

Kern County College of Law

REAL PROPERTY

Fall 2022

Professor Kathleen J. McCarthy

Instructions:

There are three (3) questions in this examination. You will be given three (3) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Kern County College of Law
Property Law
Fall 2022
Prof. K McCarthy

Essay Question #1

By grant deed in 2004 Carl acquired property in Fraiser Park (“FPP”), which consisted of a house and a few acres of open land in the Kern County mountains. Carl executed a deed of trust to secure a \$582,000 loan from Bank, which was recorded September 1, 2005 (“2005 Deed of Trust”). The beneficiary of the 2005 Deed of Trust was the Bank.

In 2008, Carl defaulted on the loan and the election to sell was recorded. However, no notice of trustee’s sale was recorded at that time. Carl had filed several bankruptcy cases which caused several delays in the foreclosure process. The foreclosure sale proceeding did not proceed any further for nearly a decade beyond the notice of election to sell.

Meanwhile, in 2013, Adam noticed FPP was unoccupied. Adam took possession of FPP on June 28, 2013 without permission and claimed it as his own in an open and obvious manner. Since that time Adam stored trailers on FPP, kept chickens, pigs and goats there, made repairs to the house, and paid the assessed property taxes each year when due.

During this entire time the 2005 Deed of Trust continued to constitute a lien or encumbrance on FPP.

In February 2018, the Bank recorded a new Notice of Trustee’s Sale and the sale was conducted on April 2, 2018. The Bank became the owner by the recording of the trustee’s deed upon sale on April 12, 2018.

On July 16, 2018, just a few months after the foreclosure sale, Adam filed an action to quiet title naming the Bank and Carl as defendants.

On July 25, 2018, the Bank served Adam with a Notice to Quit which sought to eject Adam from the FPP.

In this jurisdiction, California, the statute of limitations for quiet title requires uninterrupted and continuous possession for at least five years and the payment of all taxes assessed against the property during the five-year period.

On what basis could Adam claim ownership of FPP as against (1) the Bank and (2) against Carl?

Essay Question #2

Whiteacre is a tract of 200 acres that is used as a farm. The owner of Whiteacre, Oscar, raises cattle and grows crops on the property. Oscar has a spouse, Alice. Together, Oscar and Alice have one child, Brad.

Oscar can no longer run the farm but he wants the farm to remain in his family. If the farm cannot remain in the family, then Oscar wants the land to go to his church ("Church"), which is a charitable organization.

Accordingly, Oscar devises Whiteacre in a recorded deed as follows:

"To Alice for life, then to Brad in fee simple, provided that Brad shall not convey or attempt to convey any interest in Whiteacre to any person who is not a blood relation of Oscar, and if Brad does so, then Brad's interest shall be forfeited and pass to my Church."

During Alice's lifetime, Whiteacre is annexed by the adjacent municipality, and all of the property surrounding Whiteacre is filled by new housing developments. Although the municipality's zoning law prohibits agricultural activity, the law provides an exception for preexisting uses, which means that Whiteacre can continue to be operated as a farm indefinitely.

Although the farm continues to operate at a profit, Alice believes that the land is more valuable for other purposes. Alice therefore proposes to tear down the barns and other buildings on the property and build a mixed-use development, which will include an apartment building and a small shopping center. Alice's research indicates that these changes would provide double the current income from Whiteacre and would at least triple the market value of the land itself.

Brad objects to Alice's plans and seeks an injunction to prevent Alice from developing Whiteacre.

While the lawsuit is pending, Alice dies, and Whiteacre passes to Brad. Brad holds Whiteacre for one year, then decides to sell it. A potential buyer, Carl, comes forward and is willing to pay Brad's asking price. Carl is not a blood relation of Oscar. Another potential buyer, Derrik, offers to pay slightly less than the asking price. Derrik is a friend of Brad and is also not related in any way to Oscar. Brad sells Whiteacre to Derrik.

Carl, angry about missing an opportunity to own the Whiteacre tells the Church about the sell to Derrik. Church then asserts a claim to Whiteacre. Church argues that Brad has violated the conditions placed on transfer by Oscar, and that title should therefore vest in the Church.

Did Alice have the right to develop Whiteacre as she had planned? Explain.
As between Derrik and Church, who holds title to Whiteacre? Explain.

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Essay Question #3

Radio For the Republic (“RFR”) leased space in an office building owned by Larry Landlord (“Larry”) for a period of five years. The written rental agreement stated that the space would be used by RFR to operate a radio station. The agreement also granted a license to RFR to install an antenna on the roof of the building.

One year after RFR moved into the building and began its operations, Larry announced plans to build a 64-story building on the land which he owned next door. RFR informed Larry that the new building would interfere with the RFR broadcasts from its antenna.

Larry built the new building anyway, and it did reduce the reception from RFR’s station to some extent.

Upset about the reduced reception from its station, RFR vacated the office space with three years left on its lease, stopped paying rent and removed its antenna from the roof of the building.

Because the space was now empty and available, Larry permitted the Museum of Natural History to use the space rent free in order to promote good community relations.

Larry filed suit against RFR to recover the unpaid rent for the remainder of the lease.

Discuss the legal theories supporting Larry’s claim for recovery, the defenses which RFR will assert in response, and the likely outcome. Discuss in detail, referring to both the common law and, where applicable, the modern majority rule.

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Essay #1
ANSWER

Adam's claim to Blackacre is under the doctrine of adverse possession.

An adverse possessor may acquire title at such time as an action in ejectment (or other action for possession of real property) by the record owner would be barred by the statute of limitations. The purpose of adverse possession law is simply that of quieting title to property after passage of a significant time.

Gaining title by adverse possession results from the operation of the statute of limitations for ejectment, or recovery of real property.

If an owner does not, within the statutory period, take legal action to eject a possessor who claims adversely to the owner, the owner is thereafter barred from bringing suit for ejectment and title to the property vests in the possessor.

Statutes of limitations also serve a procedural function by reducing the error costs caused by using stale evidence to decide a dispute.

At its most basic level, the doctrine of adverse possession relates to possessory estates, i.e., it involves possession of property hostile to the corresponding rights of the true owner.

In an action to quiet title based on adverse possession, the burden is upon the plaintiff to establish every necessary element.

The elements of an adverse possession claim in California consist of the following:

- (1) actual possession by the plaintiff of the property under claim of right or color of title;
- (2) the possession consists of open and notorious occupation of the property in such a manner as to constitute reasonable notice to the true owner;
- (3) the possession is adverse and hostile to the true owner;
- (4) the possession is uninterrupted and continuous for at least five years; and
- (5) the plaintiff has paid all taxes assessed against the property during the five-year period.

Unless each of these elements is established by the evidence, the plaintiff has not acquired title by adverse possession.

Adverse Possession Claim Against the Bank.

Although some of the other required elements are easily met, Adam's claim against the Bank fails because Adam has not established that his possession of the property was adverse or hostile to the Bank for the required five-year period.

For purposes of a claim of adverse possession, to be considered hostile, the acts relied upon must operate as an invasion of the right of the party against whom they are asserted - specifically possession.

For many years the Bank, as a mere lienholder, had no right to possession of the property. Adam's possession of the property did not become adverse or hostile to Bank's rights until such time as the Bank actually took title under the trustee's deed in April of 2018, and then gained the right of possession, only a few months before Adam's complaint was filed.

The requirement that the possession be hostile does not mean the parties must have a dispute as to title during the period of possession, but that the claimant's possession must be adverse to the rights of the record owner.

The trustee's deed was based upon the foreclosure of the 2005 deed of trust ("DOT") which was executed and recorded as a lien or encumbrance on the property long before Adam's adverse possession began.

During the time period when Bank's interest was merely that of beneficiary of the 2005 deed of trust (i.e., a lienholder), Adam's possession of the property would not be considered hostile to the Bank's rights.

The statute of limitations for ejectment accrues when the owner deprived of possession. Until it obtained fee title under the 2018 trustee's deed, the Bank's interest in the property, was not that of an owner with a right of possession, but merely that of a DOT beneficiary.

Prior to Bank gaining possessory rights at the time of the foreclosure sale and delivery of the trustee's deed in 2018, Adam's occupation of the property was not hostile to the Bank's rights as a secured lienholder, and therefore, the five-year statute was not running against Bank.

DOTs except for the passage of title to the trustee for the purpose of the trust, are practically and substantially only mortgages with a power of sale. A DOT is a lien on the property and conveys title to the trustee only so far as may be necessary to the execution of the trust for purposes of security. Thus, the right to possession does not pass to the trustee or the beneficiary under a DOT in the absence of a special agreement.

A DOT carries none of the incidents of ownership of the property, other than the trustee's right to convey upon default, and in the absence of a special agreement conveys no right of possession to the trustee or beneficiary.

Because, for many years the Bank, as merely the trust deed beneficiary, did not have a right of possession, but stood in substance as a lien holder, the occupation of the property by Adam seeking to acquire title by adverse possession would not be considered hostile to the trust deed beneficiary whose rights under the preexisting trust deed would be unaffected.

A mortgagor or his grantee in possession of mortgaged property may not set up the adverse possession statute of limitations against the mortgagee since such possession is presumed to be amicable and in subordination to the mortgage

The five-year period of the statute of limitations would not commence to run against a foreclosing mortgagee until the deed was delivered to him at a sheriff's sale.

Adam's possession was "not hostile" to the interests of one "who had only a lien upon the land," and was not hostile to the purchaser at the foreclosure sale until the time the commissioner's deed was obtained. The possession was not adverse or hostile to the mortgagee, whose interest was merely that of an "owner of the mortgage lien" on the property during much of the five-year period, and the trial court's reasoning and conclusion were affirmed on appeal.

The first was the general rule that the possession of property by a mortgagor or his or her assignees "cannot be adverse" to the mortgagee unless or until the possessor's conduct has invaded the mortgagee's rights under the mortgage.

Adam's possession of the property, although open and notorious, was not hostile to the rights of the Bank. The Bank did not have a right of possession because the DOT. The general rule is that DOTs do not convey possessory rights to the beneficiary.

In California, which follows the lien theory of mortgages, a mortgage does not give the mortgagee right of possession of the mortgaged premises in the absence of a special agreement to that effect. The Bank did not have any right of possession of the mortgaged premises until delivery of the sheriff's or commissioner's deed.

The Bank was not possessed of the legal title to the land until he received the deed from the sheriff. The Bank had no right of entry until that time, and it was only at that time that Adam's cause of action accrued. The statute of limitations does not begin to run until the cause of action has accrued.

The statute of limitations does not commence running against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to the purchaser.

Where a mortgage was recorded prior to the start of the period of alleged adverse possession, the possession of the land is not deemed hostile or adverse to the rights of the mortgage holder or to a successor thereof, until such time as a right to possession of the property is acquired under the mortgage through foreclosure and delivery of the trustee's deed.

Since a mortgage does not give the mortgagee the right of possession in the absence of a special agreement, the adverse possession statute does not begin to run in the possessor's favor until foreclosure and the delivery of the trustee's deed.

Because it was—until 2018—merely a beneficiary of the DOT without a right to possession Adam's occupation of the property was not adverse to Bank's rights as a lienholder.

There is the policy that adverse possession is not to reward the diligent trespasser, but to penalize the negligent and dormant owner who allows another for many years to exercise acts of possession over his property. However, this policy is not violated by a finding for the Bank. The Bank was not a negligent owner, but only had a lien on the property without a right of possession until the time of foreclosure in 2018.

Adverse Possession Claim Against the Carl.

Adam may be successful on his claim of adverse possession against Carl. Adam had been in actual possession of the property under claim of right or color of title which was open and notorious occupation of the property in such a manner as to constitute reasonable notice to Carl for over five years and he paid all taxes during that time period. Unlike the circumstances of the Bank Adam's possession was adverse and hostile to Carl.

However, through adverse possession, Adam can only obtain the interest which Carl possessed. Adam could gain no greater title than that of the original owner Adam had dispossessed; namely, title subject to the 2005 DOT.

When adverse possession is being claimed, the possessor can gain only the title which the owners had when the adverse possession began. The possessor cannot, by adverse possession, acquire a greater estate than that held by the owner.

Thus, where the claim of adverse possession is concerning the title to property that was subject to a previously recorded DOT, the possessor can only gain a corresponding title—that is, a title subject to the prior DOT.

Consequently, the most that Adam could ever have potentially obtained as a result of his possession initiated against Carl was a title subject to the preexisting 2005 DOT. Adam's adverse possession claim was subject to and eliminated by Bank's foreclosure of the 2005 DOT.

Conclusion.

In conclusion, Adam's claim of ownership by adverse possession fails as a matter of law for two basic reasons. First, the undisputed record shows that his possession was not adverse or hostile to Bank for the required five-year period. Second, his attempt to acquire title by engaging in adverse possession, even assuming it had been successful, could only have gained a title corresponding to, but not greater than, Carl's title; that is, title subject to the 2005 DOT of which Bank was the foreclosing beneficiary in 2018.

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Essay #2

Whiteacre is a tract of 200 acres that is used as a farm. The owner of Whiteacre, Oscar, raises cattle and grows crops on the property. Oscar has a spouse, Alice. Together, Oscar and Alice have one child, Brad.

Oscar can no longer run the farm but he wants the farm to remain in his family. If the farm cannot remain in the family, then Oscar wants the land to go to his church ("Church"), which is a charitable organization.

Accordingly, Oscar devises Whiteacre in a recorded deed as follows:

"To Alice for life, then to Brad in fee simple, provided that Brad shall not convey or attempt to convey any interest in Whiteacre to any person who is not a blood relation of Oscar, and if Brad does so, then Brad's interest shall be forfeited and pass to my Church."

During Alice's lifetime, Whiteacre is annexed by the adjacent municipality, and all of the property surrounding Whiteacre is filled by new housing developments. Although the municipality's zoning law prohibits agricultural activity, the law provides an exception for preexisting uses, which means that Whiteacre can continue to be operated as a farm indefinitely.

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Brad objects to Alice's plans and seeks an injunction to prevent Alice from developing Whiteacre.

While the lawsuit is pending, Alice dies, and Whiteacre passes to Brad. Brad holds Whiteacre for one year, then decides to sell it. A potential buyer, Carl, comes forward and is willing to pay Brad's asking price. Carl is not a blood relation of Oscar. Another potential buyer, Derrick, offers to pay slightly less than the asking price. Derrick is a friend of Brad and is also not related in any way to Oscar. Brad sells Whiteacre to Derrick.

Carl, angry about missing an opportunity to own the Whiteacre tells the Church about the sell to Derrick. Church then asserts a claim to Whiteacre. Church argues that Brad has violated the conditions placed on transfer by Oscar, and that title should therefore vest in the Church.

Did Alice have the right to develop Whiteacre as she had planned? Explain.

As between Derrick and Church, who holds title to Whiteacre? Explain.

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Essay #2
ANSWER

The first task when faced with such a problem is to determine the interest of the various parties in Whiteacre. After the recording of the deed, A has a life estate, B has a vested fee simple subject to condition subsequent and Church has a shifting executory interest.

Estates in Land.

“Estates in land” may be of potentially infinite duration, as in the case of a fee simple, or they may be of limited duration, as in the case of an estate for years. They may be “freeholds,” which give possession under some legal title or right to hold. “Estates in land” may be of potentially infinite duration, as in the case of a fee simple, or they may be of limited duration, as in the case of an estate for years.

Seisen means possession of the property which creates responsibility for the feudal services connected to the property. Property must always be seised.

There are present interest estates which refer to estates where one has the right to possession now. And future interest estates where one has the right to possession, if at all, in the future. A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

A future interest is an estate that does not entitle the owner to possession immediately but possession in the future. It is a present legally protected right to property. It is not an expectancy.

Alice’s Life Estate.

Alice has a life estate which is a freehold estate, measured by A’s life. Alice’s estate is vested with immediate possession upon the recording of the deed. The Life Estate is an “Estate in Land” which has its duration measured by the lives of one or more persons. An estate that is not terminable at any fixed or computable period of time but cannot last longer than the life or lives of one or more persons.

Every life estate is followed by a future interest — either a reversion in the transferor or a remainder in a transferee, or both.

Brad’s Future Interest.

Brad has a vested fee simple subject to an executory interest (“FSSEI”) which is a future possessory interest created when both the current and future interest were given away by Oscar in the same document with a condition causing the ownership to be automatically switched

between the two recipients. Upon the happening of a stated event, the interest is automatically divested in favor of a third party – the Church. This future interest is an “executory interest” which is subject to the Rule Against Perpetuities.

Brad has an estate that does not entitle the owner to possession immediately but possession in the future. It is a present legally protected right to property. It is not an expectancy.

Brad has a vested remainder or more precisely a vested remainder subject to total divestment by virtue of the condition subsequent. A remainder is vested if it is created in an ascertained person and is ready to become possessory whenever and however all preceding estates expire. A remainder is vested if (1) it is given to an ascertained person and (2) it is not subject to a condition precedent (other than the natural termination of the preceding estates).

Even before Alice’s death Brad had present legal rights and liabilities. He could sell or give away his remainder. If Brad died during the life of Alice, Brad’s remainder will be transmitted to his heirs or devisees. And importantly for this case, he can enjoin Alice from committing waste and can sue third parties who are injuring the land.

Brad’s interest became possessory upon the death of Alice and the termination of her life estate. However, Brad may lose his interest in Whiteacre should the condition subsequent occur – if he tries to sell to a person who is not related to Oscar.

Church also has a Future Interest.

The Church has shifting executory interest. An executory interest is a future interest, held by a third person, that either cuts off another's interest or begins after the natural termination of a preceding estate.

Executory interests are always in favor of transferees and they always divest a prior vested estate. Executory interests are subject to the rule against perpetuities. The interest is not alienable because it is contingent and not guaranteed to vest.

The coinciding present estate is fee simple subject to an executory interest. A shifting executory interest is one that cuts short the interest of someone other than the grantor.

The Restatement (Third).

The Restatement simplifies the system of future interests by eliminating ancient and obsolete distinctions. Eliminates the historical division of future interests into five types (remainders, executory interests, reversions, possibilities of reverter, and rights of entry), and simply categorizes all future interests as “future interests.”

All future interests are alienable, devisable, and descendible if the owner’s death does not cause the interest’s termination (unless it is subject to a valid restraint on alienation).

Eliminates the traditional categories of future interests as indefeasibly vested, vested subject to complete defeasance, vested subject to open, and contingent, and replaces them with only one distinction—vested or contingent.

Under the Restatement the interest of Brad is a vest future interest, and the Church has a contingent future interest.

Rule Against Perpetuities.

Rule Against Perpetuities (“RAP”) is not violated in this case.

RAP provides that no interest can vest more than a life in being plus 21 years. RAP limits the period of time between creation of the contingent future interest in a third party and its vesting in interest. It has nothing to do with the timing of the possession of the future interest. RAP is a rule of proof. The person with the future contingent interest must prove beyond a doubt that their interest will vest within the time limitation of RAP.

A gift that violates RAP is void and stricken from devise. The last estate “to the Church” would be stricken removing the condition subsequent from Brad’s interest and Brad would then simply have a fee simple estate.

However, RAP does not void a gift to a charitable organizations such as the Church. The policy is to encourage charitable contributions.

Alice did not have the right to develop Whiteacre as she planned.

Because she has only a life estate there are limitations on what Alice can do with Whiteacre.

She cannot sell a fee simple unless all other persons having an interest in the property consent or unless a court of equity orders sale and reinvestment of the proceeds. Her ability lease the property for a period extending beyond her death is limited. A bank ordinarily does not lend money if the security is a life estate rather than a fee simple so a life tenant without capital cannot find funding to improve or maintain the property. Alice has no duty to make extraordinary repairs and future interest holders could have an action against Alice as long as rents and profits from land enable life tenant to make repair.

However, Alice could not effectuate a such a major alteration of Whiteacre as Alice proposed without getting consent of future interest holders, Brad and the Church. Such action could constitute “waste” entitling the remaindermen, Brad and the Church, to an injunction or damages.

The Common Law Doctrine of Waste mediates between those with present and future possessory interest. The central idea of the waste concept is that Alice should not be able to use the property in a manner that unreasonably interferes with the expectations of Brad and the Church.

There are three kinds of waste:

Affirmative Waste - injurious acts that have more than trivial effects on the property.

Permissive Waste - failure to meet duty to maintain property in reasonable state of repair as necessary to preserve property's value for the holders of future interest.

Ameliorative Waste - an old English law which imposed liability on the life tenant for altering the premises even though this increased the value of the premises.

Even though Alice's plans appear to be designed to improve Whiteacre and make it more valuable her plans are still "waste", ameliorative waste, and she cannot so alter the property as merely a life tenant. The idea is that the future tenant should receive the land in approximately the same condition as the life tenant got the property.

The Church holds title to Whiteacre.

Brad clearly violated the condition subsequent stated in the deed and therefore he has lost his interest in Whiteacre. Even though the Church's interest was not vested and was not guaranteed to vest within the RAP time period, since the Church is a charitable organization, the RAP does not void the interest of the Church. Brad could only sell the interest he had and, therefore, Derrik got nothing of value in his purchase of Whiteacre.

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ANSWER

The Lease.

A lease is a contract containing the promises of the parties. It governs the relationship between landlord and tenant over the term of the lease. A leasehold estate separates possession and ownership. The landlord agrees to transfer possession of the property for a time to the tenant in return for the tenant's promise to make periodic rental payments. The present interest is held by the tenant and the landlord holds the future interest. When the lease is over the land reverts to the landlord.

A lease is both a conveyance of land and a contract. Commercial leases tend to adopt contract rules since businesses tend to have more bargaining power. Here, we are dealing with a commercial lease by RFR for an office building.

Duties of the Parties.

Certain rights and liabilities flow between landlord and tenant from this property relationship. Tenant duties are to repair, refrain from committing waste, and pay rent. Landlord duties are to deliver legal and physical possession, covenant of quiet enjoyment, implied warranty of habitability, and doctrine of retaliatory eviction.

At common law, covenants in a lease were independent of each other, meaning that one party's performance of her promise did not depend on the other party's performance of his. Thus, if one party breached a covenant, the other could recover damages but still had to perform her promises-such as to pay rent-and could not terminate the landlord-tenant relationship. Default by one party did not excuse the other party from performance.

However, modern courts are likely to construe covenants as dependent when the other party's breach relates to a material part of the lease, excusing one party's performance after proper notice and time to cure. Under modern law lease covenants are dependent.

Statute of Frauds.

A contract which cannot by its terms be completed or fully performed within one year must be in writing to be enforceable. Furthermore, a contract conveying an interest in land must be in writing in order to be enforceable. To satisfy the statute of frauds a contract that comes within its purview must be signed by the party to be bound.

Here, Larry and RFR have entered into a written commercial rental agreement for five years and there is no indication that it is not valid.

Tenancy for Years.

This lease is a lease for a term of years, which is an estate that lasts for some fixed period of time or for a period computable by a formula that results in fixing calendar dates for beginning and ending, once the term is created or becomes possessory.

Under the common law there are four types of tenancies. A tenancy for years for a specified period of time determined by the parties which ends automatically when the agreed upon time is reached. The lease does not terminate with the death of either party nor does it terminate with the transfer of the interest to another party. The landlord may sell what she owns, which is a reversion right subject to the lease.

RFR has a tenancy for years. The period is five years. Therefore, RFR is obligated to pay rent for the fixed term unless otherwise excused.

Implied Warranty Of Habitability.

A landlord has no common law duty to repair or maintain the premises. The duty must be provided for in the lease or required by statute or by the implied warranty of habitability.

The foundation of the implied warranty of habitability is in contract and, therefore, standard contract remedies (recession, reformation and damages) are available. Also, perhaps consequential damages for discomfort and annoyance arising from the breach. With a breach of the implied warranty of habitability a tenant can remain in possession, withhold rent and still defend against possession suits initiated by the landlord.

However, the implied warranty of habitability applies only to residential leases. The warranty of habitability is not available in a commercial lease such as this lease between Larry and RFR.

Abandonment.

Larry could also argue that RFR has abandoned the lease and so it owes the 3 remaining years of rent. Abandonment occurs if the tenant vacates the premises without justification, ceases to pay rent, and has no intention to return. This is an anticipatory breach of the lease agreement.

Abandonment alone does not terminate either the lease or the tenant's obligation to pay rent. Here, Larry will argue that since the loss of reception was not substantial RFR is not justified in leaving the lease and that they have demonstrated no intention to return by removing the antenna from the roof.

Even if the court found that RFR is justified in leaving, abandonment is only a defense if RFR did not leave until they had given Larry an opportunity to cure the issue. The statement of facts in the question do not provide that such an opportunity was provided. Larry might have even been able to give RFR better reception if he let them put their antenna on top of his new building.

Acceptance of Surrender.

RFR may argue that Larry accepted their surrender of the lease by allowing the Museum to have the space. The landlord accepts surrender if (1) the landlord retakes the premises for the

landlord's own use and benefit or (2) if the landlord takes another action that is inconsistent with the continued existence of the lease.

Larry could argue that since RFR left abruptly he is not accepting their surrender but instead simply using the empty space in a way that has some use and that it does not mean that he is not accepting potential replacements for the space.

Covenant of Quiet Enjoyment.

"In every lease there is an implied covenant that the T shall have the right of possession, occupancy, and beneficial use of every portion of the leased premises". This covenant, whether express in lease or implied by law, imposes on landlord a duty to provide suitable premises.

This is an implied covenant by the landlord against interference with the tenant's possession. The landlord covenants that possession will not be disturbed by (1) the landlord or (2) anyone else claiming an interest superior to that of the tenant.

It is breached if the tenant is actually or constructively evicted from any part of the premises. In addition some jurisdictions will find a breach of the covenant if the landlord significantly interferes with the tenant's use or enjoyment of the property even if the interference does not rise to the level of an eviction. A tenant must provide the landlord with the opportunity to cure and notice to be able to reasonably solve the issue.

Here, RFR is a radio business and part of the agreement includes a license for an antenna in order to broadcast. Larry has built a 64 story building right next to the office spaced leased by RFR after RFR notified Larry of their concern that the new building would interfere with their broadcasting ability.

Larry went ahead with the building plans anyway and this resulted in a reduction of reception "to some extent" from RFRs station. Larry will argue that some loss of reception is not substantial and that this was not a justification to excuse RFR from the 3 years of rent that it still owes on the lease.

RFR will argue that this is constructive eviction because it has lost its ability to use the space as it was expected to be able to use since it had already been there for 2 years and wanted the same conditions to continue for their lease term. RFR will argue that it gave notice to Larry that the building plans would cause a reduction in reception and Larry has done nothing to compensate them for this loss.

There is no written contract specifically obligating Larry to provide the reception for the radio station and proving a breach of such an obligation will also be difficult. Larry knowing that RFR was using the property to broadcast and that access to the airwaves was important when the lease was signed is not the same as Larry promising to insure RFR has adequate reception.

Constructive Eviction

If a landlord commits acts or omissions sufficient to actually evict the tenant, the tenant is no longer obligated to pay rent. And likewise, if a landlord commits acts or omissions sufficient to

constructively evict the tenant, and the tenant leaves within a reasonable period, the tenant is no longer obligated to pay rent under the lease.

There is Constructive Eviction: If

- (a) the condition of the leased premises amounts to a breach of the covenant of quiet enjoyment,
- (b) if the breach is so substantial as to justify the tenant absents the premises, and
- (c) if the tenant thereafter leaves within a reasonable time, then it was as though the tenant has been evicted (the eviction was "constructive").

Once evicted the tenant is relieved of the obligation to pay rent.

To establish a claim for constructive eviction, the tenant must prove:

- (i) The landlord, or persons acting for him, breached a duty to the tenant (acts of neighbors or strangers will not suffice);
- (ii) The breach substantially and materially deprived the tenant of her use and enjoyment of the premises (e.g., flooding, absence of heat in winter, loss of elevator service in a warehouse);
- (iii) The tenant gave the landlord notice and a reasonable time to repair; and
- (iv) After such reasonable time, the tenant vacated the premises.

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

If Larry breached the duty of quiet enjoyment such that there was a constructive eviction of RFR, RFR would be released of the obligation to pay the remaining 3 years of lease payments.

Larry could also argue that his building next door was not the act of "RFR's landlord" but merely that of a neighbor and, therefore, not a breach by the landlord under the covenant of quiet enjoyment, even Larry is both the landlord and the neighbor. It is only act of the landlord which can cause a breach of the covenant of quiet enjoyment. Should Larry be held to be responsible for the quiet enjoyment for the entire neighborhood simply because he owns more than one property in the area?

Here, RFR is no longer able to broadcast at the same level that they were able to before the building was constructed next door. RFR will argue that this is a substantial interference because it defeats the purpose for which they leased the office space. RFR will argue that this is still substantial for the unique nature of their commercial use and that they gave notice and left the premises so they are no longer obligated to pay the rest of the rent.

Larry will argue that they have only lost some reception and are still able to broadcast from the building. Trivial interference is not sufficient under the doctrine of constructive eviction and there is nothing to indicate that RFR substantially lost reception so as to interfere with their business.

Finally there is no evidence that RFR gave Larry an opportunity to correct any interference cause by the new building.

Damages.

Because the lease creates a contractual relationship between the landlord and tenant, the standard contract remedies of rescission, reformation and damages are available.

The lease gave RFR a license to put an antenna on the building but we were not told if they had the right to remove it when they left. This should be considered when determining the amount of damages.

Failure to Mitigate Damages.

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

Larry is not automatically entitled to the full 3 years of rent remaining on the lease without first trying to relet the premises. A landlord has a duty to use reasonable efforts to re-let the premises. Damages will be reduced by an amount found that could have reasonably been avoided. After RFR left, Larry is under a continued duty to mitigate his damages by using reasonable efforts to rent the office space. He must advertise it and seek a reasonable replacement for RFR.

Instead of re-letting, Larry has allowed the Museum to use the space vacated by RFR for free. Larry is not charging the museum in order to gain good favor with the community, so he is actually gaining something even if he is not charging rent. It is not fair to allow Larry to gain favor by not charging a tenant for the same space while RFR pays for the full 3 years. Allowing the Museum to use the space that RFR was leasing is actually beneficial to Larry because he is promoting good community relations. Larry's damages should be reduced by some amount to take into consideration the value he is receiving.

Conclusion

It is likely that RFR will owe some of the rent due under the lease for the remaining 3 years. The loss of reception does not seem to be so substantial as to be a constructive eviction, but Larry should have attempted to cure the defect for the tenant under the duty of quiet enjoyment. The damages owed to RFR for this loss would be subtracted by the amount owed for the remaining rent, but Larry would also be reducing the damages owed by failing to mitigate the damages.

1)

1. On what basis could Adam claim ownership of FFP against the bank?

ADVERSE POSSESSION, hereinafter "AP", is a method of wrongful owners gaining proper ownership. AP requires Actual entry and use, Hostile: meaning without the true owner's permission, Open and notorious: meaning not hidden, and the true owner would be able to see adverse possessor upon reasonable inspection, Exclusive: meaning not shared with the true owner, and Continuous: it must satisfy the statute of limitations. We will go through the application of these elements below.

ACTUAL: An adverse possessor must actually enter and use the property.

Here, Adam noticed FFP was unoccupied, and took possession of it in June of 2013. He used the property by storing trailers and farm animals on it.

Actual element was met.

HOSTILE: Adverse possession must be hostile, meaning without the true owner's permission.

Here, Adam took possession without the owner's permission, and claimed it as his own.

Hostile element met.

OPEN AND NOTORIOUS: Adverse possession must not be hidden. The true owner should be able to see if an adverse possessor is on the land.

Here, Adam's use was open and notorious because he used it in visible way. He did not hide trailers, and farm animals. Further, he paid taxes and made repairs on the houses; both of which would be noticed by the true owner upon reasonable inspection.

Open and notorious element met.

EXCLUSIVE: The land must not be shared with the true owner, or the public.

Here, Adam did not share this property with anyone.

Exclusive element met.

CONTINUOUS: Adam stayed on the property contentiously starting on June 28, 2013. The statute of limitations in the fact pattern is five years. Adam will argue he satisfied the SOL against the bank because the bank did not record until April 12, 2018, and Adam may argue the bank could not record a deed with him on the property.

The bank will argue that the bank properly recorded the deed to the property prior to Adam satisfying the SOL. Adam's presence on FFP would not constitute an encumbrance as of the date of record (4/12/18) because Adam had not yet gained lawful possession of the property. Adam might argue he was not evicted with a notice to quit/ ejection until after the five years, however the court would likely rule in the bank's favor.

Continuous element not met.

DEEDS are written instruments used to convey ownership. To be valid, deeds must have a description of the property, name the grantor (person conveying the property), name the grantee (person receiving the property), and the grantor's signature.

Here, Adam will argue the bank's deed was invalid, but would fail (infra).

TRANSFER OF DEED: For a deed to be properly conveyed/ transferred properly, the grantor must have present intent to transfer, must be delivered (actual or constructive), and must be accepted.

The bank received proper transfer of deed on April 2, 2018 when the sale was conducted. The bank could also argue they had an encumbrance on the property since 2004, when Carl bought the property.

The banks transfer of deed was properly conveyed for the above mentioned reasons.

RECORDING OF DEED: Deeds have to be recorded in order to protect recorded owners from adverse parties attempting to claim superior title. In a race statute, first to record wins, regardless of title. In a notice statute, a bona fide purchaser wins when recording the most recent transfer of deed, and does not have notice.

Here, the bank recorded the deed to FFP before Adam could (1) gain AP, and (2) record a deed to FFP. In a race notice jurisdiction, the bank would win because the bank recorded first. In a notice jx, the bank would still win, as with race notice jx.

The bank properly recorded the deed, and won over any claim Adam may have asserted.

WARRANTY OF DEED: A deed of transfer can be warranted in three different ways: Quitclaim deed, specific warranty of deed, or general warranty of deed. A quitclaim deed makes no promises of marketable/ perfect title. A title is marketable if the grantor has seisin (ownership), power to transfer, and no encumbrances, liens, or mortgages. A specific warranty is where the grantor warrants the deed against any defects resulting from the time the grantor owned the property. A **GENERAL WARRANTY DEED** warrants the deed to be free of any defect, and expresses the grantor's seisin, power to transfer, warranty against encumbrances, warranty against any intrusion of persons or parties claiming superior ownership, and quiet enjoyment.

Here, the bank filed a quitclaim on July 25, 2018 seeking to eject Adam. Adam will argue the warranty of deed was improper, but a quitclaim makes no promises, so this is not a major issue.

Adam will argue he paid taxes and made substantial repairs, but those actions do not supplement a signature on a transfer of deed in this case because the bank had no intention of selling the property.

REVERTER. The bank owned the rights to the property, and the property should revert back to the bank after Carl defaulted.

FSSC. The bank likely had an expressed "right of entry" in a FSSC, with the condition being Carl having to pay his mortgage.

2. On what basis could Adam claim ownership of FFP against Carl?

ADVERSE POSSESSION, hereinafter "AP", is a method of wrongful owners gaining proper ownership. AP requires Actual entry and use, Hostile: meaning without the true owner's permission, Open and notorious: meaning not hidden, and the true owner would be able to see adverse possessor upon reasonable inspection, Exclusive: meaning not shared with the true owner, and Continuous: it must satisfy the statute of limitations. We will go through the application of these elements below.

application: Same as above.

conclusion: Supra

ACTUAL: An adverse possessor must actually enter and use the property. Here, Adam noticed FFP was unoccupied, and took possession of it in June of 2013. He used the property by storing trailers and farm animals on it.

application: Same as above.

conclusion: Supra

HOSTILE: Adverse possession must be hostile, meaning without the true owner's permission. Here, Adam took possession without the owner's permission, and claimed it as his own.

application: Same as above.

conclusion: Supra

OPEN AND NOTORIOUS: Adverse possession must not be hidden. The true owner should be able to see if an adverse possessor is on the land. Here, Adam's use was open and notorious because he used it in visible way. He did not hide trailers, and farm animals. Further, he paid taxes and made repairs on the houses; both of which would be noticed by the true owner upon reasonable inspection.

application: Same as above.

conclusion: Supra

EXCLUSIVE: The land must not be shared with the true owner. Here, Adam did not share this property with anyone.

application: Same as above.

conclusion: Supra

CONTINUOUS: Adam stayed on the property contentiously starting on June 28, 2013. The statute of limitations in the fact pattern is five years. Adam will argue he satisfied the SOL against the bank because the bank did not record until April 12, 2018, and Adam may argue the bank could not record a deed with him on the property.

Adam will argue that the bank did not properly recorded the deed to the property prior to Adam satisfying the SOL, and the property is still technically Carl's. Adam's presence on FFP would not constitute an encumbrance as of the date of record (4/12/18) because Adam had not yet gained lawful possession of the property. Adam might argue he was not evicted with a notice to quit/ejection until after the five years, however the court would likely rule in the bank's favor.

Continuous element not met.

DEEDS are written instruments used to convey ownership. To be valid, deeds must have a description of the property, name the grantor (person conveying the property), name the grantee (person receiving the property), a description of the property, and the grantor's signature.

application: Same as above.

conclusion: Supra

TRANSFER OF DEED: For a deed to be properly conveyed/ transferred properly, the grantor must have present intent to transfer, must be delivered (actual or constructive), and must be accepted.

application: Same as above.

conclusion: Supra

RECORDING OF DEED: Deeds have to be recorded in order to protect recorded owners from adverse parties attempting to claim superior title. In a race statute, first to record wins, regardless of title. In a notice statute, a bona fide purchaser wins when recording the most recent transfer of deed, and does not have notice.

Here, Adam may attempt to claim ownership of FFP against Carl on the basis Carl defaulted on the loan, and an election of sale was recorded in 2008. Even though the foreclosure sale recordings took nearly a decade beyond the notice to sell, Adam would not have a claim against Adam for the property of FFP on the basis of notice.

Adam could not record a deed against Carl.

WARRANTY OF DEED: A deed of transfer can be warranted in three different ways: Quitclaim deed, specific warranty of deed, or general warranty of deed. A quitclaim deed makes no promises of marketable/ perfect title. A title is marketable if the grantor has seisin (ownership), power to transfer, and no encumbrances, liens, or mortgages. A specific warranty is where the grantor warrants the deed against any defects resulting from the time the grantor owned the property. A GENERAL WARRANTY DEED warrants the deed to be free of any defect, and expresses the grantor's seisin, power to transfer, warranty against encumbrances, warranty against any intrusion of persons or parties claiming superior ownership, and quiet enjoyment.

application: Same as above.

conclusion: Supra

Adam could argue he has superior title over Carl because Carl did not eject Adam, however, Carl would not have the ultimate bearing on this claim due to having defaulted on the loan in 2005, where the beneficiary was the bank.

The bank will maintain rightful ownership of FFP.

2)

Seisen - the right to convey property. Property must always be seised.

Alice's Right to Develop Whiteacre

Life Estate - measures the time a person possess a property, by the term of their life.

Here, Alice has a life estate in Whiteacre and she was aware of her husbands wishes and deed conveying it to their son brad with the determinable limitation that the farm must remain in the property and if not the property goes to the church. Alice does not have the authority to tear down Whiteacre and turn it into a mixed-use development because that will be seen as waste because she is significantly altering it in a way that will affect not only the property but the possessor in line after her. If Alice moves forward with the mixed-use development during her life estate, when she dies and the property goes to Brad it would affect him because he would no longer be in compliance with the determinable limitation Oscar left in the will for him to remain possession of Whiteacre.

Waste

There are three forms of waste: voluntary, permissive, and ameliorative. Ameliorative waste occurs when a person makes changes to the property, even if it increases the value. Here, Alice would be committing ameliorative waste by tearing down the barns and creating a mixed-use development even though it will provide double the income. A person that is next to possess property can file an injunction to prevent the person before them with the life estate from altering the property too much where it could be considered waste. The farm is supposed to remain a farm, and if Alice's idea continued the farm would have been torn down and she would have been liable to ameliorative waste, if Brad did not file the injunction.

Brad's Ability to Convey Property

Brad is able to convey Whiteacre to Derrick because he has a fee simple estate that is subject determinable. Oscar created a limitation on the property to ensure it stays within the family. Brad's possession of Whiteacre could be infine if he adheres to the limitation so he is allowed to do whatever he wants to the property. He can convert it to something else or sale it as long as it is within the family. If Derrick was in his family he would still be adhering to the limitation, but he is not.

Derrick's Ownership

Deed

A deed is a written contract that is subject to the statute of frauds. The deed must be written, signed by parties, and must describe the property that is being conveyed.

A deed must be conveyed with donative intent, delivery, and acceptance. Here, Brad had donative intent because he was looking to sale Whiteacre to the highest bidder that is why he denied Carl and sold to Derrick who agreed to pay over asking price. Delivery of the deed can be symbolic, actual, or constructive. The deed is assumed as delivered and accepted by Brad and Derrick. The facts did not indicate there was a problem with delivery and acceptance. Derrick must have accepted Whiteacre if he is concerned about him owning it over the church.

Marketable Title

Brad must convey title to property free of encumbrances. The church can argue that Brad provided the deed to Derrick and did not notify him of the limitation on the property to remain in the family and the executory interest that church has if Brad does not adhere to the limitation.

Doctrine of Merger - when the property closes the contract converts to a deed and the deed is the operating document.

Church's Ownership

Fee Simple Subject to an Executory Interest

Initially the church had a future possession in Whiteacre, which allowed the property to shift to the church from Brad (transferee), if he did not uphold the determinable fee of keeping the farm in the family. The future possession, just became a current possession, because Brad did not adhere to the limitation and Whiteacre should have been passed to the church. Due to Brad's possession being a fee simple determinable it is subject to a possibility of reverter so soon as he sold the property to Derrick, Whiteacre automatically reverted (Oscar is presumed deceased) and the church has an executory interest so Whiteacre shifted from Brad to the church's ownership immediately.

Rule Against Perpetuties (RAP): This will might violate RAP because an interest must vest within a life in being, plus 21 years. Here, there is no guarantee that the interest will vest (Church's possession of Whiteacre) within 21 years because Brad might keep the property for 21 years or sale it to someone in the family, and that person sales it to someone in the family.

Shelly's Doctrine: if a conveyance of property creates a life estate and contingent remainder, it will merge the two to create a fee simple absolute for the transferee. Does not apply in this case, due to it being a common law doctrine that is abolished in the modern trend/majority rule.

Worthier Title: At common law this doctrine did not allow property to be conveyed to one's family through wills or deed. The property would have to go through the intestate succession. At common law Oscar would not have been allowed to convey his property to his wife, son, or make a limitation that it remains in the family. This doctrine does not apply as it was from the common law, that is now abolished.

Destructability of Contingent Remainder: The doctrine declared if an interest did not vest at the termination of the life estate, the contingent remainder's interest would have been destroyed. This doctrine does not apply as it was abolished due to RAP saving devises.

Saving Devises: The USRAP has been adopted by many states, including California that now allows a 90 year vesting period. The wait and see doctrine demands parties actually wait and see if the interest will vest within the 21 years, before declaring it violates RAP.

The church's interest in Whiteacre is valid and fair under the deed that was written and signed by the grantor/transferrer Oscar. Brad was aware of the limitation that was set for him to maintain possession/ownership of Whiteacre. Since Brad, sold Whiteacre to Derrick who is not apart of the family, Whiteacre rightfully belong to the church.

The church holds title to Whiteacre based on the shifting executory interest it possessed.

3)

Type of Lease

Tenancy of Years

There are four types of tenancies, such as: (1) tenancy of years; (2) a periodic tenancy; (3) a tenancy at will; and (4) a tenancy at sufferance. A tenancy of years, or also known as a term of years, is a lease for a fixed period of time. These leases have a termination date and upon the termination date, the tenant is allowed to leave the premises without notice. A tenancy of years can be a fixed amount of days, months, years. However, if the tenancy last for more than one year than the lease must be in writing satisfy the Statute of Frauds. Here, RFR and L have a tenancy of years because the terms of the lease state that RFR would lease the property from L for a period of five years. Also, the lease satisfies the SoFs because the written agreement stated that the space would be used for commercial purposes.

Thus, L and RFR have a tenancy of years.

Covenant of Quiet Use and Enjoyment

This covenant states that L, or through his agents or someone of superior title, will not interfere with the tenant's use and enjoyment on the premises. Here, RFR will argue that the covenant of quiet use and enjoyment was breached because L had interfere when he built the building next door and it started messing with RFR's radio signal. RFR will argue that the spaced leased was for commercial use and therefore, it makes no point for them to inhabit the space if the purpose for which they bought it for is no longer there. However, L will argue that the terms of the written agreement never stated that L was to provide adequate, high-speed signal to RFRF. The terms of the agreement stated that RFR could use the space to operate a radio station and they had permission to attach an antenna to the top of the building. The fact pattern suggest that the while the antenna signal did reduce, it only reduced to an extent, not completely, therefore, L never actually interfered with RFR's use and enjoyment of the property.

Thus, L never breached the covenant of quiet enjoyment.

Tenant's Duties -- Duty to Pay Rent

A tenant has a duty to pay rent to amount agreed upon. Here, L will argue that the lease was breached first when RFR decided to stop paying two years in. The agreed upon terms where that

RFR was to pay rent up until the lease was up in 5 years. Here, RFR stopped paying rent two years in, which left L with damages of what rent would have been in the remaining three years left on the lease. Therefore, RFR could be liable for failing to pay rent. In the event, that the court finds that L did breach the covenant of quiet enjoyment, a constructive eviction could occur.

Constructive Eviction

This occurs when the premises are in such despair that they are virtually inhabitable. This applies to both commercial and residential properties. In the event of a constructive eviction, L must (1) breach the covenant of use and enjoyment, (2) the tenant must notify the landlord, (3) L must fail to reasonably respond; and (3) tenant must leave within a reasonable time. Here, RFR will argue that the building being there did violate the covenant of enjoyment and that it made their purpose for being on the property non-existent because they could no longer broadcast their radio show from there. They will argue that they did L know about this situation because RFR had notified L one year after RFR moved in, to which he failed to respond. RFR will argue that they would have never agreed to the terms of the lease or even signed it, had they known that L would be building a 64-story building next door. Therefore, they left the premises within a reasonable amount of time. However, as mention above, the fact that they did not have adequate antenna signal would not breach the covenant because the building being there did not completely block the signal.

Thus, a constructive eviction of RFR was not proper.

Abandonment

In the event that a Tenant vacate the premises, the L has the option to (a) accept the termination; (b) re-let the premises; or (c) lease the premises and sue for damages of the unpaid rent. Here, it would be in L's best interest to lease the premises and sue for the remaining two years. However, the landlord has a duty to mitigate damages. Here, because the space was now empty and available, L allowed the Museum of Natural History to use the space rent free in order to promote good community relations. Although this was a nice gesture on behalf of Larry, he will not be able to sue for the complete two years, only for the time that RFR left the premises and up until the National Museum of History was started leasing the space. L cannot be asking for damages of the full two years because he has the opportunity to lease the space to some or to the National History Museum in exchange for rent money that would decrease the damages he incurred at the time of RFR's abandonment. To ask the court to award him damages in the amount of what 3 years of rent would have been would be egregious considering the fact that he was abled to lease the space to

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someone. Also, given the fact that the space is for commercial purposes, it can be highly desirable by other potential tenants.

END OF EXAM