KERN COUNTY COLLEGE OF LAW
Real Property
Midterm Examination
Fall 2023
Prof. J. Pledger

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.

**REAL PROPERTY**
**SLO College of Law**
**Midterm, Fall 2023**

## Question 1

Freddy was walking down the street three weeks ago and saw a shiny bracelet laying on top of a fire hydrant located on the sidewalk about one (1) foot from the curb of the street. (Vehicles routinely park on the street nearby the hydrant.) Freddy picked up the bracelet and took it home with him.

The next day, Freddy's brother urges him to get the bracelet valued to and Freddy's astonishment the jeweler – the best in town with an excellent reputation -- tells Freddy that this is *THE* "Heavenly Bracelet" from the crown jewel collection of the Raja of Rajastan, that while the bracelet is a priceless piece of history, the value of its stones and gold is $150,000 USD. "Wow," utters Freddy. The jeweler also repeats some credible sounding but unfounded information that the Raja may have sold the bracelet to an unknown buyer about a year ago and that such buyer wishes to remain anonymous.

One week later, Freddy sells the bracelet to Bert for $150,000 cash and Bert takes possession. Bert asks no questions and Freddy provides no answers. Freddy provides a simple written receipt for the money paid.

A week after that, agents for the Raja contact Bert (Freddy had posted his incredible story on Facebook, including the sale to Bert) and demand the bracelet back; the Raja's agents offer no money and state none will be paid other than a very modest fee for keeping the bracelet safe.

The next day:

(1) Bert sues the Raja for a declaration as to who is the proper owner of the bracelet.

(2) Bert also sues Freddy to reclaim the $150,000 paid. The jurisdiction follows the common law. Who prevails and why? Make sure to discuss all arguments and your evaluation of those arguments in your answer.

****

**REAL PROPERTY**
**Midterm, Fall 2023**
**Question 2**

Tina sells rugs. She signed a three-year lease for a large warehouse owned by Lee with rent set at $1,000 a month, with a start date of January 1, 2023. The lease stated that the warehouse would only be used for business purposes and that Tina was responsible for repairs and maintenance in the interior of the building. On January 1, 2023, Tina paid Lee $12,000 as rent for all of 2023 and took possession of the warehouse.

On March 1, 2023, Lee saw that Tina was not using most of the warehouse, so Lee moved his classic cars in thereby occupying about 10% of the warehouse. Tina discovered the cars on March 2, 2023, and immediately told Lee to remove the cars, which Lee never did.

In April of 2023, Tina remodeled a portion of the interior of the warehouse to create a small apartment in which she began living without Lee's knowledge.

In May of 2023, Tina notified Lee that the hot water heater in the warehouse was broken, that mice and cockroaches had infested the warehouse, and that a neighboring property owner was playing loud music nearly every night. Lee never responded. Thereafter, Tina paid $600 to fix the water heater and sent Lee a letter demanding to be reimbursed, which he never did.

On July 1, 2023, Tina notified Lee that she was moving out and that the keys would be left inside, which she did on July 31, 2023. The next day, Lee retook possession and began leasing the warehouse to Ned for $800 per month for a term of ten-years.

In subsequent litigation between Tina and Lee, what claims and counterclaims might they reasonably assert against one another.

****

Monterey College of Law
Real Property Final Examination
Fall 2023

## Question 3

Kate owned Whiteacre.

In 2010, Kate executed a deed for Whiteacre to Mary in exchange for $300,000. The deed was not immediately recorded.

In 2012, Kate executed a deed for Whiteacre to Pete in exchange for $400,000. The deed was not immediately recorded. At the time of the sale, Pete obtained a loan from South Bank secured by a mortgage on Whiteacre for $400,000. South Bank recorded the mortgage.

In 2015, Mary died, leaving Whiteacre to Nancy in her Will. Nancy discovered that there was another deed to Pete and the deed to Mary was not recorded, so she recorded the deed to Mary.

In 2017, Pete learned of the deed to Kate and recorded his deed.

In 2020, Pete executed a deed for Whiteacre to Quinn for $500,000. Quinn immediately recorded the deed. Thereafter, no payments were made on the loan from South Bank.

Today, the loan from South Bank is in default.

The jurisdiction's recording office has only grantor-grantee and grantee-grantor indexes. The jurisdiction has the following recording statute:

> No conveyance is valid against a subsequent bona-fide purchaser who has no notice of the original conveyance and who has recorded the deed to his conveyance first

1. Who owns Whiteacre? Discuss.
2. What result if South Bank attempts to foreclose? Discuss.

***

**REAL PROPERTY -KCL-Prof. Pledger**
**Midterm, Fall 2023**

## ANSWER- Question 1

### Question 1 Issue Outline

### (Finders / Misplaced Property / Abandonment;

### Basic Indemnity)

***Bert vs. Raja – Raja Prevails:***

Bert, as the buyer from Freddy, only has title as good as Freddy's. Bert, presumably, is contending that the bracelet was "lost" and that Freddy found it and as "finder" Freddy has superior title to the bracelet over all but those with superior title to him and that Bert obtained this title when he purchased the bracelet from Freddy.

But, here, unless Bert (or Freddy) can produce admissible, credible evidence that the Raja is not the true owner, *e.g.,* that the rumors are true that the Raja in fact did sell the bracelet to an unknown 3rd party prior to Freddy finding the bracelet, the Raja should prevail as the true owner. Bert (and Freddy), of course, can explore this line of inquiry during the litigation but if they cannot develop sufficient evidence to prove-it up, Bert will lose to the Raja.

Bert may also argue that he is a *bona fide purchaser* – one who paid value for the bracelet without notice (actual, constructive, or inquiry) – and as such, his title to the bracelet is clean as against the world, including the Raja. Assuming that BFP doctrine applies to personal property (it may in a given jdx) and assuming that BFP doctrine will supercede finder's doctrine (it does not – the true owner's rights are paramount), there are problems with Bert's argument. (1) Did Bert pay fair market value (FMV?) Probably not; he paid the stone and gold price but the bracelet is actually "priceless"; nor was the bracelet exposed to the open market (we have no facts showing that to be the case) and thus the "market" part of FMV is missing. (2) Did Bert have notice? Probably; his "don't ask, don't tell" approach with Freddy does not insulate Bert; the bracelet was a famous, priceless artifact and while we have no evidence that Bert had actual notice, there are good arguments that he did have constructive notice from publicly available information and at the least he was on inquiry notice that he may need to delve more deeply into the provenance of the bracelet and Freddy's title to it – Freddy, we presume is "just a guy" who now has a bracelet worth $150K that he is willing to sell quickly and with no questions. Seems fishy enough to put Bert on "notice" that title to the bracelet may have issues. Bert is not a BFP.

Freddy may also argue that the bracelet was *abandoned* (intent to abandon and an action consistent with that intent.) If abandoned by the prior owner (whether the Raja or any other

person), then the first person to take possession is the new "owner" for all purposes, i.e., Freddy, who could then pass clean title to Bert as purchaser. While there is some circumstantial evidence of abandonment – one does not "forget" a priceless artifact on top of a fire hydrant and one does not typically have such a thing fall out of one's pocket and thus a reasonable person could conclude it was abandoned – the better view is that there is no credible basis to believe the priceless artifact was simply left behind to be claimed by whomever; there is nothing in writing and the fact that the Raja's agents surfaced within 2 weeks to claim the bracelet back is not consistent with it being abandoned. Bert (and Freddy) will not prevail on an abandonment claim.

Affirmatively, the Raja contends (1) he is the true owner (and we assume here for sake of analysis that the "agents" of the Raja are legitimate) and thus his claim to the bracelet is superior as against Freddy and thus against Freddy's successor, Bert. The Raja can also argue, alternatively (2) that the bracelet was not "lost", but "misplaced" [found at waist height on top of the fire hydrant, where it was left by accident by one of the Raja's agents while getting into a car] and thus Freddy never had any title at all to the bracelet but simply held it in trust and safekeeping for the Raja (of whom Freddy was very soon aware after visiting the jeweler.) Either one of these arguments is a winner for the Raja, assuming of course that he did not actually sell the bracelet to the anonymous 3rd party prior.

***Bert v. Freddy for Indemnity / Breach of Contract – Bert Prevails and Gets his $150,000 back:***

Assuming that Bert is unsuccessful in proving the Raja does not have superior title to the bracelet and that Bert has to give it back to the Raja, Bert is out the $150,000 purchase price paid to Freddy.

Bert can sue Freddy for indemnity (and quite possibly breach of contract) for selling him something for which Freddy did not have clean title.

Freddy will argue the common law maxim of *caveat emptor* (buyer beware) and that he, Freddy, made no warranties of title to Bert, either orally, or in writing (there is only a simple receipt for the money paid), a risk Bert took in asking no questions at the time of the sale. Freddy will also argue that he, Freddy, had a good faith belief that he was the proper "owner" of the bracelet under the doctrine of finders and is thus not liable to Bert because he, Freddy, did nothing wrong.

Bert can counter this argument to some degree because Freddy knew from the jeweler the provenance of the bracelet, its significance, and who the Raja was, and did nothing to contact the Raja prior to his sale to Bert.

In counter, Freddy will point out, again, *caveat emptor*, and that the bracelet was of such public importance that Bert knew or should have known these things himself and that Bert was careful to actually make no inquiry thereby assuming the risk of loss.

On balance, Bert should win as against Freddy because any other result will unjustly enrich Freddy, who is not an "innocent" in this and to whom equity and justice does not owe a windfall.

The bracelet is back home with the Raja, Freddy gets a small safe-keeper's fee, and Bert gets his money back.

The End.

***ANSWER- Question 2***

**Present Donative Intent**

Olivia's intent appears clear from her point of view, to gift upon death. However, objectively Alice argues that the letter coupled with the placement where Alice could get it indicates a present donative intent, irrespective of Olivia's secret intent to not give yet. Alice has reason to believe the intent was to transfer now based on the letter and placement of the deed in a location Alice can get.

**Delivery**

Donor must feel the wrenching of delivery. Objective indication the donor understood that ownership was transferred. Here, it appears that Olivia thought she was estate planning and not presently transferring. Also, the behavior was such that a 98 year old likely would not give up her home while she was alive, she was still living there for months, and still getting groceries delivered. Alice will claim that irrespective of Olivia's secret beliefs, delivery occurred because the deed was placed in a location, Alice was told of the location, and Alice had the means to get it.

Also, why was Alice coming and going for weeks without getting the deed and only got it when Olivia was gone, if Alice believed she had the right to take the deed at any time?

**Acceptance**

The law presumes acceptance. No facts indicate Alice would not have accepted the gift, and to the contrary she took steps to acquire the deed.

Exam Question 3

1.

Interpretation of the Statute (10%)
- Race-notice

Deed to Mary (25%)
- Acquired without notice
- Recorded first
- Shelter Rule—claim by Nancy

Deed to Pete (20%)
- Acquired without notice
  - Effect of subsequent notice
- Recorded second

Deed to Quinn (20%)
- Acquired with notice
  - Address title search

2.

Foreclosure (25%)

Is the mortgage good?
- Recording

Who is liable for any amount due on the note?

1)

**The bracelet was lost, so the true owner of the bracelet has title as against the finder.**

The right to possession of personalty (personal property) can be acquired by anyone who finds the property. The bracelet here is personal property, since it is not attached to land. Personal property may be freely used, gifted, sold, or destroyed by the owner. Personal property may also be lost, mislaid, or abandoned by the owner. Ownership of the personal property does not change if the property is lost or mislaid, but ownership is surrendered if the property is abandoned. The key issue to determining whether personal property was lost, mislaid, or abandoned is determining where the personal property was found.

**Abandoned Property**

Abandoned property is property that the owner voluntarily relinquished both the right to possession and ownership. Abandoned property may be claimed by anyone who finds it. The first person who finds it and claims it by exercising control and possession over it to the exclusion of all others becomes the owner of the abandoned property. To determine if the property is abandoned, the court will examine the circumstances surrounding the alleged abandonment. If the owner of the property is known, and there are witnesses who saw the owner throwing a piece of property into a dumpster, for example, the property will be found to have been abandoned. Property may also be abandoned if it is found in an unlikely location - a stereo system sitting on the curb in front of an apartment building, for example.

Because abandonment is the voluntary surrender of both possession of the property and ownership of the property, the court will not find property to be abandoned unless there is clear evidence of abandonment. Here, the object in question is a small, extremely valuable bracelet. A small item like a bracelet is easily lost, either while wearing it or moving it. Based on the value of the bracelet and the location in which it was found, it is not likely the court will deem the property to have been abandoned. Because the bracelet was not abandoned, the true owner of the bracelet has a claim superior to the bracelet against a subsequent finder.

**Mislaid Property**

Property may also be mislaid. Property is mislaid when it is intentionally placed somewhere deemed by the owner to be reasonably safe, and through mistake, left there. When an owner of personal property mislays it, he does not surrender ownership of the property. Further, he may reclaim the property once it has been rediscovered. Again, the court will look to the location the property was found to determine if it was mislaid. An example of property which was mislaid is someone's wallet left on the counter at a barbership. The owner of the wallet likely took the wallet out of his pocket, placed it on the counter, and walked off with it. Even though the wallet was intentionally placed, he did not voluntarily surrender possession of the wallet, nor did he intend to divest himself of ownership of the wallet.

The finder of mislaid property must keep the property safe until the owner comes to reclaim it. In the example given above, the finder of the wallet would likely be another customer of the barbershop, or the owner of the shop himself. The finder of property in that situation has the right to possess the property until the owner comes to reclaim it. The owner is under a duty to keep the property safe until it is claimed, or until a sufficient period of time has passed and the owner cannot be located. At that time, the finder may gain ownership over the wallet.

Here, there is evidence that the bracelet was mislaid - it was found on top of a fire hydrant. It is plausible that the owner took the bracelet of his wrist and placed it on the fire hydrant. But the public location of the fire hydrant on a busy street and the immense value of the bracelet make it unlikely. For this reason, the court will likely conclude that the bracelet was not mislaid.

**Lost Property**

If a piece of personal property was found, but was not abandoned or mislaid, then the property was lost. Property becomes lost when the owner of the property does not intentionally place an item in a location, intending to retrieve it later. Property that is unintentionally dropped by the owner is considered lost property, especially if it was lost in a highly public or otherwise insecure place. Here, the bracelet's high value and its small size make it very likely that the bracelet was simply lost by the true owner.

**Right to Possession of Lost Property**

The person who finds lost property gains the right to possess the property. His right to possession is superior to the whole world except the true owner of the lost property. This means that the finder of lost property cannot be divested of possession by someone else - their claim is always inferior to the claim of the finder, unless the person attempting to gain possession is the true owner. Here, Freddy found the bracelet. The bracelet was lost, and by virtue of his finding the bracelet, taking possession of it (by picking it up) and carrying it away, Freddy has the right to possess the bracelet. If someone were to take it from him, he could sue the person who took it for its return.

**Freddy did not have the right to sell the bracelet.**

Even though the finder of lost property has the right of possession, they do not own the lost property. Ownership of lost property rests with the true owner. Here, Freddy took the bracelet to a jeweler. The jeweler advised Freddy that the bracelet likely belonged to someone who purchased the bracelet from the Raja. At that point, Freddy was on notice that the property was lost and not likely abandoned. Freddy should have taken steps to ascertain the true identity of the owner of the bracelet - by reporting the property he found to the police, or posting fliers, advertisements, or some other public-facing notice that lost property had been found. He did so - he published his story on Facebook.

**Adverse Possession of Personal Property**

Freddy had the ability to become the true owner of the bracelet, had he followed the proper procedure. Freddy may gain actual ownership over the bracelet through adverse possession. Adverse possession of personal property is established when the possessor of property (and not its owner) has open and notorious possession of property hostile to the ownership of the true owner of the property. This open and notorious possession must be continuous throughout the entire statute of limitations period where the owner could appear and demand possession of the property. Open and notorious possession would be accomplished by reporting the find to the proper authorities (the local police, for example) and publishing highly visible information (advertisements, fliers, etc.) in the area where the property was found. After a sufficient period of time expired, the adverse possessor of the lost property can become its true owner.

**Freddy never gained ownership of the property so was not entitled to sell it.**

Because Freddy never gained ownership of the property (he only waited a week after publishing his story on Facebook, which was not sufficient time to allow the relevant statute of limitations for the owner to come forward and claim the property) he never gained ownership of the bracelet. Freddy only had the right to possess the property. He can sell what he has - which is the right to possession. He sold the right to possession of the bracelet to Bert for $150,000 but not ownership of the bracelet. Bert therefore had a superior right to possess the bracelet over Freddy, but Bert's right was still inferior to the true owner - which is either the Raja, or the person who purchased the bracelet from the Raja.

**Bert's Suit against the Raja**

Bert has now purchased the right to possess the bracelet from Freddy and seeks a court declaration as to its true ownership. Bert and the Raja will be forced to litigate their claims in court to determine who owns the bracelet. This could end in two results: if the Raja can prove he owns the bracelet, then Bert will be required to return the bracelet to the Raja. Bert will lose the right of possession that he purchased from Freddy. This is because Freddy's right to possess the bracelet was good as against everyone except the true owner. If the true owner is determined to be the Raja, then the Raja will be entitled to possess the bracelet - he has a superior claim to Bert. But if the Raja cannot prove that he is still the owner of the bracelet (because he may have sold it to an unknown buyer the prior year) then Bert's claim as against the Raja is superior and Bert will be allowed to keep the bracelet. Of course, the court could not decree that Bert was the true owner of the bracelet. Bert would need to adversely possess the bracelet for the requisite time in order to gain true ownership of it.

There are insufficient facts in the pattern to determine whether the Raja does or does not still own the bracelet - but based on the information elicited from the jeweler, it is probable that the court will determine that the Raja does not own the bracelet and Bert's claim is superior. WHY? INFO FROM JEWELER WAS UNSUBSTANTIATED

Bert's claim, of course, is only good as to possession. If the unknown buyer comes forward to claim the bracelet before the statute of limitations runs out, then the unknown buyer may initiate his own suit against Bert to obtain possession, as he would be the true owner and thus has a superior claim to Bert.

**Bert's Suit against Freddy**

Bert has also sued Freddy for the return of the $150,000. Bert will likely be proceeding under two theories. The first is that Freddy is unjustly enriched because he sold something worthless to Bert (if Bert is forced to surrender the bracelet to the Raja), and the second is that Freddy committed fraud by selling him the bracelet (if Bert is allowed to keep the bracelet.) Both will fail.

Freddy did not tell Bert that he was the owner of the bracelet, nor did Bert ask. The doctrine of "buyer beware" applies to this situation - Bert was responsible for ensuring that the enormously valuable object he was purchasing was actually owned by the person he was buying it from. In other words, Bert was responsible for investigating the possibility of superior claims. Just as the purchaser of stolen property is not entitled to keep it, the purchaser of lost property is not entitled to keep it if the true owner comes forward to claim it. Because Bert made no inquiry as to the true status of the bracelet, Bert assumed the risk that the true ownership of the bracelet was in question. As such, Bert is not entitled to recover the $150,000 paid under either theory.

ISN'T FREDDY UNJUSTLY ENRICHED THEN?

2)

**Tina and Lee had a lease for a term of years.**

Leases for real property may be categorized as follows: a term of years, a periodic tenancy, a tenancy at will, or a tenancy at sufferage. Leases for a term of years have a definite beginning and ending date (not necessarily measured in years - a term of years can exist for a lease of less than 1 year, if it has a definite beginning and end date.) A periodic tenancy is a lease that automatically renews at the end of each lease period - typically, month-to-month, or year-to-year. These leases have a definite begin date but continue in perpetuity unless one of the parties gives proper notice to terminate the lease. A tenancy at will can be terminated by either party at will - these leases are commonly noted "for so long as the tenant desires." There is no prescribed notice period for a tenancy at will, and it can be terminated at any time. Finally, a tenancy at sufferage is a tenancy established when a lease has expired or has been breached, but the tenant is still in possession: the tenancy at sufferage continues as long as the tenant remains in possession and typically concludes via an eviction action.

Because Tina and Lee executed a lease for three years, beginning on January 1, 2023, they had a term of years. The tenancy was set to go for three years, and terminate on January 1, 2026 (the expiration of the three year period.) The lease would terminate on that date without further action or notice by either party.

**Statute of Frauds**

Leases which exceed 1 year in length are required to be in writing. The statute of frauds is satisfied in this case, because the lease was signed by both parties. The lease between them is therefore valid.

**The lease was for commercial property.**

The lease in question was for commercial property: the subject property was a large warehouse and the intended use was for Tina's rug-making business. The commercial nature of the lease becomes important later in this analysis.

**Lee's Obligations under the Lease**

A landlord has several obligations under a lease, whether it is commercial or residential. A landlord is first obligated to deliver actual possession of the premises to the lessee on the date the lease is

set to begin. After possession is delivered, the landlord is required to keep the tenant in quiet enjoyment of the leased premises. This means that the landlord cannot interfere with the tenant's possession of the property, nor allow a nuisance to exist which would disrupt the tenant's quiet enjoyment. The landlord is prohibited from evicting the tenant through some sort of retaliation - for instance, if the tenant reports a building code violation or other problem with the property, the landlord may not evict her. Finally, in the case of leases for residential property, the landlord is under a duty to not breach the implied warranty of habitability. The implied warranty of habitability is the landlord's duty to keep the premises fit for human habitation. A court will usually look to housing regulations to determine if this implied warranty has been breached. Failure to provide adequate heat in the winter, cooling in the summer, hot water, running water, or operating toileting facilities are considered breaches of the implied warranty of habitability. *The implied warranty of habitability does not apply to commercial leases.*

**Tina's Obligations under the Lease**

A tenant has several obligations under a lease as well. The first obligation of the tenant is to not commit waste upon the leased premises. A tenant may commit voluntary waste, permissive waste, or ameliorative waste. This obligation applies equally to commercial and residential leases.

Voluntary waste is the intentional destruction or harm to the leased property. For example, a tenant breaking windows, tearing up carpet, or putting large holes in walls are all voluntary waste, and prohibited by all leases. Permissive waste is general neglect of a leased property. If a tenant allows a water leak in the leased property to continue unabated without repairing the leak, the waste of water and damage to the property would both be considered permissive waste. Ameliorative waste occurs when a tenant makes unauthorized improvements to a property. If a tenant installed new flooring and renovated the kitchen, even though the improvements would increase the value of the property, this would be ameliorative waste. Ameliorative waste is prohibited by leases and is considered a breach.

A tenant is also obligated to pay rent for the property leased. Rent is the money paid pursuant to the lease agreement for the to possess and use the leased property.

Finally, a tenant is responsible for repairs - including normal wear and tear, unless specifically excluded in the lease - to the property. The obligation to make repairs is for both items that need repair because of the tenant's commission of waste, or general repairs that the property needs, like fixing a leaky roof or a defective toilet valve. Significant repairs, like repairing the property after a

natural disaster has damaged it, remain the obligation of the landlord, unless specifically stated otherwise in the lease.

Importantly, the responsibility for repairs affecting habitability do not shift to the landlord if the lease is for a residential property. A landlord may not disclaim the implied warranty of habitability. A landlord is still responsible for those repairs, and the tenant has several options in the case of a landlord's breach, discussed later.

**Lee's Claims against Tina**

Lee has several possible claims against Tina for various breaches of the lease.

**Lee's Claim for Unpaid Rent from August, 2023 through January, 2026**

The original lease was for three years, or 36 months. The value of the lease was to be $36,000. Rent was to be paid in advance, on the first of each year. Tina paid $12,000 rent on January 1, 2023 but paid no additional rent. Lee could sue Tina for $24,000 - the value of the unpaid rent due under the lease. But for the reasons explained below, Lee's claim for unpaid rent will fail.

**Tina properly surrendered her lease, and Lee accepted the surrender.**

A tenant may surrender a lease. If the landlord accepts the surrender, the lease is canceled as of the date of surrender, and no further rents are due. Here, Tina notified Lee that she would be vacating on July 31, 2023. Lee did not object, and immediately took possession of the premises. By his actions, Lee accepted the surrender, so the lease ended on July 31, 2023. Therefore, the only sums due under the lease were for the months of January through July of 2023 - which is $7,000. Because Tina paid Lee $12,000 for the first year, Tina is entitled to a refund of $5,000.

**Lee may successfully argue that he did not accept Tina's surrender and she is still responsible for the balance due.**

Lee's counter-argument to Tina's defense of surrender is that he did not actually accept her surrender. He may argue that Tina abandoned the property and he merely re-let the premises to a new tenant to mitigate his damages. In the event a tenant abandons their lease (where a tenant vacates the property, with or without notice, before the expiration of the lease term) the landlord may choose to do nothing, leave the property empty, and sue for the entire balance of the lease due. Or the landlord may re-let the premises to someone else to mitigate his damages. The modern trend is to require landlords to attempt to re-let the premises and mitigate their damages. If they are

successful, then the previous lessee is responsible for contract damages calculated as the difference in rents between the new and old tenants.

CAN TINA ARGUE LEE FAILED TO PROPERLY MITIGATE BY ONLY GETTING $800/MO WHEN VALUE WAS $1000?

If Tina abandoned the property and Lee did not accept her surrender, then Tina would still be obliged to pay the difference between the rents received by Lee from his new tenant ($800 per month) and the rents he would have received had Tina not improperly abandoned the property. The difference in rents due is $1000 for the remainder of 2023 ($200 x 5 months), and $2400 per year for 2024 and 2025. The total amount Tina would be responsible for would therefore be $5800. With the $5,000 offset for the overpayment Tina made in 2023, Lee would be entitled to a judgment of $800 if he sued Tina for the difference in rents under the two leases.

**Lee may sue Tina for committing waste.**

The lease between the parties stated that the warehouse was to be used for business purposes only. In April of 2023, Tina renovated the warehouse to add a living space to the warehouse and began living in it. The addition of the apartment could be considered ameliorative waste: if the apartment was built up to code and was otherwise habitable, it may increase the value of the property. If, on the other hand, the residential space Tina constructed in the warehouse was not to code, it could be considered voluntary waste because it diminished the value of the property and some warehouse space was destroyed by the construction of the apartment. Whether ameliorative or voluntary, it was still waste - and still prohibited by the lease. Lee can sue Tina for the cost to return the property to its condition prior to the renovation. These damages would include the cost to demolish and remove the unauthorized addition.

Of course, Tina could argue that Lee allowed the renovation - but this argument would fail, since there is no evidence that Lee actually did agree to the renovation, and there is substantial evidence that he would have refused permission even if she had asked, since the lease was for a commercial space, and not to be used for residential purposes.

Finally, Tina could argue that even though she committed waste, Lee suffered no damages, since her additions could have increased the value of the property. This could be true - depending on the quality of the apartment she constructed in the warehouse, Lee may choose to leave it intact. In that case, he would suffer no damages. But there would still be a breach of the lease, and could evict Tina on that basis, had she not vacated on her own initiative in July.

**Tina's Claims against Lee**

Tina can also produce evidence of several breaches of the lease by Lee and may be entitled to some compensation.

**Lee's repossession of 10% of the warehouse is a breach of the lease.**

Tina's best claim against lee is that he breached the lease by taking possession of a portion of the leased premises. Under the lease, Tina was entitled to the possession and use of 100% of the leased space. Lee noticed that she was only using 90% of the space and reclaimed the remaining 10% to store his cars. Tina can argue that Lee materially breached the terms of the lease, and that she was entitled to terminate the lease in March. Lee will argue that the space was unused, and his reclaiming a portion of the space did not harm Tina in any way. Tina may be entitled to an offset of her rent for the months affected of 10%, since that is the amount of space that Lee occupied without her permission.

**Constructive Eviction**

Tina may also argue that Lee constructively evicted her, and she is entitled to a refund of $5000. An action for constructive eviction lies when a landlord takes an action which substantially interferes with the tenant's quiet enjoyment of the property, the tenant notifies the landlord of the issue, the landlord does not take any ameliorative action, and the tenant vacates the leased property as a result of the breach.

Lisa has several plausible claims for constructive eviction. The first is Lee's repossession of 10% of the warehouse space. Tina may argue that the landlord's use of the leased space substantially interfered with her ability to conduct business. This claim would likely fail. Even though Tina was entitled to 100% of the leased space, she was not using the space that Lee took possession of. Tina cannot reasonably argue that the space was necessary to her conduct of business, as it was unused. If Lee had moved some of Tina's merchandise or equipment out of the space to store his cars, Tina would have a much stronger argument. But because the space was unused, Tina's argument that Lee substantially interfered with her business is likely to fail.

Tina may also point to the lack of hot water as substantially interfering with her ability to conduct business. This claim is much more plausible. Unfortunately for Tina, though, the lease specifically placed on her the responsibility for repairs and maintenance to the inside of the building. This disclaimer would not be effective in the case of a residential lease, because the implied warranty of habitability would apply - but as previously noted, the implied warranty of habitability does not apply to commercial leases. The landlord in this case was therefore under no duty to actually repair the

water heater, so his failure to do so is not an act of the landlord necessary to give rise to a constructive eviction. This claim would also fail.

An infestation of mice and cockroaches would also substantially interfere with Tina's ability to conduct business. Mice and cockroaches could also cause damage to Tina's personal property stored in the warehouse. Again, though, the lease places the responsibility of repairs and maintenance on Tina. It was Tina's responsibility to mitigate any insect infestations, not Lee's. If this had been a residential lease, then Lee would have breached the implied warranty of habitability - but there is no such warranty for commercial leases, and Tina's claim would again fail.

The last claim Tina may make for constructive eviction is the loud music played by the neighbor. Although the landlord is not responsible for the conduct of third parties, the landlord does have a duty to keep the tenant in quiet enjoyment of the leased premises. This duty includes the duty to prevent a nuisance on the property. The loud music played by the neighbor constitutes a private nuisance. Both Tina and the Lee have standing to sue the neighbor to abate the nuisance, but the duty under the lease falls to Lee. The failure of Lee to prevent the nuisance is a qualifying act of the landlord which could give rise to a constructive eviction. However, Lee will argue that the loud music was only being played at night - which would not interfere with Tina's business. The disruption to Tina's sleep would be immaterial - Tina was not supposed to be living in the warehouse. So it is likely that the court will find Tina failed to meet her burden of proving a substantial interference with her ability to conduct business, and her final claim for constructive eviction would also fail.

**Tina may sue Lee for $600 to repair the water heater.**

Tina will likely claim that Lee owes her the $600 she spent to repair the water heater. If a landlord breaches the implied warranty of habitability for residential leases, the tenant has several options. The tenant may terminate the lease and vacate, the tenant may repair the defect and deduct the money spent on repairs from the rent, the tenant may withhold rent and place it in escrow until a court decides what the reduced rent should be, or the tenant can reduce the rent paid while the defect existed. However, these remedies are only applicable to residential leases. This was not a residential lease, so the implied warranty of habitability did not apply. The disclaimer of responsibility for interior maintenance and repairs that was contained in the lease is valid in its entirety, and Tina was responsible for repairing the water heater. Therefore, her claim for the $600 spent to repair the water heater will also fail.

**Tina may sue Lee for overpayment of rent.**

Tina's best and final claim against Lee is for the overpayment of rent. As noted above, Tina abandoned the lease when she vacated the property on July 31, 2023. It is arguable that Lee accepted the surrender and the lease was terminated as of the date Tina vacated. If the court finds that the lease was properly surrendered, and that Lee accepted the surrender, Lee is not entitled to keep any portion of the rent for the months of August through December 2023 that Tina paid. Tina would therefore be entitled to receive a refund of $5,000 from Lee.

3)

Very good!

**Recording Statutes, Generally**

Problems arise with conveyances of real property when the same property is conveyed by one grantor to multiple grantees. The historical common law rule is that the first conveyance made is valid, since the grantor has nothing left to convey to a subsequent grantee. But, predictably, the competing grantees will disagree over who received the first conveyance, creating problems of title: no one is exactly sure who owns the property.

Recording of deeds, and recording statutes, attempt to solve this problem. A recording statute is a statute that declares who has valid title in the event multiple conveyances of the same property are made to multiple purchasers. Recording statutes are intended to protect bona fide purchasers.

**Bona Fide Purchasers**

A bona fide purchaser for value (a BFP) is anyone who pays valuable consideration for a conveyance of real property. In its most common usage, a BFP is the party purchasing real property. Recording statutes are not intended to protect persons who are not bona fide purchasers: a person who is gifted a piece of property, or who inherits a piece of property is not protected by a recording statute against a bona fide purchaser.

**Race Statutes**

A race statute is a statute that declares the first person to record the conveyance has the valid claim to the property, regardless of whether they have notice of a prior conveyance from the same grantor. The first person to record their deed at the recorder's office has valid title, and the other party does not.

**Notice Statutes**

A notice statute is a satute that declares that a subsequent purchaser has the valid claim if, at the time of the conveyance, they had no notice that the property had been previously conveyed to someone else. The notice can come from any source. If a previous purchaser has recorded a deed prior to the time of conveyance, then the subsequent purchaser is charged with notice and their claim is not valid. If, however, the prior purchaser did not record, and there was no other notice to the subsequent purchaser, the subsequent purchaser has the valid claim. The burden is on the first purchaser to prove the subsequent purchaser had notice. Of course, the subsequent purchaser runs

the risk that yet a third purchaser will not have notice and end up with a claim superior to theirs, so notice statutes encourage recording of deeds to provide notice.

**Race-Notice Statutes**

A race-notice statute is a statute that declares that a subsequent purchaser will have the valid claim if, and only if, the subsequent purchaser had no notice of the original conveyance, and the subsequent purchaser records their deed before the original purchaser records theirs. If the original purchaser records their deed before the subsequent purchaser, even if the subsequent purchaser had no notice of the conveyance when the subsequent conveyance occurred, the original purchaser has the valid claim.

Here, the jurisdiction is operating under the race-notice theory. This is because the statute states that the bona-fide purchaser "has no notice of the original conveyance" and "has recorded the deed to his conveyance first."

**Title History of Whiteacre**

Kate owned Whiteacre and conveyed it to Mary for $300,000. This makes Mary a BFP, since she paid money for the conveyance. Mary had no notice of any prior conveyances (because there were none.) If Mary had recorded her deed immediately upon the conveyance, the inquiry would end here and Mary would have owned Whiteacre. But Mary, predictably, did not record.

Kate then conveyed Whiteacre to Pete for $400,000. This also makes Pete a BFP, since he paid money for the conveyance, and had no notice of the prior conveyance to Mary (this assumes that Kate did not tell Pete she conveyed Whiteacre to Mary.) There was no record of the conveyance in the jurisdiction's recording office.

At this point, since Mary was the original purchaser, and Pete did not have notice of Mary's purchase, there is a race to record. Whoever records first would own Whiteacre. But, of course, neither recorded.

The bank, however, did. South Bank recorded a mortgage, which is usually a deed of trust. The recorder's index would have shown a grant of a deed of trust from Pete to South Bank, and a receipt of a deed by South Bank from Pete. Anyone searching the recorder's office would have had to search either Pete or South Bank (or both) to discover the deed of trust. The deed of trust made no reference to Kate, since she was not the grantor or the grantee of the deed of trust.

The deed of trust to Whiteacre granted to South Bank was, therefore, a wild deed: it was a recorded deed creating an encumbrance on a property, but because the jurisdiction did not have a tract or address index. Anyone interested in purchasing Whiteacre who was not involved in a transaction with Pete would not have spotted it.

In 2015, Mary died. At this point, a title search of Whiteacre would have showed Kate to be the owner of Whiteacre, since the last deed to Whiteacre was recorded from the previous grantor to Kate. There were no subsequent entries in the recorder's office of Kate granting Whiteacre to anyone.

Mary, in her will, left Whiteacre to Nancy. Nancy somehow discovered that Kate had also conveyed Whiteacre to Pete. Now in possession of the knowledge of the existence of a subsequent purchaser, Nancy records the deed granted from Kate to Mary.

(**The facts state that "in 2017 Pete learned of the deed to Kate and recorded his deed." This appears to be a typographical error in the fact pattern - in 2017, Pete could have learned about a deed either from Kate to Mary, or a deed from Mary's estate to Nancy. The answer will assume that Pete learned about both possible deeds.)

She then records a deed granting Whiteacre from Mary's estate to Nancy pursuant to Mary's will.

Pete learns of the conveyance to Mary and Nancy (the conveyance to Mary occurring prior to the conveyance to him, and the conveyance to Nancy occurring after the conveyance to him) and now records.

The title chain for Whiteacre now shows that Kate conveyed to Mary who conveyed to Nancy, and a separate chain shows Kate conveyed to Pete who conveyed a deed of trust to South Bank.

In 2020, Pete conveyed Whiteacre to Quinn for $500,000, who immediately recorded the deed. Each of the previous conveyances was recorded before Quinn purchased Whiteacre. There is still a deed of trust to South Bank.

**Quinn owns Whiteacre subject to the mortgage of South Bank**

Quinn has the superior claim to Whiteacre. When Pete purchased Whiteacre from Kate, he had no notice of the conveyance to Mary. If Mary had recorded the deed first, Pete would not have been the owner of whiteacre. But Mary did not record. Nancy recorded on Mary's behalf, after she became aware of the subsequent conveyance to Pete. Pete was a bona-fide purchaser and is protected by

the notice statute. Nancy is not protected for two reasons: the first is that she had notice of Pete's deed when she recorded hers. She therefore recorded the deed from Kate to Mary, and from Mary to herself, in bad faith. The second reason Nancy does not take is that she was not a bona-fide purchaser of Whiteacre. The claims of a bona-fide purchaser will extinguish the claims of a devisee, since the devisee did not pay valuable consideration for the property.

Nancy will argue that Quinn cannot be a bona-fide purchaser, since the entire title chain had been recorded prior to his purchase from Pete. This is true: Quinn's due diligence would have revealed Pete's grant from Kate, Pete's granting of a deed of trust to South Bank, and had he also searched the index for Kate's name, he would have seen conveyances from Kate to Mary and from Mary to Nancy. Quinn would be charged with the knowledge of all the prior conveyances.

This was probably a risk Quinn was willing to take. The deed from Pete to Quinn was likely a general warranty deed, which would have warranted the deed to Quinn against title defects. The risk would be borne by Pete if the title turned out to be invalid. There were no purchasers after Quinn and if his title were questioned, Pete would be responsible for defending Quinn's title.

**South Bank's Foreclosure Action**

Lurking behind the scenes, of course, is South Bank. South Bank holds a deed of trust to Whiteacre from Pete which secures the $400,000 mortgage. The proceeds from the sale, ordinarily, would have been used to pay off the South Bank mortgage, since they were more than sufficient (the mortgage was for $400,000 and the sale price to Quinn was $500,000.) A mortgage technically makes a title unmarketable - but if the sale proceeds are sufficient to cover the entire balance due on the note, the unmarketability is waived and the conveyance proceeds as normal.

For whatever reason, though, no payments were made to South Bank. The mortgage was still attached to Whiteacre when Quinn purchased it. Further, Quinn had notice of the mortgage on Whiteacre, since the branch of the title chain Quinn purchased Whiteacre from (Kate-Pete-Quinn, with the deed of trust to South Bank) included the deed of trust. Quinn is not responsible for the payments to South Bank, but South Bank can still foreclose on the property, since the lien is attached. South Bank's lien was not extinguished by the sale or transfer, so a foreclosure action by South Bank would be successful.

**END OF EXAM**