

QUESTION 1

Purchaser acquired Blackacre from Seller in 1988. Seller had purchased the property in 1978. Throughout Seller's ownership, Blackacre had been described by a metes and bounds legal description, which Seller believed to include an island within a stream. Seller conveyed title to Blackacre to Purchaser through a special warranty deed describing Blackacre with the same legal description through which Seller acquired it.

At all times while Seller owned Blackacre, she thought she owned the island. In 1978, she built a foot bridge to the island to allow her to drive a tractor mower on it. During the summer, she regularly mowed the grass and maintained a picnic table on the island. Upon acquiring Blackacre, Purchaser continued to mow the grass and maintain the picnic table during the summer.

In 1994, Neighbor, who owns the property adjacent to Blackacre, had a survey done of his property (the accuracy of which is not disputed) which shows that he owns the island. In 1998, Neighbor demanded that Purchaser remove the picnic table and stop trespassing on the island.

QUESTION:

Discuss any claims which Purchaser might assert to establish his right to the island or which he may have against Seller.

DISCUSSION FOR QUESTION 1

I. Mr. Plaintiff's Claims versus Mr. Neighbor

One who maintains continuous, exclusive, open, and adverse possession of real property for the requisite statutory period may obtain title thereto under the principle of adverse possession. *Edie v. Coleman*, 235 Mo. App. 1289, 141 S.W. 2d 238 (1940), *Vade v. Sickler*, 118 Colo. 236, 195 P.2d 390 (1948). The construction of the foot bridge, mowing of the grass, and maintenance of the picnic table suggest an open and adverse possession of the island. It is not clear whether the seasonal cutting of the grass and maintenance of the picnic table are sufficient to establish the element of continuous possession. The facts do not address the issue of exclusive possession.

The fact that both Ms. Seller and Mr. Plaintiff mowed the grass and maintained the picnic table based upon the mistaken impression that they owned the island, raises the question of whether or not possession of a property due to mistaken ownership satisfies the "adverse" element of an adverse possession claim. While jurisdictions do not uniformly resolve this question, Colorado and Missouri are jurisdictions in which possession based upon mistaken ownership is sufficient to establish a claim of adverse possession. *Edie v. Coleman*, 235 Mo. App. 1289, 141 S.W. 2d 238 (1940), *Vade v. Sickler*, 118 Colo. 236, 195 P.2d 390 (1948). An example of a case requiring the claimant to knowingly possess the property of another is *Holzer v. Read*, 216 Cal 119, 13 P.2d 697 (1932)

Ms. Seller only owned Blackacre for ten years. Mr. Plaintiff has only owned Blackacre for nine years. However, the doctrine of "tacking" allows the addition of periods of successive possession of adverse possessors to establish a continuous possession for the requisite time period. *Ryan v. Schwartz*, 94 Wis. 403, 69 N.W. 178 (1886), *Lundquist v. Eisenmann*, 87 Colo. 584, 290 P. 277 (1930).

Regardless of whether Mr. Plaintiff has an adverse possession claim to fee title (*i.e.*, out-right ownership) to the island, he may have easement rights in it (a "prescriptive easement"), to use the island for picnics. The establishment of a prescriptive easement right requires the same elements as a claim for adverse possession. *F.C. Ayers Merc. Co. v. Union Pacific R. Co.*, 16 F.2d 395 (8th Cir. 1926), *Trueblood v. Pierce*, 116 Colo. 221, 179 P.2d 671 (1947).

II. Mr. Plaintiff's Claims versus Ms. Seller

A. Claims Based on Deed

Ms. Seller, as the grantor of a special warranty deed to Mr. Plaintiff, made warranties of title to Mr. Plaintiff. However, through a special warranty deed, the grantor only warrants to the grantee that the title conveyed is in the same condition as the title received by the grantor. (This is distinguished from warranties of title contained in a general warranty deed in which the grantor warrants title to the property against all claims.) Because Ms. Seller conveyed title to Mr. Plaintiff in the same condition in which she received it, Mr. Plaintiff would have no claim versus Ms. Seller based upon the warranties of title contained in a special warranty deed.

Additionally, the island was outside of the property physically described by the special warranty deed. As such, no warranties of title could have been given by Ms. Seller to Mr. Plaintiff regarding the island.

Examinee # _____

Final Score _____

SCORESHEET FOR QUESTION 1
ASSIGN ONE POINT FOR EACH STATEMENT BELOW

Mr. Purchaser's claims versus Mr. Neighbor

1. Adverse possession claim is established by a: 1. _____
 - 1a. continuous 1a. _____
 - 1b. open and notorious 1b. _____
 - 1c. hostile possession of the island for 1c. _____
 - 1d. the requisite statutory period. 1d. _____

2. The construction of the foot bridge, the mowing of the grass, and the maintenance of the picnic table were open and notorious. 2. _____

3. The seasonal mowing of grass and maintenance of picnic table may not be sufficient to satisfy establish continuous use. 3. _____

4. There is an issue whether or not possession under mistaken ownership is sufficient to demonstrate the "hostile" element. 4. _____

5. The tacking doctrine may allow the periods of adverse possession of Ms. Seller and Mr. Purchaser to be added together to satisfy the requisite statutory time period. 5. _____

6. The facts may also support a claim for prescriptive easement rights, to use island as picnic area, if they do not establish a claim to fee title to the island. 6. _____

Mr. Purchaser's claims versus Ms. Seller

7. Special warranty deed warrants only against defects arising during period which seller held title. 7. _____

8. Therefore, Purchaser would have no claim based upon warranty of title as no warranties of title were made in the deed with respect to the island. It was not included within the property described in the deed. 8. _____

QUESTION 3

In 1970, Amy built two homes on a piece of property she owned. She constructed a driveway between the homes, just wide enough for a single car to use. The driveway was, and continues to be, the only way to reach the attached garages in the rear of each home. After construction was completed, Amy moved into one of the homes. She allowed her brother, Mark, to use the other home rent free. Both Amy and Mark used the common driveway to access their garages.

In 1997, Amy died and her son Donald inherited all of her property. Donald allowed Mark to continue living in the house for a month after Amy's death. Mark paid Donald \$300 for the month's stay. Donald then told Mark to immediately vacate the house because he, Donald, intended to sell it. Mark refused, but nevertheless, Donald had Mark evicted and sold the house to Mary.

Shortly thereafter, Donald sold the home Amy lived in to Sally. Soon after moving in, Sally decided to put an addition on her home that would extend to the center of the common driveway. (She no longer uses the garage behind her home.)

The deeds for both homes were properly recorded and established the property line down the center of the common driveway.

~~QUESTIONS:~~ ANS:

1. Discuss the rights, if any, under which Donald required Mark to vacate the house and whether Mark had any defenses.
2. Discuss whether Mary can block Sally from building the proposed addition to her house.

DISCUSSION FOR QUESTION 3

Analysis/Discussion

I. Part (a): Donald's Arguments that he can demand Mark vacate the house immediately

Amy as owner of the second home allowed her brother, Mark, to live there. However, she did not convey in writing any interest in the house to Mark. Consequently, Mark cannot have any real property interest in the house since the Statute of Frauds requires a real property conveyance to be in writing. Additionally, after Amy died and Donald inherited the houses, Donald didn't convey any property interest in the house to Mark.

Upon Amy's death, Donald inherited all of her property, including her interest as it relates to Mark. Amy allowed Mark to live in the house so he is not a trespasser; he at least has a license to be in the house. However, a license is typically terminable at will. Therefore, if Mark is a licensee, Donald is free to require him to vacate immediately. Even if a new license was created by Donald when he allowed Mark to continue living in the house, Donald still would have the right to demand that Mark vacate. Alternatively, the fact that Mark has lived in the house for a long time may establish a tenancy despite the Statute of Frauds. However, since Mark has not paid rent, any resulting tenancy that can be implied would be at most a tenancy at will. Like a license, a tenancy at will is terminable by the lessor at will without any notice. (See Cunningham, Stoebuck & Whitman, **The Law of Property** (2nd ed. 1993) § 6.18 & 6.19 at 269-71)

A claim of adverse possession cannot be successfully made by Mark. Even though he lived there for longer than the statutory period of 15 years, his occupancy of the house was at all times with the permission of its owner. An adverse possession claim must be based on "hostile" occupancy of the property. Typically, "hostile" use is defined as non-permissive occupancy of the property. (See Cunningham, Stoebuck & Whitman, **The Law of Property** (2nd ed. 1993) § 11.7 at 811)

II. Part (b): Mary's arguments that Sally cannot build her addition to her house

The deed conveying the property from Donald to Mary did not contain any express language with regard to an easement. Nevertheless, Mary can argue an implied easement over the half of the driveway owned by Sally was created by the conveyance. Typically, an implied easement based on prior use requires the following:

(a) Common ownership of the property prior to severance; (b) Severance of the property into two or more separate parcels with ownership in one of the parcels being transferred to a third party; (c) Continuation of the use right after severance is necessary for the use/enjoyment of the dominant estate; and (d) Prior to the severance, part of the land was apparently used for the benefit of another part of the land (called a "quasi-easement"). (See Cunningham, Stoebuck & Whitman, **The Law of Property** (2nd ed. 1993) § 8.4 at 445-47)

Initially, Amy owned both houses. Subsequently, Donald inherited the houses from Amy upon her death. He then severed the land into two parcels with the boundary line between them running down the center of the common driveway. He first conveyed one parcel to Mary; subsequently, he conveyed the other parcel to Sally. Therefore the first two requirements, above, are satisfied.

DISCUSSION FOR QUESTION 3
Page Two

At the time of the initial severance - the sale of one house to Mary - it can be argued that it was necessary for Mary to use the half of the common driveway located on the land Donald retained. The driveway was only as wide as a single car; additionally, it was the only way to reach the garage located at the rear of Mary's house. Consequently, the third requirement, above, is met since absent the right to use the entire common driveway Mary will be unable to put her car in her garage.

Prior to Donald selling one house to Mary, the common driveway had been used for many years to reach the garages behind each of the two homes. If the two homes had been separately owned during this time, the use of the common driveway by each owner would have involved using the portion of the driveway located on their neighbor's property. Additionally, in such a situation each home would be both a dominant and servient estate since half of the common driveway would be on each homeowner's land. Finally, the use of the common driveway would be both obvious and apparent to any observer. Consequently, the final requirement above, the "quasi-easement" requirement is satisfied.

If Mary can establish that an implied easement by prior use was created when Donald sold the house to Mary, she can seek to enjoin Sally from building her addition because the addition would block half of the common driveway thereby interfering with Mary's easement.



Essay 3 GradeSheet

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and write numbers clearly

- 1. Recognize that Mark was licensee. 1. _____
- 2. It can be argued that there was an implied leasehold or tenancy at will. 2. _____
- 3. Like a license, a tenancy at will is terminable at will by the lessor or her death. 3. _____
- 4. Mark could argue that he had a month to month lease because of the \$300 he paid to Donald. 4. _____
 - 4a. Notice is necessary to terminate. 4a. _____
- 5. No adverse possession because it must be based on "hostile" occupancy of the property. 5. _____
- 6. Mary may argue that an implied easement based on prior use was created without any writing; 6. _____

Requirements:

- 6a. common ownership of the property prior to severance (Donald was the common owner of both houses). 6a. _____
- 6b. severance of the property into two or more separate parcels with ownership in one of the parcels being transferred to a third party (Donald sold both parcels). 6b. _____
- 6c. continuation of the use after severance is necessary for use/enjoyment of the dominant estate (Only way to reach Mary's garage was the common driveway). 6c. _____
- 6d. prior to severance part of the land was apparently used for the benefit of another part of the land (Inspection of the property would have revealed the need to use the driveway). 6d. _____

QUESTION 6

Landlord orally agreed to rent a small office to Tenant for thirteen months, beginning immediately. Landlord promised that he would send Tenant a written lease to execute, but never did. As part of the oral agreement, Tenant promised to pay rent in monthly installments of \$400, and Landlord agreed to replace three windows and re-tile the floors. Landlord replaced the windows and re-tiled the floors.

Tenant moved in and paid the rent for the first five months according to the rental agreement. Tenant then transferred the remaining eight months to Renter, retaining no reversionary interest. The transfer was in writing and signed by both Tenant and Renter. According to the transfer agreement, Renter agreed to pay the remaining eight \$400 monthly rental installments to Landlord. Renter moved in, but has never paid any rent.

QUESTION:

Discuss any legal claims that Landlord may have to recover rent from Tenant and Renter, and potential defenses of Tenant and Renter.

DISCUSSION FOR QUESTION 6

Tenant and Renter could maintain that the initial lease agreement is unenforceable because of the Statute of Frauds. The Statute of Frauds requires that a contract for conveying an interest in land be in writing. A leasehold is such an interest in land. In some jurisdictions, the Statute explicitly includes leases. CRS § 38-10-108 provides:

38-10-108. Contracts for interests in land - must be written. Every contract for the leasing for a longer period than one year or for the sale of any lands or any interest in lands is void unless the contract or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the lease or sale is to be made.

In all others, courts construe the Statute as applying to leases. Here, the lease is not in writing, and, therefore, initially might appear to be unenforceable. This is probably incorrect, however, because of the Statute's rule about partial performance. Substantial partial performance of an oral agreement by one party entitles that party to specific performance. According to the rationale, if one party acted under the agreement, it gives independent evidence of the agreement's existence. C.R.S. 38-10-110. See also, Zamboni v. Graham, 104 Colo. 23, 88 P. 2d 98 (1939), Hill v. Chambers, 136 Colo. 129, 314 P. 2d 707 (1957). Here, Landlord partially performed by making substantial repairs and improvements. Arguably some courts might find Landlord's efforts were insufficiently substantial to warrant specific performance.

Under the doctrine of privity of contract (surety of contract), Landlord can enforce the lease's covenants, including the covenant to pay rent, against the Tenant. This doctrine applies even though the burden of the covenant to pay rent also runs to the assignee (Thus, Landlord may also sue Renter under the oral lease.) The rationale is that Tenant made a contractual promise in the initial lease and remains bound by it. Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, The Law of Property §§ 6.15 at 265-66, 6.67-69 at 386-89 (2d ed. West 1993). Thompson on Real Property, Vol. 4 § 39.06(a) (6) at 521; Vol. 5 § 42.04(d), (e) (1) (2) at 278-80 (Thomas edition, Michie 1994).

Renter may claim that Landlord must bring the action directly against Tenant. As an assignee, however, Renter has the duty to perform all covenants whose burden runs with the leasehold, including the covenant to pay rent. An assignment arises where the tenant transfers the right of possession to all or part of the premises for the full time remaining in the lease and retains no reversion. D.A.G. Uranium Co. v. Benton, 149 F. Supp. 667 (Colo. 1957), Gordon Inv. Co. v. Jones, 123 Colo. 253, 227 P. 2d 1004 (1951). (If Tenant had transferred to Renter less than the full-time remaining in the lease, Tenant would have retained a reversion, making Renter a sublessee. In that case, Landlord could sue Tenant, but not Renter, for the unpaid rent. See generally, J. E. Martin, Inc. v. Interstate 84th St., 41 Colo. App. 203, 585 P. 2d 299 (Colo. App. 1978).)

Landlord can also sue Renter under privity of estate and Renter is liable on all covenants in the lease which run with the land. The obligation to pay rent is a covenant which runs with the land because it benefits landlord and burdens the tenant with respect to their interest in the property. See, FDIC v. Mars, 821 P2d 826 (Colo App 1991).

An assignment does not release the tenant from his contract obligation to landlord. In absence of an express prohibition, Tenant is permitted to assign a lease without landlord's permission. Ochsner v. Landendorf, 175 P.2d 392, 115 Colo. 453 (Colo. 1947).



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Essay 6 GradeSheet

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1. The Statute of Frauds requires that a contract for conveying an interest in land for a longer period than one year, including a leasehold, be in writing. 1. _____
2. Under the Statute of Frauds, substantial partial performance entitles the plaintiff to specific performance. 2. _____
3. Recognition that Landlord has partially and substantially performed by making improvements and repairs; therefore satisfying the requirements of the Statute of Frauds. 3. _____
4. Recognition that Renter is an assign. 4. _____
5. An assignment arises when the tenant transfers the right of possession to all or part of the premises for the full time remaining in the lease and retains no reversion. 5. _____
6. In the absence of an express prohibition, Tenant is permitted to assign this lease to Renter without Landlord's permission. 6. _____
7. The doctrine of privity of contract (surety of contract) permits the landlord to enforce the lease's covenants, including the covenant to pay rent against the Tenant. 7. _____
8. Renter is also liable to the landlord to perform all the tenant's covenants under privity of contract. 8. _____
9. Landlord can sue Renter under privity of estate, because the covenant to pay rent runs with the land. 9. _____

QUESTION 9

Sally Lessor owned commercial space which she leased to Restaurant Inc. for five years. The lease, which expired August 31, 1996, contained a clause allowing Restaurant Inc. to renew the lease, at its option, upon forty-five days written notice to Lessor.

On July 30, 1996, Lessor leased the space for twenty years to Pizza Inc. The term of the lease to begin October 1, 1996, and requiring Lessor's approval for any lease assignments.

On August 1, 1996, Restaurant Inc. delivered written notice to Lessor of its desire to renew the lease. Lessor refused to accept the renewal notice, but Lessor did accept one month's rent from Restaurant Inc. on September 1, 1996.

On September 30, 1996, Restaurant Inc. vacated the premises. Pizza Inc. then took possession and operated its business successfully for two years before selling the business to Andy. As part of the sales transaction, Pizza Inc. transferred the remaining term of its lease to Andy with Lessor's approval. After three years, Andy sold the pizza business to Molly and transferred the lease to her for ten years without Lessor's approval. After a year Molly made an assignment of the remaining term of her lease to Arnold, also without Lessor's approval.

QUESTION:

Discuss Lessor's relationship with Restaurant Inc., and on what grounds Lessor may object to any of the transactions with the parties above.

DISCUSSION QUESTION 9

Upon the termination of a leasehold interest, a tenant no longer has any right to remain on the leased property. In such a case a tenant who continues in possession of the property is a "tenant at sufferance." At common law the landlord can treat the holdover tenant as a trespasser and seek eviction and damages. Alternatively, the landlord can expressly or impliedly consent to the creation of a new tenancy with the holdover tenant. The landlord must elect one of these options. Dukeminier & Krier, Property at 431 (3rd ed. 1993).

The lease between Lessor and Restaurant Inc. was a term of years with an initial five year term. The lessee (Restaurant Inc.) had the option of renewing the lease, but it could only be done by written notice provided to Lessor forty-five days before the end of the lease term. Restaurant Inc. provided written notice to Lessor of its intent to renew the lease only thirty days before the end of the lease. Therefore, pursuant to the terms of the lease, the lessee didn't have the right to renew the lease because the notice was late. Upon termination of the original five year lease, lessee became a holdover tenant or tenant at sufferance. At that point Lessor could treat lessee as a trespasser and seek eviction; or Lessor could enter a new lease with lessee. However, prior to the end of the original five year lease Lessor rejected lessee's notice of renewal. Furthermore, prior to the end of the lease, Lessor leased the premises to a new tenant (Pizza Inc.) as of one month after Restaurant Inc.'s lease expired. Such actions by Lessor do not support any indication that Lessor intended to renew the original five year lease. However, Lessor didn't bring an eviction action against the lessee when the original five year lease ended. Lessor's inaction coupled with the subsequent lease to Pizza Inc. as of October 1, 1996 supports an inference that Lessor impliedly consented to a one month tenancy for Restaurant Inc. from September 1 to September 30, 1996. This conclusion is supported by Lessor's acceptance of one months rent from Restaurant Inc. on September 1, 1996.

A transfer of a leasehold interest, at common law, is a property conveyance. See Cunningham, Stoebeck & Whitman, The Law of Property section 6.29, at 282 (2d ed. 1993). Therefore, the lessee can freely transfer her respective property interests in the leased property. Nevertheless, lease terms which require lessor approval of lease assignments are permissible. However, the lessor can't unreasonably withhold approval to assign unless the parties have specifically agreed that the lessor has an absolute right to withhold consent to assign. Restatement (Second) of the Law of Property, Landlord & Tenant, section 15.2.

Additionally, since a lease clause requiring lessor approval of any lessee assignment is a type of restraint on alienation such clauses are generally strictly

construed by courts. Therefore, a clause requiring approval of assignments will typically be held not to apply to subleases. Restatement (Second) of the Law of Property, Landlord & Tenant, section 15.2, Comment e. An assignment is the transfer by a lessee of her entire interest in the leasehold estate. In contrast, a sublease is the transfer by a lessee of a portion of her interest in the leasehold estate. At the end of the sublease there is a reversion to the lessee for the balance of the lease term. Nelson, Stoebuck & Whitman, Contemporary Property at 540 (1996).

A lease clause requiring lessor approval for any assignment of the leasehold is normally treated as a real covenant or a covenant running with the land. Nelson, Stoebuck & Whitman, Contemporary Property at 566 (1996). Therefore, any assignee of a lessee's interest in a leasehold is also required to obtain lessor consent for any subsequent assignment of the leasehold since a lessee and their assignee are in vertical privity of estate. In contrast, a sublessee would not be bound by a real covenant since they are not in vertical privity of estate with a lessee who sublets to them. A sublessee would only be bound by the assignment approval clause if they contractually agreed to be bound by it by assuming the obligations of the sublessor. *See* Nelson, Stoebuck & Whitman, Contemporary Property at 591-92 (1996).

Obviously, Lessor can't object to the initial transfer of the leasehold interest by Pizza Inc. to Andy since Lessor approved of the transfer. Pizza Inc. conveyed its entire remaining interest in the lease to Andy so the transfer is an assignment. Andy is therefore bound by the assignment approval clause since it is a real covenant. This means Andy must obtain Lessor approval for any assignment of his leasehold interest which he might desire to make in the future.

After three years Andy conveyed his interest in the leasehold to Molly for ten years. This transfer is a sublease (not an assignment) because at the end of Molly's ten year leasehold interest there is a reversion to Andy for the remaining term of the leasehold. Since Molly is a sublessee Andy doesn't need approval of Lessor to make this conveyance since the approval clause only applies to assignments not subleases.

Molly subsequently conveyed her entire interest in the lease to Arnold. Therefore, Molly has made an assignment of her lease to Arnold. Molly is not subject to the assignment approval clause however. She acquired her interest in the leasehold from Andy who was not in vertical privity of estate with Andy since Andy only conveyed a sublease to Molly. Therefore, Molly is free to assign her interest in the lease without approval of Lessor. Lessor can't object to any of the lease transfers between Pizza Inc., Andy, Molly or Arnold.



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Essay 9 GradeSheet

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Please use blue or black pen
and write numbers clearly

1. Upon termination of the original lease, Restaurant Inc. became a holdover tenant or tenant at sufferance. 1. _____
2. Lessor impliedly consented to one month tenancy because it accepted one month's rent and/or rejected the notice to renew. 2. _____
3. An assignment is the transfer of the tenant's entire interest in the leasehold estate. 3. _____
4. Lessor's other option is to seek eviction and damages. 4. _____
5. A sublease is the transfer of a portion of an interest in the estate. 5. _____
6. An assignee of a leasehold is bound by a requirement that landlord must approve all assignments because the assignee is in privity of estate with the landlord. 6. _____
7. Andy is bound by the approval clause as an assignee of Pizza, Inc. 7. _____
8. Absent a contractual provision to the contrary, a sublessee would not be bound by the approval clause because he/she is not in privity of estate with the landlord. 8. _____
9. Andy does not need approval for the sublease because Molly is only a sublessee. 9. _____
10. As a sublessee, Molly may assign her interest to Arnold without Lessor's approval. 10. _____

QUESTION 3

For three years, Alexa and Bart lived on a farm which they owned in joint tenancy with right of survivorship. During her occupancy, Alexa refused to pay her pro rata share of the property tax bill. Bart paid the entire tax bill for those years.

Recently, Alexa signed and delivered a deed transferring all of her interest in the property to Xena. Xena properly recorded the deed and moved onto the farm. Shortly thereafter, Alexa died.

QUESTION:

Discuss:

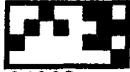
1. Whether Alexa, before she sold the property, was responsible for any of the property taxes paid by Bart;
2. How the farm is currently owned and the rights of the respective parties; and
3. Whether Bart can obtain legal title to all, or a portion, of the farm.

DISCUSSION FOR QUESTION 3

Alexa is liable for half the property tax bill. "A co-tenant, not in sole possession, who pays more than his [or her] pro rata share of property taxes . . . has a right of contribution. . ." Roger Cunningham, William Stoebuck & Dale Whitman, *The Law of Property* (2d ed. West 1993) § 5.9 at 216. Here, Bart and Alexa are joint tenants sharing possession of the farm. As joint tenants, they have a unity of interest; each owns an equal fractional share. *Id.* § 5.3 at 194. Therefore, Alexa and Bart each own a one-half share in the ranch and each is responsible for one-half of the property tax bill. See also *Powell on Real Property* (Lexis Publishing, 2000) §604(2).

Bart and Xena own the property equally as tenants in common. Although Bart and Alexa initially owned the ranch as joint tenants, which gave a right of survivorship to whomever survived the other, Alexa's transfer of her share to Xena severed her interest and defeated Bart's survivorship right. Such a transfer converted the joint tenancy into a tenancy in common held by Bart and Xena. *The Law of Property, supra*, § 5.4 at 199-200. At the time of Alexa's death, she held no interest in the ranch. Therefore, her death effected no change in ownership of the ranch. Xena, as a co-tenant of the farm, has equal rights to occupy the farm with Bart. *Powell on Real Property* (Lexis Publishing 2000) §603(1) and (2).

As co-tenants, Bart and Xena can voluntarily agree to sever the ranch into two parcels, or agree to sell it and share the proceeds. *Powell, supra* at §607(2). If Xena is unwilling to agree to a voluntary partition, Bart can compel partition as a matter of right (as can any co-tenant, except for a tenant by the entirety). *Id.* § 5.11 at 222-23. Although equitable defenses to partition are sometimes available, no facts suggest that they would be appropriate here. *The Law of Property, supra* at § 5.11 at 223, n. 7. Partition can be in kind (a physical division of the property into two parcels), or by sale (selling the property and dividing the proceeds between the co-tenants). Although partition in kind has been traditionally favored, partition by sale is more common, because a fair and equitable physical division of property usually is impossible. *Id.* § 5.13 at 230-31 and *Powell, supra* at §607(4).



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Essay 3 GradeSheet

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1. A co-tenant in possession (Bart) has a right of contribution of a pro rata share of real estate taxes from the other co-tenant in possession (Alexa). 1. _____
2. Alexa's transfer to Xena ended the joint tenancy and Bart's survivorship interest. 2. _____
3. The transfer converted the joint tenancy into a tenancy in common between Bart and Xena. 3. _____
4. Bart and Xena have equal rights to use and occupy the farm. 4. _____
5. Bart and Xena can agree to a voluntary partition. 5. _____
6. If Xena is unwilling, Bart can compel a judicial partition as a matter of right. 6. _____
7. Partition can be in kind or by sale. 7. _____
8. Both Bart and Xena have equal obligation for taxes. 8. _____

QUESTION 7

In 1981, Alice Able purchased a tract of land on the side of a mountain. A portion of the tract was suitable for building, but it could be reached only over a dirt road that ran through a neighboring ranch belonging to Bill Baker. Able asked Baker if she could use the road to access her property and he agreed. The parties, however, never reduced their agreement to writing. Able built a house on the site and has lived there and used the road ever since.

Last year, Baker sold his ranch to Carl Client, providing a warranty deed to Client at the time of the sale. Client paid for a thorough title search by a title company before purchasing the ranch. The search confirmed that record title belonged to Baker; however, the search did not reveal any use of the road. Shortly after the sale, Client discovered Able using the road and told her to stop.

QUESTIONS:

Discuss any potential theories under which Able may regain use of the road. Also discuss any liability that the title company may have for not discovering and reporting Able's use of the road.

DISCUSSION FOR QUESTION 7

One can acquire an easement by prescription through the adverse use of another's land under claim of right which is open, notorious, and continuous for the limitations period on actions in ejectment. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 451-452 (3d ed. 2000); CRIBBET & JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY, 373-374 (3d ed. 1975). In Colorado, the statutory period is eighteen years. Colo. Rev. Stat. §38-41-202 (2000); *Gleason v. Phillips*, 172 Colo. 66, 70-71 (1970). When an owner of property permits another to use it, however, the use is not "adverse" or, as it is sometimes characterized, "hostile." Such a use generally cannot ripen into a prescriptive right. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 453 (3d ed. 2000). Applying these principles to the problem, Able does not have a strong claim to an easement by prescription. She began using the road over the ranch with Baker's permission and presumably did so throughout the years Baker held title to the ranch. Her use of the road was never adverse to Baker's interest.

A person who holds a land locked tract of land may be entitled to claim an easement arising from necessity over the land of another. They may do so, however, only if the two parcels once formed a single tract and the necessity arose upon severance of the two parcels. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 447-449 (3d. ed. 2000); *Martino v. Fleenor*, 148 Colo. 136, 139-40 (1961). No facts in the problem indicate that Able's land and Client's were once a single tract. Therefore, Able does not has a strong claim for an easement implied in law from necessity.

The statute of frauds requires any agreement to convey an interest in real property to be embodied in a writing signed by the grantor. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 707-708 (3d. ed. 2000). An easement is an interest in real property and therefore any grant of an easement must comply with the statute. *Id.* at 442. A license, on the other hand, is a personal privilege to use another's land in a manner that would otherwise be trespass. *Id.* at 438. Under the law, a license is considered personal property. As such, the statute of frauds does not apply to the grant of a license but a license is considered to be revocable at the will of the grantor. *Id.* The grant from Baker to Able was not in writing. Able's reliance on the grant however may make it enforceable under an exception to the statute of frauds. Reliance can make a license irrevocable or an oral grant of an easement enforceable.

In nearly all states, a person may acquire the right to use the land of another through detrimental reliance on an oral agreement. In some states, the courts rely on the well recognized exception to the statute of frauds that permits enforcement of an oral agreement by estoppel. In other states, the courts hold that a license has been made irrevocable by estoppel. In either case, a person who was granted a right of way without a written grant may be permitted to enforce the grant. CUNNINGHAM, STOEBUCK & WHITMAN, PROPERTY, 457-458 (3d. ed. 2000). Here, Able detrimentally relied on Baker's agreement to let her use the road across the ranch. She built a house on her property in the belief she had the ability to use the road. A court could therefore hold she had acquired an easement by estoppel or an irrevocable license.

A title examiner undertakes a contractual duty to examine the public records for his or her employer. Ordinarily, the examiner is not liable failing to report title defects which do not appear in the public record. *See generally*, W. W. ALLEN, ABSTRACTER'S DUTY AND LIABILITY TO EMPLOYER RESPECTING MATTERS TO BE INCLUDED IN ABSTRACT, 29 A.L.R.2d 891 (1999). Easements by estoppel or prescription arise by operation of law and are not therefore included in the public record. Therefore, Client does not have a cause of action against her title examiner.



42345

Essay 7 GradeSheet

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1. A Prescriptive Easement requires:
 - 1a. Adverse or hostile use.
 - 1b. Open, Notorious, Visible Use.
 - 1c. Continuous for the requisite period.
2. Baker's grant of permission defeats Able's claim of adverse use.
3. An Easement by Necessity Requires:
 - 3a. Original ownership of whole estate by Grantor.
 - 3b. Necessity of easement at time of severance by original owner.
 - 3c. Great necessity for easement at the present time.
4. Easement by Implication/Implied Easement requires:
 - 4a. At the time of conveyance, one part of the land is being used for the benefit of the other part (quasi-easement).
 - 4b. The use is apparent and continuous.
 - 4c. That the use is reasonably necessary to the enjoyment of the quasi-dominant tract.
5. Irrevocable License or Easement by Estoppel exists if:
 - 5a. Justifiable reliance.
6. All interests in land must be in writing to comply with the Statute of Frauds.
7. A title examiner does not generally have liability for failing to disclose unrecorded agreements.

QUESTION 9

In 1940, Karen, the fee simple absolute owner of Blueacre, leased it to Acme for 99 years. On January 1, 1960, Acme entered into a valid agreement with Baker which stated:

Acme conveys Blueacre to Baker for a term of fifty years at an annual rent of \$5000, so long as Baker continues its business on Blueacre. If Baker discontinues the business, the term shall automatically terminate and the property revert to Acme.

Baker used Blueacre until 1975, when he ceased all business activities on the property. A year later, Harold started living on Blueacre. Once Harold began living on Blueacre, he never left the property for longer than a couple of hours at a time. It was immediately obvious to anyone who drove or walked by Blueacre that someone was living there. Harold lived on Blueacre until he died in 2002. When he died, he had neither a will nor heirs.

Assume the statutorily prescribed period for adverse possession in the state where Blueacre is located is ten years.

QUESTION:

Discuss the parties' property interests in Blueacre.

DISCUSSION FOR QUESTION 9

The Conveyance from Karen to Acme

Karen, as the fee simple absolute owner of Blueacre, conveyed a leasehold interest in Blueacre (a lesser estate for years) to Acme for a term of 99 years. Following the effective date of the lease, Acme had the right to present possession of Blueacre for the next 99 years. Karen, as the fee simple absolute owner had a future interest in Blueacre. This future interest, a reversion, gave Karen the right to present possession of Blueacre after 2039. (*See generally* Cunningham, Stoebuck & Whitman, *The Law of Property* § 6.12 at 260-61 (2nd ed. 1993)) This reversionary interest is an automatic right on the happening of a certain event, a date in 2039. Although a reversionary interest is possessory in the future, it is a vested interest, not a contingent interest, because both the owner and the event upon which it will become possessory are certain. Therefore, a reversionary interest is not subject to the Rule Against Perpetuities.

The Conveyance from Acme to Baker

Acme conveyed a portion of its leasehold estate to Baker in the form of an estate for years leasehold for a fifty-year term beginning on January 1, 1960. Baker's leasehold interest ends in 2010, which is prior to the end of Acme's 99-year leasehold interest. Therefore, Baker is a sublessee of Acme since Acme has conveyed less than its entire interest in Blueacre to Baker. (*See id.* § 6.68 at 387-88) This means Acme has a reversion in Blueacre giving Acme the right to present possession of Blueacre from the time Baker's sublease ends until 2039.

Baker's sublease is subject to the condition that it automatically terminates if Baker ceases its business activities on Blueacre. Additionally, the sublease provides that upon termination, Baker's interest in Blueacre automatically reverts to Acme. This condition renders Baker's leasehold interest defeasible since the fifty year term can be cut short upon violation of the condition. The automatic nature of the transfer from Baker to Acme upon violation of the condition indicates that the type of defeasible interest created was a determinable interest. Additionally, the words used - "so long as" - are words of art usually indicative of the creation of a determinable interest. (*See* Moynihan, *Introduction to the Law of Real Property* § 6 at 108-110 (2nd ed. 1988)). Therefore, Acme conveyed to Baker a 50 year determinable leasehold interest. Additionally, Acme has a possibility of reverter interest in Blueacre during the 50-year term of the sublease.

In 1975, prior to the end his sublease, Baker violated the terms in the sublease by ceasing all business activities. Consequently, in 1970, Baker's interest in Blueacre automatically terminated and Acme automatically became entitled to the right of present possession. At that time, Acme's rights in Blueacre were the remaining time on its 99-year lease.

Adverse Possession

Under the doctrine of adverse possession, a non-owner of real property can become the owner of realty if the non-owner engages in "actual, continuous, exclusive, open & notorious, and hostile possession" of the property for a statutorily prescribed period. (*See* Cunningham, Stoebuck & Whitman, *The Law of Property* § 11.7 at 808 (2nd ed. 1993)). Here, the statutorily prescribed period is ten years. The above requirements are indicia of actions that demonstrate that the adverse possessor behaved to the outside world as if he were owner of the property in question. Typically, if a non-owner is on the property without the owner's permission, the hostile requirement is satisfied. Additionally, if

the non-owner is using the property in such a way that a reasonably vigilant owner would be aware of the existence of an adverse possessor who is acting like an owner merely by inspecting the property, then the non-owner is an adverse possessor. If such adverse possession continues for the statutory period then the adverse possessor becomes the owner of the property. Such adverse possession title is a new title that replaces the true owner's title, which has been extinguished by the adverse possession. (See Boyer, *Survey of the Law of Property* at 237 (3rd ed. 1981)).

Although the title created by adverse possession is a new title, the extent of the title is determined by the property interest owned by the property owner whom the adverse possession ran against. Typically, it must be determined who owned the present right to possession of the property at the time the adverse possession period started to run. Whatever interest that party owned is the interest the adverse possessor has in the property at the end of the adverse possession period. Adverse possession does not run against the holder of a remainder interest because the estate only terminates against a party in possession.

In 1975, Harold, without permission from anyone, moved onto Blueacre and became an adverse possessor of Blueacre. His possession was "hostile" and sufficiently open such that it was obvious to anyone he was living there. After ten years, in 1985, Harold had adversely possessed Blueacre. At the time Harold began his adverse possession, Baker had no interest in Blueacre. Instead, Acme had the right to present possession of the property. Therefore, Harold owned the remaining 99 year leasehold interest in Blueacre that had previously been owned by Acme.

The Effect of Harold's Death

When Harold died in 2002, he had no heirs. Therefore, via escheat, the state became the owner of whatever property Harold owned at his death. (See Moynihan, *Introduction to the Law of Real Property* § 6 at 108-110 (2nd ed. 1988)). Consequently, in 2002, the state owned the remaining term of the 99-year leasehold interest in Blueacre, which would last until the end of 2039. At that time, Karen's reversionary interest in fee simple absolute for Blueacre would mature into a possessory interest.



21741

Essay 9 GradeSheet

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1. Karen has an automatic reversionary interest in Blueacre to become effective after 2039. 1. _____
2. Karen's reversionary interest is vested and therefore, not subject to the Rule Against Perpetuities. 2. _____
3. Baker's 50-year determinable leasehold estate automatically terminated when Baker ceased to do business. 3. _____
4. Baker had a sublease from Acme since it conveyed less than the entire estate. 4. _____
5. Acme had a determinable estate for the period after termination of Baker's sublease for the remaining 99 year lease (with a possibility of reverter during Baker's sublease). 5. _____
6. For Adverse possession by a non-owner to be effective it must be
 - 6a. open and notorious; 6a. _____
 - 6b. actual and exclusive possession; 6b. _____
 - 6c. continuous for the statutorily prescribed period; 6c. _____
 - 6d. hostile (adverse). 6d. _____
7. Adverse possession does not run against the holder of a remainder interest (Karen) because the estate only terminates against a party in possession. 7. _____
8. Harold adversely possessed Blueacre against Acme. 8. _____
9. On Harold's death the remaining 99-year leasehold (Acme's original interest) escheats to the state because he had no heirs. 9. _____

QUESTION 9

Ginny owned ten acres of wooded land in State X. When she died in 1991, her valid will left all her property to be shared equally by her only daughter Ellen and her grandson Junior. At Ginny's death Junior was three years old. Ellen lived in a state that was distant from her mother's home, and she did not visit the property until December 2003.

In 1992, Alfred, a stranger, noticed that the property was vacant and that nobody was using it. Alfred tore down the ramshackle hut that was on the land and replaced it with a lovely cottage. He planted a garden and surrounded the cottage and one acre of the yard with a white picket fence. Alfred moved into the cottage with his dog Beauregard in 1993. He has resided there since then, paying the yearly tax bill that comes to the property addressed to Ginny. Alfred and Beau occasionally walk through the woods that cover the remaining acres.

In January of 2004 Ellen discovered that Alfred was living on the property and commenced an action to eject him on behalf of herself and Junior.

QUESTION:

Assuming that State X has a 10 year statute of limitations for actions to recover real property, discuss Ellen's, Junior's, and Alfred's interests in the property.

DISCUSSION FOR QUESTION 9

Ellen and Junior have inherited undivided equal shares of Ginny's property which includes her ten acres of real property. "A transfer to two or more persons (other than husband and wife) will create a tenancy in common unless the grantor clearly expresses the intent to create a joint tenancy." The Law of Property 190 Cunningham, Stoebuck and Whitman (2nd ed., 1993) Ginny's will gives no indication that she intended to create a right of survivorship. Ellen and Junior will have an equal right to possess the whole property. The interest owned by each tenant in common can be sold or transferred without affecting the rights of the other tenant. Id.

Alfred entered the property in 1992 after Ellen and Junior had become the owners of the property. The ten year statute of limitations began to run against Ellen at that time because she is an adult, but it should have tolled against Junior because he was a minor when Alfred entered the property and still has not reached the age of 18. See Powell on Real Property, para. 101413]. If the statute is tolled for Junior then Alfred can only assert his adverse possession claim against Ellen.

To establish adverse possession, Alfred's use must be actual, adverse, open and notorious, exclusive and continuous. To establish actual use Alfred must "use and possess the land to the same extent as a record owner would, in light of the property's actual attributes." Powell. para 1013[2a] . Alfred can establish actual use with respect to the area he has improved and enclosed, the improvements also help to satisfy the requirement of open and notorious as they make Alfred's use apparent to the world. Exclusivity seems to be established both by the fence, which would exclude the public from the enclosed area, and because nothing indicates that Ellen used the property during the running of the statute of limitations.

As a stranger, Albert can establish that his use was non-permissive or hostile. Although most jurisdictions do not inquire into the intent of the adverse possessor some jurisdictions will find that the possession is not adverse if the entry is under a mistaken belief in rightful ownership. (Cunningham, et.al., 813).

Alfred may have more difficulty establishing the actual requirement for the unfenced portion of the property, he only walked on it occasionally and made no improvement or agricultural use of the property. If Alfred can establish that he openly, notoriously and continuously used an identifiable path or trail for the statutory period he may be able to establish an easement by prescription that will benefit his interest in the fenced area. (Bruce and Ely The Law of Easements and Licenses in Land (1988 para 5.)

If Alfred can establish that he adversely possessed Ellen's interest, he will step into her shoes as a tenant in common with Junior as to the cottage and enclosed area. He may be able to establish that he has a prescriptive easement for a particular path in the woods if he can show the elements of adverse possession for that trail, thus barring Junior or Ellen from excluding Alfred. However, it is unlikely that Alfred has adversely possessed the wooded acreage.

As Junior's co-tenant, Alfred may be entitled to a pro-rata contribution for the property taxes that he paid, if the amount exceeds the rental value of the premises. (Cunningham et.al., 217). If the property is ultimately partitioned, Alfred would be entitled to recover the costs of the fence and cottage, to the extent that they have increased the value of the land. (Cunningham et.al., 228)

ESSAY Q9

SEAT

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ISSUE

	YES	NO
1. Ellen and Junior each inherited an undivided equal one half share in the land as tenants.	1. <input type="radio"/>	<input type="radio"/>
2. To establish adverse possession, the use must be:		
2a. actual possession (occurred);	2a. <input type="radio"/>	<input type="radio"/>
2b. adverse/hostile (no permission of owner);	2b. <input type="radio"/>	<input type="radio"/>
2c. open and notorious (sufficiently apparent to true owner to put owner on notice);	2c. <input type="radio"/>	<input type="radio"/>
2d. exclusive (must not share with owner);	2d. <input type="radio"/>	<input type="radio"/>
2e. continuous (period of occupancy must be continuous for statutory period);	2e. <input type="radio"/>	<input type="radio"/>
3. Alfred was a stranger to Ginny, Ellen and Junior, so his use was adverse or hostile and not permissive.	3. <input type="radio"/>	<input type="radio"/>
4. His <u>actual and continuous</u> use for ten years fulfilled the statute of limitations.	4. <input type="radio"/>	<input type="radio"/>
5. His improvements of the cottage and fence and payment of taxes helped to satisfy the <u>open and notorious</u> as well as actual requirements.	5. <input type="radio"/>	<input type="radio"/>
6. The fence around the cottage indicates that the public did not use the area, meeting part of the <u>exclusive</u> requirement and establishing actual possession for that area.	6. <input type="radio"/>	<input type="radio"/>
7. In most jurisdictions, the statute of limitations is tolled if the owner is a minor at the inception of the adverse possession for the period of the disability.	7. <input type="radio"/>	<input type="radio"/>
8. Since the statute of limitations for adverse possession is tolled while Junior is a minor, Alfred will not prevail against Junior's undivided interest.	8. <input type="radio"/>	<input type="radio"/>
9. Alfred can assert an adverse possession claim against Ellen.	9. <input type="radio"/>	<input type="radio"/>
10. Alfred and Junior will be tenants in common.	10. <input type="radio"/>	<input type="radio"/>
11. As a co-tenant Alfred may be entitled to recover from Junior a portion of the property taxes he has paid, but he cannot recover the cost of the improvements until the property is sold or partitioned.	11. <input type="radio"/>	<input type="radio"/>
12. Alfred's claim as to the unfenced acres may fail because he will have difficulty establishing exclusivity, so Ellen and Junior may still be co-owners of the wooded acreage.	12. <input type="radio"/>	<input type="radio"/>
13. Alfred may claim a prescriptive easement over the wooded areas upon which he took his daily walks (if he can establish adverse, open and notorious, continuous and uninterrupted use for the prescriptive period).	13. <input type="radio"/>	<input type="radio"/>

QUESTION 4

Oliver Owner (“Owner”) held a fee simple absolute to a tract of land located in what was the undeveloped outskirts of a large city. In 1970, Owner leased the tract for 50 years to Developer Corporation (“Developer”). Owner and Developer signed a lengthy, written lease agreement which, among other things, permitted Developer to construct improvements on the site. Additionally, the lease agreement provided that “Developer, its successors and assigns shall never permit intoxicating drinks to be sold or consumed on the leased premises.”

Owner and Developer also executed a single page document styled a “Memorandum of Lease” which recited that the parties had entered into a lease agreement for a term of 50 years. The “Memorandum of Lease” did not mention any of the other terms of the lease. The parties recorded the “Memorandum of Lease” but not the longer lease agreement.

Developer timely paid all of the lease payments and built apartment buildings, townhouses, and a few storefronts on the tract. Early in 2004, Developer entered into a ten year written agreement with Sally’s Saloon, Inc. in which Sally’s leased a storefront located on the edge of the tract. Several nightclubs were located across the street from this storefront on land Owner did not own. Between 1970 and the present, the city had grown considerably and now surrounds Owner’s tract.

After signing the lease, Sally’s began a six-month, \$750,000 remodeling project on the storefront, converting the property from retail use to a saloon and restaurant. During the remodeling project, Sally’s repeatedly ran large ads in the local newspaper proclaiming “Opening soon, the longest bar in the West” and posted a sign on the exterior of the premises with the same wording.

Two nights after Sally’s opened for business, Owner filed a lawsuit seeking to enjoin Sally’s from selling liquor on the site.

QUESTION:

Discuss all defenses Sally’s could raise against Owner.

DISCUSSION FOR QUESTION 4

Here, Owner is seeking to enforce a real estate covenant in equity. To put it simply, he is seeking an injunction. To enforce a covenant in equity: (1) the covenant must “touch and concern” the land; (2) the parties must intend that the covenant run with the land; and (3) the party against whom enforcement is sought must have notice of the covenant.¹ *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (1848).

A covenant is said to “touch and concern” the land if it affects the parties’ legal interests in their capacity as owners of the land and not merely as members of the community in general. *Neponsit Property Owners’ Association, Inc. v. Emigrant Industrial Savings Bank*, 15 N.E.2d 793, (N.Y., 1938). Covenants which restrict the use of the land are generally held to satisfy “touch and concern” requirements. Covenants banning the sale and consumption of liquor have uniformly been held to “touch and concern” the land although they have sometimes failed other standards for enforcement. *E.g.*, *Baker v. Seneca*, 329 Mass. 736, 739; 110 N.E.2d 325, 327 (1953); *Sorrentino v. Cunningham*, 111 Ind. App. 212, 39 N.E.2d 473 (1942); *Leach v. Larkin*, 1993 Tenn. App. LEXIS 631, 14.

The requirement that the parties intend a covenant to run also presents little opportunity for a defense on the facts of the problem. Owner and Developer specifically agreed that Developer’s “successors and assigns” would be bound by the covenant. They thus made their intention manifest.

The final requirement of notice, however, may present some grounds for a defense. Sally’s Saloon had no actual notice of the restrictions against liquor. The “Memorandum of Lease” did not mention the restrictions. Sally’s Saloon therefore had no record notice of the prohibitions. The key issue is whether the Memorandum’s reference to the ground lease put Sally’s Saloon on inquiry notice.

Many jurisdictions have held that a title examiner must inquire as to the contents of unrecorded instruments if they have been referred to in a recorded document. *Harper v. Paradise*, 233 Ga. 194, 210 S.E.2d 710 (1974). Other jurisdictions, however, have tried to limit the extent to which an examiner must look into unrecorded material in order to reduce the costs of title examination. *See*, COLO. REV. STAT. § 38-35-108 (1997). Not surprisingly, courts have split on whether a recorded memorandum of lease imparts constructive notice of the full, unrecorded lease. *Compare*, *Howard D. Johnson v. Parkside Development Corp.*, 169 Ind. App. 379, 348 N.E.2d 656 (1976)(the recorded memorandum does not impart notice of the provisions of the full lease) *with* *Mister Donut of America, Inc. v. Kemp*, 368 Mass. 220, 330 N.E.2d 810 (1975)(the memorandum does give constructive notice).

If conditions have changed since a restrictive covenant was put in place, a court of equity may refuse to enforce the restriction. The law focuses on whether the covenant still serves its purpose within the confines of the restricted land. Changes outside the restricted land ordinarily

¹ When a covenant is enforced in equity it is frequently labeled an “equitable servitude.” Black’s Law Dictionary, 539 (6th ed. 1990)

DISCUSSION FOR QUESTION 4

Page Two

do not justify a refusal to enforce the covenant if parcels covered by the restriction still substantially benefit from it. *Western Land Company v. Truskolaski*, 88 Nev. 200, 495 P.2d 624 (1972); *Baker v. Seneca*, 329 Mass. 736, 739; 110 N.E.2d 325, 327 (1953).

Conditions have clearly changed around the tract of land subject to the ground lease; the city has grown around the site and a number of nightclubs are located just outside the tract (these presumably serve liquor). Thus, the facts of the problem do present an opportunity to raise the changed conditions defense. However, the restricted land was primarily developed for residential use. The residents of the townhouses and apartments built by Developer may still benefit from the restriction on liquor sales. Changes outside the restricted land, like the nightclubs, may be disregarded by the court if the restriction still serves the residents of the development.

A court of equity will not enforce a servitude if the plaintiff has unreasonably delayed in bringing suit to the detriment of the defendant. A plaintiff who knows or should know of a right to bring a claim must not unreasonably delay in bringing suit. If such a delay prejudices the defendant, a court of equity will apply the doctrine of laches and bar the claim to the extent necessary to prevent injustice. 1 DOBBS, LAW OF REMEDIES § 2.4(4) (2d ed. 1993).

The defendant in the injunction action, Sally's Saloon, engaged in a lengthy and expensive remodeling project to make the store suitable for a saloon. During the period of the remodeling, Sally's Saloon repeatedly ran ads announcing its intention to operate a bar on the property. Under these circumstances a court could find that laches barred Owner's claim. A court could hold the newspaper ads and posted notice were sufficient to give Owner notice of the breach of lease. Sally's expenditures during the course of the remodeling might have been avoided had Owner brought suit earlier, and Owner's delay might be seen to have been unreasonable. Nevertheless, if the Owner is found to have brought suit promptly, laches will not bar the suit even if the defendant is prejudiced.

In answering the question, an examinee may rely on concepts related to laches like estoppel, acquiescence, or waiver. Courts do not always distinguish these doctrines. Waiver is an intentional relinquishment of a known right. Acquiescence is waiver implied by non-action. The defense of estoppel is appropriate whenever the defendant has detrimentally relied on words of conduct by the plaintiff. There are only subtle differences between these doctrines. The courts often apply them with laches without differentiation. *See*, 1 DOBBS, LAW OF REMEDIES § 2.3(5) (2d ed. 1993). Waiver does not appear to fit the facts of the problem. An examinee could, however, address Owner's delay in bringing suit in terms of acquiescence or estoppel.

ESSAY Q4

SEAT

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<u>ISSUE</u>	POINTS AWARDED
1. An equitable servitude/covenant in a ground lease is enforceable against an assignee of the original tenant if:	1. ○
1a. The original parties to the ground lease intend that it run;	1a. ○
1b. The covenant touches and concerns the land; and	1b. ○
1c. The assignee has notice of the restriction.	1c. ○
2. A recital in a recorded Memorandum of Lease referring to a full ground lease may put an assignee on inquiry notice of the provisions of the ground lease.	2. ○
3. There is no constructive (record) notice because the Memorandum did not mention the restriction.	3. ○
4. There was no actual notice because Sally was not told or otherwise informed of the restriction.	4. ○
5. A Court will not enforce an equitable servitude if conditions have so changed within the burdened land that the restriction can no longer achieve its original purpose.	5. ○
6. A Plaintiff who knew, or should know, of a right to bring a claim must not unreasonably delay in bringing suit (laches).	6. ○
7. Plaintiff's delay may have prejudiced Defendant, given he has expended substantial sums during the delay (estoppel/waiver).	7. ○
8. Sally may have a claim against the Developer for indemnification against the Developer; there was no privity of contract between Sally and Owner.	8. ○

QUESTION 9

Tenant rented a five room residential apartment from Landlord for two years, to begin immediately. In the standard written lease, one provision prohibited Tenant from having any pets on the premises. After tenant moved in, he noticed that a number of other tenants had pets. Tenant wrote Landlord a letter stating that he wanted a dog and asked if Landlord had any objection. Landlord never answered the letter. Two weeks later Tenant obtained a dog. A few months later, on adjoining property, Landlord fenced in a yard where tenants could exercise their pets.

Twelve months later, Landlord sent a notice to all residents of the apartment building stating that he was enforcing the ban on pets. He ordered the residents to find alternative homes for pets within two weeks.

Tenant did not comply with Landlord's order. A few weeks later Tenant returned to his apartment to find that Landlord had changed the lock on one of the doors to Tenant's apartment. As a result, Tenant could use only three of the five rooms that he was renting. Tenant stopped paying rent and continued to occupy the remaining three rooms.

QUESTION:

Discuss whether Tenant may legally continue to keep his dog in the apartment and occupy the three rooms without paying rent.

DISCUSSION FOR QUESTION 9

Tenant can argue that he can keep his pet on two grounds. First, Landlord waived his right to enforce the contrary lease provision; and second, Landlord is estopped from enforcing the lease provision.

Landlord's waiver of the right to enforce the "no pets" provision is evidenced by his failure to answer Tenant's letter. Landlord's waiver is also evidenced by his failure to enforce the "no pets" provision for a year, a lengthy period of time. Third, Landlord also evidenced waiver by fencing in the yard for the purpose of exercising pets.

Landlord is also estopped from enforcing the "no pets" provision because Landlord engaged in conduct on which Tenant could rely as evidencing that Landlord was rendering the lease provision unenforceable. Estoppel requires affirmative conduct on the part of the party being estopped and/or detrimental reliance on the part of the party seeking estoppel. Here, there is affirmative conduct on the part of Landlord because he built the exercise area for the tenants' pets. There is also detrimental reliance on the part of Tenant in that he went out and got a dog on the basis of Landlord's behavior.

There is an implied covenant of quiet enjoyment in all leases which provides that a landlord will not interfere with a tenant's quiet enjoyment and possession of the premises. The covenant of quiet enjoyment may be breached by actual eviction, partial actual eviction, or constructive eviction. Tenant has the right to stop paying rent and remain in the remaining three rooms because of the doctrine of partial actual eviction. The doctrine applies when a landlord has deprived a tenant of some part of the tenant's premises. Here, Landlord deprived Tenant of two of the five rooms that Tenant had rented. Under the doctrine of partial eviction, the tenant need not pay the proportionate part of the rent represented by the continued use of the part that remains accessible. According to the doctrine, rent issues from the entire premises and cannot be apportioned. In addition, the landlord cannot apportion his own wrong. Therefore, Tenant has no obligation to pay any rent. For the same reasons, the doctrine permits the tenant to remain in possession of the property that remains accessible. Robert S. Schoshinski, American Law of Landlord and Tenant (1980) §5:10 at 251-55 (waiver and estoppel); §3:4 at 95-97 (partial actual eviction).

COLORADO SUPREME COURT
Board of Law Examiners

JULY 2005 BAR EXAM
Regrade

ESSAY Q9

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ISSUE

POINTS
AWARDED

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|----|--|-----|-----------------------|
| 1. | Landlord waived breach of the no dog provision of the lease. | 1. | <input type="radio"/> |
| 2. | Waiver evidenced by Landlord: | | |
| | 2a. failing to respond to letter in negative; | 2a. | <input type="radio"/> |
| | 2b. failing to enforce the provision against other tenants; | 2b. | <input type="radio"/> |
| | 2c. fencing in yard for pets. | 2c. | <input type="radio"/> |
| 3. | Estoppel requires active conduct on the part of Landlord or detrimental reliance with a change in position of Tenant. | 3. | <input type="radio"/> |
| 4. | Landlord is estopped from enforcing the lease because he fenced in yard and/or Tenant relied on Landlord's failure to respond to letter informing him of dog purchase. | 4. | <input type="radio"/> |
| 5. | Landlord breached implied covenant of quiet enjoyment. | 5. | <input type="radio"/> |
| 6. | Tenant has defense of partial actual eviction. | 6. | <input type="radio"/> |
| 7. | Under doctrine of partial eviction, there is no duty to pay <u>any</u> rent. | 7. | <input type="radio"/> |
| 8. | Under doctrine of partial eviction, Tenant can continue to occupy the part of the premises that remains accessible. | 8. | <input type="radio"/> |

QUESTION 3

Greenacre is a twenty acre parcel of vacant rural land owned by Owner. It is bounded on three sides (north, west, and south) by a county wildlife preserve. The preserve is secured by a high chain link fence around its entire perimeter. Along Greenacre's east boundary lies County Road #1, the parcel's only public access road.

In 1989, Owner sold and conveyed the east half of Greenacre to Buyer. After the closing, Buyer proceeded to build and permanently maintain a high chain link fence around the entire boundary of his property. Owner retained no access easement benefitting the western half of Greenacre.

Immediately after closing, Owner left the country and did not return to visit Greenacre until early this year. When he returned, Owner discovered Buyer's fence denying access to the county road from Owner's parcel.

Today, Owner read in the newspaper that the county had contracted to build a new public road through the wildlife preserve late in 2006. This new road will abut Owner's half of Greenacre.

QUESTIONS:

Assume that the local statute of limitations (statutory period) is ten years in all civil matters.

1. Discuss whether Owner has any right of access to his parcel.
2. Discuss the legal effect, if any, of Owner's nonuse of his parcel from 1989 to 2006.
3. Discuss the legal effect, if any, of the proposed new county road on the rights of the parties.

DISCUSSION FOR QUESTION 3

1. Was any easement created when Greenacre was conveyed to Buyer?

The common law doctrine of easements implied from necessity can only be invoked when (a) unity of title existed; (b) the parcel was severed (a larger parcel has been severed by an owner into smaller parcels and one or more of the resulting parcels is conveyed to another party); (c) the necessity for an easement came into existence at the moment of conveyance; and (d) the necessity was caused by the severance of the larger parcel. These necessary conditions would have been met in 1989 when Owner conveyed the east half of the parcel to Buyer. *Stoebuck & Whitman, THE LAW OF PROPERTY, Third Ed.* at 445 (West, 2000) (*Stoebuck & Whitman*).

The necessity element has jurisdictional variations as to the level of necessity that will trigger the doctrine. These variations run from (a) strict (or sheer) necessity to (b) reasonable necessity to (c) significant need. In most jurisdictions Grantors such as

Owner are held to a higher level of necessity than Grantees such as Buyer because the Grantor made the transfer and could have included a reservation of easement in their conveyance. Accordingly, courts are reluctant to award Grantors access easements by implied reservation which would burden the lands they conveyed to their Grantees without placing a written reservation in their deeds. Under these facts most courts would hold Owner to a strict level of necessity (rather than the lesser requirement of reasonable necessity often used to create easements for the benefit of the Grantee). But jurisdictional variations about strict-reasonable necessity will not matter under these facts. This is so because the west half of Greenacre retained by Owner is landlocked unless it enjoys an access easement across the east half to County Road #1. Being landlocked meets the highest level of necessity in all jurisdictions. *Stoebuck & Whitman*, at 447-448.

2. What is the legal effect on Owner's rights of his nonuse of the west half of Greenacre from 1989 to 2006?

If the required conditions for creating an Easement Implied from Necessity (unity of title, severance & conveyance, and necessity) all existed in 1989, then the mere nonuse of the implied easement by the dominant estate owner will not defeat the implied easement. The dominant owner's property right in such an unused easement will lie dormant upon the servient estate until needed for the enjoyment of the dominant estate. Periods of dormancy can be decades long (and even survive transfers of the servient and dominant estates to third parties, which is not an issue here). *Cribbet & Johnson, PRINCIPLES OF THE LAW OF PROPERTY, Third ed.* at 372 (Foundation Press, 1989) (*Cribbet & Johnson*).

There can be no claim of adverse possession of Owner's fee simple by Buyer based on the stated facts. Buyer merely fenced his own land. Buyer never entered Owner's fee simple or occupied it openly, adversely, notoriously, exclusively, and continuously for the statutory period. *Cribbett & Johnson* at 334. The statute of limitations and its doctrines of adverse possession & prescription can legally terminate an easement that is in actual use. Hostile conduct visibly and adversely interfering with the use of the easement, such as blocking off an access easement, and doing so continuously for the period of time prescribed by the statute of limitations could ripen prescriptive rights and terminate the easement. Such interference is necessary by the hostile servient estate owner such as Buyer. The mere nonuse of the easement by the owner of the dominant estate is not enough to terminate the easement. Examinees should nevertheless argue the question whether Buyer's construction and maintenance of his high chain link fence for over ten years was sufficient. *Cribbett & Johnson*, at 378-79; *Stoebuck & Whitman*, at 468-69.

The stated facts deal with a dormant implied easement which is not in actual use. The law respecting dormant easements and their termination by prescription is unsettled. Thus, the issue could be argued both ways on the question of whether a dormant easement implied from necessity (such as Owner's) can be terminated by prescription

(such as Buyer fencing it off for the statutory period of time).

3. What is the legal effect of the proposed new county road?

The duration of an Easement Implied from Necessity lasts only so long as the necessity that created the easement continues to exist. Accordingly, should the planned new county road actually be completed and opened at some future date, providing public access to Owner's west half of Greenacre, then at that time the necessity that created an implied reservation of easement across Buyer's east half of Greenacre will have ended. This would result in the termination of the implied easement. *Stoebuck & Whitman* at 449; *Cribbet & Johnson*, at 373.

ESSAY Q3

SEAT

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ISSUE

POINTS
AWARDED

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| 1. An implied Easement of Necessity may exist across Buyer's parcel to Owner's parcel. | 1. <input type="radio"/> |
| 2. The elements of an Implied Easement of Necessity are: | |
| 2a. Unity of Title existed in both parcels; | 2a. <input type="radio"/> |
| 2b. The subject parcel was severed from the unified parcel, and the necessity was caused by the severance; | 2b. <input type="radio"/> |
| 2c. The need for the easement came into existence at the time of the conveyance. | 2c. <input type="radio"/> |
| 3. If the conditions for an Implied Easement of Necessity exist, then mere nonuse (dormancy) will not terminate or defeat the implied easement. | 3. <input type="radio"/> |
| 4. Buyer may argue that adverse possession extinguishes Owner's implied easement. | 4. <input type="radio"/> |
| 5. Adverse possession required: | |
| 5a. Open use; | 5a. <input type="radio"/> |
| 5b. Adverse use; | 5b. <input type="radio"/> |
| 5c. Notorious use; | 5c. <input type="radio"/> |
| 5d. Exclusive use; | 5d. <input type="radio"/> |
| 5e. Continuous use for the statutory period. | 5e. <input type="radio"/> |
| 6. When constructed, the new county road would provide public access to Green's acreage and would therefore destroy the implied easement of necessity. | 6. <input type="radio"/> |

QUESTION 8

Tom Worker, a municipal employee, was called into his supervisor's office and told he had been fired from his job. No reasons were given for his firing.

The relevant municipal ordinance regarding an employee's dismissal provides that no employee can be discharged except for "cause." The ordinance also provides that "employment is terminated effective upon the receipt by the employee of a written statement of the reason(s) for the dismissal."

QUESTION:

Discuss Worker's right to a hearing and on what grounds he may challenge his dismissal.

DISCUSSION FOR QUESTION 8

In this question Tom Worker will argue that he has a constitutional (procedural) due process right to a hearing. The Court has set forth a basic two-step procedure to be used in analyzing issues of procedural due process. See, e.g., Board of Regents v. Roth, 408 U.S. 564 (1972); see also Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1491-93 (1985). The first step is to determine whether there is either a "property" or a "liberty" interest. The question is meant to evoke discussion of the standards for what constitute protected "property" interests. In this respect, two points are of particular importance.

1) To determine whether a property right has been created, a court must, in this case, look to state law. As the Supreme Court stated in Roth, supra: "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

2) When applying state law, it must be determined whether, in fact, the state meant to create a "property" interest. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth at 577. In particular, ["t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

In this case, Tom Worker's right to a job is a protected property interest created by ordinance under state law.

The second step is to decide "what process is due." Three points are of particular importance here.

1) The most important is that even though the state law governs whether a property interest has been created, federal constitutional law determines what process is due. See Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1493 (1985); Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982); see also Vitek v. Jones, 445 U.S. 480, 491 (1980). Previously, some members of the Supreme Court had argued that state law would also control what process is due. See Arnett v. Kennedy, 416 U.S. 134, 152-54 (1974) (Rehnquist, J., concurring) (arguing "bitter with the sweet" theory).

2) The test for determining what process is due is the three-part standard set forth in Mathews v. Eldridge, 424 U.S. 319 (1976). As the Court stated: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

3) In these circumstances, this would require that the employee be given a pretermination hearing that, at the very minimum, required that he be given "oral or written notice of the charges against him, and explanation of the employer's evidence, and an opportunity to present his side of the story." Loudermill, *supra*, at 1495; see also *id.* at 1496 n.12. In this case, the court would balance the loss of a property interest with the chance of erroneous deprivation of a protected interest and the cost to provide a pre-termination hearing. Thus, Tom Worker would assert that before he could be fired he must be given written notice and a hearing. There is no emergency or public risk that would required firing first and then a post-termination hearing.

ESSAY Q8

SEAT

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ISSUE

POINTS
AWARDED

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|---|---------------------------|
| 1. Tom Worker will argue that he has a constitution due process claim. | 1. <input type="radio"/> |
| 2. Constitutional due process depends on whether the protected interest is a "property interest." | 2. <input type="radio"/> |
| 3. State law determines whether there is a protected property interest. | 3. <input type="radio"/> |
| 4. A property interest is determined by whether the individual entitlement is grounded in state law or based on a legitimate claim. | 4. <input type="radio"/> |
| 5. Tom Worker's right to his job is a protected property interest created by ordinance (i.e. under state law). | 5. <input type="radio"/> |
| 6. Federal law (not state law) determines what process is due. | 6. <input type="radio"/> |
| 7. To determine what process is "due" is a balance of 3 factors: | |
| 7a. The private interest that will be affected by the official action; | 7a. <input type="radio"/> |
| 7b. The risk of an erroneous deprivation of such interest through the procedures used; | 7b. <input type="radio"/> |
| 7c. The government's interest (including the fiscal and administrative burdens) that a procedural requirement would entail. | 7c. <input type="radio"/> |
| 8. Tom Worker would assert that he is entitled under the constitution to a pre-termination hearing on his dismissal. | 8. <input type="radio"/> |

QUESTION 8

Tom leased a building from Lola for five years with the expectation of converting it into a fast food drive-in restaurant. The building had formerly housed a restaurant. The lease included the following clause:

Paragraph 7: The tenant's use of the premises is restricted to carrying on a restaurant business.

After Tom leased the property, he applied for a license to operate a fast food drive-in restaurant. The local zoning authority denied his application. Although the property is zoned to permit "eating establishments," the zoning authority construed the zoning ordinance to forbid drive-in restaurants. Before Tom leased the property, neither he nor Lola was aware of the zoning restriction.

Tom attempted to obtain a variance or legal permission to operate a drive-in restaurant on the leased property, but failed. Because he could not operate a drive-in restaurant as planned, Tom claimed that the lease had an illegal purpose and therefore was invalid. He then abandoned the premises.

Lola advised Tom that she intended to hold him to the terms of the lease. Lola immediately found a new tenant who agreed to rent the property for the duration of Tom's lease term, but at a much lower rate. (The law in the jurisdiction where the property is located permits landlords to rent on the account of a defaulting tenant.)

Lola sued Tom for the difference between (a) the rent Tom would have paid and (b) the rent that the new tenant is paying for the balance of Tom's term. Tom's lease contained no acceleration clause making the balance of the rent due and payable upon default of a payment.

QUESTION:

Discuss Tom's liability to Lola under the lease agreement.

DISCUSSION FOR QUESTION 8

1. The lease is valid and enforceable, because its purposes are not illegal.

When a lease limits the tenant to a specific use and the use is invalid because of a zoning restriction, the tenant may terminate the lease. Here, however, under the lease, Tom still could validly use the property for a restaurant, a use permitted under the zoning ordinance's provision permitting an "eating establishment." This is a use that the premises formerly had and thus a use that is not unreasonable or impractical. When a lease permits more than one use and not all uses specified violate the zoning ordinance, the lease is valid. Here, the zoning ordinance permits other reasonable uses, such as an "eat-in" eating establishment." Therefore, the lease permits legal purposes and is valid. Robert S. Schoshinski, *American Law of Landlord and Tenant* §5:14 at 261-63 (Lawyers Co-op [now West] 1980) & 2000 Supp.

2. Because Lola has refused Tom's offer of surrender, Lola can choose to hold Tom to the lease and rent it out as his agent on his account. She may sue Tom for a rental payment (minus the rent of the new tenant) only after the payment becomes due.

If a landlord relets the premises, the Tenant's liability rests on whether the landlord has accepted surrender of the premises. If the landlord's reletting for the landlord's own account constitutes acceptance of surrender, the abandoning tenant is relieved of any rental liability accruing after abandonment. Lola has clearly refused to accept Tom's offer of surrender and therefore can choose to rent out the premises as an "agent" for Tom. Her express notification to Tom of her intention eliminates any ambiguity. Because Lola has refused to accept surrender, she cannot treat Tom's conduct as an anticipatory breach and sue for damages of all the rent. The lease does not contain an acceleration clause for rental payments upon default. Because Lola has refused to accept surrender, she may sue Tom for the rental payments that he owes minus the rental payments that she is receiving from the new tenant. However, she may sue for Tom for each installment of rent (minus the new tenant's rental) only after each payment becomes due. She may not sue for the balance of the entire rental (minus the new tenant's rental) until the end of the lease. Ralph E. Boyer, Herbert Hovencamp & Sheldon Kurtz, *The Law of Property* § 9.9 at 253-54, 282-84 (West 1991).

ESSAY Q8

SEAT

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ISSUE

POINTS
AWARDED

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| 1. A lease will not be enforced if the activity is illegal. | 1. ○ |
| 2. In this case, the leased premises could be legally used as a restaurant consistent with zoning and the language of the lease and therefore could not be terminated on the basis of illegal purpose. | 2. ○ |
| 3. Tom breached the lease by unjustifiably abandoning the property. | 3. ○ |
| 4. Tenant's liability of a default depends on whether the Landlord has accepted surrender of the premises. | 4. ○ |
| 5. If Landlord is deemed to have accepted surrender of the premises and relets for the Landlord's own account, then the Tenant may be released from any further rent liability after abandonment. | 5. ○ |
| 6. If surrender is not found, the Tenant is liable for the difference between the lease rent and the fair value rent which is generally the rent received from the reletting. | 6. ○ |
| 7. The act of reletting to mitigate damages does not constitute surrender for the purpose of relieving the Tenant of its rental obligations consistent with the majority of jurisdiction. | 7. ○ |
| 8. Since Lola did not have an acceleration clause in the lease and did not accept surrender, she may only sue Tom for rent (minus the new tenant rental amounts) only after such rental is due. | 8. ○ |

QUESTION 8

Lisa rented a house to Tim for a period of three years with a written lease specifying monthly rental payments. Shortly after moving in, Tim purchased and installed, with Lisa's permission, a window air conditioning unit and a new in-wall fireplace.

The day after the lease expired, Lisa called Tim reminding him that he needed to move out. She also told Tim that a friend wanted to use the house the following week to film a TV commercial and was willing to pay \$1,500, but only if the house was vacant. Tim did not vacate by the following week, so Lisa's friend chose to film the TV commercial elsewhere. Several weeks later, Tim called Lisa and told her that he had mailed her a rent check and wished to remain in the house.

QUESTION:

Discuss Lisa's legal rights and remedies regarding Tim's ongoing occupancy of the house, and whether Tim, if he must vacate the house, can legally take the air conditioning unit and fireplace he purchased and installed.

DISCUSSION FOR QUESTION 8

1. Lisa's legal rights and remedies regarding Tim's occupancy.

Once the lease term expired, Tim no longer had any right of possession in the house and a tenancy-at-sufferance" arises. See FJK Assocs. v. Karkoski, 725 A.2d 991, 993 (Conn. App. 1999); 49 Am.Jur.2d Landlord and Tenant § 284 (2006). Applicants should also receive credit if they describe Tim as a "holdover tenant." See Restatement (Second) of Property, Landlord and Tenant, § 14.1 (1976) (describing tenant-at-sufferance as "tenant improperly holding over.") During this period, Tim is still responsible for paying Lisa a reasonable rental value of the property which typically will be the rental rate under the expired lease. See Mack v. Fennell, 171 A.2d 844, 846 (Pa. 1961) (tenant is liable for use and occupancy during such interval); Restatement (Second) of Property, Landlord and Tenant, § 14.5 (1976).

When faced with a tenancy-at-sufferance, Lisa has two options. First, she can treat Tim as a trespasser and utilize available common law or statutory remedies, including a wrongful detainer action, to remove or evict Tim from the property. See id.; Bryan v. Big Two Mile Gas Co., 577 S.E.2d 258, 267 (W. Va. 2001); 49 Am.Jur.2d Landlord and Tenant §§ 273-274 (2006). Under this option, Lisa can also recover damages proximately resulting from Tim's wrongful withholding of possession. See 49 Am.Jur.2d Landlord and Tenant §§ 277-278 (2006); Restatement (Second) of Property, Landlord and Tenant, § 14.6 (1976). In this case, it appears that Lisa's damages would include \$1500 for the lost opportunity to rent the house to her friend for the TV commercial.

Alternatively, Lisa has the unilateral option of binding Tim to a new periodic tenancy. See Restatement (Second) of Property, Landlord and Tenant, § 14.4 (1976). The term of the periodic tenancy can be agreed upon by the parties, but absent such an agreement, courts will look to the terms of the original lease. If, as here, the lease term exceeds one year, some authorities indicate that a year-to-year tenancy is created. See Sinclair Refining Co. v. Shakespeare, 175 P.2d 389, 391 (Colo. 1946); 49 Am.Jur.2d Landlord and Tenant § 286 (2006). However, other authority provides that if rent under the expired lease was computed on a monthly basis, a month-to-month periodic tenancy is created. See Restatement (Second) of Property, Landlord and Tenant, § 14.4, comment (f) (1976); Roth v. Dillavou, 835 N.E.2d 425, 430 (Ill. App. 2005) (acceptance of monthly rental payments by the landlord will generally create a month-to-month tenancy).

2. If Tim vacates the house, can he legally take the air conditioning unit and fireplace?

Whether Tim can legally remove these items from the house when he leaves depends on whether the items have retained their status as personal property or, instead, have become "fixtures" to the real property. A fixture is former personal property that is so affixed or connected with real property that it is considered to be part of the real property. See 35A Am.Jur.2d Fixtures § 1 (2001).

DISCUSSION FOR QUESTION 8
Page Two

In landlord/tenant scenarios, the most important factor in determining whether an item of personal property has become a fixture is whether the owner of the personal property (the tenant) intended for the item to become part of the real property. See 8 Powell on Real Property § 57.04[4] (2001); 35A Am.Jur.2d Fixtures § 13 (2001); Hartberg v. Am. Founders' Sec. Co., 249 N.W. 48, 49 (Wis. 1933). An express agreement between the landlord and tenant regarding the status of the item will control. See Alexander v. Cooper, 843 S.W.2d 644, 646 (Tex. App. 1992). However, absent such an agreement (and in the present case), a court will look to various factors including (1) whether the nature of the item makes it essential to the use of the real property, (2) the manner or mode of attachment of the item, (3) whether the item is specially adapted to the real property, and (4) whether removal of the item will cause damage to the real property. See 8 Powell on Real Property § 57.05[5][b] (2001). In landlord/tenant cases, there is often a presumption that a tenant would not intend to make such a donation to the property owner. See 8 Powell on Real Property § 57.05[2][b] (2001); see also C.J.S. Fixtures § 54 (2004).

Applying the above listed factors, the window air conditioning unit that Tim installed would likely not be deemed a fixture and, therefore, may be removed by Tim. See Bay State York Co. v. Marvix, Inc., 119 N.E.2d 727, 730 (Mass. 1954) (detachable air conditioning units held to be removable by tenant). In contrast, the in-wall fireplace would appear to be more substantially attached to, and specially adapted for, Lisa's house and removal would probably result in damage to the house walls. Thus, it is likely to be deemed a fixture and not removable. See Wells v. Clowers Const. Co., 476 So.2d 105, 106 (Ala. 1985) (once affixed to a house, a fireplace becomes as much a part of that house as the four walls); see also 35A Am.Jur.2d Fixtures § 80 (2001).

ESSAY Q8

SEAT

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ISSUE

POINTS
AWARDED

Lisa's Legal Rights Regarding Tim's Occupancy

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|---|----|-----------------------|
| 1. Recognition of "tenancy-at-sufferance" or Tim as "holdover" tenant . | 1. | <input type="radio"/> |
| 2. As holdover/tenant-at-sufferance, Tim is still liable for reasonable value of use (rent). | 2. | <input type="radio"/> |
| 3. Lisa's first option (treat Tim as trespasser and seek eviction/wrongful detainer/removal). | 3. | <input type="radio"/> |
| 4. Can recover damages for TV commercial. | 4. | <input type="radio"/> |
| 5. Lisa's second option (bind Tim to new periodic tenancy). | 5. | <input type="radio"/> |
| 6. Term of tenancy is either year-to-year or month-to-month. | 6. | <input type="radio"/> |

Lisa's Legal Rights Regarding Tim's Occupancy

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|---|-----|-----------------------|
| 7. Depends upon whether items are "fixtures." | 7. | <input type="radio"/> |
| 8. Focus is on <u>intention</u> of tenant. | 8. | <input type="radio"/> |
| 9. Intent factors: | | |
| 9a. Prior Agreement? | 9a. | <input type="radio"/> |
| 9b. Essential to use? | 9b. | <input type="radio"/> |
| 9c. Degree of attachment/ease of removal. | 9c. | <input type="radio"/> |
| 9d. Specially adapted. | 9d. | <input type="radio"/> |
| 9e. Causes damage? | 9e. | <input type="radio"/> |
| 10. General presumption favoring tenants. | 10. | <input type="radio"/> |
| 11. Air conditioner (not a fixture/Tim may remove). | 11. | <input type="radio"/> |
| 12. Fireplace (a fixture/Tim cannot remove). | 12. | <input type="radio"/> |