) by "mak[ing] sure not to run the water when [Donna was] in the shower," but he did not repair the defect. This omission, in the presence of a duty to repair, may constitute a substantial interference provided that the risk of injury is sufficiently high.

Retaliation--Hot Shower

A landlord must not retaliate against tenant for complaints or requests made under the lease. Here, Donna merely sought Perry's consent to assign the lease to her friend. Perry refused and, thereafter, deliberately ran the water downstairs to make Donna's shower dangerously hot. This intentional, bad-faith retaliation for requesting to assign her lease to another constitutes substantial interference with Donna's use and enjoyment of the premises because it created a significant risk of injury to her.

Nuisance--Stinky Cheese

A private nuisance is any substantial interference with another person's use and enjoyment of property to which they have a right to possession. Whether an alleged nuisance constitutes substantial interference is an objective question. If the plaintiff is deemed ultra-sensitive, she will not recover because the interference is not objectively substantial even if it is substantial subjectively. Whether the stinky cheese is a substantial interference is a question of fact for the trier of fact at trial. Depending on the severity of the odor, a reasonable person may find that stinky cheese odor constitutes substantial interference. Therefore, Donna may satisfy the substantial interference requirement based on the stinky cheese as well as the retaliation.

(2) Notice

Donna gave Perry notice of the problems with the shower and the stinky cheese as evidenced by Perry's recognition of her complaints. Donna gave Perry a total of five weeks to resolve the problems about which she complained. Perry refused to resolve the issues. Therefore, the notice and time to repair requirements are satisfied.

(3) Vacate

Donna moved out of the premises and returned the keys in a timely manner.

Conclusion--Constructive Eviction Satisfied

Based on the foregoing, Donna has satisfied the requirements for constructive eviction and will not be liable for past due or future due rent for the remainder of the lease. She is not liable for past due rent because she stopped paying at or after the time the constructive eviction arose--namely, when Perry started retaliating after already refusing to repair the hot shower. She is not liable for future rent because she has been constructively evicted and moved out by that time.

Absence of Equitable Defenses

Perry may claim equitable defenses such as laches or unclean hands, but Donna moved out timely and did not have unclean hands. Rather she demonstrated good faith by giving notice and returning the keys and moving out in a peaceable fashion.

Duty to Mitigate/Avoidable Consequences

Even assuming that Donna moved out wrongfully, when a tenant wrongfully vacates premises, the landlord has three options (1) treat the tenant's vacation as a voluntary surrender and accept without demanding further rent, (2) re-let the premises [to] someone else as an act of mitigation and sue the tenant for the unpaid rent, (3) only in a minority of jurisdictions, ignore the tenant's act and sue for damages for past and future due rent. As a general/majority rule, and the rule reflected in the second option, a landlord must attempt to re-let premises in order to obtain damages that would otherwise be considered avoidable. Any damages that could reasonably have been avoided by mitigation will not be awarded to the landlord.

Here, Perry attempted to hold Donna liable for the entire twenty-two months remaining on the lease. None of those money damages are recoverable because Perry could reasonably have avoided those damages by leasing the premises to Donna's friend.

Conclusion

Donna has successful defenses based on constructive eviction and failure to mitigate damages.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2014 California Bar Examination and two selected answers for each question.

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Question Number	Subject
1.	Professional Responsibility
2.	Community Property
3.	Civil Procedure
4.	Real Property
5.	Constitutional Law
6.	Remedies

Question 4

Jane owned a machine shop. It had one slightly buckled wall. It had been built years prior to Town's adoption of a zoning ordinance that permits office buildings and retail stores, but not manufacturing facilities.

Ira purchased the machine shop from Jane for $500,000. He gave her $50,000 in cash and a promissory note for an additional $50,000 secured by a deed of trust. He borrowed the other $400,000 from Acme Bank (Acme), which recorded a mortgage. Acme was aware of Jane's promissory note and deed of trust prior to the close of escrow.

Donna owns a parcel adjoining Ira's machine shop. She recently began excavation for construction of an office building. Ira complained to Donna that the excavation was causing the shop's wall to buckle further, but she did nothing in response.

Shortly thereafter, Ira's machine shop collapsed. Ira applied to Town for a building permit to rebuild the shop, but Town refused. He then defaulted on his obligations to Jane and Acme.

Ira has sued Donna seeking damages, and he has sued Town seeking issuance of a building permit. Acme has filed a foreclosure suit against Ira, and Jane has demanded a proportionate share of the proceeds from any foreclosure sale.

1. How is the court likely to rule on Ira's claim for damages against Donna? Discuss.

2. How is the court likely to rule on Ira's request that Town issue a building permit? Discuss.

3. How is the court likely to rule on Jane's claim for a proportionate share of the proceeds from any foreclosure sale? Discuss.

QUESTION 4: SELECTED ANSWER A

1. Ira's Claim for Damages against Donna

Ira owned the machine shop that adjoined Donna's parcel of land. When Donna excavated her parcel it caused Ira's machine shop to collapse. Ira has many multiple causes of action that he may pursue against Donna in attempt to recover from the collapse of his machine shop. They include a strict liability claim based on lateral support principles, or based on negligence.

Strict Liability and Lateral Support:

Landowners have a right to the support of the surface of their property. When an adjoining landowner engages in action that causes the adjoining property to subside, the owner who caused the subsidence may be strictly liable for the damage caused. In order for strict liability to apply, the injured party whose property has subsided must show that the actions of the adjoining landowner caused the subsidence, and that the subsidence would have occurred even if no structures were built on the injured party's land. If the subsidence would not have occurred but for the weight of the structure built on the land, then strict liability will not attach and the injured party will have to pursue another cause of action to recover.

Here, Donna began excavation for construction of an office building on her parcel that was adjacent to Ira's machine shop. Despite complaints from Ira, Donna continued her planned excavation. Based on Ira's statements that the excavation was causing the wall of his machine shop to "buckle further," which eventually led to the collapse of the machine shop, it seems clear that the excavation is what actually caused the structure to fall. Ira can recover for strict liability as long as the subsidence would have occurred even if the machine shop were not built on the land. This is likely where Ira's cause of action will fail. Facts stipulate that the wall of the machine shop was slightly buckled, and the excavation caused the wall to "further buckle." Facts do not indicate that the

land on which Ira's shop actually subsided, only that the action caused the machine shop to collapse. It does not appear that the land would have been damaged or lost lateral support if the machine shop was not built on the land.

In conclusion, Ira cannot recover based on his right to lateral support in strict liability because the collapse of the structure and the land likely would not have occurred if the structure was not built. No facts indicate the land would have subsided despite the shop. Ira must look to another cause of action.

Negligence:

Ira may attempt to assert a negligence claim against Donna. Negligence occurs when a party breaches a duty owed to another and the breach is the actual and proximate cause of damages suffered by another party.

Duty:

Donna has a duty to act as a reasonably prudent landowner who adjoins other parcels with structure on them. Ira is an owner of an adjoining parcel, she had a duty to act as a reasonably prudent landowner to the adjacent owners.

Foreseeable plaintiff:

Under the majority view of Cardozo, a party only owes a duty to foreseeable plaintiffs. Foreseeable plaintiffs are those that reside within the zone of danger of the defendant's actions. Here, Ira was the adjacent landowner to Donna. When Donna began excavation all adjacent landowners were foreseeable plaintiffs because it is foreseeable that construction could cause injury to the adjacent land or landowners. Ira was a foreseeable plaintiff.

Breach:

Donna possibly breached her duty to act as a reasonably prudent landowner when she continued excavation despite the fact that she was informed it was causing a wall of Ira's to buckle and was likely going to cause damage. Facts do not indicate whether or not the excavation was executed with reasonable care or not, but the fact that Donna continued after being informed that her actions were causing damage may mean that she breached her duty of care to Ira.

Actual Cause:

Actual cause is also termed the "but for" cause. The issue is whether but for Donna's actions the building would have collapsed. Ira informed Donna that the construction was causing the wall to buckle further, and the continued excavation led to the collapse of the building. Donna's actions were the but for cause of the collapse.

Proximate Cause:

Proximate cause is called the legal cause and the issue is foreseeability. Here, it is foreseeable that a person doing excavation may end up causing damage to the structures of adjoining parcels. Ira will argue that Donna's actions were completely foreseeable. Donna on the other hand will argue that the proximate cause was not her excavation, but rather the fact that the machine shop already had a "slightly buckled wall." Donna will argue that it is not foreseeable that adjacent landowners have improperly supported structures that will collapse during excavation of adjoining parcels. Donna's argument that the buckled wall makes the collapse unforeseeable probably will not work, but it may be effective as a defense (discussed below.) Moreover, Donna knew that her actions were causing the wall to buckle more after Ira told her, so ultimately her actions were foreseeable because she was informed of them.

Damages: Damages must be causal, foreseeable, certain, and unavoidable.

Here, Donna's actions caused the entire shop to collapse, and it is very possible that a court will find that she breached her duty to Ira and that her actions were the actual and proximate cause of Ira's damages. Absent any defenses, Donna will be required to pay Ira for either the cost of repair of the building (which is substantial), or the reduced value of Ira's property now that the shop has collapsed.

Defenses: Comparative Negligence

Donna has a good argument that Ira was himself negligent and she should be absolved of liability or that her liability should be substantially reduced. Ira knew that the machine shop had a slightly buckled wall that would likely reduce its structural soundness. Ira had a duty to investigate the structural integrity of the building, and insure that it was not at risk for collapsing easily. This is a very strong argument and Donna will likely have her damages reduced by the amount of Ira's negligence, which is significant.

In conclusion, Ira may recover from Donna under a negligence theory but Donna's damages will be offset by the amount of Ira's own negligence.

2. Ira's Request to have Town Issue a Building Permit.

Here, Ira's machine shop has been destroyed, and he wishes to rebuild it. Because of the current zoning ordinance, Ira's machine shop is not permitted in the area where he wants to build it. The issue is whether Ira should be granted a permit to operate the machine shop.

Zoning Ordinances:

Zoning ordinances are an effective way for states and localities to regulate the land use of their jurisdiction. However, a person who seeks to violate a zoning ordinance may

seek a variance that will be granted or denied in the form of a permit.

Variance:

A variance is an individual exception to a zoning ordinance. There are two types, area variances and use variances. Area variances are more likely to be granted because it is simply an exception given to allow a building to exist in dimensions that slightly violate the zoning ordinance. Use ordinances are less likely to be granted — a use variance is a permit allowing a person to operate a structure for a purpose that is not permitted by the zoning ordinance. Here, Ira wishes to get a permit to allow him to use his property for manufacturing, which is a use that is not permitted. In order to get a use permit, Ira must show that he will (1) suffer a hardship without the ordinance, (2) that the variance would not damage or harm the neighborhood, and (3) that he is not at fault or a bad actor in his request.

(1) Suffer a hardship

Here, Ira has paid a substantial amount of money in order to purchase the machine shop and operate it at the location where it currently resides. But for the fact that the machine shop collapsed, Ira would still be able to operate it most likely as a nonconforming use (discussed below). Preventing Ira from being able to rebuild and operate the shop as he had previously would cause him significant injury and he will surely suffer an economic hardship if not allowed to resume his business.

(2) Won't Harm the Neighborhood

Here, the neighborhood permits office buildings and retail stores, just not manufacturing. If the neighborhood were zoned only for residential use by families, it is likely that granting such a variance would cause harm to the neighborhood because families would have to deal with the constant manufacturing noise. But, because the area allows offices and retail stores, it is unlikely that the manufacturing would likely

cause significant harm to the neighborhood, unless the manufacturing involved toxic materials or chemicals. This factor weighs in favor of Ira.

(3) Ira is not at Fault

Here, Ira was operating the machine shop until Donna's excavation caused the shop to collapse. Ira did not buy the property knowing about the ordinance and now seeks a variance to benefit knowing all along such action would be in violation. And, but for the collapse of the structure, Ira likely would have been able to continue to run the business as a nonconforming use. Ira is not at fault in seeking the variance.

Conclusion:

In conclusion, the court should rule that the Town should issue a building permit because all of the elements required for a proper use variance are satisfied, and Ira is not a bad actor.

Nonconforming Use:

The other argument that Ira may present is that his operation of the machine shop is a nonconforming use because it was in existence prior to the change of the ordinance. Nonconforming uses that are in effect prior to an ordinance change are allowed to continue unless they cause harm to residents or adjoining property. Even then, an amortization period is generally allowed to allow the owner to find a new location for the activity. Here, Ira was properly operating the manufacturing business prior to the ordinance, and the fact that the building collapsed should not deprive him of being able to rebuild a similar structure and continue with the nonconforming operation he had prior to the collapse. There is no evidence the manufacturing is causing harm to other residents.

In conclusion, the court also should have the Town issue a building permit because Ira's prior nonconforming use should still be considered in effect.

3. Jane's Claim for Proportionate Share of the Proceeds from Foreclosure.

Deed of Trust and Mortgage:

When Ira purchased the property from Jane, he gave her a 50K promissory note secured by a deed of trust. He borrowed the other 400K from Acme which recorded a mortgage. Mortgages and Deeds of Trust operate similarly.

A Deed of Trust is an arrangement where a third party holds a deed in a trust to stand as collateral for a debt owed. With a deed a trust, if the debtor (Ira) fails to make payments and ends up in default on the loan, the party that made the loan, Jane, can initiate foreclosure and execute a private sale of the property.

A Mortgage is an arrangement where a party who has or is buying property gets a loan and has the property itself stand as security for the debt. If a debtor fails to make the loan payments and ends up in default, then the holder of the mortgage, the mortgagee, may initiate public foreclosure proceedings against the property.

Here, Ira failed to make payments on the loan and was thus in default. Acme was within its right to initiate foreclosing proceedings against the property to recover for the debt owed. The order of payment from a foreclosure sale is determined by a number of factors, including whether the loan was a purchase money security interest.

Priority:

Upon a foreclosure sale, how proceeds from the sale are distributed is determined by the priority of the creditor's interest. Priority is determined by (1) whether or not the loan was a purchase money security interest and (2) when the interest or mortgage was

recorded. All purchase money security interests have priority over other creditor interests executed at the same time.

Here, Jane executed a valid deed of trust, and Acme executed a valid mortgage. The mortgage was recorded and had notice of the deed of trust secured by Jane. Because both loans were provided in order for Ira to obtain the purchase of the property, both interests should be considered purchase money security interests. If Acme had recorded the mortgage on the property without notice of the deed of trust secured by Jane, Acme would have had priority over all other creditors. However, because Acme had notice of the deed of trust, and because both loans will be considered purchase money security interests, Jane's Deed of Trust will have priority.

Order of Payment:

Foreclosure proceeds are not distributed in proportion. So, the court will not rule that a proportionate share of the foreclosure proceeds should be given to her. However, that does not mean that Jane's interest will necessarily be adversely affected. When a creditor forecloses on a property and provides notice to any junior interest, at the sale of the property the junior interest is extinguished. Here, Acme initiated the public foreclosure sale, and had Jane's deed of trust been a junior interest, then Jane was required to notice, but her interest would be extinguished at the end of the sale, whether or not she received proceeds. A senior interest remains intact on the property when a junior interest initiates the foreclosure. When a foreclosure is executed, the priority of payment is that (1) all fees are paid for the foreclosure, (2) Senior creditor interests are paid first and in order to the junior interests, and (3) anything left over is given the debtor, or owner of the property.

Here, Jane's interest in the property has priority to Acme's because her deed of trust was executed first, Acme was aware of the deed of trust, and both interests are purchase money security interest. Accordingly, Jane's interest will not be extinguished by the foreclosure sale by Acme. If the proceeds from the sale produce enough to pay

both the debts of Acme and Jane, then both will be paid, and any remainder will be given to Ira. If not, Acme's foreclosure sale will be subject to Jane's deed of trust, and the sale will not extinguish that interest. Jane will be able to foreclose on the property regardless of who purchases the shop during the public foreclosure sale.

CONCLUSION:

In conclusion, though the court will not order Acme to split the proceeds from the foreclosure sale with Jane proportionally, Jane's deed of trust is superior to Acme's mortgage, and the public foreclosure would not extinguish her interest in the machine shop.

QUESTION 4: SELECTED ANSWER B

1. Ira v. Donna

The first issue is establishing what obligations, if any, Donna owes to Ira as a neighboring property owner.

Ira is claiming damages against Donna for the damage caused by Donna's excavation for the construction of an office building. Duties between neighboring property owners can arise in several ways, namely, through contract or tort law. Under contract law, if parties enter into covenants with each other to do something or refrain from doing something on their land, they may be obligated under contract law to fulfill those obligations. Another way in which neighboring property owners may owe each other a duty is through tort law. If Donna and Jane (Ira's predecessor) or Donna and Ira had created a covenant not to interfere with one another's sublateral support, Ira may have a claim for damages under that theory. However, it does not appear that they have an explicit agreement.

Tort law will also impose duties on neighboring property owners in some instances. For example, if one property owner's use of the property is in a way that causes a nuisance, that may give rise to liability under tort law. Likewise, neighbors have a general obligation to refrain from engaging in hazardous or inherently dangerous activities on their property that may interfere with others outside of their property. Additionally, property owners may have a duty under either a strict liability or negligence theory for interfering with a property owner's sublateral support.

Inherently Dangerous Activities

Ira may argue that Donna's use of the neighboring property (using an excavator) constitutes an inherently dangerous activity. When a property owner engages in an inherently dangerous activity she will be held strictly liable for injuries resulting as a

consequence of that activity's inherently dangerous propensities. In order to be considered inherently dangerous, an activity must be: 1) unusual for the community; 2) one that cannot be made safer by safety measures; 3) one whose utility is outweighed by the danger it is likely to cause.

In this case, Donna is excavating her property to build an office building. Donna is doing so in a zone that specifically permits office buildings. One may assume that if office buildings are allowed in the zone, their construction is also a usual activity for that area. Further, there is utility in developing a community for business and thus, there is utility in building office buildings. Further, the construction of office buildings can be made safer by taking safety precautions, by having licensed contractors, putting up warning signs, etc. Therefore, using an excavator will likely not constitute an inherently dangerous activity and Ira does not have a cause of action under this theory.

Interference with Sublateral Supports

An alternative theory will arise by asserting that Donna has interfered with Ira's subadjacent property rights. In cases where a neighbor excavates and causes a disturbance in their neighbor's sublateral support for their property, the neighbor whose property was damaged may have a cause of action under either a negligence theory or a strict liability theory. Which theory applies depends on whether or not the neighbor (Ira) can show by clear and convincing evidence that her property and the weight of his buildings did not contribute to the damage. That is, there would have been damage regardless of whether or not the buildings were constructed. If the plaintiff (Ira) cannot show that his buildings did not contribute to the ultimate injury, then he must make out a case in negligence. If he can, then he may make out a case in strict liability.

In this case, when Jane owned the machine shop it already had a slightly buckled wall. Therefore, when Ira took the building, the wall was likely still buckled or even made worse with the passing of time. Because of this, the unsecured nature of the construction likely contributed in some way to the building's ultimate destruction.

Therefore, strict liability is not available to Ira because he cannot demonstrate that the buildings on his property in no way contributed to the damage.

Therefore, Ira must make out a case in negligence. In order to make out a case in negligence, a plaintiff must show that: 1) defendant had a duty to the plaintiff; 2) defendant breached that duty; 3) the breach was the actual and proximate cause of the damage; 4) there were damages.

In this case, a duty has already been established under the sublateral support doctrine. The standard of care is an objective, reasonable person standard. Negligence causes of action incentivize individuals to act in a reasonable way in their interactions with others. The standard of care in this case would be what a reasonable person excavating property next to a neighbor's property would do.

The next issue is whether or not the defendant breached that duty. In this case, it appears as though Donna initially was acting as a reasonable person; as discussed, she was excavating property to build an office building in an area zoned for that use. However, Ira complained to Donna that the excavation was causing the shop's wall to buckle further. After Donna was put on notice of creating this damage, the question becomes whether a reasonable person would have done something to attempt to avoid the damage. In this case, Donna did nothing at all. It seems that a reasonable person would have assessed whether it was possible to move the location of the excavation or adjust construction in some other way to avoid the damage. Because there is no evidence that Donna did this, a court may find that she breached her duty toward Ira.

The next issue is whether her breach was the actual cause and proximate cause of the damage. Actual cause is but-for cause: but for the breach, would the damage have occurred? Actual cause may also be substantial cause if there are two or more contributing causes, either one of which may have been sufficient to cause the damage. In this case, it appears as though Donna's actions were the but for cause of the building's collapse. Ira complained to Donna that the excavation was causing the

building to further buckle. While it may ultimately be an issue of fact regarding whether it was the buckling of the wall or the excavation, for the purposes of getting the question to a jury a court would likely assume this element was met.

The next question is whether the excavation was the proximate cause of the injury. Proximate cause is the philosophical nexus between the act taken and the damage done -- it requires more than just actual cause and requires that the cause be something foreseeable from the defendant's actions such that it comports with notions of common sense and justice to hold the defendant liable for his actions. Under Palsgraf, the relevant question is whether the injury was foreseeable to the actor. A minority view would hold any damage is foreseeable if it resulted from the action. In this case, because Donna had notice of the damage the excavation was causing, and the excavation was occurring right under the building, it seems foreseeable the damage to the building was likely. Therefore, the proximate cause element is likely met.

Finally, Ira must show there was damage resulting from the breach. In this case, there was actual destruction of his building, resulting in substantial damage, so this element is also met.

Note, most jurisdictions would reduce the amount of damages that Ira receives based on a pure comparative negligence standard, which reduces the amount of recovery that plaintiff receives by her amount of fault. In a traditional comparative negligence state, the recovery would be reduced entirely if the plaintiff was at all at fault. In this case, it does seem as though Ira was partially to blame for not strengthening his wall or doing anything to avoid the damage. Therefore, his damage award will likely be reduced based on the findings of a jury.

2. Ira v. Town

Is the ordinance valid under the Constitution?

Ira's case against the town arises from the Town's refusal to permit him to rebuild a machine shop in a zone that permits office buildings and retail stores, but not manufacturing facilities.

The first issue is whether or not the town's adoption of a zoning ordinance is permissible under the Constitution. The Constitution permits state actors to take or incur on a private citizen's property rights for the public good provided they are given just compensation, measured by the value to the property owner, not the benefit conferred to the government. Generally, zoning ordinances, although they are not complete takings under the Constitution, are analyzed under this framed work.

The general rule is that if the government possesses a private actor's property, no matter in what degree, it will constitute a taking under the Constitution and the property owner will be entitled to compensation. In this case, because the Town has not physically possessed Ira's property, this does not constitute a complete taking.

However, a regulatory regime that destroys all economic viability will also constitute a complete taking under the Constitution and will require the property owner be justly compensated. In this case, the zoning ordinance is a regulation. However, it does not completely destroy the value of Ira's property because he could still build an office building, retail store, sell the property, etc. Therefore, it is not a complete taking under this theory either.

Finally, a partial taking may also require compensation under the Penn Central balancing test if a property owner's property interests are interfered with and his property value decreased. Courts look at: 1) the investment-backed expectations of the property owner; 2) the nature of the government action; 3) the benefit to the public and harm to the individual property owner and what the owner should rightfully have to bear for the benefit of the public. In this case, it is unclear whether Ira's property rights decreased. Clearly, he cannot do what he wants with the property, but that does not

mean it does not have other values. Therefore, a court would likely find the Town's refusal to issue a building permit proper under the Constitution.

Is a variance warranted?

The question becomes then, whether or not Ira is entitled to continue using the facility pursuant to a zoning variance for prior use. A zoning variance may be granted if the owner of property can show that the use of their property in the manner previously used will cause undue hardship to the owner and would not cause significant harm to the community if the variance was granted. Notably, when the zoning ordinance is valid, as this one is (see previous discussion), a Town has some discretion in balancing the harms to the application and to the community.

In this case, the zoning ordinance permits office buildings and retail stores, but not manufacturing facilities. The reasoning behind this ordinance seems apparent: manufacturing facilities are generally larger, more disruptive, more likely to emit noise, debris, etc. A town has a reasonable basis for preferring to have a community comprised of stores and office buildings, were people can shop and work without distraction and interference. Therefore, the harm to the community if the variance were granted seems great.

However, Ira does have an argument that because of the pre-existing use of the machine shop by Jane, he is entitled to a variance under the theory that he was grandfathered into the ordinance. However, there are three problems with this argument. First, as previously discussed, the Town has good reason for not wanting manufacturing facilities in the retail/office area of town and variances are discretionary. Second, there are privity issues between Jane and Ira and the Town. It was Jane, not Ira that had been using the building as a machine shop (presumably a manufacturing facility, though Ira might raise a classification argument), when the ordinance was passed. Third, the pre-existing use generally must be consistent if a variance is granted for pre-existing use. When the machine shop collapsed, it was no longer used as a

manufacturing facility and Ira likely lost his ability to claim any sort of entitlement to use the property as a manufacturing facility under the pre-existing use doctrine.

In conclusion, a court will likely deny Ira's request that the Town issue a building permit.

3. Jane v. Bank (re: proportionate share of the foreclosure proceeds)

The issue this question raises is how to be characterize the security interests that Jane and Acme have in the machine shop property and what the priority of those interests are.

Generally, mortgages are security interests in property, used by a mortgagee to secure a debt that she has issued to a mortgagor. In this case, Ira purchased the machine shop from Jane for $500,000, but as he clearly did not have that much money, he took out loans. A loan may be either secured or unsecured. An unsecured loan is one that does not have any collateral that a lender may use as compensation in the event of default. A secured loan is one that has property of some sort as collateral for the repayment of a loan. Unsecured loans take a second seat to secured loans when property is foreclosed upon.

Generally, mortgages are prioritized in the order they were made. A bank that loans money to a home purchaser will take a first mortgage on that home. If the purchaser later borrows more money, that lender may also secure the repayment with a mortgage on the home, but it will be subject to the first lender. Once the first lender is paid in full, the second lender will be entitled to proceeds. This is why second mortgages often have higher interest rates or are otherwise on less favorable terms -- they are less secure because they are subordinate to another's interests in the property. The proceeds come from a foreclosure sale, which occurs when the property securing the debt is sold to pay off the lenders.

Finally, there are special types of loans/mortgages called "purchase money mortgages". The mortgages occur when the money lent to a mortgagee is used for the purchase of the item itself. This typically occurs with owner financing -- if a homeowner sells her home and loans money to the purchaser to buy it, there is a purchase money mortgage in the house. These types of mortgages will take priority, even if there is a primary lender that attached prior to the purchase money mortgage being issued.

In this case, Ira purchased the machine shop from Jane for $500,000. Obviously Ira did not have that cash up front. Instead, he paid $50,000 in cash to Jane, which is hers to keep and is not up for grabs at the foreclosure sale. Next, he gave her a promissory note for an additional $50,000 secured by a deed of trust. Then he borrowed another $400,000 from Acme Bank, which recorded a mortgage.

If the $50,000 from Jane was secured by an interest in the machine shop, the very property the loan was made to purchase, this loan will take priority and Jane will be entitled to the first $50,000 received in the foreclosure sale.

Acme will argue that it is the primary lender and that it is entitled to all the money from the foreclosure sale, until it exceeds its $400,000 loan, at which case it may spill over to secondary lenders. There are two problems with this argument: 1) First, as discussed above, Jane's loan to Ira was a purchase money mortgage and takes priority over the Bank's loan. Even if it were not a purchase money mortgage, Jane was still the first lender. 2) Second, Acme knew of Jane's promissory note and deed of trust prior to the close of escrow. Notably, although Jane did not appear to record her mortgage, a recording is not required to secure an interest. Rather, a recording system serves to give subsequent mortgagees and purchasers notice, something Acme already had.

The issue then becomes, what is the effect of Acme's knowledge on its mortgage in the property? Generally, in order to take priority, a mortgagee must be a holder in due course, or a bona fide mortgagee, who takes without knowledge of any other interests in the property. In this case, because Acme knew about Jane's deed of trust, Acme was

not a bona fide mortgagee or holder in due course; therefore, Acme's mortgage could be subordinated on this ground.

Note: Generally the holder in due course requirements are intended to protect a subsequent mortgagee who takes from a first mortgagee. A holder in due course will be protected if he takes a negotiable instrument, made out to the holder, without notice of impediments, for valuable consideration and in good faith. A holder in due course will be free from personal defenses raised by the mortgagor (e.g., lack of consideration, waiver), but will take subject to non-personal defenses (e.g., duress). In this case, Acme did not take the mortgage from another mortgagee, but rather was the first mortgagee. Therefore, this doctrine does not apply, but its principles still do. Generally, courts do not reward mortgagees or other property holders who take knowing of another's interest in land.

In sum, Acme, although it was the first to record, under either a notice or race-notice jurisdiction, Acme is not entitled to bona fide purchaser/mortgagee status because it took knowing of Jane's mortgage. Further, Jane is protected by her status as a purchase money mortgagee. Therefore, a court will likely rule that she is entitled to $50,000 from a foreclosure sale.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

QUESTION 2

Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Blackacre is located in a jurisdiction with a race-notice recording statute.

Without Bob's knowledge, Amy gifted her interest in Blackacre to Cathy by deed. Amy and Bob then sold all of their interest in Blackacre by a quitclaim deed to David, who recorded the deed. Shortly thereafter, Cathy recorded her deed.

David entered into a valid 15-year lease of Blackacre with Ellen. The lease included a promise by Ellen, on behalf of herself, her assigns, and successors in interest, to (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Ellen recorded the lease.

Five years later, Ellen transferred all of her remaining interest in Blackacre to Fred. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. While Fred was in possession of Blackacre, a building on the property was destroyed by fire due to a lightning strike.

David has sued Ellen and Fred for damages for breach of the covenant regarding hazard insurance for Blackacre.

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred? Discuss.

2. Is David likely to prevail in his suit against Ellen and Fred? Discuss.

QUESTION 2: SELECTED ANSWER A

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred?

At common law, there were no recording statutes and the rule was that the first in time prevailed. Under this jurisdiction, there is a race-notice statute that will govern the facts of this case. If the statute does not apply, then the common law does. A race-notice statute provides that any subsequent purchaser of property will take if they are a bona fide purchaser (BFP) and recorded first. To be a BFP, a party must pay value and take without notice of any prior recordings that may affect their title to the property. Notice can be by: (1) actual notice; (2) constructive notice; or (3) inquiry notice. Actual notice is that the party knew there was another party with a claim on the property. Constructive notice is when a recording in the grantor-grantee index gives notice to a party that there are other parties claiming interest to the land. Lastly, inquiry notice is when the party is given facts that there may be other possessors to the property and that party has a duty to inquire further (i.e., if they see a house built on the land with occupants, that party has a duty to inquire why they are on the land).

A. Cathy

A joint tenancy is created with a right of survivorship when the four unities are met: time, title, instrument and possession. In other words, the parties must acquire their joint tenancy at the same time, with the same amount of title, in the same instrument and each have the right to possess the entire land. The right of survivorship allows that when one of the joint tenants die, the entire estate goes to the surviving joint party. However, if the joint tenancy is severed, the parties become tenants in common and the right of survivorship no longer exists. The joint tenancy can be severed by a unilateral conveyance of one of the joint tenants to another party.

Here, Amy and Bob owned the land in fee simple as joint tenants with the right of survivorship. The facts do not give details as to if the four unities of time, title, instrument and possession were met. However, the facts assume that these elements

were met. As such, Amy and Bob owned Blackacre as joint tenants with the right of survivorship to begin with. Amy thereafter gifted her interest to Cathy. This bequest severed the joint tenancy between Amy and Bob. At this point in time, Bob and Cathy were then owners to Blackacre as tenants in common. However, as will be discussed in the following section, because Cathy failed to record her deed, David will take Blackacre under the recording statute and Cathy has no interest in Blackacre.

B. David

As mentioned, under the recording statute in this jurisdiction, a subsequent purchaser will take if they are a BFP and record their interest first. Amy and Bob sold all of Blackacre to David. Although Amy no longer had any interest in Blackacre because she had conveyed her interest to Cathy, David was unaware of that fact. David was a BFP as required under the statute. First, he paid value for the property. And secondly, based on the facts, he did not have knowledge about Cathy's conveyance. There are no facts to indicate that he had actual knowledge of the conveyance to Cathy. Additionally, David did not have constructive notice of the conveyance to Cathy. A BFP only has a duty to check the grantor-grantee index when the conveyance is made to him. He does not have to subsequently check the index for good title. Therefore, when he checked the index before accepting the property, there was no notice of Cathy's deed. Lastly, David did not have inquiry notice. It doesn't appear that Cathy lived on the land or made any assertions of title over the land. As such, David qualified as BFP because he took without notice and paid value for the land. Also, to prevail under a race-notice statute, the subsequent purchaser must record. Here, David recorded his deed promptly. As a result, David's interest in the land is superior to Cathy's.

C. Ellen

David had good title to the property as discussed above and therefore, was free to do what he wanted with the land. He subsequently leased the property to Ellen. Ellen is a BFP under the recording statutes as well. She is paying value for the lease through rent payments and took without notice of Cathy's interest. Similar to David, there is no actual or inquiry notice for the same reasons as stated above. Additionally, she just not

have constructive notice. Although Cathy has now recorded the deed, it is not within the chain of title that Ellen would have to search. Even if Ellen did have notice of Cathy's interest, she would be protected by the Shelter Doctrine, which allows subsequent parties to assume BFP status from the prior conveyance, even if that purchaser did not have BFP status. Here, David was a BFP and recorded his deed; thus, Ellen is a BFP under David anyway.

However, David's conveyance to Ellen was not a fee simple, but rather, a lease for a term of 15 years. Thus, by the terms of the lease, Ellen has a possessory interest in the property for the next 15 years. At the time of the lease, she was in privity of contract with David (through the lease) and privity of estate with David (by occupying the land).

D. Fred

Parties are generally free to assign their interests under a contract or lease to another party. An assignment is where a party gives the remaining interest under the lease to a subsequent party. Alternatively, a sublease is where a party gives less than the full interest left on the lease. Thus, the courts are to look at the actual interest conveyed and not what the parties might have labeled it.

The lease between David and Ellen did not contain an anti-assignment clause. Rather, the lease applied to Ellen, her assigns, and successors in land. Thus, an assignment of Ellen's interest was valid under the lease. (Even if it wasn't, David would have likely waived the anti-assignment provision because he continued to accept rent from Fred). Additionally, the facts state that Ellen transferred "all her remaining interest in Blackacre to Fred." Therefore, it was an assignment, since all her interest, the remaining 10 years on the lease, was transferred to Fred. As such, Fred assumed Ellen's interest in the land. As such, Fred is lawful tenant with possessory interest in Blackacre for the next ten years.

E. Conclusion

Because this is a race-notice jurisdiction and the statute applies under the facts of this case, David has superior title to the land. Cathy does not have any interest in the land because she failed to record her interest. David conveyed his possessory interest

to Ellen, who assigned her interest to Fred. As such, David holds title in fee simple to Blackacre and Fred has possessory interest in Blackacre for the next ten years under the terms of the lease between David and Ellen.

2. David v. Ellen & Fred

As mentioned above, there was a valid assignment of Ellen's interest to Fred under the lease. Ellen, as the assignor, remains in privity of contract with David. Fred, as the assignee, remains in privity of estate with David. The terms of the lease between David and Ellen contained two covenants: Ellen, on behalf of herself, assigns, and successors was to: (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. Unfortunately, lightning struck the property and destroyed a building on the property. Thus, the issue is whether David can prevail on a damages claim based on these covenants against Ellen and Fred?

A. Ellen

As mentioned, Ellen remains in privity of contract with David under the terms of the lease. A novation occurs when two parties agree that one party will no longer be held liable under the terms of the contract.

Under the facts, Ellen and David entered into a 15-year lease agreement. Five years into the lease, Ellen assigned her interest to Fred. There does not appear to be any agreement between David and Fred relieving Ellen of her liability under the lease. As such, no novation has occurred. Because David and Ellen are still in privity of contract, David can bring claims against Ellen for damages for breach of the covenant regarding hazard insurance for Blackacre.

B. Fred

For a covenant to run with the land and bind successors in interests, certain requirements must be met depending on whether the interest in the burdened (servient) or benefited (dominant) estate is being transferred. The servient estate is the estate that incurs the burden of the covenant, while the dominant estate is the one that

benefits from the covenant. If the covenant is on the servient estate, the covenant will run with the land if: (1) the parties intended the covenant to run with the land; (2) the covenant touches and concerns the land; (3) the servient estate has notice of the covenant; (4) there exists horizontal privity; and (5) vertical privity.

Here, the covenant burdens the lessee estate, since Ellen and her successors/assigns are required to maintain hazard insurance and use that insurance to repair the damages. Thus, David will have to show the above five elements in order to be able to collect damages from Fred.

i. Intent

The parties to the original agreement must have intended that the covenant be perpetual and continue to bind successors in interest of the land. Here, the parties specifically included in the written lease agreement that "Ellen, on behalf of herself, assigns, and successors in interest" will maintain hazard insurance and use the proceeds of such insurance to fix any damage caused by any hazards. Therefore, the express language of the parties in the lease provide that they intended the covenant to bind all successors in interest.

ii. Touch and Concern the Land

To bind successors in interest, the covenants must also touch and concern the land. Courts have held that a covenant touches and concerns the land if it conveys a benefit onto the land. For example, the payment of rent is a sufficient covenant that touches and concerns the land. Here, the covenant is to provide insurance to protect the land in case of damage and to repair the land in the event that such hazardous damage does occur. This is for the benefit of the land to maintain the premises and therefore, it touches and concerns the land.

iii. Notice

The successor in interest must have notice of the covenant in order to be bound by the terms of it. As mentioned above, there are three types of notice. Here, Fred had constructive notice because Ellen recorded the deed in the grantor-grantee index.

Therefore, Fred would be able to know the terms of the lease because it was within the chain of title and will be deemed to have constructive notice of the covenants.

iv. Horizontal Privity

Horizontal privity must exist between the original parties to the covenant, such as grantor-grantee or lessor-lessee. A covenant agreement alone is insufficient to establish horizontal privity. Here, David and Ellen have horizontal privity as their relationship was that of lessor-lessee. Thus, horizontal privity exists.

v. Vertical Privity

Lastly, vertical privity must exist between the successor in interest and the previous owner of the servient estate. Here, Ellen conveyed the remainder of her interest on the lease to Fred. Therefore, there is a vertical privity between Ellen and Fred.

Thus, all five elements are met for a covenant to run with the land and David may hold Fred liable for damages for the breach of the covenants.

C. Conclusion

David may hold Ellen liable for damages for breach of the two covenants because she is in privity of estate with David. Additionally, David will be able to hold Fred liable for damages because the two covenants run with the land and Fred had notice of such covenants.

QUESTION 2: SELECTED ANSWER B

1. **What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and Fred.**

Classify the Interest: Joint Tenants with a Right of Survivorship

A joint tenancy is a concurrent interest in land in which case at least two individuals own an undivided interest in the whole of the property. A joint tenancy is created with express language that the tenancy carry with it the right of survivorship. The right of survivorship means that when one joint tenant dies the other co-tenants take the deceased tenant's interest in the property. A joint tenancy is created when four unities are present at the time of creation. These unities are the unities of time, title, interest, and possession.

Here, facts indicate that Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Thus, the original property relationship was that of a joint tenancy because the right of survivorship was expressly provided for.

Severance of the Joint Tenancy

A joint tenancy is severed whenever any one of the four unities of time, title, interest, and possession is disturbed. When one of the four unities of a joint tenancy is disturbed a tenancy in common results and the right of survivorship is extinguished. In this event the tenants in common own a undivided interest in the whole of the property which is then freely alienable.

Here, the facts indicate that Amy gifted her interest in Blackacre to Cathy by deed. By gifting her interest in the joint tenancy, Amy disturbed the four unities, particularly the unity of title. As indicated above, when a joint tenancy is severed a tenancy in common is created. Thus, since the joint tenancy was severed, at this particular point in the facts

Amy held no interest, and Cathy and Bob held the property as tenants in common. The right of survivorship was extinguished and both Cathy and Bob had an undivided interest in the whole of the property.

Amy's Conveyance to David / Recording the Interest / Recording Statute

The facts indicate that after Amy gifted her interest in Blackacre to Cathy by deed she and Bob sold all of their interest in Blackacre to David. These facts implicate the rules for the relevant recording statue.

In a race-notice jurisdiction, a subsequent bona fide purchaser (BFP) is protected by the recording statute provided that he takes without notice and is the first to record his interest in the deed. There are three different kinds of notice. There is actual notice, record notice, and inquiry notice. Actual notice refers to the extent to which a BFP actually knows that someone else claims an interest in the land. Record notice refers to the extent to which the BFP is notified by researching the record of title. And inquiry notice refers to the extent to which a BFP inspects the property and discovers someone else asserting a claim to the property. Additionally, it should be noted that the recording statutes are designed to protect subsequent BFP's and not gratuitous grantees of real property.

Here, the facts indicate that Amy and Bob sold all of their interest in Blackacre to David after Amy gifted her interest to Cathy by deed. The facts also indicate that David recorded his deed before Cathy recorded her deed. Thus, for the recording statute to apply and for David to take title to the property he must be a subsequent BFP who took without notice and who recorded first. The facts indicate that David did in fact record before Cathy recorded. Thus, the "recorded first" element is satisfied. The next question that must be determined is whether David had notice of Amy's interest. There is nothing in the facts which says that David had actual notice of Cathy's interest. Additionally, although the facts do not indicate that David inspected the property, the facts also do not indicate that Cathy occupied the property so as to put David on notice

had he inspected the property. The real question is whether David had record notice. Determining record notice is a two-step process. First, the BFP must go to county recorder's office, locate the particular property and construct the chain of title. The chain of title can be constructed by looking first at the grantee index and then building the chain of title back in time. Next, the BFP must adverse each link of the chain. This is done by looking at the Grantor index and following the chain of title until the BFP reaches his interest. Here, David will not discover Cathy's interest in Blackacre. Cathy recorded her deed too late. By recording her deed after David recorded his deed David would not be put on notice as to Cathy's interest in Blackacre. Also, although not directly relevant, it should be noted that Cathy, as a gratuitous grantee, is not likely to receive any protection under the recording statute.

On balance, David obtained lawful title to Blackacre as a subsequent BFP who took without notice and was the first to record his interest.

2. Is David Likely to Prevail in his Suit Against Ellen and Fred

The Lease with Ellen

A tenancy for years is a specific type of tenancy that has a specific start date and a specific end date. A tenancy for years need not be for a terms of actual years but rather only needs a specific starting and ending date. A tenancy for years is terminated upon the end of the specified date.

Here, the facts indicate that David entered into a valid 15-year lease of Blackacre with Ellen. Since the lease has a specific start date, and a specific end date, it is likely considered a tenancy for years.

Ellen's Transfer to Fred

A sublease is a legal relationship in a leased property that arises when the tenant conveys out less than his entire interest under the lease. In this circumstance, sublessor has privity of estate with the lessor. An assignment occurs when the lessor conveys out all of his durational interest under the lease. In the case of an assignment the original lessee is no longer in privity of estate with the lessor but depending on the circumstances may still remain in privity of contract with the lessor. Privity of estate means that two individuals share an interest through their relationship to a leased property and privity of contract is a contract obligation between two contracting parties.

Here, the facts indicate that five years into the lease, Ellen transferred all of her remaining interest in Blackacre to Fred. Thus, because all of the remaining interest was transferred as opposed to only some or part of the interest Ellen executed a valid assignment. The results of this assignment is Fred is not in privity of estate with David. However, because Ellen was the original contracting party with David, she remains in privity of contract with David.

Breach of the Covenant: Ellen

A restrictive covenant is a written promise with respect to land either to take an affirmative action or to refrain from taking action. Liability for the restrictive covenant may attach to parties that are either in privity of contract with the lessor or privity of estate. In the event of privity of contract, the contracting party remains liable under a contract theory of recovery. If an express contract between the lessor and the lessee is breached by failing to satisfy the written covenant then the landlord may sue to evict the tenant and/ or assert a claim of money damages.

Here, as noted above, Ellen is in privity of contract with David. She is the original party under the lease, who signed the lease and who had knowledge of the covenants in the lease. The fact that she assigned her interest to Fred means only that she is not under privity of estate with David, but she is still liable under privity of contract. The lease included a promise by Ellen to obtain hazard insurance and to use any payments for

damage to the property to repair such damage. Ellen breached the lease covenant because she never obtained hazard insurance covering Blackacre and because a building on the property was destroyed by fire.
Thus, because Ellen is in privity of contract with David, David can elect to sue Ellen for breach of the express contractual covenant.

Breach of the Covenant: Fred

Restrictive Covenant

A restrictive covenant is a written promise with respect to a particular piece of property to do or to refrain from doing something on that particular property. Restrictive covenants run with the land to successive assignees if the covenant makes the land more beneficial or useful. In order for the burden of a restrictive covenant to apply there must be intent and notice, the covenant must touch and concern the land, there must be vertical privity and horizontal privity. In order for the benefit of a restrictive covenant to apply there need only be the elements of intent, touch and concern and vertical privity. Vertical privity is present when the successor in interest has the entire interest in the property. Horizontal privity refers to the fact that the original parties to the agreement had a mutual interest in the property outside of the covenant agreement.

Here, the facts indicate that the lease expressly stated that the covenant to obtain hazard insurance and to use its proceeds would apply to "Ellen, on behalf of herself, her assigns, and successors' interest." Thus, because there was intent that the covenant apply to subsequent parties, the intent element is met. The facts also indicate that Ellen recorded the lease and that the covenants were expressly written in the lease. Thus, it appears that Fred had notice of the lease provisions. The next element that must be satisfied is the touch and concern element. As discussed above, in order for the covenant to touch and concern the property it must make it more beneficial or more useful. Here, the covenant was that Ellen and her assigns obtain hazard insurance which would cover any damage to the property. If a particular piece of property is

covered by insurance, then it is more likely than not to be benefitted and thus, as a result will be more valuable. As noted above, vertical privity must also be satisfied. Here, Ellen conveyed out all of her remaining interest on Blackacre. Additionally, there is nothing in the facts to suggest that anyone else other than Fred not presently occupies the property. Thus, vertical privity is satisfied. Finally, there must be horizontal privity. David owns the property outright. Additionally, David and Ellen had no interest in the property outside of the lease. Thus, horizontal privity is satisfied.

Based on the foregoing analysis, it appears that the burden of the restrictive covenant to obtain hazard insurance does run to Fred, a party in privity of estate with David. Thus, because Fred failed to obtain insurance and because the property was destroyed implicating the need for the insurance, David is likely to prevail in his suit against Fred.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

QUESTION 2

Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Blackacre is located in a jurisdiction with a race-notice recording statute.

Without Bob's knowledge, Amy gifted her interest in Blackacre to Cathy by deed. Amy and Bob then sold all of their interest in Blackacre by a quitclaim deed to David, who recorded the deed. Shortly thereafter, Cathy recorded her deed.

David entered into a valid 15-year lease of Blackacre with Ellen. The lease included a promise by Ellen, on behalf of herself, her assigns, and successors in interest, to (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Ellen recorded the lease.

Five years later, Ellen transferred all of her remaining interest in Blackacre to Fred. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. While Fred was in possession of Blackacre, a building on the property was destroyed by fire due to a lightning strike.

David has sued Ellen and Fred for damages for breach of the covenant regarding hazard insurance for Blackacre.

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred? Discuss.

2. Is David likely to prevail in his suit against Ellen and Fred? Discuss.

QUESTION 2: SELECTED ANSWER A

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred?

At common law, there were no recording statutes and the rule was that the first in time prevailed. Under this jurisdiction, there is a race-notice statute that will govern the facts of this case. If the statute does not apply, then the common law does. A race-notice statute provides that any subsequent purchaser of property will take if they are a bona fide purchaser (BFP) and recorded first. To be a BFP, a party must pay value and take without notice of any prior recordings that may affect their title to the property. Notice can be by: (1) actual notice; (2) constructive notice; or (3) inquiry notice. Actual notice is that the party knew there was another party with a claim on the property. Constructive notice is when a recording in the grantor-grantee index gives notice to a party that there are other parties claiming interest to the land. Lastly, inquiry notice is when the party is given facts that there may be other possessors to the property and that party has a duty to inquire further (i.e., if they see a house built on the land with occupants, that party has a duty to inquire why they are on the land).

A. Cathy

A joint tenancy is created with a right of survivorship when the four unities are met: time, title, instrument and possession. In other words, the parties must acquire their joint tenancy at the same time, with the same amount of title, in the same instrument and each have the right to possess the entire land. The right of survivorship allows that when one of the joint tenants die, the entire estate goes to the surviving joint party. However, if the joint tenancy is severed, the parties become tenants in common and the right of survivorship no longer exists. The joint tenancy can be severed by a unilateral conveyance of one of the joint tenants to another party.

Here, Amy and Bob owned the land in fee simple as joint tenants with the right of survivorship. The facts do not give details as to if the four unities of time, title, instrument and possession were met. However, the facts assume that these elements

were met. As such, Amy and Bob owned Blackacre as joint tenants with the right of survivorship to begin with. Amy thereafter gifted her interest to Cathy. This bequest severed the joint tenancy between Amy and Bob. At this point in time, Bob and Cathy were then owners to Blackacre as tenants in common. However, as will be discussed in the following section, because Cathy failed to record her deed, David will take Blackacre under the recording statute and Cathy has no interest in Blackacre.

B. David

As mentioned, under the recording statute in this jurisdiction, a subsequent purchaser will take if they are a BFP and record their interest first. Amy and Bob sold all of Blackacre to David. Although Amy no longer had any interest in Blackacre because she had conveyed her interest to Cathy, David was unaware of that fact. David was a BFP as required under the statute. First, he paid value for the property. And secondly, based on the facts, he did not have knowledge about Cathy's conveyance. There are no facts to indicate that he had actual knowledge of the conveyance to Cathy. Additionally, David did not have constructive notice of the conveyance to Cathy. A BFP only has a duty to check the grantor-grantee index when the conveyance is made to him. He does not have to subsequently check the index for good title. Therefore, when he checked the index before accepting the property, there was no notice of Cathy's deed. Lastly, David did not have inquiry notice. It doesn't appear that Cathy lived on the land or made any assertions of title over the land. As such, David qualified as BFP because he took without notice and paid value for the land. Also, to prevail under a race-notice statute, the subsequent purchaser must record. Here, David recorded his deed promptly. As a result, David's interest in the land is superior to Cathy's.

C. Ellen

David had good title to the property as discussed above and therefore, was free to do what he wanted with the land. He subsequently leased the property to Ellen. Ellen is a BFP under the recording statutes as well. She is paying value for the lease through rent payments and took without notice of Cathy's interest. Similar to David, there is no actual or inquiry notice for the same reasons as stated above. Additionally, she just not

have constructive notice. Although Cathy has now recorded the deed, it is not within the chain of title that Ellen would have to search. Even if Ellen did have notice of Cathy's interest, she would be protected by the Shelter Doctrine, which allows subsequent parties to assume BFP status from the prior conveyance, even if that purchaser did not have BFP status. Here, David was a BFP and recorded his deed; thus, Ellen is a BFP under David anyway.

However, David's conveyance to Ellen was not a fee simple, but rather, a lease for a term of 15 years. Thus, by the terms of the lease, Ellen has a possessory interest in the property for the next 15 years. At the time of the lease, she was in privity of contract with David (through the lease) and privity of estate with David (by occupying the land).

D. Fred

Parties are generally free to assign their interests under a contract or lease to another party. An assignment is where a party gives the remaining interest under the lease to a subsequent party. Alternatively, a sublease is where a party gives less than the full interest left on the lease. Thus, the courts are to look at the actual interest conveyed and not what the parties might have labeled it.

The lease between David and Ellen did not contain an anti-assignment clause. Rather, the lease applied to Ellen, her assigns, and successors in land. Thus, an assignment of Ellen's interest was valid under the lease. (Even if it wasn't, David would have likely waived the anti-assignment provision because he continued to accept rent from Fred). Additionally, the facts state that Ellen transferred "all her remaining interest in Blackacre to Fred." Therefore, it was an assignment, since all her interest, the remaining 10 years on the lease, was transferred to Fred. As such, Fred assumed Ellen's interest in the land. As such, Fred is lawful tenant with possessory interest in Blackacre for the next ten years.

E. Conclusion

Because this is a race-notice jurisdiction and the statute applies under the facts of this case, David has superior title to the land. Cathy does not have any interest in the land because she failed to record her interest. David conveyed his possessory interest

to Ellen, who assigned her interest to Fred. As such, David holds title in fee simple to Blackacre and Fred has possessory interest in Blackacre for the next ten years under the terms of the lease between David and Ellen.

2. David v. Ellen & Fred

As mentioned above, there was a valid assignment of Ellen's interest to Fred under the lease. Ellen, as the assignor, remains in privity of contract with David. Fred, as the assignee, remains in privity of estate with David. The terms of the lease between David and Ellen contained two covenants: Ellen, on behalf of herself, assigns, and successors was to: (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. Unfortunately, lightning struck the property and destroyed a building on the property. Thus, the issue is whether David can prevail on a damages claim based on these covenants against Ellen and Fred?

A. Ellen

As mentioned, Ellen remains in privity of contract with David under the terms of the lease. A novation occurs when two parties agree that one party will no longer be held liable under the terms of the contract.

Under the facts, Ellen and David entered into a 15-year lease agreement. Five years into the lease, Ellen assigned her interest to Fred. There does not appear to be any agreement between David and Fred relieving Ellen of her liability under the lease. As such, no novation has occurred. Because David and Ellen are still in privity of contract, David can bring claims against Ellen for damages for breach of the covenant regarding hazard insurance for Blackacre.

B. Fred

For a covenant to run with the land and bind successors in interests, certain requirements must be met depending on whether the interest in the burdened (servient) or benefited (dominant) estate is being transferred. The servient estate is the estate that incurs the burden of the covenant, while the dominant estate is the one that

benefits from the covenant. If the covenant is on the servient estate, the covenant will run with the land if: (1) the parties intended the covenant to run with the land; (2) the covenant touches and concerns the land; (3) the servient estate has notice of the covenant; (4) there exists horizontal privity; and (5) vertical privity.

Here, the covenant burdens the lessee estate, since Ellen and her successors/assigns are required to maintain hazard insurance and use that insurance to repair the damages. Thus, David will have to show the above five elements in order to be able to collect damages from Fred.

i. Intent

The parties to the original agreement must have intended that the covenant be perpetual and continue to bind successors in interest of the land. Here, the parties specifically included in the written lease agreement that "Ellen, on behalf of herself, assigns, and successors in interest" will maintain hazard insurance and use the proceeds of such insurance to fix any damage caused by any hazards. Therefore, the express language of the parties in the lease provide that they intended the covenant to bind all successors in interest.

ii. Touch and Concern the Land

To bind successors in interest, the covenants must also touch and concern the land. Courts have held that a covenant touches and concerns the land if it conveys a benefit onto the land. For example, the payment of rent is a sufficient covenant that touches and concerns the land. Here, the covenant is to provide insurance to protect the land in case of damage and to repair the land in the event that such hazardous damage does occur. This is for the benefit of the land to maintain the premises and therefore, it touches and concerns the land.

iii. Notice

The successor in interest must have notice of the covenant in order to be bound by the terms of it. As mentioned above, there are three types of notice. Here, Fred had constructive notice because Ellen recorded the deed in the grantor-grantee index.

Therefore, Fred would be able to know the terms of the lease because it was within the chain of title and will be deemed to have constructive notice of the covenants.

iv. Horizontal Privity

Horizontal privity must exist between the original parties to the covenant, such as grantor-grantee or lessor-lessee. A covenant agreement alone is insufficient to establish horizontal privity. Here, David and Ellen have horizontal privity as their relationship was that of lessor-lessee. Thus, horizontal privity exists.

v. Vertical Privity

Lastly, vertical privity must exist between the successor in interest and the previous owner of the servient estate. Here, Ellen conveyed the remainder of her interest on the lease to Fred. Therefore, there is a vertical privity between Ellen and Fred.

Thus, all five elements are met for a covenant to run with the land and David may hold Fred liable for damages for the breach of the covenants.

C. Conclusion

David may hold Ellen liable for damages for breach of the two covenants because she is in privity of estate with David. Additionally, David will be able to hold Fred liable for damages because the two covenants run with the land and Fred had notice of such covenants.

QUESTION 2: SELECTED ANSWER B

1. **What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and Fred.**

Classify the Interest: Joint Tenants with a Right of Survivorship

A joint tenancy is a concurrent interest in land in which case at least two individuals own an undivided interest in the whole of the property. A joint tenancy is created with express language that the tenancy carry with it the right of survivorship. The right of survivorship means that when one joint tenant dies the other co-tenants take the deceased tenant's interest in the property. A joint tenancy is created when four unities are present at the time of creation. These unities are the unities of time, title, interest, and possession.

Here, facts indicate that Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Thus, the original property relationship was that of a joint tenancy because the right of survivorship was expressly provided for.

Severance of the Joint Tenancy

A joint tenancy is severed whenever any one of the four unities of time, title, interest, and possession is disturbed. When one of the four unities of a joint tenancy is disturbed a tenancy in common results and the right of survivorship is extinguished. In this event the tenants in common own a undivided interest in the whole of the property which is then freely alienable.

Here, the facts indicate that Amy gifted her interest in Blackacre to Cathy by deed. By gifting her interest in the joint tenancy, Amy disturbed the four unities, particularly the unity of title. As indicated above, when a joint tenancy is severed a tenancy in common is created. Thus, since the joint tenancy was severed, at this particular point in the facts

Amy held no interest, and Cathy and Bob held the property as tenants in common. The right of survivorship was extinguished and both Cathy and Bob had an undivided interest in the whole of the property.

Amy's Conveyance to David / Recording the Interest / Recording Statute

The facts indicate that after Amy gifted her interest in Blackacre to Cathy by deed she and Bob sold all of their interest in Blackacre to David. These facts implicate the rules for the relevant recording statue.

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Here, the facts indicate that Amy and Bob sold all of their interest in Blackacre to David after Amy gifted her interest to Cathy by deed. The facts also indicate that David recorded his deed before Cathy recorded her deed. Thus, for the recording statute to apply and for David to take title to the property he must be a subsequent BFP who took without notice and who recorded first. The facts indicate that David did in fact record before Cathy recorded. Thus, the "recorded first" element is satisfied. The next question that must be determined is whether David had notice of Amy's interest. There is nothing in the facts which says that David had actual notice of Cathy's interest. Additionally, although the facts do not indicate that David inspected the property, the facts also do not indicate that Cathy occupied the property so as to put David on notice

had he inspected the property. The real question is whether David had record notice. Determining record notice is a two-step process. First, the BFP must go to county recorder's office, locate the particular property and construct the chain of title. The chain of title can be constructed by looking first at the grantee index and then building the chain of title back in time. Next, the BFP must adverse each link of the chain. This is done by looking at the Grantor index and following the chain of title until the BFP reaches his interest. Here, David will not discover Cathy's interest in Blackacre. Cathy recorded her deed too late. By recording her deed after David recorded his deed David would not be put on notice as to Cathy's interest in Blackacre. Also, although not directly relevant, it should be noted that Cathy, as a gratuitous grantee, is not likely to receive any protection under the recording statute.

On balance, David obtained lawful title to Blackacre as a subsequent BFP who took without notice and was the first to record his interest.

2. Is David Likely to Prevail in his Suit Against Ellen and Fred

The Lease with Ellen

A tenancy for years is a specific type of tenancy that has a specific start date and a specific end date. A tenancy for years need not be for a terms of actual years but rather only needs a specific starting and ending date. A tenancy for years is terminated upon the end of the specified date.

Here, the facts indicate that David entered into a valid 15-year lease of Blackacre with Ellen. Since the lease has a specific start date, and a specific end date, it is likely considered a tenancy for years.

Ellen's Transfer to Fred

A sublease is a legal relationship in a leased property that arises when the tenant conveys out less than his entire interest under the lease. In this circumstance, sublessor has privity of estate with the lessor. An assignment occurs when the lessor conveys out all of his durational interest under the lease. In the case of an assignment the original lessee is no longer in privity of estate with the lessor but depending on the circumstances may still remain in privity of contract with the lessor. Privity of estate means that two individuals share an interest through their relationship to a leased property and privity of contract is a contract obligation between two contracting parties.

Here, the facts indicate that five years into the lease, Ellen transferred all of her remaining interest in Blackacre to Fred. Thus, because all of the remaining interest was transferred as opposed to only some or part of the interest Ellen executed a valid assignment. The results of this assignment is Fred is not in privity of estate with David. However, because Ellen was the original contracting party with David, she remains in privity of contract with David.

Breach of the Covenant: Ellen

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Here, as noted above, Ellen is in privity of contract with David. She is the original party under the lease, who signed the lease and who had knowledge of the covenants in the lease. The fact that she assigned her interest to Fred means only that she is not under privity of estate with David, but she is still liable under privity of contract. The lease included a promise by Ellen to obtain hazard insurance and to use any payments for

damage to the property to repair such damage. Ellen breached the lease covenant because she never obtained hazard insurance covering Blackacre and because a building on the property was destroyed by fire.
Thus, because Ellen is in privity of contract with David, David can elect to sue Ellen for breach of the express contractual covenant.

Breach of the Covenant: Fred

Restrictive Covenant

A restrictive covenant is a written promise with respect to a particular piece of property to do or to refrain from doing something on that particular property. Restrictive covenants run with the land to successive assignees if the covenant makes the land more beneficial or useful. In order for the burden of a restrictive covenant to apply there must be intent and notice, the covenant must touch and concern the land, there must be vertical privity and horizontal privity. In order for the benefit of a restrictive covenant to apply there need only be the elements of intent, touch and concern and vertical privity. Vertical privity is present when the successor in interest has the entire interest in the property. Horizontal privity refers to the fact that the original parties to the agreement had a mutual interest in the property outside of the covenant agreement.

Here, the facts indicate that the lease expressly stated that the covenant to obtain hazard insurance and to use its proceeds would apply to "Ellen, on behalf of herself, her assigns, and successors' interest." Thus, because there was intent that the covenant apply to subsequent parties, the intent element is met. The facts also indicate that Ellen recorded the lease and that the covenants were expressly written in the lease. Thus, it appears that Fred had notice of the lease provisions. The next element that must be satisfied is the touch and concern element. As discussed above, in order for the covenant to touch and concern the property it must make it more beneficial or more useful. Here, the covenant was that Ellen and her assigns obtain hazard insurance which would cover any damage to the property. If a particular piece of property is

covered by insurance, then it is more likely than not to be benefitted and thus, as a result will be more valuable. As noted above, vertical privity must also be satisfied. Here, Ellen conveyed out all of her remaining interest on Blackacre. Additionally, there is nothing in the facts to suggest that anyone else other than Fred not presently occupies the property. Thus, vertical privity is satisfied. Finally, there must be horizontal privity. David owns the property outright. Additionally, David and Ellen had no interest in the property outside of the lease. Thus, horizontal privity is satisfied.

Based on the foregoing analysis, it appears that the burden of the restrictive covenant to obtain hazard insurance does run to Fred, a party in privity of estate with David. Thus, because Fred failed to obtain insurance and because the property was destroyed implicating the need for the insurance, David is likely to prevail in his suit against Fred.

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Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Criminal Law and Procedure
4.	Community Property
5.	Business Associations/ Professional Responsibility
6.	Constitutional Law/Real Property

QUESTION 6

City Council (City) amended its zoning ordinance to rezone a single block from "commercial" to "residential." City acted after some parents complained about traffic hazards to children walking along the block. The amended ordinance prohibits new commercial uses and requires that existing commercial uses cease within three months.

Several property owners on the block brought an action to challenge the amended ordinance.

In the action, the court ruled:

1. Property Owner A, who owned a large and popular restaurant, had no right to continue that use, and had time to move in an orderly fashion during the three-month grace period.

2. Property Owner B, who had spent $1 million on engineering and marketing studies on his undeveloped lot in good faith prior to the amendment, was not entitled to any relief.

3. Property Owner C, whose lot dropped in value by 65% as a result of the amended ordinance, did not suffer a regulatory taking.

Was each ruling correct? Discuss.

QUESTION 6: SELECTED ANSWER A

Constitutional Protection

The Constitution prohibits wrongful government/state action, not private action. State action allows constitutional protections to arise.

State Action

The state action here is the City Council amending its zoning ordinance.

Takings Clause

The power of the government to take private property for public use is known as eminent domain. The takings clause of the 5th Amendment to the US Constitution provides "no property shall be taken for public use without just compensation." The government must provide just compensation for any property taken for a public use. Since the *Kelo* decision the US Supreme Court has interpreted a public use broadly and deemed a public use to even include "economic development" as well as the classic highway, military base, etc. The Takings Clause applies to states and local entities through the 14th Amendment. Regulations are not usually considered takings but can be in certain circumstances.

Here there was no physical taking of any land by the government for a 'public use'. The City Council amended the zoning ordinance to change a block from commercial to residential. The property of the block was not actually seized, but rather the activity on the property was regulated. The property owners will argue this regulation constitutes a regulatory taking.

Regulatory Taking

A regulatory taking is that which deprives the owner of the economic use of his property. A regulatory taking is often found when a regulation deprives the owner completely of any substantial economic use. A regulatory taking analysis can be applied to the states and local entities through the 14th Amendment. (See Florida Water District.)

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

1. Property Owner A

Property Owner A will argue the City Council's amended zoning ordinance constituted a regulatory taking violated the right to a Non-conforming use.

Regulatory Taking of the Restaurant

See Rule above

To determine if a regulatory taking occurred Property Owner A will demonstrate the economic impact of the regulatory taking on the property. Here the Owner operated a popular restaurant on the premises. The impact of the regulation on the land is severe as location is vital for [a] popular restaurant. The actual economic impact of the ordinance on the property value itself would need to be determined if there is value in land that has a restaurant on it and must be remodeled or rebuilt to conform with the residential requirement.

Property Owner's reasonable expectation on the return on investment for the property. If the owner has a popular restaurant and has been there for a long period of time then the economic return expected out of the property to be achieved can be argued to have occurred then the court decision is supported. However if the restaurant is newly open and popular for this reason, the owner has likely not achieved the expected return on investment for the restaurant. Restaurants are capital intensive and it takes time to recoup the capital costs.

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street. The government will argue it only had to show a rational basis for the decision.

Non-Conforming Use

A non-conforming use occurs when a business or residence is in existence and within the proper use of a city ordinance, at which point the ordinance subsequently changes and the current use of the property becomes in violation of the current code. The non-conforming use must be permitted to continue unless substantial threat to public safety/health is at stake. The non-conforming use may continue as long as the business or use does not cease or a change in ownership of the property occurs.

In this case the restaurant business can only operate as a non-conforming use. Owner A should have been permitted to continue using the property as a popular restaurant. There was no significant threat to public safety or health. In fact the restaurant was likely feeding many residents due to its popularity. Traffic hazards are not necessarily related to the commercial uses on the property.

Conclusion: The Court was incorrect in ruling that the property owner had no right to continue that use. There was no emergency or threat to public safety to not permit a non-conforming use.

2. Property Owner B

Property Interest

A party that makes substantial investment and obtains the necessary permits for a development based on the current zoning ordinance is entitled to complete the project within a reasonable amount of time even if the zoning ordinance changed in the meantime. Once the government has granted the permission, and the party has then relied on that permission it may not be taken away arbitrary by new ordinances. If such action occurs the party may rely on the governing zoning and ordinances at the time the project was permitted and began.

In this case Property B substantially relied on commercial zoning ordinance based on his investment of $1 million on engineering and marketing studies. This investment was for the undeveloped land based on the commercial zoning ordinance. This is a significant sum, and the Owner may even claim he detrimentally relied on the previous ordinance, but such an argument would not be upheld.

The courts often require there be some permission granted or approval of a project by a review board before a developer can be found to substantially rely on the zoning ordinance. It is not enough to have a good faith belief that your use will be permitted in [the] future, some certainty must be acquired by permit or council approval. Unfortunately for Property Owner B the facts do not indicate he submitted his plan for the undeveloped property to local official for review. No applications submitted, and unfortunately the owner will be unable to mitigate losses if all the studies were based on commercial use.

Conclusion: The court's ruling was likely correct based on the Property Owner B's failure to obtain government permission for future investment. Owner B is not entitled to any protection as he would have been if permits were granted before the City Council amended the zoning ordinance.

3. Property Owner C

Regulatory Taking

See Rule Above

To determine if a regulatory taking has occurred the Court will look at (1) the economic impact of the regulatory taking on the property, (2) the owner's reasonable expectation on the return on investment for the property, (3) and how the burdens of the regulation are distributed across interested community members.

Economic Impact

The economic impact of the residential zoning ordinance on Owner C's property is significant. There was 65% drop in value because of the new ordinance. This is over

half of the value. However, even with a severe economic drop in value the property maintains some viable economic use if it retains 35% of its value. The courts when granting a regulatory taking prefer to see no economic benefit from the property because of the regulation. Based on these facts the economic impact to the ordinance favors the City Council.

Expectation on Investment Return

This analysis depends on Property Owner C's reasonable expectation on the return on investment for the property. This is a fact specific analysis. Given the fact that the property value decreased by 65%, this was not likely an expectation of the Owner. Even in a severe economic recession property losing over half of its value is substantial and not reasonably expected.

This factor supports the lot owner's claim.

Burdens Distributed

Finally the court should have analyzed how the burden of the regulation was applied to owners across the community. Clearly the owners on the block were affected, but there is no indication the new ordinance affected any of the surrounding blocks.

In fact the purpose of the ordinance was to reduce traffic hazards to children, but this is not likely accomplished by re-zoning only one side of the street.

Conclusion: The court should have ruled that the lot owner suffered a regulatory taking if the reduced expectation on investment and distributed burdens were severe enough.

QUESTION 6: SELECTED ANSWER B

Zoning Powers

The Supreme Court has historically granted great deference to municipalities engaged in creating zoning ordinances. (*See Euclid v Ambler Realty*). Generally, local government has the police power to enact zoning ordinances so long as they are reasonably related to a legitimate government purpose, namely, that they relate to protecting the general welfare, safety, or health of the community.

Here, the city enacted the zoning amendment to change a commercial to residential area in response to traffic that may have endangered children. Clearly, the zoning ordinance is related to a legitimate government interest in protecting children pedestrians. On these grounds, it would most likely be upheld.

However, the facts indicate that the ordinance only applies to "a single block." This raises the specter of spot zoning, which may be impermissible if used to single out landowners or make a handful of landowners bear a disproportionate burden that the public at large should have to bear. In contesting zoning that appears to unlawfully inhibit a landowner's use of his property, a landowner may bring a takings claim challenging the constitutionality of the zoning ordinance on its face or as applied. As demonstrated in *Euclid,* a facial challenge is bound to fail--zoning has been upheld for decades. But an "as-applied" challenge can be viable, and is discussed below.

Takings

Under the 5th amendment and applied to the states via the 14th amendment, the government may not take private property without just compensation. Typically, a government taking is through eminent domain, where the government must show a valid public purpose for the taking and compensate the landowner for the land the government takes for the public purpose.

Here, the ordinance does not employ eminent domain, and as such is analyzed under takings jurisprudence.

Physical Takings

Any government statute that incurs a physical occupation of a landowner's land or real property (including airspace) must be compensated (*Lorretto Teleprompter*). Here, however, the ordinance does not install or require imposition of any government presence within any property owner's physical space, so this strict rule is unavailable to the plaintiffs.

Regulatory Takings

Courts have held that an ordinance that is so burdensome, or that unduly burdens a single landowner in order to benefit the public at large, may be a regulatory taking, and must be compensated. Under *Lucas,* a regulation that incurs a "total economic wipeout", meaning that it deprives a landowner of any economically beneficial use of his land, is a regulatory taking and must be compensated. The one exception to the total wipeout rule is if the ordinance is based on preexisting common law in the state (*Lucas*).

Here, the ordinance rezones the use of land from commercial to residential, and is thus most likely not based on common law principles. In *Lucas*, the court recognized an argument that an ordinance restricting beach development could be based on common law principles, if it sought to mitigate nuisance. But the facts here are not analogous. Nonetheless, the ordinance has also not incurred a total economic wipeout. Property owners A, B, and C all may still make use of their property in economically beneficial ways, even though those uses are not the ones they anticipated.

Because *Lucas* is unavailing, a takings analysis would go to the *Penn Central* multi-factor balancing test, in which the government determines if an ordinance incurs a taking based upon: the government interest to be advanced, the nature of the government regulation, and the degree of interference with the landowner's "investment back expectations."

Variances and Amortization

Lastly, landowners may also seek relief through variances and amortizations if they do not wish to bring a constitutional claim under Penn Central. A variance can be Area or Use. An area variance allows a nonconforming use to vary by the area used; a Use variance allows a nonconforming use in an area that is not zoned for that purpose. Use variances are typically harder to secure, and the landowner must show an undue burden if the use variance is not granted.

An amortization allows a nonconforming use to persist until ownership of the property changes, and prohibits the owner from expanding or changing his permitted non-conforming use. Amortization works to mitigate the impact of a sudden zoning change, which could deprive the landowner of economic use of their property and also reduce the likelihood of a takings lawsuit.

Application to Property Owners A, B, and C

Property Owner A

Here, the court has granted the property owner a mere 3 month period to move out of the premises or change it. Under *Lucas*, the property owner most likely does not have a claim. He has not experienced a total economic wipeout because he can still sell the land for residential development.

Under *Penn Central*, he has a stronger claim. The government interest in protecting children is strong, but it zones a single block, thus making property owner A largely bear this burden rather than the community as a whole. Further, the restaurant is popular, viable, and most likely has significant investment backed expectations--namely, its physical assets and cooking equipment. Although the government does not need to ensure that the new restaurant location is equally as profitable, the strict and narrow application of the zoning amendment gives the restaurant a factual advantage if it chooses to bring a takings claim.

To avoid a takings challenge under Penn Central, the court would have been wise to issue a use variance just for the property or an amortization, allowing the owners to continue operating until they finally closed by their own accord. As is, only allowing 3 months to move and in light of an ordinance that appears to single out the owners, the court risks a viable takings claim.

Conclusion: the court can uphold the ordinance and three-month grace period because the zoning appears to be a valid government action. But these are draconian measures and a three month grace period is very short. It might consider permitting an amortization or use variance to avoid a takings claim under Penn Central. An amortization would reduce the economic impact while allowing the area to gradually conform to the zoning the city enacted.

Property B

Here, the property owner has an undeveloped lot, so his loss is minimal. Under *Lucas*, he can probably sell the lot and earn a profit, and based on the jurisprudence in *Euclid*, a zoning ordinance is still viable even if it changes the permissible uses and devalues a property significantly.

But the owner has also invested $1 million in assessing his lot in "good faith" prior to the amendment. *Euclid* makes it clear that the zoning ordinance can still be upheld. However under *Penn Central*, this huge investment backed expectation gives serious weight to a takings claim. As mentioned above, the government objective is valid--public safety--but the nature of the government action is targeted and intrusive because it only applies to a single block. By contrast, in *Penn Central*, the court upheld a development restriction on a historical building because it found that the owner could build elsewhere, and moreover, everyone else in New York was equally burdened by the restriction. Here, only the block is burdened; a handful of landowners are bearing a burden for the whole city, but they are not being compensated. Because Penn Central is a fact-based inquiry, and the investment backed expectations here are so high, the landowner has a fairly strong case.

Nonetheless, the court's decision is valid--the owner is not entitled to relief, despite his investments because he can still sell his land. But in the interest of precluding a subsequent takings claim, the court might permit the owner to submit an area variance to the zoning board. Depending on what he had planned to use the lot for, the traffic impacts of that use, and how that lot would conform with surrounding uses and traffic, an area variance may still achieve the city's goals while avoiding a costly takings lawsuit and providing relief.

Property C

Here, the court properly ruled that the landowner did not suffer a regulatory taking. There has been no total wipeout, so the land is still valuable for residential uses. Further, the facts indicate that there are not investment-backed expectations. As such, the Penn Central analysis merely considers the impact--65% reduction in value--as well as the valid government interest in protecting children. Overall, there is no valid regulatory claim.

Lastly, *Euclid* is directly on point and confirms the court's holding. A city may enact zoning using its police powers and to further the general safety, welfare, or health of the community, even when the ordinances greatly reduce the value of property owner's land. In Euclid, the owner's land was greatly devalued because he could not use it for industrial purposes, but the supreme court nonetheless upheld the zoning ordinance.
Here, there was no regulatory taking. It is also unclear if a variance of any kind would provide relief, as the facts do not indicate the type of harm the property owner has experienced or his current use of the land.

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QUESTION 2

Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny "as joint tenants with a right of survivorship for so long as neither Martha nor Lenny make any transfer of Greenacre. In the event of such a transfer, Greenacre shall automatically revert back to Oscar."

Subsequently, without Lenny's knowledge, Martha conveyed all of her interest in Greenacre to Paul. She died shortly afterwards. Unaware of Paul's existence, Lenny paid the property taxes.

Paul entered into a written lease of his interest in Greenacre with Sally for a two-year term at a rental of $500 per month. At the end of the lease, Sally stopped paying rent, but continued to occupy Greenacre without Paul's consent. After three months, Paul confronted Sally. Although they did not agree to a new lease, Sally paid Paul the three months' rent she had not paid and resumed paying him monthly rent.

Lenny then attempted to sell his interest in Greenacre. He soon learned that Sally was occupying Greenacre and that Paul had acquired Martha's interest.

Concerned about conflicting property interest claims regarding Greenacre, Lenny commenced a lawsuit seeking to quiet title against Oscar, Martha's estate, Paul, and Sally, and to obtain from Paul an accounting and contribution for a share of the rent paid by Sally and for a share of the property taxes paid by Lenny.

1. What property interest in Greenacre, if any, is the court likely to find possessed by Oscar, Lenny, Paul, Sally, and Martha's estate? Discuss.

2. Is Lenny likely to obtain an accounting and contribution from Paul? Discuss.

QUESTION 2: SELECTED ANSWER A

1. Interests in Greenacre

To determine who has what interest in Greenacre (G), the validity and effect of each transfer/agreement must be determined. Generally, property may be transferred by sale, gift, will, or intestate succession. Leases may also create interests in possession of property.

Oscar

First, it must be determined what interest Oscar (O) had in the property. A fee simple is the largest property interest possible and O began with a fee simple interest in G.

Fee Simple Determinable

A fee simple defeasible is a fee simple interest that may be cut short by a subsequent event. When a fee simple defeasible contains terms of duration (e.g. as long as, for the time that, until, etc.), it is a fee simple determinable. A fee simple determinable will be a fee simple until a designated event occurs. Here, O's conveyance to Martha (M) and Lenny (L) was likely a fee simple determinable because it contained the phrase "for so long as." Thus, this conveyance conveyed a fee simple determinable interest to M and L.

Possibility of Reverter

The grantor of a fee simple determinable interest retains a possibility of reverter. Here, O's conveyance additionally contained explicit language that he retained a possibility of reverter. A possibility of reverter means that fee simple automatically reverts to the grantor at the time the designated event occurs. The grantor need not go to court to claim this interest; the interest automatically vests at the occurrence of the subsequent event. Here, O had a possibility of reverter. The event in question was if either M or L made any transfer of G. Thus, if his possibility of reverter was valid, O gained a fee simple interest in G at the time M transferred her interest in G to Paul (P).

Restraints on Alienation

However, the possibility of reverter here may not be valid because it may be an undue restraint on alienation. Generally, courts do not allow title instruments/conveyances that absolutely prohibit future transfer of the property. Restraints on alienation may be

allowed if the restraint is only conditional/for a moderate time period (e.g. does not transfer for the next 50 years). However, absolute restraints on alienation are invalid. Any language indicating such absolute restraint will be struck from the instrument, so the resulting interests will remain. Here, the proposed restraint was absolute--O conveyed to M and L so long as neither transferred G. There was no condition or limited time period on this restraint; it was absolute. So, this clause will be struck from the instrument and the remaining interests will exist. With this clause struck, there is no future event that gives O a possibility of reverter. Rather, it changes M's and L's interests to fee simple interests and strips O of his possibility of reverter. Thus, because of the striking of the invalid restraint on interest, O conveyed G in fee simple to L and M and retains no interest in the property. So, O has no interest in G.

Lenny

As discussed above, because the alienation language had to be struck, L received a fee simple interest with M in G from O.

Joint Tenancy

There are various forms of co-tenancies. Each form allows all co-tenants to possess the whole of the property, though each holds only a lesser, divided share of the property. A tenancy in common is the default form. A joint tenancy carries the additional right of survivorship between joint tenants. This right of survivorship means that when one joint tenant dies, the surviving joint tenant receives the deceased joint tenant's interest in the property automatically, and the deceased tenant's interest is no longer part of her estate and so cannot be passed through probate. A joint tenancy exists when property is conveyed by an instrument that indicates intent for the property to be held as a joint tenancy with a right of survivorship, and when the four unities of (1) possession, (2) interest, (3) time, and (4) title exist. Here, O conveyed G to M and L "as joint tenants with a right of survivorship." So, the explicit language indicating intent to convey as a joint tenancy and to convey a right of survivorship is present.

1. Possession

The unity of possession means that all joint tenants have equal right to possess the whole property. Here, although L and M (and P as M's successor) took various degrees of possession of G, there is no indication that any ousted the other at any time--i.e. no

tenant ever prevented the other from taking possession of the whole property. Thus, there was unity of possession.

2. Interest

Unity of interest means that each joint tenant must have an equal share interest in the property--i.e., for two joint tenants, each must have a 50 percent interest rather than, e.g., one having a 40 percent and one a 60 percent interest. Here, it is not indicated what interest each L and M had in G, so presumably each was conveyed a 50 percent interest in G. So, there was unity of interest.

3. Time

Unity of time means that each tenant must have acquired her interest in the property at the same time. Here, initially, both L and M acquired their interests in G at the same time--when O conveyed it to them. However, subsequently, M conveyed her interest to P. So, P acquired his interest in G at a different time than L (the remaining joint tenant), thus destroying the unity of time (discussed more below).

4. Title

Unity of title means that each tenant must have acquired her interest in the property by the same instrument. Here, as with the unity of time, L and M initially had unity of title because both originally acquired their interests in G by means of the grant from O. However, when M conveyed her interest in G to P, P then got title from M's conveyance while L still had title from O's conveyance. So the unity of title was also broken at that time.

Thus, while M and L originally were tenants in common because the four unities were present and the intentional joint tenancy and right of survivorship language was included in the relevant instrument, the joint tenancy ended when M conveyed her interest in G to P because this broke the unities of time and title.

Tenancy in Common

When any of the unities for a joint tenancy are broken, the tenancy reverts to a tenancy in common. A tenancy in common is the default form. Under a tenancy in common, each co-tenant has equal right to possess the whole of the property, but only a lesser divided interest in the property. Under a tenancy in common, each tenant may devise

her interest in the property or it will pass through intestate succession because a tenancy in common has no right of survivorship.

Here, because the unities of time and title were broken when M conveyed her interest in G to P, the tenancy reverted to a tenancy in common. So, at that point, L and P held G as tenants in common with no right to survivorship. However, each's interests in the property (i.e. 50 percent share) was not affected.

So, at the time of the action, L held a 50 percent interest in G as a tenant in common.

Paul

Next, it must be decided what interest P had.

Inter Vivos Transfer

P obtained his interest in G by an inter vivos transfer from M. It must be determined that this interest is valid. First, the provision in the conveyance from O that the property was conveyed to M and L so long as neither transferred it could prohibit the transfer. However, as discussed above, that provision of O's conveyance was an invalid absolute restraint on alienation, so must be struck from the instrument. Thus, M was not restrained from transferring by means of O's clause in his conveyance. Second, the nature of a joint tenancy may prevent M from transferring her interest. Generally a joint tenant may transfer her interest in the property without the consent of her joint tenants. The effect of the transfer is that it converts the joint tenancy to a tenancy in common, but permission is not required to make the transfer. By contrast, a tenancy by the entirety--which is a joint tenancy held by married spouses--requires that property interest cannot be transferred without consent of the other tenant-by-the-entirety. Here, there is no indication that M and L were married to each other, so no indication that this was a tenancy by the entirety rather than a joint tenancy. So, as a joint tenancy, M was not required to obtain L's permission to transfer to P. Third, as a transfer of interest in real property, the Statute of Frauds would ordinarily require that the conveyance be in writing. Here, it is not clear whether the conveyance was in writing, but the Statute of Frauds may nonetheless be satisfied by part performance if P did two of the three: took possession of the property, made payment for the property, or made improvements on the property. So, M's transfer to P was likely valid.

Tenancy in Common

As discussed above, thus, P holds a 50 percent interest in G as a tenant in common with L.

Lease to Sally

However, P has also entered a lease with Sally (S) that may affect his interests. There are three kinds of landlord-tenant leases--(1) tenancy for years, which is a lease for a definite period of time; (2) periodic tenancy, which is a lease for a definite period (e.g. one month) that automatically renews at the end of each period; or (3) tenancy at sufferance, which is a tenancy caused by the holdover of property by the tenant after a lease has ended. Generally, rental leases need not be in writing unless they are a lease for years for greater than a 1-year term (because the Statute of Frauds requires a writing for any contract that cannot be performed within one year). Here, the initial rental agreement was for 2 years, but was in writing. P initially rented G to S as a tenancy for years with a fixed two-year term. A tenancy for years automatically terminates at the end of the fixed period. So, here, this tenancy terminated at the end of two years.

A periodic tenancy is created by implication if a tenant pays rent and the landlord accepts it each period. Typically, a periodic tenancy is created at the end of a tenancy for years when the tenant pays rent and the landlord accepts. However, here, S stopped paying rent at the end of the two-year lease, but remained on G as a holdover. So, at that time, a Tenancy at Sufferance was created. However, when S subsequently paid P for those three months and resumed paying monthly rents, a periodic tenancy was created if P accepted those rents. There is no information to the contrary, so P presumably accepted those rents.

Thus, at the time of the action, P owned a 50 percent interest in G as a tenant in common, but leased possession of G to S as a periodic tenancy.

Sally

S's interest in G is only that granted her by her lease with P. Because P, as a tenant in common, has a right to possess the whole property, he may lease the whole property to a tenant. Further, as discussed above, at the time of the action, S and P had a periodic

tenancy by implication. Thus, S has an interest in possessing the whole of G (but no ownership interest) as a periodic tenancy.

Martha's Estate

Finally, as discussed above, M's inter vivos transfer to P was valid. Thus, that property was no longer in M's estate at the time she died. So, M's estate has no interest in G.

2. Likelihood Lenny Can Obtain an Accounting and Contribution from Paul

Next, it must be determined whether L can obtain an accounting and contribution from P, his tenant in common.

Rights to Third-Party Rents

Generally, tenants in common each have a right to possess the whole property. So, one tenant may not demand rent from her co-tenant because the co-tenant possesses the whole of the property exclusively. However, co-tenants may demand accounting for rents received from third parties. Here, P, a co-tenant, rented G to a S, a third party, and received rents from S. So, L may demand an accounting for the rents received from S in proportion to his interest in the property. Here, L had a 50 percent interest in G, so may demand 50 percent of the rents received from S.

Contribution for Operating Expenses

Generally, tenants in common are not entitled to contribution from other co-tenants for costs expended to repair or improve the property. However, they are entitled to contribution for basic operating expenses--which include property taxes. Here, L paid all property taxes on G after M died. Because property taxes are operating expenses, L is entitled to demand contribution from P for his share (proportionate to his interest in the property). Here, P had a 50 percent interest in G, so L may demand that P pay him contribution for 50 percent of the property taxes.

QUESTION 2: SELECTED ANSWER B

1. What Property Interests in Greenacre is the Court Likely to Find Possessed by Oscar, Lenny, Paul, Sally, and Martha's Estate

Oscar

Fee Simple Determinable and the Possibility of Reverter

The issue is whether Oscar has the possibility of a reverter interest in Greenacre. Oscar owned a fee simple absolute interest in Greenacre. He conveyed a fee simple defeasible interest in Greenacre to Martha and Lenny as joint tenants with the right of survivorship, but included a fee simple determinable ("FSD"), so that if Martha or Lenny ever transferred Greenacre, the property shall automatically revert back to Oscar.

Thus, Oscar attempted to give Martha and Lenny an FSD, and leave for himself the possibility of a reverter. A possibility of reverter follows an FSD. A possibility of reverter means that the property automatically reverts back to the grantor upon the happening of an event, and thus, the grantor does not need to take any action in order to regain access to the property.

Improper Restraint on Alienation

The issue is whether Oscar's FSD to Martha and Lenny contained an improper restraint on alienation. If Oscar's FSD is found to be a complete restraint on alienation, then the condition will be removed and Martha and Lenny will own Greenacre in fee simple. Oscar will be left with no remaining interest in Greenacre.

An owner of property may grant interests in property subject to certain conditions. These are known as defeasible fees and include fee simples determinables ("FSD") and fee simples subject to conditions precedents ("FSCS"). A court will generally uphold such conditions, as long as they are reasonable restraints on use and not complete bars

on alienation. Public policy favors free alienability of property. Thus, a court will generally invalidate a FSD if the condition contains a complete restraint on alienation. A court will remove the condition, and leave the grantee with a fee simple absolute interest in the property.

Here, Oscar stated that neither Martha nor Lenny may make any transfers of Greenacre. Lenny and Martha's estate will thus argue that this condition is a complete bar on alienation, and thus invalid. The two will argue that in the event that they are to sell Greenacre, it will automatically revert back to Oscar. Thus, they will argue that this is a complete restraint on alienation because it does not require any action from Oscar to determine whether or not to take back Greenacre: it simply automatically reverts back to him upon any alienation of the property.

Oscar, however, will argue that this is not a complete restraint on alienation. He will argue that Martha and Lenny may do whatever they like with the property and may use it however they like; they may even rent it out to tenants, but their only restraint is that they may not entirely transfer the property. Thus, he will argue that when Martha transferred her interest in Greenacre to Paul, Greenacre automatically reverted back to him. However, this argument is a weak one, for it appears that the condition is one barring complete alienation.

Conclusion

If a court finds Oscar's argument persuasive, then Oscar has a fee simple absolute in Greenacre, for Greenacre reverted back to Oscar when Martha transferred Greenacre to Paul. If this is the case, then Paul, Lenny, Martha's Estate, and Sally have no interest in Greenacre. However, a court is more likely to find Oscar's restraint on alienation complete and unreasonable. Thus, a court is likely to find that Oscar transferred Greenacre to Lenny and Martha in fee simple absolute, and that Oscar retains no interest in Greenacre.

LENNY'S INTEREST IN GREENACRE

Joint Tenancy

The issue is whether Lenny owns Greenacre in fee simple, or as a tenancy in common with Paul. Oscar granted Greenacre to Lenny and Martha "as joint tenants with a right of survivorship." As discussed above, the condition that Oscar placed on Greenacre is likely an invalid restraint on alienation, and thus Oscar granted Lenny and Martha the land as joint tenants in fee simple. A joint tenancy gives the co-owners equal right and possession to the property. The right of survivorship, a unique aspect of a joint tenancy, allows one joint tenant's interest in the land to pass to the other joint tenant upon death. A joint tenancy is created with the four unities are present: the joint tenants must have equal interests, rights to possession, must have obtained title by the same interest, and must have obtained title at the same time. Thus, at the onset, Lenny and Martha owed Greenacre as joint tenants with a right of survivorship, in fee simple absolute.

Severance of a Joint Tenancy

A joint tenancy is severed when any one of the four unities discussed above is severed. A joint tenancy may be severed by one joint tenant conveying his interest to another. A severance can occur without the permission of the other joint tenant. When a severance occurs, the new owner of the land will take as tenants in common with the remaining joint tenant.

Here, Martha conveyed all of her interest in Greenacre to Paul. Thus, she severed the joint tenancy. When she severed the joint tenancy, Lenny and Paul became tenants in common.

Tenancy in Common

In a tenancy in common, the only unity that exists is the unity of possession. There is no right of survivorship. Thus, when Martha transferred her interest to Paul, Paul and Lenny became tenants in common, with equal rights of possession in Greenacre. Lenny lost his right of survivorship when Martha transferred her interest to Paul. Lenny

may argue that because he did not consent to Martha's transfer, when Martha passed away they were still joint tenants, and her interest passed to him through the right of survivorship. However, this argument will fail. As discussed above, consent of the joint tenants is not necessary for severance.

Conclusion

Thus, a court will likely find that Lenny has a fee simple absolute interest in Greenacre and that he is a tenant in common with Paul.

PAUL'S INTEREST IN GREENACRE

As discussed above, Martha conveyed her interest in Greenacre to Paul before her death. She therefore severed the joint tenancy. Paul thus takes the same as Lenny: he has a fee simple absolute interest in Greenacre, and is a tenant in common with Lenny.

MARTHA'S ESTATE'S INTEREST IN GREENACRE

A court is likely to find that Martha's estate has no remaining interest in Greenacre. Before Martha's death, Martha conveyed all of her interest in Greenacre to Paul. Thus, Martha has no remaining interest in Greenacre.

SALLY'S INTEREST IN GREENACRE

The issue is whether Sally created a new periodic tenancy when she resumed paying monthly rent to Paul. Paul, a co-owner of Greenacre, entered into a written lease of Greenacre with Sally for a two-year term at a rental of $500 per month. At the end of the lease, Sally stopped paying rent but continued to occupy Greenacre without Paul's consent. After Paul confronted Sally, while they did not enter into a new lease, Sally paid Paul the three months' rent she had not paid and resumed paying him monthly rent.

A lease is a possessory interest in property whereby the tenant maintains a present interest in the property, and the landlord retains a future interest. There are four types of leases or tenancies: tenancy at will, tenancy at sufference (a holdover tenancy),

periodic tenancy, and tenancy for years. Here, it seems as though initially, Sally and Paul entered into a tenancy for a term of two years. Thus, they had a tenancy for years, which was to terminate at the end of the two year period.

Holdover Tenant - Tenancy at Sufferance

When Sally stopped paying rent, but continued to occupy Greenacre without Paul's consent, Sally became a holdover tenant. When one stops paying rent but remains on the premises, one becomes a holdover tenant. A holdover tenant is one who was once properly on the landlord's premises, but has exceeded her permission to occupy the premises, and thus remains on the premises unlawfully. A landlord has the right to evict the holdover tenant and sue for past rent, or the landlord may create a new periodic tenancy, by operation of law, with the tenant.

Periodic Tenancy

Although they did not agree to a new lease, Sally and Paul entered into a new periodic tenancy by operation of law. It appears as though Paul accepted Sally's late payment of the three months' rent, and Sally resumed paying Paul monthly. Thus the pair created a new month-to-month periodic tenancy, where rent will be due every month. The periodic tenancy will require notice to terminate it. The amount of notice required will be one month, the time of one period under their lease. If Paul has indeed accepted Sally's three months' rent she has not paid and has accepted her next month's rent, then Sally is a tenant and Paul is her landlord.

Conclusion

Sally has a present possessory interest in Greenacre under a periodic tenancy. However, as long as proper notice is given, she or Paul may terminate the periodic tenancy at any point, and Sally will retain no interest in Greenacre.

2. Is Lenny Likely to Obtain an Accounting and Contribution from Paul?

The issue is whether Lenny may obtain a contribution from Paul for a share of the property taxes paid by Lenny and whether Lenny may obtain an accounting from Paul for a share of the rent money paid by Sally.

Contribution

A contribution is a payment from one co-tenant to another co-tenant to reimburse a co-tenant for necessary costs spent in maintaining the property. Co-tenants who do not presently occupy the property (live there or otherwise do business on the premises) are required to share the costs of necessary improvements, principle payments on the mortgage, and taxes paid on the property. If one co-tenant pays these costs up front, he is entitled to contribution from his co-tenants.

Here, Lenny paid taxes on Greenacre. Thus, he is entitled to contribution from Paul to reimburse him for half of the amount spent.

Accounting

An accounting is a sharing of the profits derived from the property that two tenants co-own. Co-tenants of a property are entitled to share in the profits gained from leasing the property to a third party.

Here, Paul leased the property to Sally. He obtained $500 per month for two years, plus as discussed above, started a new periodic tenancy with Sally at the end of the two year period. Lenny is thus entitled to a receipt of half of the profits earned from the leasing of Greenacre to Sally.

Conclusion

Lenny is likely to obtain both an accounting and contribution from Paul.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2016

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2016 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Civil Procedure
2.	Real Property
3.	Contracts
4.	Constitutional Law
5.	Community Property
6.	Professional Responsibility

QUESTION 2

Al owned a farm.

In 1990, Al deeded an easement for a road along the north side of the farm to his neighbor Ben. Ben immediately graded and paved a road on the easement, but did not record the deed at that time. Al and Ben both used the road on a daily basis. The easement decreased the fair market value of the farm by $5,000.

In 2009, Al deeded the farm to his daughter Carol and she recorded the deed.

In 2011, Ben recorded his deed to the easement.

In 2012, Carol executed a written contract to sell the farm to Polly for $100,000. The contract stated in part: "Seller shall covenant against encumbrances with no exceptions." During an inspection of the farm, Polly had observed Ben traveling on the road along the north side of the farm, but said nothing.

In 2013, Carol deeded an easement for water lines along the south side of the farm to Water Co., the local municipal water company. The water lines provided water service to local properties, including the farm. Water Co. then recorded the deed. The easement increased the fair market value of the farm by $10,000.

In 2014, after long delay, Carol executed and delivered to Polly a warranty deed for the farm and Polly paid Carol $100,000. The deed contains a covenant against all encumbrances except for the easement to Water Co. and no other title covenants. Polly recorded the deed.

In 2015, Polly blocked Ben's use of the road and objected to Water Co.'s construction of the water lines.

Ben has commenced an action against Polly seeking declaratory relief that the farm is burdened by his easement. Polly in turn has commenced an action against Carol seeking damages for breach of contract and breach of the covenant under the warranty deed.

1. What is the likely outcome of Ben's action? Discuss.

2. What is the likely outcome of Polly's:

    a. Claim of breach of contract? Discuss.

    and

    b. Claim of breach of the covenant under the warranty deed? Discuss.

QUESTION 2: SELECTED ANSWER A

QUESTION ONE

At issue is the outcome of Ben's (B) action against Polly (P) for blocking the access to the road that he received an easement from Al (A) to use.

Express Easement

An easement is the right to enter onto someone's land and use a portion of that land for a specific purpose. Easements may be granted expressly to an individual by deed. An express easement by deed must meet the deed formalities to be valid, including a valid writing, and other statute of frauds requirements. Moreover easements are deemed to be perpetual in nature unless otherwise indicated. Here in 1990, A deeded an easement to B for using a road along the north side of his farm. There are no facts indicating whether or not the deed itself meets the formalities of a valid writing; however it can be presumed here because there are no facts to the contrary. Therefore given that A created an easement by deed, that expressly named the easement in the deed, an express easement was likely created for B's use. Thus in 1990, after A's valid deed, B obtained an express easement to use the road on the farm.

Reasonable Use/Scope

An easement must usually be used reasonably within the scope of the granting instrument if an express easement. This typically allows the holder of the easement to improve the land where the easement lies and to enter on to it to repair it. Here after A granted B the easement, B immediately graded and paved the road for his use. These actions are likely valid given that B was entering onto the property to pave a road. It would be implied that the holder of this easement for use of a road could enter onto land to improve the land, grade it and maintain the road. Therefore it would appear that B has been validly using the easement and comporting with its ramifications.

Termination

The next issue is whether B's easement could be said to have terminated in any way after P took title to the land it was on. Termination of an easement may occur where the easement is abandoned, where the granting instrument states a specific condition to occur, or where the properties that the easement lies on and the adjacent property holder are merged. Typically easements are perpetual in nature unless stated otherwise. Here A granted the easement to B by deed. There was nothing in the deed that stated any kind of condition as to whether the easement could terminate. Therefore no conditions have occurred. Moreover there was no abandonment of the easement as B has used the road ever since he was granted it. Finally no merger occurred under these facts as B still maintains his own property and the property that the easement lies on is separately owned by P now. Thus the easement did not terminate.

Transfer of Land - Notice

Generally when land that is burdened by the easement, the servient estate, transfers title the easement runs with the land. Thus even though A transferred the land to Carol (C) and then C transferred the land to P, each time the transfer occurred the easement would automatically run with the land. However a subsequent bona fide purchaser may attempt to argue that they lacked notice of the easement. If a subsequent bona fide purchaser can do so and state that they did not have notice of the easement then they can typically defeat an easement holder's title. The goal is to show that the subsequent bona fide purchaser did not have notice of the easement on the land. Thus P must show she did not have notice; this is done through a recording act.

Recording Act

Under the common law, title in land was measured by first in time, first in right. However under modern recording acts, people who record their interest in land can preserve their title by putting the world on notice of that interest in the land. There are jurisdictional splits as to what type of recording statute is used and there are three main ones: race, race-notice, and notice. Race recording statutes are used only in a minority of jurisdictions. Therefore notice and race-notice jurisdictions are typically the most

commonly used. Here in order to use a recording statute, P would have to show that she was a SBP and that she met the requirements of each recording statute.

Subsequent Bona Fide Purchaser (SBP)

In order to actually argue that one did not have notice to the easement, they must be a SBP. Typically a SBP is someone who took title to land subsequently to the current holder of the land and they did so for value. Here P paid for title to the farm in which B's easement lies. Moreover B's interest was received in 1990 and P's interest was received in 2014, so she was subsequent.

Thus P is a SBP who could seek to use a recording statute to take superior title in land and invalidate B's easement.

Notice and Race-Notice Jurisdictions

In a notice jurisdiction and a race-notice jurisdiction, the SBP must show that at the time that they took title to the land they did not have a notice of the competing interest. There are three kinds of notice: inquiry, actual and constructive. Inquiry notice occurs where the SBP is charged with looking at the property to examine it, and if they had examined it they may have found the competing interest. Actual notice occurs where the SBP is actually aware of the interest and recording notice occurs where the competing interest was recorded so that the SBP was on constructive notice via the recording. Here P actually saw the road that B had built on the property and she saw that B was using it. Therefore P likely had actual notice since she physically saw someone driving on the land. Moreover B recorded his deed in 2011 and P did not record until 2014. Thus she would be on constructive notice as well. At a very minimum P should have asked C who B was and what he was doing. Therefore notice would most likely be charged to P.

Thus P as a SBP cannot argue that she took title to the land without notice of the competing interest.

Race Jurisdiction

In a race jurisdiction, the person who records first wins and that is why it is not

used in many jurisdictions because it often results in unfair outcomes. Here B recorded in 2011 and P recorded in 2014. Thus under a race jurisdiction B would win as well.

Conclusion

In total, P cannot use a recording act to argue that she as a SBP should take title without B's interest. She had notice of B's usage of the land and moreover she did not record first. Thus the common law rule applies of first in time and first in right and B's interest is superior. P would lose to B's claim as B's easement would automatically run with the land.

Shelter Rule

Under the shelter rule, a SBP may be able to step into the shoes of a previous grantee and argue that the previous grantee could have validly used a recording in order to defeat a previous claim. The shelter rule may be used despite the fact that a SBP may have had actual knowledge. Here P could argue that C was a SBP under a recording act and therefore P could step into C's shoes to invalidate B's claim.

C as SBP

A SBP must typically pay value for title to the land and take subsequently to the competing interest. Here B got his easement in 1990 and C took title in 2009. Therefore C was subsequent. But it is not clear that C paid for the land. Her father was A and he just deeded her the land. If she did not pay value for the land then she was a mere donee and not a valid SBP. Any value is enough; typically only a "mere peppercorn" would suffice; but if someone did not actually give value then they are not a SBP. Thus if C was not a SBP then she could not use a recording act. As such it is unlikely that the shelter rule could be used here.

Recording Claim

Under a race notice and a notice jurisdiction it is likely that C would be charged with inquiry notice. Since B built and paved a road on the farm, that would have went from his farm to C's farm, any inspection of the farm that C was to take title to would

charge with her inquiry notice. She would have seen the road and been charged with asking what it was. Moreover given B's usage of the road, she likely would have seen him, especially if this was her father's farm before it was hers. Thus under a race and race-notice jurisdiction it is unlikely that C would prevail since she likely took title with notice.

Under a race recording statute C would probably prevail however, since she did record before B did, as she recorded in 2011 and B recorded in 2014.

Conclusion - Shelter Rule

In total, P cannot likely use the shelter rule here to step into C's shoes because C was probably not a SBP. Moreover under a notice and race-notice recording statute she would not win since she probably would be charged with notice of B's claim. However she may win under a race recording statute if she was a SBP because she recorded first.

Overall Conclusion

In conclusion, B's claim against P would likely be valid. B can establish that he had a valid express easement and that it automatically ran with the land when it was transferred from A to C and then to P. Moreover P cannot argue she did not have notice of the easement nor can she use a recording statute. Moreover she cannot use the shelter rule here either since C was not likely a SBP.

QUESTION TWO

At issue is the likely outcome of P's lawsuit against C.

Part A

At issue is P's claim for breach of contract. When parties convey land it is a two-step process: first the parties enter into a contract for the sale of land and then there is a period of escrow. Following escrow, closing occurs. At closing is where the actually deed is delivered and at that point the deal is finished. P's first claim arises under the

land sale contract.

Land Sale contract - Marketable Title

A contract for the sale of land is required to be in a valid writing satisfying the statute of frauds. Here on 2012, P and C executed a written contract to sell the farm to P for $100,000. The contract stated that the seller "shall covenant against encumbrances with no exceptions". This express provision essentially was stating that the land would not be sold with any encumbrances on it. An encumbrance is something that includes easements. In every contract for the sale of land there is the doctrine of marketable title however. This means that upon closing, the land would not have any defects of title in it, including easements. Therefore even though the contract stated that the land would not be sold with any encumbrances on it, this would be implied in the contract. Here at closing the land had an easement on it with the water company as well as B's easement as argued above. Thus at closing two easements existed on the land.

The problem however is that at closing, under the merger doctrine, the land contract merges into the deed and cannot be used to provide relief to a buyer.

Merger

Under the merger doctrine, the contract is said to merge into the deed and the buyer may not use the contract to recover for defects on the property. Here at closing the land sale contract that C and P entered into would be said to merge into the deed. Thus even though the contract was breached at closing, there could be no relief afforded under the terms of the contract. As such, P cannot make a breach of contract claim here.

Conclusion

In total, P's breach of contact claim would fail because the merger doctrine merged the contract into the deed and it can no longer afford relief to P.

Part B

The next issue then is the buyer's ability to recover under the warranty that was contained within the deed. Deeds contain covenants in them that allow for recovery to a buyer. Whether the buyer can recover depends on the type of deed and covenant contained in a deed.

Type of Deed

There are three kinds of deed: general warranty deeds, special warranty deeds, and quitclaim deeds. Quitclaim deeds do not provide any relief under a covenant. General warranty deeds provide relief under several different kinds of covenants. Here the deed that was given to P contained the covenant that stated there would be no encumbrances on the property, except the easement to Water Co. (W). Thus we must examine that covenant.

Covenant Against Encumbrances

The covenant against encumbrances states that at closing, there will be no encumbrances on property. This is breached immediately at closing and is considered a present covenant on the property. Here at the time of closing there were two easements contained within the property. Since both were on the property, they are both subject to the covenant against encumbrances.

B's Easement

As stated above B has a valid easement on the farm that P bought. Thus this easement will exist on the property and therefore at closing the deed covenant against encumbrances was breached. As such P has a valid cause of action against C for breaching this covenant with respects to B's easement. It does not matter that P saw B's using the road at the time of contract formation; notice is not material for purposes of the covenants. C specifically included a covenant against encumbrances in her deed. Therefore the presence of this one breached that covenant.

W's Easement

As explained above, an easement can be created by express deed. Here in 2013, C deeded an easement to W for water lines along the property. This was during the escrow period. Given that an express easement was likely created via deed to W, W had an easement on the property at closing. The covenant however specifically disclaimed liability for W's easement. Given that C specifically disclaimed the easement in her covenant, and P accepted closing at that time, P likely waived any argument she has that C breached this covenant.

Insofar as this was a present covenant the statute of limitations for it began to run at the time of closing. Therefore P should have raised any objection to this encumbrance at the time that it existed. However P went through with closing, specifically accepting the deed that contained a waiver with W's easement on it. Therefore P cannot likely recover for W's easement under the covenant in the deed.

P can attempt to argue for fraud or some other kind of defense to C's actions here but it is unlikely that such an argument would prevail. It does seem unfair that C would include in the contract a provision stating that there would be no encumbrances in the title, yet during escrow she actually put another on her property. But C specifically included a waiver of this encumbrance in the warranty in her deed. Therefore P would be charged with reading the warranty and seeing such waiver. If P did not like the waiver she should have raised the issue during closing and not accepted the deed as is. Therefore P likely waived any argument against W's easement given her acceptance of the deed with the waiver on it.

Remedies

Typically the remedy for a defect in title to land such as occurred here with B's easement is the difference of the value of the land with the easement on it and the value of the land without the easement on it. Here the difference in value of the land would be $5,000 as the facts indicate that the farm is worth $5,000 less with B's easement on it. Thus P can likely recover $5,000 from C for B's easement in violation of the covenant in her deed.

However P cannot recover the $10,000 that W's encumbrance decreases the

value of the land by since the covenant would not extend to that encumbrance as P likely waived it as stated above.

Conclusion

In total, P can recover under the covenant in the warranty deed for B's easement only and she would likely get only $5,000.

Overall Conclusion

P's cause of action against C for breach of contract would fail under the merger doctrine. Yet P can recover under her deed against C for B's easement on the property, but not W's easement.

QUESTION 2: SELECTED ANSWER B

1. Ben v. Polly

Easements

An easement is a right in land granted to a third party. Easement may be created expressly or impliedly. Implied easements may be created by prescription, by prior use, or by necessity. Easements can additionally be classified as appurtenant or in gross. Easements in gross have no dominant estate and are personal in nature and are generally non-transferable.

Appurtenant easements are those which burden one estate (servient estate) while also benefiting another estate (the dominant estate). Appurtenant easements run with the land to subsequent takers who take with notice of the easement. Notice can be actual, constructive, or inquiry. Actual notice arises when the subsequent taker is actually aware of the easement. Constructive notice arises when the easement has been properly recorded. When an easement has been properly recorded, takers are put on constructive notice of the existence of the easement whether or not they were actually aware of the easement. Lastly, inquiry notice arises when based on the facts or circumstances of the property a reasonable person would have inquired about the existence of any easements or interests in land.

Express Easement

An express easement must be in writing.

Here, in 1990, Al deeded an easement for a road along the north side of his farm to his neighbor Ben. The facts indicate that Al deeded the easement to Ben thus satisfying the writing requirement and establishing an express easement. Further, the easement will be classified as an appurtenant easement because Al and Ben are neighbors and therefore the easement concerns the land and benefits Ben's land by allowing an access road, while burdening Ben's land by granting access to a third party.

Additionally, the facts indicate that the easement decreased the fair market value of Al's land by $5,000 which further shows that the easement burdened the farm (the servient estate) thus establishing an easement appurtenant. Because the easement granted to Ben was an easement appurtenant, it will run with the land to successive takers who take with notice of the land.

Priority

Here, because Al deeded the property to Carol who recorded her deed prior to Ben's recording of his easement, it must be determined who has priority. There are three methods of recording statutes in the different jurisdictions: race, race-notice, and notice. If the recording statute applied in the jurisdiction does not apply, the courts will resort to the common law principles of first in time to determine priority. Under the shelter rule, a subsequent purchaser in land may take shelter and be protected under a recording statute, if a previous transferee of land would have otherwise been protected by a recording statute.

Race

Under a race notice jurisdiction, priority goes to the first to record. Here, Carol recorded her deed in 2009 and Ben did not record his deed until 2011. Therefore, between Ben and Carol, in a race jurisdiction, Carol would have priority over Ben. Polly would then be able to use the shelter rule, if it applies, to be protected by Carol's priority under the recording statute and thus Polly would have superior title to Ben. However, if the shelter rule does not apply between Polly and Ben, because Ben recorded his deed in 2011 and Polly did not record her deed until 2014, Ben would take priority and Polly would be burdened by the easement.

Notice

Under a notice recording statute, priority is given to subsequent bona fide purchasers who took property without notice. Notice may be actual, constructive, or inquiry. Actual notice arises when the taker actually knew of the interest. An individual is deemed to have constructive notice when a look into the grantor-grantee index would have put

them on notice of the interest. Lastly, inquiry notice arises when the facts or circumstances would have led a reasonable person to inquire about other interests in the land.

Under a notice statute, Polly would have priority over Ben if she could establish that she took the property without notice of Ben's interest. Ben, however, will successfully argue that Polly had notice of his easement both under constructive notice and under inquiry notice. Because Ben recorded his easement in 2011, had Polly looked at the grantor-grantee index for the parcel of land, she would've seen Ben's easements. Further, because Polly had observed Ben traveling on the road, she likely was put on inquiry notice to inquire into Paul's right to be on the land at issue. Further, because Al deeded the farm to Carol and there is no evidence that she paid any value for the farm, she is not a bona fide purchaser protected by the recording statute and Polly could not use the shelter rule in a notice jurisdiction.

Race-Notice

Under a race-notice recording statute, priority is given to the first bona fide purchaser to record without notice. Here, Carol recorded her deed in 2009, Paul subsequently recorded his deed in 2011, and Polly lastly recorded her deed in 2014. Because Carol likely is not a bona fide purchaser since she did not pay value for the farm, priority would go to the next bona fide purchaser who records without notice. However, because Carol has recorded her interest, Polly will argue that Ben was put on notice of the conveyance to Carol. However, because Ben received the deed in 1990 there was likely no requirement for him to look into the grantor-grantee index after he received the easement. However, if so, he will be deemed to have been put on notice. Further, Polly cannot claim priority over Ben because, as discussed above, she also took with notice to the property; thus in a race-notice jurisdiction, the priority will resort to common law rules of first in time and Ben will have priority over Polly.

Therefore, it will likely be determined in any of the three jurisdictions that Ben had priority over Polly and thus Ben will be successful in his action against Polly.

Easement by Prescription

Alternatively, Ben can claim that he acquired an easement by prescription. An easement by prescription requires the holder to take actually, openly, and continuously use the land in a manner hostile to the true owner, for the statutory period. At common law the statutory period for adverse possession was 20 years. Thus, Ben will argue that because he used the land continuously and openly from 1990 to present day, he has acquired an easement by prescription. However, because Ben used the road with permission by Al, his use will not be hostile and he will not succeed on such a claim.

2a. Polly v. Carol (Breach of Contract)

Here, Polly has commenced an action against Carol seeking damages for breach of contract based on the clause in Carol and Polly's written contract stating that "Seller shall covenant against encumbrances with no exceptions." Polly's claim for such a breach may lie wither in the concept of marketable title or a breach of an express condition of the contract.

Implied in any sale of land is a warranty that at closing the seller will convey marketable title. Marketable title warrants that there are no encumbrances on the property which are defined as any interest in a third party that diminishes the value or use of the land but is consistent with a granting of a fee interest in the property. While a seller must convey marketable title at closing, once a deed to the property is delivered and accepted the land sale contract merges with the deed and any rights to sue under the contract are extinguished and the buyer may only sue upon the deed.

Here, Polly has commenced an action against Carol seeking damages for the breach of the clause in the contract covenanting against encumbrances. Polly's claim may arise out of a claim that title was not marketable based on the easement to Ben or the easement to Water Co., or breach of the specific covenant in the agreement. While the easements to Ben and Water Co. are encumbrances which would warrant a breach of the contract or of marketable title, provided that Polly was unaware of them at the time

of signing, because the facts indicate that in 2014 Carol executed and delivered to Polly a warranty deed which Polly accepted, the land sale contract has merged with the deed and Polly can no longer sue on the contract and must sue on the deed. Polly may, however, have a claim under the deed which is discussed below.

2b. Polly v. Carol (Breach of Covenant Under the Warranty Deed)

Type of Deed

Upon the transfer of land, the seller may execute and deliver to the buyer one of the following three types of deeds: general warranty deed, a special warranty deed, or a quitclaim deed. The parties' rights under the deed depend on the type of deed granted to the seller. A quitclaim deed contains no covenants or promises to the buyer and is essentially an "as is" deed leaving the buyer with no rights to sue the seller. Alternatively, warranty deeds may include all or any of the six covenants of title including: the covenant of seisin, the right to convey, the covenant against encumbrances, general warranty, further assurances, and quiet enjoyment. Warranty deeds can be classified as either general warranty deeds or special warranty deeds. General warranty deeds are the most protective deed and warrant that neither the seller, or anyone in the chain of title, has breached the covenants included in the deed. Alternatively, a special warranty deed only warrants that the seller has not breached the covenants of title.

Here, Polly is commencing an action for breach of the covenant under the warranty deed. The facts indicate that the deed was a warranty deed containing only the covenant against encumbrances. Because the covenant was included in the deed, Polly may properly sue Carol for breach of the warranty.

Covenant Against Encumbrances

The covenant against encumbrances in a deed warrants that there are no unknown encumbrances on the property. Under title, encumbrances are defined as any right in a third party that diminishes the value or interferes with the use and enjoyment of the

land. Such encumbrances include mortgages, liens, easements, and covenants. Here, Polly is suing for breach of the covenant against encumbrances. There are two possible easements on the property which may be the subject of her claim, the easement to Water Co. and the easement to Ben. Because the deed expressly warrants against any encumbrances other than the easement to Water Co., Polly cannot successfully claim a breach of the covenant in relation to that covenant because it was expressly excluded in the deed. However, Polly may be able to assert a breach based on the encumbrance to Ben. The determination of whether Ben's easement is valid is discussed above and, provided it is valid, Carol will likely argue that Polly was put on notice of such easement based on inquiry notice because the facts indicate that she had observed Ben traveling on the road along the north side, but said nothing. Polly will argue that those circumstances alone did not give rise to suspicion that he claimed an interest in the property; however, considering she was aware of his passing over the land, it is reasonable to assume that a buyer would have inquired into the circumstances. Further, Carol will argue that even if she did not have inquiry notice of Ben's interest, she would have constructive interest of Ben's interest because he recorded his deed in the easement in 2011 before Carol and Polly had entered into the land sale contract. Therefore, while Polly can properly claim a breach of the covenant based on the warranty deed received by Carol, provided it is valid, it will likely be determined that she had sufficient notice of the easement.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2018

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2018 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility / Contracts
2.	Constitutional Law
3.	Real Property
4.	Criminal Law and Procedure
5.	Wills / Community Property

QUESTION 3

Len, an excellent chef, installed a smokehouse in his backyard three years ago to supply smoked meats to his friends. Len's neighbor, Michelle, enjoyed the mild climate and spent most of her time outdoors. She found the smoke and smells from Len's property very annoying and stopped having parties outdoors after receiving complaints from some of her guests. She asked Len multiple times to stop using the smokehouse, but he rebuffed her requests.

Len has frequently invaded Michelle's patio to retrieve his dog when it wandered from home. Michelle put up a "no trespassing" sign and a wire fence between their parcels. After the dog dug a hole under the fence, Len cut some of the wires and entered Michelle's property anyway, telling her that he had been fetching his wandering dog from her patio for at least ten years and wouldn't stop now.

Last week, the Town filed suit to condemn Michelle's land for a public park. It tendered to the court as compensation a sum substantially exceeding the prices of comparable parcels recently sold in the neighborhood. Michelle argues that the amount is insufficient because it is substantially less than a sum she turned down for her parcel a few years ago and it does not include compensation for relocation costs.

1. If Michelle sues Len regarding his continued use of the smokehouse, what claims, if any, may she reasonably raise, what defenses, if any, may he reasonably assert, and what is the likely outcome? Discuss.

2. If Michelle sues Len regarding fetching his dog, what claims, if any, may she reasonably raise, what defenses, if any, may he reasonably assert, and what is the likely outcome? Discuss.

3. Is Michelle likely to prevail in her argument for additional compensation from Town? Discuss.

QUESTION 3: SELECTED ANSWER A

Property/Tort (Nuisance), Torts (Trespass/SL), Property (easement by prescription), Con Law (Takings)

1. Smokehouse

a. Private Nuisance

A private nuisance is any substantial and unreasonable interference with the use and enjoyment of property.

i. Substantial

The interference must be substantial. An interference is substantial if it would be offensive or annoying to an average member of the community. This is an objective standard - there is no requirement that the plaintiff actually be annoyed nor is there any special allowance if he or she is actually annoyed or offended.

Here, M finds the smoke and smell annoying, so much so that she stopped having parties. This is, however, irrelevant.

It is unclear from the facts whether an "average" person in the community would be annoyed by a smokehouse. While many people find barbecue scents pleasant, just as many find them offensive. It is unclear how much smoke is produced by the smokehouse and how much of it blows into M's property. If the smoke is found to be of such volume that it makes it difficult or impossible for an average person to enjoy M's backyard, then there will be substantial interference. Given that M is annoyed to such a serious degree, it is likely that an average person would at least be annoyed or offended.

ii. Unreasonable

The activity causing the nuisance must be unreasonable. This is a balancing test. If the utility of the activity outweighs its interference with the plaintiff's property rights, it is

reasonable. Otherwise, it is unreasonable.

Here, M will assert that the smokehouse is unreasonable because it prevents her from enjoying the outdoors in the way which she had done for years. Furthermore, it prevents her from having her parties, and likely depreciates her property somewhat.

However, L will counter that the smokehouse enables him to hone his skills as a chef and provide smoked meats to his friends. He will argue that these activities are of substantial benefit.

However, because L's activities substantially interfere with M's enjoyment of her property, and because only L and his immediate circle of friends substantially benefit from the smokehouse, the smokehouse will likely be found to be unreasonable.

iii. Interference/Trespass

The activity must actually interfere with the use of land. Generally, this has been expressed as requiring that the activity have a trespass component. Interfering with access to light traditionally has not met this standard. However, the introduction of any particulate matter or sound waves on the plaintiff's property satisfies this requirement.

Here, L will claim that the smoke is only offensive in that it blocks light, and that therefore there is no interference.

M will counter that the smell component of the nuisance is fundamentally particulate in nature, because of how noses work (discussion omitted). Additionally, she will contend that the smoke consists of particulate matter, and that some of that particulate actually invades her property.

Because there is some degree of physical trespass, M will succeed in demonstrating interference

iv. Use and Enjoyment of Property

The substantial and unreasonable interference must directly interfere with the use of private property. Interfering with public spaces does not create a private nuisance.

Here, L's activity is interfering with M's personal use of her own property. Therefore, it interferes with the use and enjoyment of her property.

Assuming that a reasonable person would be annoyed at L's smokehouse and its resultant effluence, M could succeed in an action for private nuisance. (see statute of limitations, below)

Remedy

Generally, the remedy for a private nuisance is an injunction. If the activity is essential to a community's economic health or otherwise of exceptional utility, money damages may be awarded instead.

Here, L's smokehouse serves limited economic purpose, and does not benefit the community as a whole. Therefore, M will likely receive an injunction.

b. Public Nuisance

Public Nuisance is any activity that interferes with the health or safety of the public at large.

i. Standing

Public nuisance has strict standing requirements. In order to collect under public nuisance, a private individual must demonstrate that they have suffered a harm that is different in kind than the general public. A harm different in degree is insufficient.

Here, M will claim that she has uniquely suffered from the smoke and odor, and that she has uniquely stopped having parties. However, it is extremely unlikely that the smokehouse only deposits smoke and odor on her property, and if it does, there is no effect on the community at large (and as such there is no public nuisance regardless). Furthermore, the inability to have parties is a result of that same harm, merely an intensifier, rather than a unique or different harm. Therefore, M lacks standing to bring a public nuisance cause of action.

c. Statute of Limitations

The statute of limitations serves as an absolute bar to legal action. For most causes of

action, the statute of limitations is one year from the time the cause of action arises. However, continuous actions can be recovered for any violation within the previous year.

Here, L started using his smokehouse 3 years ago. While this initial use would be outside the statute of limitations, L has used the smokehouse continuously. M will still be able to obtain an injunction against current and future use.

2. Fetching the Dog

a. Trespass

A trespass is any physical occupation of real property without permission.

i. Intent

A trespass only occurs if the trespasser actually intended to occupy the land. The trespasser's knowledge about the ownership of the land is irrelevant. A mistaken belief that they had the right to enter the land is not a defense. In essence, trespass is a strict liability offense.

Here, L entered M's property past a fence with a no trespassing sign. L intended to enter the property, so the intent requirement is met.

ii. Physical Presence

The trespasser must be physically present on the property.

Here, L actually entered M's property. The physical presence test is met.

iii. Without Permission

The property owner must not have consented to the trespass, impliedly or expressly.

M did not expressly consent to the trespass. Any implied consent from the adjoining nature of their properties was withdrawn when M constructed the fence. M did not consent to the trespass.

iv. Damages

There is no requirement of actual harm. Nominal damages are recoverable.

Here, M can recover nominal damages for L's trespass. Additionally, she can recover from the actual harm she suffered when L cut the wires on the fence (cost of repairs).

b. Defenses

i**. Necessity**

a. Private Necessity

Private necessity exists when exigent circumstances cause the trespass. For example, docking a ship on a storm constitutes a private necessity, or swerving to avoid an obstacle on the road. Private necessity allows the avoidance of nominal damages and ejectment.

Here, L trespassed in order to retrieve his dog. L needed to trespass in order to ensure that his dog was safe and that it did not cause any damages to M's property without his supervision, since he could be held liable for such damages. As such, private necessity exists, and M cannot eject L or collect nominal damages.

I. Private Necessity - Limitations (Actual Damages)

Private necessity fundamentally involves a balancing of the risk of not trespassing and harm inflicted by trespassing. The trespasser has the ultimate decision on the balance of these factors. As such, the trespasser is traditionally held responsible for any actual damages that occur as a result of the trespass.

Here, L caused actual damages when he cut through M's fence in order to retrieve his dog. As such, L is responsible for actual damages despite the necessity.

b. Public Necessity

Public necessity exists when the trespass is necessary to prevent harm to the public at large. Unlike private necessity, the landowner cannot collect actual damages from public necessity.

Here, the necessity was solely to protect L's dog and prevent L's liability. There was no

benefit to the public at large, and therefore no public necessity. L remains liable for actual damages.

ii. Easement

a. Implied Easement by Prescription

Easements grant the dominant estate (or a party in limited circumstances) the right to use the subservient estate for limited purposes. An implied easement has no writing requirement. An easement by prescription functions similarly to adverse possession of a property, but only for a limited use. In order to establish that there is an easement by prescription, the seeker of the easement must demonstrate **(1) continuous use of the subservient estate**, **(2) for a statutory period, (3) that was open and notorious, and (4) hostile**. Unlike in adverse possession, there is no requirement that the easement holder have had exclusive use over the property, since the easement does not eliminate the property owners' rights entirely.

i. Continuous Use

The use must have been continuous throughout the statutory period. It need not have been constant, but must have been reliable enough for the scope of the easement sought.

Here, L claims that he had been fetching his dog for 10 years. Because he did so "frequently", this is likely continuous use.

ii. Statutory Period

The use must have lasted the statutory period (usually 7-14 years)

Here, it is unclear what the statutory period for adverse possession is in the jurisdiction. It is likely 10 years or less just based on average AP statutes. As such, the statutory period requirement is met.

iii. Open and Notorious

The use must have been such that an observant landowner would be aware of it. In essence, the landowner must have been put on inquiry notice of the use.

Here, L invaded M's patio. For 7 of the 10 years, M regularly spent time outside and

likely observed his actions. Furthermore, even after M abandoned the outside due to the smoke, she should have observed L walking on her patio. As such, the open and notorious requirement is met.

iv. Hostile

The use must have been without the permission of the landowner. Otherwise, there is a freely revocable license.

Here, it is unclear whether or not M consented to the use prior to erecting the fence.

b. Right to Protect Easement

An easement holder has the right to protect their easement from interference, even from the landowner. This includes the dismantling of any barrier erected as an impediment to that easement.

If L had not received permission to trespass on M's property at any point, then he likely has an easement (assuming the statutory period is met). However, if he had permission to retrieve his dog, then there will be no easement.

If there is an easement, L is not vulnerable to nominal damages or ejection for trespass, so long as the trespass is for the purpose of retrieving his dog. Additionally, L has the right to protect his easement by demolishing or circumventing barricades such as M's fence. As such, he is not liable for actual damages either.

3. Town's Suit

Government entities have the right to "take" property, providing that "just compensation" is provided. In order to take, the government must merely show that the taking is rationally related to a legitimate government purpose.

Town is a government entity.

a. Legal Taking

If the taking was illegal, than M may be able to retake her property or receive additional damage. As above, a taking must be rationally related to a legitimate government purpose. Here, T took the property for the purpose of building a public park. Building a public park is a legitimate purpose. Additionally

b. Just Compensation

Generally, the compensation must merely be equal to the full market value at the time of the taking, including the value of any improvements. Fair market value can be determined by appraisal or by the sale of comparative properties.

Here, the government determined the FMV by paying based on comparable properties in the area. Assuming that those properties actually were comparable, including the cost of any improvements, the compensation was just. If M can demonstrate that the other properties were defective, she can recover more.

However, the prior offer to purchase M's property is likely not relevant. Current FMV is the indicator for just compensation, not prior FMV. If the increased value was due to mineral rights or something, than M can likely recover more, but otherwise she is probably out of luck.

c. Relocation Costs

The government may be liable for losses resulting from reliance on the assumption that there would be no taking. For example, the government may be required to compensate a party for the cost of recent improvements. However, the government is not responsible for other costs, such as the costs of finding a replacement property.

Here, M is seeking relocation costs. However, these costs were not incurred on reliance of the assumption that her property would not be taken. Additionally, they were not incurred based on any recent improvement to her property. They are the types of cost incurred in almost every taking, and as such M is not entitled to additional compensation.

QUESTION 3: SELECTED ANSWER B

1. Whether Michele may assert any claims against Len for his smokehouse.

Michelle is most likely to succeed against Len in a claim for private nuisance. To state a claim for private nuisance, the plaintiff must allege that the defendant's conduct constitutes a substantial and unreasonable interference with the use and enjoyment of her property. Interference is substantial if it would be annoying or offensive to an average member of the community. Interference is unreasonable if the harm to the plaintiff outweighs the benefit of defendant's activity. If there are other members in the community, Michelle may also make a claim for public nuisances. However, it is harder to plead these threshold elements. A claim for public nuisance requires that defendant's activity constitute a substantial and unreasonable interference with the use and enjoyment of the property of the public at large, and at least one homeowner suffers specific injury that is distinct from the common injury suffered by the community. Since the facts do not support a public nuisance claim and do not allege a community of homeowners, Michelle is best off bringing a claim for private nuisance.

What is the nuisance?

Michelle will argue that the smokehouse Len installed in his backyard is a nuisance because, while it smokes the meat, it produces smoke and smells that waft over to Michelle's property and prevent her use and enjoyment of it. Len installed the smokehouse three years ago and he uses it to supply smoked meats to his friends. Len is an excellent chef, so presumably his smoked meats are in high demand. Michelle enjoys the climate near her home and enjoys spending time outdoors. She used to have parties outdoors, but she stopped doing that after she received complaints from her guests. Even though she has asked Len to stop using the smokehouse, he has

refused.

Based on these facts, Michelle should argue that the smoke and smells from Len's smokehouse are a substantial and unreasonable interference with the use and enjoyment of her property because they prevent her from spending time outside.

Is it a substantial interference?

Interference is substantial if the interference would be annoying or offensive to an average person in the community. Based on these facts, the smoke and smells from Len's smokehouse is substantial. An interference is not substantial if it is annoying or offensive to the plaintiff because of her particular traits or sensitivities. Here, nothing in the facts suggests that Michelle has specific sensitivities. Moreover, she has guests over and they also find the smells and smoke to be annoying and they find it unpleasant to be outside. The smokehouse not only prevents her from having outdoor dinner parties (which Len will argue are a specialized use of the property and do not give rise to nuisance) but from spending time outdoors as she enjoys.

It is important for Michelle to focus on the harm that she suffers as an average member of the community. If she alleges that the harm is that she cannot have outdoor dinner parties anymore, her claim for nuisance may fail because Len will argue that the nuisance arises from her particular circumstances. It is important for Michelle to show that having a few friends over for dinner is a regular part of being a homeowner.

Michelle's strongest argument is that the smoke and smells prevent her from being outside and enjoying her property. She should use her friends as evidence that the smoke and smells are offensive to an average person.

Is it an unreasonable interference?

Interference is unreasonable if the harm to plaintiff outweighs the benefit to defendant. Here, the harm Michelle likely outweighs the benefit to Len. Michelle can no longer enjoy the outdoors on her property, something that she enjoys doing. Therefore, she has been deprived of the use and enjoyment of her property. Michelle will argue that Len's harm is slight - she is merely asking him to stop using the smokehouse in his backyard. Although Len is a chef, the facts do not indicate that he's smoking the meat for commercial gain or as part of his livelihood. Len is merely providing the smoked meats to his friends, gratuitously. Accordingly, the harm to Len is slight if he has to stop using the smokehouse. Len will argue that the smokehouse cost a lot of money, and he will be harmed greatly, because he will not be able to reap the benefit of his investment. On balance, Michelle will probably prevail that the interference is unreasonable.

Defenses

Len will probably assert the defense of laches and argue that too much time has passed for Michelle to assert this claim. He will argue that he installed the smokehouse 3 years ago, and this is the first time that she is alleging it is a nuisance. In response, Michelle will argue that she tried to live with it, but after three years, it was clear that the smokehouse would permanently deprive her of the use and enjoyment of her property. She will also bring up that she asked Len, multiple times, not to use the smokehouse, and tried to arrive at a compromise. Len, however, rejected her attempts to deal. Since she and Len were not able to resolve it privately, she is finally bringing suit. Len will probably not prevail on his defense of laches.

Outcome

Michelle is likely to prevail on her private nuisance claim. Since the remedy for nuisance is often an injunction, or a court order telling a person to act or not act, the

court may balance the harms. Instead of granting a complete injunction against Len using the smokehouse, the court may limit his use so that it does not substantially and unreasonably interfere with Michelle's use and enjoyment of her property. An injunction may permit Len to use the smokehouse for a certain number of hours or to give Michelle notice that he will use it. An injunction may also order Len to install some technology to limit the smoke and smells coming from the smokehouse. While Michelle will likely prevail on her claim, Len's own right to the use and enjoyment of his property will probably block her from obtaining a complete injunction.

2. Whether Michelle may assert any claims against Len for fetching his dog from her patio.

The issue here is whether Michelle may assert a claim against Len for trespass for fetching the dog (not for the dog itself), and whether Len has any valid defenses.

The elements of trespass are 1) intentional act, 2) entering the land of another, 3) causation, 4) damages. The interference with the property right is sufficient for damages. The facts state that Len's dog had been entering the property for years and that Len repeatedly entered the property to fetch the dog. Michelle will argue, on these facts, she has stated a valid cause of action for trespass. Len intentionally enters her land and retrieves her dog. Her damages/injury is the injury to her property right and her right to keep trespassers from her property. Len's conduct is the actual cause of her injury.

Len's Defenses

Privilege

Len will argue that his entrance onto the land was privileged because he was retrieving

his property, the dog. However, when an animal is on another's property, the owner is not privileged to go and retrieve it himself without giving notice to the landowner. Len's entrance onto the land would only be privileged if he informed Michelle that his dog was on her property and he intended to retrieve. She would then be compelled to allow him to retrieve it at a reasonable time and in a reasonable manner. The facts state that no such communications occurred. Therefore, Len's entrance onto land was not privileged.

Prescriptive easement

Len will argue that he has an easement by prescription to enter Michelle's property and retrieve the dog from the patio. An easement is a nonpossessory right in land. Here, Len will argue that there is an easement appurtenant. His land is the dominant tenement, and Michelle's land is the servient tenement. He has a right to use the servient tenement within the scope of the easement.

An easement by prescription is an easement that is acquired through use over time, and the elements are similar to those of adverse possession. The use of the land must be continuous for the statutory period (usually the same as adverse possession), open and notorious, and hostile to the landowner. Here, the facts state that Len has been entering the property and retrieving the dog from the patio for the last 10 years. In many jurisdictions, ten years is the applicable period for the statute of limitations. Therefore, the first element is likely satisfied. Second, his entrance has been open and notorious. First, Michelle knows that Len regularly enters her property, because sometimes the dog is there and sometimes it is not. Based on Len's statement to Michelle, he does not try to keep it a secret that he regularly enters her property. Additionally, Michelle installed a fence and 'no trespassing' signs, showing she was aware of the trespass. Therefore, the open and notorious factor has likely been satisfied. Finally, the entrance is hostile because Len enters knowing it is not his land and knowing that Michelle considers him a trespasser.

Michelle may argue that Len merely had a license to enter her property and remove the dog from the patio, and that she revoked his license to do that when she built the fence and put up the signs. A license is not a right in land, it is merely permission to enter the land of another. Michelle will argue that she implicitly granted Len a license to retrieve the dog from the patio, however she chose to revoke that license, and built a fence so the dog would not enter her property and Len would not retrieve it. Len then clipped the fence and trespassed onto her property.

Michelle may not succeed in an action alleging that all of Len's entrances onto her land constituted trespass. However, she will probably prevail in an action for any trespass that occurred after Len clipped the fence and re-entered her property. Moreover, clipping the fence on Michelle's property constitutes trespass to chattels (interference in the use and enjoyment of personal property) which is actionable.

3. Whether Michelle is likely to prevail in her argument for additional compensation from Town.

The issue here is whether Town has provided Michelle with just compensation for her property.

Takings

Under the 5th Amendment, the government is permitted to condemn private land for public use so long as it provides the landowner with just compensation. Just compensation is measured as fair market value at the time of condemnation. Here, the condemnation is likely valid because the government is taking the land for a public use, to create a public park. The facts state that Town has offered Michelle a sum "substantially exceeding the prices of comparable parcels recently sold in the neighborhood." Generally, the way to determine fair market value for real property is to look at recent sales of similar parcels in the area. Here, Michelle will receive even more

than the sale price of comparable lots. While this isn't a guarantee of fair market value, it makes it likely that she is receiving fair market value. However, Michelle will still point out the sum she turned down a few years ago. The fact is that the market a few years ago is not the current market, and a pass offer does not affect the value of property under takings law. She will also argue that the price is insufficient because it doesn't provide compensation for relocation. However, the Takings Clause does not require the government to compensate landowners for relocation costs. Accordingly, Michelle's challenges to the Town's taking will probably not prevail. If she wants to challenge the purchase price, she must have her land appraised and sue the government in court, arguing that what they offered her is below market compensation.

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Question Number	Subject
1.	Wills and Trusts / Community Property
2.	Torts
3.	Real Property
4.	Evidence / Civil Procedure
5.	Professional Responsibility

QUESTION 3

Lois rented a furnished apartment in her building to Tammy, a medical student, for nine months, beginning June 1. Tammy prepaid the first month's rent. When Tammy arrived at the apartment on June 1, Ralph, the prior tenant, was still there despite the fact Ralph's rental term had ended on May 15. Tammy complained to Lois and Lois was able to evict Ralph by June 15. Tammy took possession of the apartment on June 16.

The apartment above Tammy's was occupied by Coco, a member of an up-and-coming band, The Gyrations. The band's daily rehearsals interfered with Tammy's studies so much that she complained repeatedly to Lois about the continuing noise. On July 15, The Gyrations were arrested at Coco's apartment for disturbing the peace. After that Tammy was spared the noise from rehearsals.

Beginning July 16, the shower in Tammy's apartment delivered only cold water. Tammy complained, and Lois promptly hired a plumber to fix the problem. The repair only worked for a week. Tammy was too busy with her studies to tell Lois.

On August 30, Tammy's stove in her apartment stopped working. On August 31, Tammy, disgusted with all these events, knocked on Lois's door, gave the key to Lois, and said, "This place is a zoo; I wouldn't live here if you paid me!" Lois took the key and said, "Sure, okay, if that's how you feel." Tammy stopped paying rent and never returned to the apartment.

Lois commenced a lawsuit against Tammy for breach of her lease and special damages for past due and prospective rent.

What arguments may Lois reasonably raise in support of her lawsuit, what counterclaims and defenses may Tammy reasonably assert, and what is the likely outcome? Discuss.

QUESTION 3: SELECTED ANSWER A

Rights and Duties of Lois and Tammy

Duties of Landlord

In general, landlords owe tenants a duty to deliver possession. Although the traditional rule required only the delivery of constructive possession, such as by providing a key to the property, most states follow the modern rule of requiring the delivery of actual, physical possession. Lois has therefore breached this duty by failing to evict or otherwise remove Ralph, the prior tenant who became a holdover tenant after the term of his lease ended. Although Tammy was able to take possession by June 16, her lease started on June 1. Ralph's lease had ended on May 15, and Lois failed to evict him for more than two weeks before Tammy's lease began. Tammy therefore has a valid claim/defense against Lois for being constructively evicted from her apartment from June 1 through June 15. Tammy should not be liable for payment of rent during this period.

Landlords in residential leases also generally have a duty to make repairs. Even if a lease places this duty on the tenants, courts will still find that it rests with the landlord. Landlords are permitted to engage professionals to make repairs - there is no obligation that they do so themselves. Lois likely satisfied this duty with respect to the hot water issue by immediately hiring a plumber. Lois was not made aware of the faulty stove (as discussed below) and therefore could not have reasonably arranged for its repair, such that she should not be found to have violated this duty.

Please see below (implied warranty) for further discussion of repairs.

Covenant of Quiet Enjoyment

Landlords also generally are required to comply with the covenant of quiet enjoyment. This doctrine requires that landlords not interfere, or permit others (such as other tenants in a multi-unit property) to interfere, with one's right to use, possess and enjoy their possessory interest. Tammy will argue that Lois breached this covenant by permitting *daily* band rehearsals in the upper floor apartment, as Lois had the right to stop such rehearsals in her capacity as landlord. Although Lois may respond that Tammy suffered only because of her unique study requirements as a medical student, such that Lois did not cause or permit the Gyrations to surpass an objective level of loudness so as to interfere with Tammy's quiet enjoyment of her property, this is a failing argument because the Gyrations were all arrested in the upper apartment during a rehearsal for disturbing the peace. In general, a tenant can suffer a breach of the covenant without giving rise to an arrest for disturbing the peace, but that should be completely sufficient for Tammy's claim. Moreover, Lois was on notice of the issue because Tammy had repeatedly complained to her.

Because Lois likely breached this covenant, Tammy could seek remedies. A tenant that has suffered a breach of this covenant must give notice to the landlord to take remedial action. Failing any remedial action, the tenant is permitted to give notice of her constructive eviction and cease paying rent. See below for discussion of damages. Although Tammy may be likely to reduce her rent during this period, the grounds for constructive eviction ceased once the Gyrations were arrested.

Implied Warranty of Habitability

Residential leases only are subject to an implied warranty of habitability. This requires that the landlord deliver the property in a condition fit for ordinary residential use. This implied warranty generally requires landlords to provide electricity, heating, hot and running water. A tenant must give notice to the landlord if a breach has occurred, and they may either refuse rent during the period of breach, make repairs and deduct the costs from their rent, or vacate the premises until remedied. Here, the hot water failed

in Tammy's apartment on July 16. T promptly gave notice to Lois as required, and Lois promptly hired a plumber to repair the problem. The problem, however, occurred again in one week. Again, Tammy was obligated to give Lois notice of the issue. Tammy failed in this regard because she was too busy with her studies. Because Lois was not on notice of the problem (that she reasonably would have believed had been solved the previous week), Lois should not be found to have violated the implied warranty with respect to the water.

Tammy may also allege that Lois violated the implied warranty because the stove failed. This is not as critical a failure as a lack of heating or electricity, and the implied warranty does not typically extend to include household appliances, even those useful for making food. Further, although the stove did break, Tammy never informed Lois of that fact. Rather, Tammy instead moved out the next day without mentioning the stove, such that Lois should not be found to have violated the warranty.

Duties of Tenant

In general, a tenant has two key duties: pay rent and not commit waste. Lois may bring a claim against Tammy on both grounds.

Waste

First, Lois may argue that Tammy committed waste by failing to inform her of the second time the hot water failed. There are three types of waste: affirmative (tenant intentionally destroys or reduces value of property), permissive (tenant's negligence causes damage or otherwise reduces value of property), and ameliorative (tenant alters the property, even in an economically valuable way, without landlord's permission). Here, Lois may claim that Tammy committed permissive waste because Tammy was aware that the hot water did not work but did not take any steps to inform Lois or otherwise fix the issue because she was too busy. Her alleged negligence may cause

potential and ongoing problems with the water if it remains unfixed. Lois may therefore seek damages to satisfy this waste claim.

Rent

As noted, a tenant has the duty to pay rent. As discussed above, however, there are instances in which a tenant may refuse to pay, reduce, or otherwise withhold (such as in an escrow account) rent.

General

The facts indicate that Lois and Tammy entered into a lease or tenancy for years. Despite its name, this lease is simply a lease for a fixed period, such as nine months in this case. (Leases, because they are interests in real property, must generally be in writing to satisfy the statute of frauds even if under one year in length). This lease is different from a periodic lease, such as month-to-month, because it has a definite end-point that the parties have agreed upon.

Termination of Lease

A tenancy for years will automatically terminate at the expiration of its term. Continued tenancy following the lease can give rise to a periodic tenancy or a holdover tenancy. A lease can also terminate through an action for eviction or by mutual agreement of the parties. Here, Tammy will allege that the lease terminated instead on August 31. Tammy will assert that because she made evident her desire to end the lease by saying the "place was a zoo" in which she could not be "paid" to live, and because Lois responded by saying "sure, okay" and taking back the key, the parties mutually agreed to terminate the lease on August 31. Lois may aver that her expression was not an affirmative agreement to end the lease but rather a surprised reaction to "how [Tammy] feels," such that the lease should not be viewed as terminated. But in light of Tammy's

express statement that she would not continue living there and turning over the key, Lois's actions may be seen as an agreement by silence, such that any reasonable landlord would challenge it if they wanted to. Because Tammy stopped paying rent and never returned to the apartment, she will argue that she does not owe any more rent. Regardless of the ultimate disposition of Tammy's defense, Lois is required to mitigate damages by taking reasonable steps to rent out the property once Tammy leaves, but Lois will not be responsible if she cannot find a suitable renter after taking reasonable steps.

Damages

As discussed above, Tammy was within her rights to withhold rent because of her constructive eviction during Ralph's holdover tenancy. Tammy would then be responsible for rent from June 16 onward. But because Tammy also has a valid claim for breach of the covenant of quiet enjoyment from June 16 through July 15. Tammy's rent obligations would thus begin on July 15 instead. Tammy would not have a claim to breach of the implied warrant with respect to the water or stove as discussed, so her obligation to pay rent would continue from July 15 through the end of her lease. The lease ended at earliest on August 31 as discussed above. But because Tammy paid only one month's advance rent, she is still at least a half-month behind in her rental payment. Further, Tammy's claim to being constructively evicted appears either irrelevant or moot on August 31: the hot water does not work likely as a result of Tammy failing to inform Lois; Tammy never gave notice to Lois about the stove; and the issue with the Gyrations stopped more than a month previously. Tammy's constructive eviction claim has been resolved after which she continued living in the apartment, and Tammy has no other grounds to terminate the lease. But if the lease is found to have mutually terminated, Lois can still claim back rent but not prospective rent.

QUESTION 3: SELECTED ANSWER B

Lois's Claim Against Tammy

Type of Lease

A term of years lease is one that terminates on a specific date.

Here, the lease was for a specific nine month period starting on June 1. This makes it a term of years lease.

Duties of Tenant

In a term of years lease, the tenant is obligated to pay rent for the period of the lease unless that duty is relieved by some breach of duty by the landlord. Traditionally, the duties under a lease were independent of each other such that a breach of one duty would not relieve the other of their obligations. However, modernly, the duties under a lease are dependent on each other. Therefore, if the landlord breaches her duties under a lease, that may relieve the tenant of her obligation to continue paying rent. If, however, the tenant breaches her duty without an appropriate reason, the landlord is entitled to damages for the unpaid rent for the remainder of the lease term, subject to the landlord's duty to mitigate losses by re-letting the premises.

Here, Lois will argue that Tammy breached the lease improperly and without justification and therefore, Tammy is liable to Lois for the rent for the remainder of the lease term. Tammy paid rent for three months until her abandonment of the lease on August 30. This would leave a remaining 6 months of rent that Tammy would owe to Lois.

Surrender

When a tenant breaks a lease and surrenders, it generally must be in writing if the lease term was over 1 year. Because this lease was for only nine months, the surrender did not need to be in writing.

When a tenant surrenders the lease, and the landlord accepts the surrender, the landlord owes a duty to mitigate losses. Here, Lois responded to Tammy's surrender by

stating, "sure, ok, if that's how you feel." This would imply acceptance of the surrender, and would obligate Lois to mitigate her damages by attempting to re-let the premises.

Tammy's Defenses

Tammy's duty to pay rent for the remainder of the term may be mitigated or eliminated if she can show that Lois breached her duties under the lease.

Duties of Landlord

Duty of Possession

A landlord owes a duty to deliver possession of the premises to the tenant. Traditionally, this simply required providing the right to possession, but not actual possession. However, modernly, the landlord is required to deliver actual possession of the property and is required to remove any holdover tenants prior to the commencement of the lease.

Here, Lois did not provide possession of the premises at the beginning of the lease. Instead, Ralph was in possession of the property at commencement of the lease. Lois did finally remove Ralph 15 days later and Tammy was able to possess the premises. Technically, Lois was in violation of her duties under the lease by failing to provide possession. This could have given Tammy the opportunity to break the lease, however, she did not pursue this action.

Duty to repair

Generally, there is no general duty of a landlord to repair or maintain the property. However, there are special duties in relation to the duty of habitability and quiet enjoyment as discussed below which may create a duty to repair.

Implied Warranty of Habitability

In every residential lease, a landlord owes an implied duty of habitability to make the premises suitable for human habitation.

Here, Tammy may be able to establish that Lois breached this duty when the shower started delivering only cold water, or when the stove stopped working. However, it is unlikely that either of these issues would render the apartment unsuitable for human habitation. In addition, when Tammy notified Lois of the shower issue, she promptly sent a plumber to fix the problem. And, when the fix did not work, Tammy failed to notify Lois again of the issue.

With regard to the stove, Tammy never notified Lois of the problem so she had no opportunity to repair

Because the issues were minor and likely did not render the facility unsuitable for human habitation, and because Tammy failed to pursue the issue and notify Lois of the continuing problems, it is unlikely that a court would find that Lois was in breach of the warranty of habitability in such a way that it would allow Tammy to terminate payment of rent.

If, a court did find these issues to be sufficient, however, Tammy's obligation to pay rent may have been terminated, or Tammy could have remained and sued for the cost or repair, or withheld the cost of repair from her rent.

Implied Warrant of Quiet Enjoyment

Implied in every lease is a warranty of quiet enjoyment where the landlord will not disturb the tenant from their ability to use and enjoy the property. A breach of this covenant may exist when the landlord fully or partially evicts the tenant, or if the landlord fails to repair a condition that significantly impairs the tenant's ability to use and enjoy the property.

Constructive Eviction

There are no facts to show that there was an actual eviction of Tammy, such that Lois prevented Tammy from using all or part of the property. However, Tammy may argue constructive eviction under two theories. Constructive eviction exists when 1) there is a wrongful action by the landlord such as a breach of duty, 2) the tenant timely notifies the landlord of the issue, 3) the breach or issue significantly interferes with the tenant's use and enjoyment of the property, and 4) the tenant abandons the property.

The Band

First, Tammy may argue that the band practices of The Gyrations significantly interfered with her use and enjoyment of the property because the practices interfered with her ability to study. However, it is unlikely that Tammy will succeed on this claim because, although Tammy complained repeatedly about the issue to Lois, it is not totally apparent that Lois breached her duty to Tammy. The band was removed from the premises only one month after Tammy moved in. It is not immediately clear whether their removal was instituted by Lois or another tenant. However, it is not immediately clear from the facts that Lois failed to heed Tammy's complaints about the band. In addition, even though the band interfered with her use and enjoyment of the property, Tammy failed to abandon the property at the time. She did not abandon the property until a month and a half later, after the band had been removed and her enjoyment was no longer disturbed.

Therefore, it is not likely that Tammy can show constructive eviction due to the band's noise because she did not abandon the property in a sufficient time, and the issue was remedied shortly after it began.

Issues in the Apartment

Second, Tammy may assert constructive eviction due to Lois's lack of repairs of the issues in the apartment which substantially interfered with her use and enjoyment of the property. However, this theory is also not likely to succeed because, as discussed above, Tammy failed to notify Lois of the fact that the shower continued not to work, or that the stove was broken. When the stove stopped working, she simply moved out without notifying Lois or giving her an opportunity to fix the issue. Without proper notice,

Lois could not have breached her duty to Tammy because she did not know of the issue.

Because there was lack of notice and lack of a breach of duty by Lois, it is unlikely that Tammy will succeed on a claim of constructive eviction against Lois.

Lois's Damages

Here, the damages to which Lois is entitled are based on her duty to mitigate. Contract damages must be causal, foreseeable, certain, and unavoidable. Under a lease contract, the landlord owes a duty to mitigate damages by re-letting the premises. In addition, the landlord is only entitled to those damages that are certain and unavoidable.

Therefore, Tammy should not be liable for any future rent on the premises if Lois was able to re-let the premises to someone else in order to mitigate her damages, and she definitely is not liable for any prospective rent that she did not owe under the lease because those prospective rent damages were not foreseeable from the lease contract. In addition, the prospective rent damages are likely not certain.

The facts do not indicate whether Lois attempted to re-let the premises. However, if she failed to do so, Tammy may assert this as a defense in order to reduce the damages that she owed to Lois under the lease.

Statute of Frauds

The statue of frauds requires that contracts creating interests in land, including leases over one year, must be in writing.

Because this lease is for nine months, it is not subject to a statue of frauds defense. Therefore, if it was not in writing, this defense could not be asserted.

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ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2020

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the October 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Business Associations
3.	Real Property
4.	Criminal Law and Procedure
5.	Remedies

QUESTION 3

Andrew, a widower with three adult children (Bobby, Carol, and Dylan), owned a forty-acre parcel of wooded land called Havenwood. In 1988, Andrew by written deed validly conveyed the north half of Havenwood to his brother Elmo.

In 1989, Andrew died, leaving a valid will that gave "all my real estate to Bobby, Carol, and Dylan as joint tenants with right of survivorship." Carol and Dylan lived out of state. Bobby lived near Havenwood.

In 1990, without permission from anyone, Bobby cut down some trees and prepared a number of campsites on both the north and south halves of Havenwood. He sometimes used one campsite himself and rented out the other sites during the spring and summer each year. Bobby paid taxes on the entire property using the rental fees he collected, keeping the remaining profits.

In 2017, Dylan asked Bobby about the land and Bobby told Dylan that it was none of his business. Bobby said, "I've improved the land and, anyway, I'm the youngest and it will be mine in the end." Dylan then by written deed validly conveyed his interest in Havenwood to Fred, his friend, as a gift. Dylan told Carol what had happened, and she had a written deed drawn up validly conveying her interest in Havenwood "from Carol as a joint tenant to Carol as a tenant in common."

In 2018, Bobby died leaving a valid will that gave his entire estate to Sam, his son. Sam continued renting the campsites and paying taxes, keeping the remaining profits, and occasionally using one campsite himself, just as his father had done.

1. What right, title or interest in Havenwood, if any, are currently held by Elmo, Fred, Carol and Sam? Discuss.

2. Are any claims available to or against Sam for payment of taxes or recovery of rental fees? Discuss.

QUESTION 3: SELECTED ANSWER A

Will Requirements

An attested will must be (1) in writing, (2) signed by the testator with testamentary capacity and intent, and (3) jointly witnessed by 2 witnesses who understand the testator's act.

Here, the facts state that A's and B's wills were valid. These requirements are met.

Deed Requirements

To be valid, a deed conveying real property must (1) be in writing, (2) be signed by the grantor, (3) identify the land to be transferred, (4) identify the grantee, (5) contain language of the grantor's present intent to transfer, and (6) be delivered to and accepted by the grantee.

Here, the facts state that all of the deeds at issue were valid, so there is no problem with the above requirements.

Adverse Possession (AP)

An individual may acquire ownership of land through AP if (1) their possession of the land is exclusive; (2) their possession is continuous for the statutory period; (3) their possession is hostile, i.e., under a claim of right; and (4) their possession is open and notorious. These elements are discussed below.

1) Interests in Havenwood (H)

The parties' interests in H changed as a result of several events from 1988 to 2018. Each event is discussed in turn.

1988 - Transfer of North Half (North H) to Elmo

In 1988, A - who appeared to own H in fee simple, executed a written deed validly conveying North H to his brother Elmo.

After this action, A held the southern half of H (South H) in fee simple. Elmo held North H in fee simple.

1989 - A's Transfer to Bobby, Carol, and Dylan

In 1989, A transferred "all of [his] real estate to Bobby, Carol, and Dylan as joint tenants with a right of survivorship."

As discussed above, all A had to transfer was his fee simple interest in South H.

Joint Tenancy

A joint tenancy is a form of joint ownership of property. To create a joint tenancy, the tenants must have the unities of possession, interest, time, and title. The deed conveying the property must also state that it is with the right of survivorship.

Unity of possession exists when all joint tenants have an equal right to possess the land. Here, A's will gave Bobby (B), Carol (C), and Dylan (D) the land and did not indicate that they would have anything but equal possessory rights, so this unity is met.

Unity of interest means that all joint tenants have the same interest in the land. Here, A's will conveyed the land to Bobby, Carol, and Dylan equally so they each have the

same interest in the land as joint tenants.

Unity of time and title require that the joint tenants' interests must have been created at the same time and in the same conveyance. Here, Bobby, Carol, and Dylan all received their interest at the same time via the same conveyance in A's will.

Finally, A's will expressly stated that the joint tenancy would have a right of survivorship. Thus, A's will created a valid joint tenancy.

Conclusion

At the end of 1989, A had no interest in H. Bobby, Carol, and Dylan held South H as joint tenants.

1990 - Bobby's Actions

In 1990, Bobby cut down some trees and prepared campsites on North H and South H. He sometimes uses one campsite himself and rented out the others during spring and summer.

North H

As stated above, Elmo owned North H at this time, so Bobby had no right to enter into North H absent an easement (a nonpossessory right to enter property) or profit a prendre (a nonpossessory right to enter property and remove specific natural resources from the land). As discussed below, B's use of the land was thus hostile at this point, which is important for purposes of adverse possession (AP).

South H

As a joint tenant of South H, B had the right to equal possession of South H. His cutting down the trees and earning rental fees was relevant for purposes of contribution

(discussed in Question #2). But because B's entrance and use of the land was not hostile to Carol and Dylan's rights, it did not have an effect on their rights of possession and ownership.

2017 - Bobby's Statement to Dylan

A joint tenant's use of property, although usually not hostile to the other joint tenants, may become hostile if the joint tenant denies the other joint tenants access to the land. This is called ouster.

Here, one could argue that B's statement to Dylan that the land was "none of his business" and that it would be B's land in the end because he was the youngest was sufficient to make B's use and possession of the land hostile to C and D. But as discussed below, to be hostile, an adverse possessor's possession must be under a claim of right. Here, B was probably just being rude to D by saying the land was "none of his business" and by saying it would eventually be his (which actually did not turn out to be true). B never claimed that South H *was* his at that time. Thus, B's statements were not sufficiently hostile to put D or C on notice of an AP claim.

2017 - D's Conveyance to Fred

Also in 2017, D conveyed his interest in South H to Fred (F). A joint tenancy is severed as to a joint tenant whenever that joint tenant conveys his interest to a third party. At that point, the third party becomes a tenant in common. A tenancy in common requires only unity of possession. Here, D severed the joint tenancy in South H as to himself when he conveyed his interest in it to Fred.

Thus, at this point, B and C held 2/3 of South H as joint tenants; F held 1/3 of South H

as a tenant in common.

2017 - C's Conveyance to Herself

Finally, in 2017 C conveyed her interest in South H to herself as a tenant in common. Some jurisdictions permit an individual to convey land to themself via a deed. If so, then C would become a tenant in common under the rules stated above. But if not, the severance was ineffective and the ownership interests remained unchanged. But under the general rule that a property owner may do what they please (subject to some exceptions) with their property interests, C's conveyance was likely valid. This is bolstered by the fact that the facts state that C drew up the deed *validly* conveying her interest as a joint tenant to herself as a tenant in common.

Assuming that C's conveyance was valid, it severed her joint tenancy with B. Thus, at this point, B, C, and F each held a 1/3 interest in South H as tenants in common.

2018 - B's Death - North H

In 2018, B died and left his entire estate to his son Sam (S). Sam continued to rent the campsites and pay taxes, keeping the profits and occasionally using the site himself.

At this point, B had been operating a campsite on North H at least seasonally since 1990, or for 28 years. This raises the issue of whether B had acquired North H through adverse possession. If he did, then his will conveyed that interest to S.

See rule above for adverse possession.

Exclusive

First, Sam will argue that B's possession was exclusive. To be exclusive, the possession cannot be shared with the rightful owner. Here, there is no evidence that Elmo ever even visited the property or shared possession with B in any way. Elmo will respond that B's possession was not exclusive because he rented out the campsite to other campers. But B did so based on his belief that North H was his exclusively to rent out. Thus, this element is met.

Continuous

Second, Sam will argue that B's possession was continuous for the statutory period. The facts do not list a statutory AP period, but in most jurisdictions it is between six and twenty years. Here, B's possession was for 28 years, so it probably satisfies this requirement.

If not, S can continue to possess the property under a claim of right via his inheritance from B. Under the rule of "tacking," a court would then "tack" the time of B's possession to S's possession because he was B's successor in interest. The court would then conclude that the continuity element was met if S and B's combined possession satisfied the statutory period.

Elmo may respond that B's possession wasn't actually continuous because B only sometimes used the campsite himself. But courts have held that if a property is of the type that is appropriate for seasonal use, then seasonal use is sufficient to satisfy the continuity requirement. Here a campsite is not something that is used year round. Thus, assuming that B used the campsite seasonally, this requirement is met.

Hostile

S will next argue that B's possession was hostile. To be hostile, the possession must be made under a claim of right. Here, B used North H like it was his own, cutting down trees, building a campsite, and renting out the site to campers. Thus, B acted as though North H was his and his only. This requirement is met.

Open and Notorious

Finally, S will claim that B's possession was open and notorious. There is no evidence that B attempted to hide his possession of the land. Elmo will argue that he didn't have notice of the possession. But if Elmo had visited North H, he would have seen the chopped-down trees and the campsite. His failure to visit doesn't make B's possession less open. This element is met.

Conclusion

B adversely possess North H. He thus obtained Elmo's fee simple interest. After B's death, because B's valid will gave his entire estate to Sam, Sam had a fee simple interest in North H.

2018 - B's Death - South H

As stated above, B had a right to possess South H as a joint tenant and then as a tenant in common, so his use of the property was not exclusive or hostile for AP purposes.

It could be argued that his possession became hostile in 2017, when he told Dylan that the land was none of his business and B would get it anyway in the end. But as discussed above, this statement was not sufficiently hostile to meet the AP

requirements.

Thus, after B's death, his 1/3 interest in South H as a tenant in common will pass to Sam. The right of survivorship that applies to joint tenancies will not preclude this because, as discussed above, the joint tenancy was completely severed before B's death.

CONCLUSION

Based on the above events, Elmo has no interest in Havenwood. Sam owns North H in fee simple. Fred, Carol, and Sam each have a 1/3 interest in South H as tenants in common.

(2) Claims Regarding Taxes and Fees

North H

As discussed above, S now owns North H in fee simple. Because none of the other parties has no interest in North H, S is not liable to them for any rental fees that B earned. S also cannot seek payment for taxes that B paid on North H.

South H

South H is different. The parties may have claims against each other based on events during the joint tenancy and during the tenancy in common.

Joint Tenancy

From 1989 to 2017, B, C, and D held South H as joint tenants. Joint tenants are all responsible for payment of taxes and entitled to the profits on the land they jointly hold. Thus, S can seek reimbursement on behalf of B's estate for the parties' pro rata share of taxes paid. B and C can also seek their pro rata share of the profits that B

earned on South H from 1989 to 2017.

Tenancy in Common

From 2017 to 2018, F, C, and B held South H as tenants in common. When B died, his tenant in common interest went to S.

A tenant in common is entitled to possession of the premises. However, a tenant in sole possession of the land is required to pay taxes on the land to the extent that the land produces income. Here, B paid taxes on the entire property using the rental fees he collected and kept the remaining profits. Thus, S cannot seek reimbursement from any parties for the taxes B paid.

With respect to the rental profits, F and C can seek contribution from S for a pro rata share of the net profits that B received from 2017 to 2018 as a result of running the campsite on South H.

Partition

If F and C do not wish to be tenants in common with S anymore, they may also seek a partition. This will not require S's consent: any tenant in common may unilaterally partition the property. Courts prefer a partition in kind as opposed to a forced sale of the property.

Here, C lives out of state. Given that D also lives out of state and is friends with F, it is likely that F lives out of state, too. Thus, a court may partition the property to give the campsite portion to B and split the other 2/3 between C and F, since they live out of state and evidently do not wish to use the campsite portion of the land -- or even visit the land.

Upon partition, the court can order S to pay contribution for C and F's pro rata share of B's after-tax profits from the property.

C and F may also argue that B owed them a duty as a tenant in common and seek damages for his renting out their property for their involvement. But given the partition and contribution remedies outlined above, this argument will fail.

Conclusion

S is probably not entitled to any net payments from C or F because the income B, as sole possessor, derived from the property exceeded the taxes that he paid. However, C and F can seek contribution from S for their pro rata share of B's net profits from renting out the land as a campsite.

QUESTION 3: SELECTED ANSWER B

Havenwood Property

A property is held in fee simple absolute if it is fully under the control of an individual, with no interests of reverter or reentry. Property owned in fee simple absolute may be freely transferred according to the wishes of the property owner. A property owner may transfer part of their property pursuant to a valid deed, creating two estates.

Andrew conveyed the northern half of Havenwood, pursuant to a valid deed, to his brother Elmo. Elmo was the owner, in fee simple absolute, of the northern half of the parcel as of 1988.

Joint Tenancy

Joint tenancy is the holding of a property by multiple parties with equal rights to possession of the entire property and a right of survivorship. Thus, if any of the joint tenants die, their heirs will not receive their share, but instead will go to the surviving joint tenants. A joint tenancy is created by the express intention of the creator in a valid document. Under the common law, devise of property in common ownership was automatically presumed to be a joint tenancy. Under modern law, devise of a property in common ownership is presumed to be a tenancy-in-common unless there is evidence of the grantor's intent to convey a valid joint tenancy. Creation of a right of survivorship alone is usually not enough to show an intent to create a joint tenancy. Instead, the words joint tenancy are usually required. Creation of a joint tenancy requires traditionally the four unities, that of time, title, interest, and possession. First, the joint tenants must take at the same time. Second, the joint tenants must take title through

the same document. Third, the joint tenants must take the same interest in the property. Finally, the tenants must have equal right to possession of the entire property. If a joint tenancy fails the four unities, it will instead be a tenancy-in-common. Any conveyance of an interest in property requires satisfaction of the statute of frauds. A valid written will satisfies the Statute of Frauds, as it requires the signature of the testator (whether attested or holographic).

Andrew created a valid joint tenancy in Bobby, Carol, and Dylan as of 1989. Andrew's express intent was demonstrated in his valid will that gave "all my real estate to Bobby Carol and Dylan as joint tenants with right of survivorship." The use of the term "with right of survivorship" and "as joint tenants" clearly demonstrated this intent. The conveyance met the four unities. The parties took at the same time, at Andrew's death in 1989. The parties took through the same document, the will. The parties took the same interest, an equal third share. Finally, the parties took an equal right to possession of the entirety of the property. Because the joint tenancy met the four unities and was created with the express intent to create a joint tenancy, a valid joint tenancy existed in 1989. There is no issue with the statute of frauds because the will was valid and thus signed by Bobby.

Ouster

Tenants may commit ouster when they take possession of the entire property that was once in common ownership with an intent to oust the other tenants. Ouster requires notice to the ousted tenants, whether that be constructive or actual notice, and intent to oust the other parties, and the taking of full possession of the property. Once ousted,

the ousted parties may seek to partition the property. The ousted parties also lose their right to possession of the property.

Bobby's actions do not amount to an ouster, as he did not demonstrate a clear intent to oust both Bobby and Carol. While Bobby and Carol may have been put on notice of a potential ouster in 2017, when Bobby told Dylan that Havenwood was none of his business and when Dylan told Carol about the encounter, Bobby did not demonstrate enough of an intent to oust his siblings. He simply stated that the land was none of Dylan's business and that he both improved the land and would eventually get it anyway. These statements are consistent with Bobby simply telling Dylan that, though he is a joint tenant, he has not been around to manage the property and should just trust Bobby. At no point did Bobby exclude either Dylan or Carol from entering the property. As such, he has not met the requirements for ouster.

Tenancy-in-Common

A joint tenancy is terminated and replaced by a tenancy-in-common upon the severance of the joint-tenancy arrangement, such as by the conveyance of a joint tenant’s possession to another. Severance of a joint tenancy does not require the consent of both parties and can be done unilaterally. A tenancy-in-common exists when multiple parties hold equal interests to a property and have the right to possession of the entire property. A tenancy in common gives the right to possession of the entire property but does not include a right of survivorship. The interests can be transferred without breaking the tenancy in common. If a tenant-in-common conveys their interest to another, a new tenancy-in-common is created with the owner of the

conveyance. Creation of a tenancy in common does not require the four unities.

Dylan terminated the joint tenancy by conveying his interest in the property to Fred. Thus, Fred took a 1/3 interest in the southern half of Havenwood, and Carol and Bobby maintained a joint tenancy for the other 2/3. Carol attempted to also convey her interest but did so to herself. Because severance of a joint tenancy does not require the consent of all parties, and can be done through voluntary acts like conveyance to a third party, Carol likely severed the joint tenancy and took a 1/3 share of the southern half of Havenwood as a tenant in common. She indicated an intent to sever the joint tenancy and did so through a conveyance to herself as a tenant-in-common, which does not require compliance with the four unities. Thus, she now has a 1/3 interest as a tenant in common.

Adverse Possession

A party may establish adverse possession, in which they obtain legal title to the land of another, when they meet the requirements. First, their possession must be open and notorious. Second, the possession must be hostile. Third, possession must be exclusive. Fourth, they must show continuous use. Finally, possession must meet the statutory period (many states have a 7- year or 10 -year period). The possession period of a predecessor in interest may be tacked onto the claims of a successor in interest to meet this statutory period if there is privity of estate. Some states also require that an adverse possessor pay taxes on the property they claim. If a party can establish the elements of adverse possession, they may obtain title to the entirety of the land they have openly and notoriously possessed through a quiet title action. To adversely

possess land held in common or by joint tenancy, one must first oust the other tenants, otherwise they have not established exclusive possession.

Bobby has not established a claim for adverse possession against his siblings. Because he has not ousted the other siblings (or even if he had ousted in 2017, he would not have met the statutory period starting then), he has no claim of adverse possession for the southern half of Havenwood. However, Sam has likely established a valid claim to adverse possession of the northern half of Havenwood. Sam and Bobby's possession was open and notorious, as Bobby cut down trees and prepared several campsites on the northern half of Havenwood. He also paid taxes on the entire property. Elmo had constructive notice that Bobby was adversely possessing his property and should have discovered it through reasonable inspection. Second, neither Sam nor Bobby received permission to construct campsites and thus possessed with hostile intent. Third, they had exclusive possession because they collected rents from others who used the property, and thus did not allow others to maintain possession without permission and license. Fourth, there are no facts suggesting they did not continuously use the property. In fact, the facts suggest that Sam continued to rent the campsites, use his own, and pay taxes. Finally, their possession would likely meet any statutory period. Sam, as a successor in privity through devise, may tack Bobby's period of possession onto his own. Thus, they have established 28 years of possession, which is enough to meet the statutory period in most states. The facts suggest that Sam and Bobby used the entire northern half of Havenwood. As such, Sam is not only owner of a 1/3 share of the southern half of Havenwood, but also the total owner of the northern half of Havenwood.

Remaining Interests as of the Present

Because Dylan and Carol severed the joint tenancy in 2017 through their conveyances, Carol maintains a 1/3 interest in the southern half of Havenwood. Dylan validly conveyed his interest to Fred, and thus Fred maintains a 1/3 interest in the southern half of Havenwood. Sam retains the other 1/3 interest in Havenwood through devise from Bobby, using a valid will that conveyed his entire estate. Sam has also established a full claim to the northern half of Havenwood by adverse possession, which he may exercise through quiet title. As such, Elmo has no interest remaining.

Payment of Taxes or Rental Fees

Joint tenants and tenants in common have an equal right to possession of the entirety of the property. Thus, they are equally responsible for the payment of taxes, maintenance, and other obligations arising from possession of the property. They are also entitled to the profits from the property, including any rental fees accrued. Tenants will not be reimbursed for improvements made to the property, though they may recover the increase in value from those improvements if the property is sold. Tenants may sue for contribution to recover payments they made in excess of their obligations or to recover payments not properly distributed to them.

Sam may seek contribution from Dylan and Carol for the payment of taxes by Bobby for their shared property. Sam may also seek contribution from Fred, as a new tenant-in-common for payment of taxes he made after conveyance of the interest to Fred in 2017. Dylan and Carol may seek contribution from Sam for the profits from the property, namely the rental fees for their period of ownership. Fred may seek payment of rental

fees beginning in 2017, when he took possession.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2021 CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2021 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Evidence
2.	Contracts/Remedies
3.	Community Property
4.	Professional Responsibility

QUESTION 5

Ed owned a parcel of land on the north side of a rural highway. A lane connected the highway to the small country inn Ed operated on the land. Ten years ago, Ed entered into a signed written agreement conveying a right-of-way easement over the lane to Fran, his neighbor north of his parcel. Fran operated a commercial farm with a small bunkhouse for farm workers on her land. She often used Ed's lane to access the farm and bunkhouse from the highway.

Recently, Fran announced that she was converting her farm into a 50-lot residential subdivision and the bunkhouse to a computer server center. She informed Ed that she wanted to run new electric lines and a fiber optic cable along the lane.

Fifteen years ago, Ed and Gloria, his then-neighbor on the south side of the highway, had entered into a signed written agreement in which Gloria covenanted that she and her successors in interest would use her property only as a commercial organic garden and, in exchange, Ed would purchase produce from Gloria for use in his country inn. Soon thereafter, Gloria sold her land to Henry. Ed continued to buy produce from Henry.

Recently, Henry informed Ed that the more intense development Fran had planned for her parcel and the increased traffic along the highway justified the conversion of Henry's garden into a combination truck stop and diner.

Ed objected to Fran's and Henry's intended changes and decided to sue both of them to enforce his rights.

1. What rights and interests do Ed and Fran each have in the lane, and may Fran, over Ed's objection, carry out her plans for the lane? Discuss.

2. What rights and interests do Ed and Henry each have in the garden property, and may Henry, over Ed's objection, carry out his plans for that property? Discuss.

QUESTION 5: SELECTED ANSWER A

Easements

An easement is a property right that grants the use of land to someone who does not otherwise own the property. It can either be tied to anther parcel of land (appurtenant) or be tied to the person who has the easement (in gross). Typically, easements are appurtenant, but it does not appear to matter for the controversy here.

Ten years ago, Ed and Fran entered into an agreement for an express easement. Fran's property benefited from the easement, so it is the dominant estate, while Ed's was burdened, so he has the servient estate. This was a signed document, so it appears that it has satisfied the requirement that it comply with the Statute of Frauds. There is a valid express easement.

With that easement, Fran has the right to use the lane as she has been doing for the past ten years (as they agreed). She also has the right to make minor changes to her use so long as it is reasonable under the circumstances. Her right to use the lane is not exclusive (Ed can use it too). And Fran has the obligation to pay or make repairs necessary to the easement.

Change in use

When easements are established, they are typically limited to the use that was agreed upon. Establishing the use of the lane does not give Fran the absolute right to use it however she sees fit. A court will judge whether a change in use of an easement is allowable based on a test of reasonableness.

Fran says that she needs to run new electric lines and a fiber optic cable along the lane because she is converting her farm into a 50-lot residential subdivision. While needing the additions to the lane, given the changes to the property she is making, is reasonable for Fran, the court will question whether it is a reasonable accommodation based upon the agreement that was made between the parties.

Given these circumstances, it does not appear to be reasonable. This is transforming the use of the easement into something it never was before. Before it was used to access the small farm and bunkhouse from the highway. Now Fran wants to install significant electrical infrastructure. Importantly, this is inconsistent with how Ed, one of the signatories to the easement, uses his land. He runs a small country inn. While Fran's old farm and bunkhouse, along with a path used to reach it, did not affect Ed's enjoyment of his land, his inn will be materially hurt if he is forced to place cables and electric lines along the path. Ed does not have a right to tell Fran what she does with her property (changing the farm and bunkhouse into large residential lots), but he will convince the court that her attempt to add the lines (and potentially the cable, although it may be allowed if the court believes it can be underground and not an eyesore, resulting in minimal harm to Ed) is not reasonable under the circumstances.

Ed will be able to enforce his rights to maintain the easement as to its current use with Fran.

Real Covenants

Real covenants occur when owners of property covenant to engage or refrain from certain behaviors with their property regarding one another. That is what appeared to

happen between Ed and Gloria 15 years ago. Here, Ed now seeks to enforce the rights under the covenant to prevent Henry, a successor in interest from Gloria, from changing his land into a truck stop and diner, in violation of the agreement Ed had struck with Gloria.

While Ed could have simply enforced his contractual rights with Gloria, since Henry is not a party to that contract, Ed will try to enforce his rights under a real covenant. In order to enforce the burden of a covenant you must show that there is privity, intent for the covenant to run with the land to successors in interest, notice, the covenant touches and concerns the land, and that it complies with the Statute of Frauds. I will address each below.

Privity

While for the benefit to run with the land in a real covenant, it only requires minimal vertical privity, for the burden to run with the land, there must be horizontal and complete horizontal privity. Here, the burden is running because it is Ed who is trying to enforce the rights, or burden, under the real covenant on Henry, who was not a party to the original contract (and therefore is only subject to the covenant if it runs with the land).

Horizontal privity occurs when the covenant was involved in the actual establishment of the horizontal transaction of the real property between the landowners. A common way to see if this is the case is to see if the covenant is in the deed. Here, Ed and Gloria simply entered into an agreement to use their property in specific ways, without the required transaction relating to the land. Therefore, the requirement for horizontal

privity is not met.

Complete vertical privity is also required to enforce the burden of a real covenant. Complete vertical privity means that the entire property interest, nothing short of that, must be passed along to the successor in interest against whom the burden is sought to be enforced. Here, it appears that Gloria sold her entire interest, so vertical privity is met.

While complete vertical privity exists, horizontal privity does not. Therefore, the requirement of privity has not been met.

Intent

It must be the intent of the parties to the contract that the covenant run with the land. Here, the facts state that the agreement stated the covenant applied to Gloria and her successors in interest. This is sufficient evidence to show that the requirement of intent is met.

Notice

A purchaser of land, such as Henry, must be on notice that the covenant exists as well, or else it will not be enforceable. Here, the facts are unclear. On one hand, they state that Ed did continue to buy fruit from Henry and Henry informed Ed, giving him a chance to evaluate his legal obligations, before going ahead with the change. On the other, Henry may have simply been giving a kind of heads up to Ed, and Ed's actions do not serve as evidence to what Henry knew. These facts do not cut one way or the other definitively, but it seems likely that Henry was indeed aware of the agreement between Gloria and Ed.

The requirement of notice is met.

Touch and Concern

Real covenants must also touch and concern the land. That means that each party enters into the agreement to benefit their land, rather than entering into unrelated contractual relations regarding personal conduct that have nothing to do with the property. Here, Ed benefits from having a consistent supplier of produce to serve his country in, while Gloria benefits by having a consistent buyer of goods for her business. These are both tied to the pieces of property.

The touch and concern requirement is met.

Statute of Frauds

As will all contracts regarding real property, the contract must comply with the Statute of Frauds. Here, the facts state that they entered into a signed written agreement, demonstrating compliance with the Statute of Frauds.

Conclusion re Real Covenant

As the above demonstrates, Ed has satisfied the requirements of intent, notice, touch and concern, and Statute of Frauds that are necessary to enforce his rights against Henry. However, he has fallen short of establishing the final prong of privity necessary, meaning he will not be able to enforce his rights as a real covenant. However, the remedy available when enforcing a real covenant is damages. Ed appears to want to maintain the status quo, meaning he may have another option.

Equitable Servitude

An equitable servitude is similar to a real covenant but has two important differences. First, while it requires a showing on intent, notice, touch and concern, and compliance with the Statute of Frauds (things Ed has shown), it does not require privity. Privity is the one issue Ed was missing, meaning that he will be able to enforce his rights under an equitable servitude.

Second, while damages are not the available remedy under an equitable servitude, an injunction is. Here, Ed objects to Henry's change, and an injunction preventing Henry from changing the land from its use as an organic garden is exactly what he wants. Therefore, Ed will be able to prevent Henry from carrying out his plans for the property.

Changed Circumstances Doctrine

Henry may counter that he should not have to abide by the contract because of the changed circumstances doctrine. This applies in situations where there have been drastic changes to the land and the surroundings such that it makes it unreasonable to comply with the former restrictions placed by covenants/equitable servitudes/implied reciprocal servitudes. However, this is a very high bar to establish. The facts do not suggest that it is infeasible, or even close to it, for him to continue operating as a commercial organic garden. Rather, it appears that due to external factors, he may have a better commercial option if he switches to being a truck stop and diner. The existence of a better commercial opportunity on its own is not sufficient to release Henry from his legal obligation.

Ed will still be able to enforce his rights via injunction under the equitable servitude.

QUESTION 5: SELECTED ANSWER B

Easements

Express Easement

An easement is the right to enter the property for a particular purpose, but it does not grant any right of possession or enjoyment in the land.

An express easement is an easement given in writing signed by the party to be charged in order to satisfy the Statute of Frauds.

Here, Ed gave signed written agreement to Fran over the lane going to the highway. Therefore, this was a valid express easement.

Termination of An Easement

Easements are presumed to last forever. However, they can be terminated by a writing, oral statement, and act of abandonment, selling of the servient estate to a bona fide purchaser without notice, or merging of the dominant and servient estate (the benefited and burdened estate, respectively).

Here, there is no indication that there has been any attempt to terminate this express easement. Fran did not say or write that she was abandoning the easement and Ed (the servient owner) has not sold his land.

Therefore, Fran will successfully argue that the easement is still valid.

Use of an Easement -- Surcharging the Easement

An easement can be used in a reasonable way for the purpose that it has been given. If the dominant estate owner exceeds the reasonable use of the easement and thus surcharges the easement, the servient estate holder can sue to enforce an injunction and prevent the use beyond what is reasonable.

Additionally, the user of the easement can do what is reasonably necessary for the maintenance of the easement even if it burdens the servient estate owner.

Here, Ed will argue that he gave Fran this right of way easement so she could access her farm and bunkhouse from the highway, not to run electrical lines and cables across it. Therefore, she is surcharging the easement by going beyond the scope of its use. Additionally, these additions of cables are not maintenance of the easement, that would be adding something to the easement.

Here, Fran will argue that the right of way easement was not conditioned on the fact that she continue to use the property as a farm and bunkhouse. Therefore, running the cables along the lane is now reasonable for the use of her property and thus the easement should still apply to it.

Here, the court will likely find that the right of way express easement was intended for the use of Fran having *access* to her property, not to run lines and cables across it or along it. Therefore, by wanting to install cables along the lane, Fran is exceeding the reasonable use of the easement. Therefore, Ed can likely get an injunction to prevent Fran from carrying out her plans with the lane.

Covenants and Servitudes

A covenant or servitude is a condition on the use of land. A covenant is when the person seeking to enforce the covenant is seeking damages. An equitable servitude is when they are seeking an injunction.

Here, Ed and Gloria entered into an agreement when Gloria covenanted that she and her successors would use the property as a garden and Ed would purchase produce from her in exchange. However, Gloria sold the land to Henry, but Ed continued to be able to buy produce from Henry.

Now, Henry wants to get out of this covenant.

Covenants

Burden to Run

For there to be a valid covenant to enforce for damages the subsequent owner of the burdened estate must have 1) notice 2) in writing 3) horizontal privity 4) vertical privity 5) intent 6) and the covenant must touch and concern the land.

Notice

The owner must have notice (actual, constructive, or inquiry).

--Actual

Actual means that the new owner has actual knowledge of the covenant at the time of conveyance.

Here, it appears that Henry has actual knowledge of the covenant because he continued to sell Ed produce after he bought the land and there are no facts suggesting

that he learned this later. It is likely that Gloria informed Henry of this in the sale of the land considering her contract with Ed that her successors in interest would also be bound.

--Constructive

Constructive notice means that the covenant is recorded in the chain of title.

There is no indication here that anything is in the title to the property because this covenant was just in a signed written agreement, not the deed itself.

--Inquiry

Inquiry notice is when there are facts or circumstances that would lead a reasonable person to further inquire about the property.

Here, Henry is selling product to Ed, so he seems to be aware of the covenant and thus inquiry notices doesn't apply.

Thus, Henry had actual notice of the covenant.

Writing

Here, the covenant was set out in a signed writing.

Horizontal Privity

Horizontal privity means that the covenant was set out in the conveyance of the land between the original grantor and grantee.

Here, there is no indication of that.

Facts indicate that Ed and Gloria were merely neighbors who signed a written agreement. Thus, this was not a covenant set out between a grantor and grantee, but

just a contract between to neighbors, so there is no horizontal privity.

Vertical Privity

Vertical privity means that the new owner owns the same interest as the original owner. Here, it appears that Gloria sold all of her land to Henry and there are no facts to the contrary.

Thus, Henry likely has the same interest in the property that Gloria did and therefore there is vertical privity.

Intent

Intent means that there is an intent that the subject matter of the covenant be affected.

Here, there was clearly an intent for Gloria/Henry's land to be subject to this produce covenant that limited her use to a garden in exchange for Ed buying her produce because they explicitly put that in the written agreement.

Touch and Concern

Touch and concern means the covenant is valuable to the benefitted party.

Here, the covenant is valuable to Ed, who is the benefitted party because, he gets to buy organic produce for his country inn which he runs on his property. Additionally, it also benefits Ed's "country inn" by being right next to a garden which is likely more appealing to guests out in the country than a truck stop/diner combination would be.

Thus, this covenant touches and concerns the land.

However, since there is no horizontal privity, Ed does not have a right to seek damages for breaching this covenant.

Benefit to Run

To determine if the benefit to run for a subsequent owner of the benefitted parcel requires 1) notice 2) intent 3) vertical privity 4) and for it to touch and concern the land.

Here, Ed was the original party to the covenant, and he is the one trying to enforce it; therefore, there is no need to analyze whether the benefit runs. That only applies to subsequent owners of the benefitted estate.

Here, Ed can seek to enforce the covenant without showing this.

Equitable Servitude

Burden to Run

Ed may also seek an injunction for this equitable servitude and prevent Henry from changing the land from a commercial organic garden into a truck stop and diner.

For the burden to run for an equitable servitude there must be 1) notice 2) a writing 3) intent 4) and it must touch and concern the land. There is no requirement for privity.

Notice

See above for rule statement.

See above for discussion as to why Henry likely had actual notice of the covenant.

Writing

See above for discussion how this equitable servitude is in writing because it was set forth in the written agreement between Gloria and Ed.

Intent

See above for rule statement.

See above for discussion on why there was intent.

Touch and Concern

See above for rule statement.

See above for discussion for why this equitable servitude likely touches and concerns the land.

Therefore, since all four of these elements are likely met, Ed is able to enforce this equitable servitude and get an injunction that prevents Henry from operating the land as anything other than the commercial garden.

Benefit to Run

For the benefit to run for an equitable servitude it requires 1) notice 2) intent 3) and that it touch and concern the land.

Here, see above for discussion as to why Ed does not need to show the benefit to run because he is the original party to the servitude.

Termination of a Covenant/Servitude

A covenant or equitable servitude can be terminated based on abandonment, change in circumstances, estoppel, written release, and merger of the dominant and servient estates.

Change of Circumstances

Here, Henry is asserting that this covenant/servitude is terminated and thus cannot be

enforced because of change of circumstances. Henry will argue that Fran's change to her parcel and increased traffic change the circumstances of the area such that this covenant no longer should apply.

Fran used to use the land as a farm and bunk house, but now, Henry will argue, she is changing that to 50 residential homes and a computer server center, thus changing the nature of the area from agricultural and farmland. Thus, since there will be more people and less farms. a truck stop and diner now fit within these new circumstances. Additionally, many more people will be in the area because instead of one farm with some workers on Fran's land, it will be 50 residences with people living in them.

Ed will argue back that she is changing her land into majority residential housing which is different in nature to a truck stop or diner which are entirely different types of establishments for commercial uses. Ed will argue that keeping the garden is still applicable and should be enforced because this is an agricultural area and thus a truck stop and diner do not fit in the area. This is a "rural" area, even with additional residential homes.

Here, because of the likely massive construction changes that will take place on Fran land, the increase in traffic due to 50 residential houses being used, and the change from using the land for agriculture/farming to a different use, the court could likely find that the circumstances have changed enough that the covenant/servitude should no longer apply to Henry's land even it was previously enforceable.

Therefore, Henry can likely carry out his plans over Ed's objections.