

*h/ers*

**PROPERTY  
FINAL EXAMINATION  
Professor Peter M. Malaguti  
Fall 2011 Semester**

Please provide **both** numbers requested below.

**YOUR ENTIRE STUDENT ID NUMBER:**

\_\_\_\_\_ 5 9

**YOUR PR NUMBER:** \_\_\_\_\_

**INSTRUCTIONS:**

I have made the exam a little shorter than last year's. Accordingly, the instructions have changed slightly.

The instructions run onto the next page. You may read this page and then turn the page to finish reading the instructions. You are not to look beyond the second page of instructions until you are instructed to begin the exam.

**YOU ARE NOT TO HAVE A CELL PHONE, OR ANY OTHER DEVICE THAT CAN TRANSMIT AND/OR RETAIN INFORMATION, ON YOUR PERSON DURING THIS EXAM. POSSESSION OF A CELL PHONE OR SUCH OTHER DEVICE SHALL BE TREATED, AND DEALT WITH, AS CHEATING.**

Please take one (1) blue book. Please write "Scrap" on the blue book. Please write your student id number and PR number on the blue book and turn it in with this exam booklet.

Please do not identify yourself in any way other than by social security number and PR number. Please do not write any information in your blue book or this exam booklet that might reveal who you are.

**All of your answers are to go in this exam booklet. The blue book is only for scrap. I will not read it for answers.**

This is a closed-book examination; other than writing implements, you are not to have any materials on your table or at your feet. Please place all books, knapsacks, briefcases, etc. at the side or front of the room.

Please do not use your own scrap paper. You may use the blue book labeled "Scrap" as scrap paper. Please turn in your scrap blue book with this exam booklet.

During this exam, unless otherwise stated or implicated by the facts, you are to use multistate law.

This examination consists of two (2) parts:

Part One consists of several fact patterns, each of which has a number of questions that follows and inquires about the law and analysis that applies to the particular fact pattern. You are to read each fact pattern carefully and answer each question that follows. There are a total of 50 questions, and you are to answer them all. The suggested time for Part One is two hours and fifteen minutes (135 minutes).

Please place your answers to Part One in the space provided **in this exam book**, not in a blue book. Please limit your answers to the lines provided below each question. Do not sandwich extra lines into the lines provided. I will not read beyond the lines provided under each question, and will not read doubled-up text; I am not kidding about this. Please make each answer readable in terms of neatness and the size of your handwriting. (I will not use a magnifying glass to read your answers.) Please answer the question responsively; don't provide information not asked for in the question. For example, if the question asks "Who wins?" please state the name of the person who wins; don't state why he or she wins. Please state your reasoning only if the question asks for it. Part One counts for 70 percent of your exam (70 out of 100 points).

**Please note that sometimes the lines given for your answers in Part One may run onto the next page.**

Part two consists of one (1) short essay question. **Please put your answer in this exam booklet, not in a blue book.** The suggested time for part two is forty-five (45 minutes). Part two counts for 30 percent of your exam (30 out of 100 points).

Despite the fact that the suggested time for all three parts is three hours, **I will give you three and one-half (3.5) hours to complete the exam.** You may use the extra half hour however you like, if you choose to use it at all.

Please make your answers legible.

There is a bathroom book at the front of the room. Please sign out and in when you leave the room.

I will tell you when there are 15 minutes left, at which point *no one* may leave the room. I will also warn you when there are 5 minutes left and 1 minute left. When I call time, you are to bring up your exam and blue books *immediately*.

**Please use multistate law unless the facts or instructions suggest otherwise.**

**GOOD LUCK!**

## Part One – Suggested Time: 2 Hours

Questions 1 through 4 are based on the following fact pattern:

About ten years ago, a farmer introduced a number of deer, antelope, buffalo, and peacocks onto his 160 acre farm where he allowed the animals to roam freely. These animals peacefully coexisted with the farm animals already there: cattle, chickens, horses, goats, sheep, and pigs. Over the years, the population of each species doubled or tripled in size. Because of the great care the farmer took in feeding and tending to the animals, almost all returned to the farmer's barn each day for feed and care. In fact, most of the animals became so tame that they even allowed the farmer's family and friends to pet them, play with them, and take food from the human hand.

Except for a 30 foot-wide front gate that was never closed, the entire farm was fenced in. Although the animals could walk through the gate and off the farm at virtually any time, it rarely happened. And, when an animal did wander off of the farm, it always came back to the farm where it had been fed and cared for.

The state in which the farm is located imposes a yearly 2% personal property tax on "all farm and household personal property." The tax law specifically includes "owned farm animals" and "owned pets" within the taxable class of personal property, although it does not define either category and does not list any specific animals that fit within either category.

For the past ten years, the farmer has paid the personal property tax on all the cattle, chickens, horses, goats, sheep, and pigs that have been on his farm. But the farmer has not paid a personal property tax on the deer, antelope, buffalo, and peacocks that have been on the farm. Recently, the state Department of Revenue assessed a personal property tax on the deer, antelope, buffalo, and peacocks on the farm and sought to recover back taxes, penalties and interest for the past 10 years on such animals. Of course, the state does not tax deer, antelope, buffalo, and peacocks in the wild.

The farmer claims that he does not own the deer, antelope, buffalo, and peacocks on his farm.

1. Given the facts described above, as well as a proper application of the law, the deer, antelope, buffalo, and peacocks are: (Circle only one answer below)

DOMESTIC ANIMALS

WILD ANIMALS

Question 2 is on the next page.

2. Please state the so-called capture doctrine (including its elements) in its entirety.

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3. In the space below, please make your best argument that the farmer does not own the deer, antelope, buffalo, and peacocks roaming on his farm.

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7. Upon learning that the hunter had taken a deer from his farm, the farmer sued the hunter for the value of the deer taken. The hunter has defended that suit on the ground that a court decision has already deemed that the farmer did not own the deer, and therefore the farmer cannot recover its value from the hunter. In the space below, please make your best argument that the farmer's lack of ownership of the deer while it was on the farmer's land is irrelevant, and that the farmer does have the right to recover the value of the deer from the hunter.

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**Questions 8 through 12 are based on the following fact pattern:**

An owner of a parcel of land in a large city built a fully-enclosed, four-story parking garage on the land. The garage was capable of handling 100 parked cars at once. Patrons entered the garage by driving to an entrance door, taking a parking ticket from a machine that automatically dispensed the tickets (with a time stamp placed upon the ticket), waiting for the entrance gate to lift, finding an open space inside the garage, and parking the car into the open space. Patrons were instructed to lock their cars upon parking them, and to take their keys with them; the garage would not be liable for items left in the cars. Patrons left the garage by returning to their cars, driving to the exit door, paying the parking attendant a rate based upon how long the car had been parked in the garage, waiting for the gate to lift after the parking fee had been paid, and driving out of the garage. At no point during this process does any garage employee or agent take the keys or drive the car. On the other hand, a patron cannot remove his or her parked car from the garage until a garage employee lifts the gate (after the payment of the fee).

**Question 8 is on the next page.**

8. What is the definition of a bailment?

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9. In the space provided below, please apply the elements of bailment to the facts to determine whether the legal relationship between the garage and its patrons is one of bailment. Be sure to clearly state your conclusion: bailment or no bailment.

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**10.** Would your legal conclusion as stated in your answer to the last question change if the parking method involved so-called “valet parking” rather than the above-described “park and lock” system of parking? Valet parking occurs when a patron drives to a designated spot and delivers possession of the car and car keys to an attendant who gets into the car, drives it to a parking spot, and then physically returns the car to the patron later on.

YES

NO

**11.** In the space below, please fully explain why your legal conclusion would or would not change.

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**12.** At common law (as well as currently in some states), there were three types of bailment. If the legal relationship between the garage and its patrons is indeed one of bailment as described above under either the “park and lock” or “valet” scenario, what type of common law bailment would it be?

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**Questions 13 and 14 are based on the prior fact pattern as well as the following supplemental facts:**

One evening, a patron brought his automobile to the “park and lock” garage described above. When the patron returned to get his car several hours later, he found that the automobile was gone. The patron walked throughout all three floors of the garage just to make sure he had not forgotten where he parked the car. He found no car. The patron questioned the parking attendant in the exit booth, who assured him that he had been there all evening, that no one had left without presenting a valid parking ticket and payment, and that he would never allow anyone to leave without doing so. The patron showed the attendant the parking ticket he had received upon entering the garage, and incredulously questioned how his car could be gone when the person who removed it obviously did not have the proper parking ticket.

The patron never recovered his car and subsequently sued the garage for the value of the automobile.

**13.** If the legal relationship between the garage and its patrons was indeed one of bailment, what was the standard of care that parking garage owed to the patron under the specific type of bailment that you previously identified?

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**Question 14 is on the next page.**



The patron immediately claimed ownership of the money, and the hotel manager immediately claimed the hotel's ownership of the money. The police took the money and held it pending the outcome of a legal action between the patron and hotel.

15. What kind of property was the bundled money at the time it was found by the patron in the drawer of the hotel room bureau? (Circle only one.)

LOST PROPERTY

MISLAID PROPERTY

ABANDONED PROPERTY

EMBEDDED PROPERTY

TREASURE TROVE

16. In the space provided below, please apply the facts to the law to explain the reasoning for your last answer.

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17. Based on the kind of property you have chosen, who should prevail, the patron or hotel?  
(Circle only one.)

PATRON

HOTEL

18. In the space provided below, please explain your legal reasoning in choosing your prior answer.

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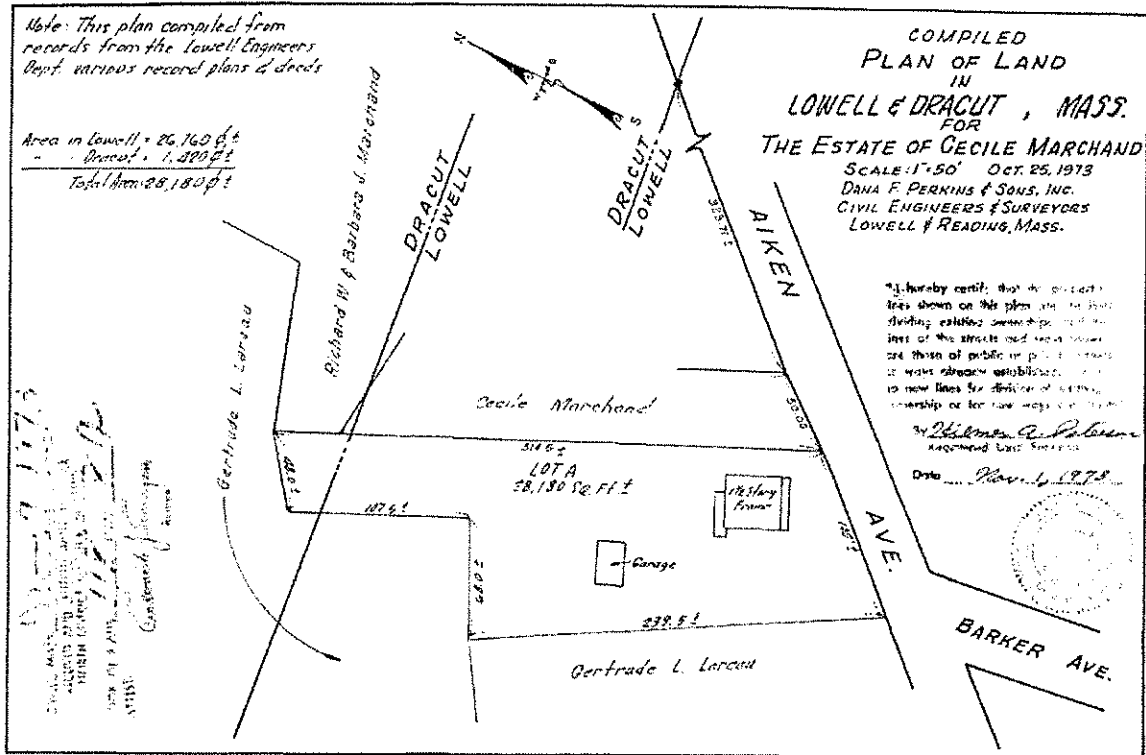
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**The next fact pattern begins on the next page.**

**Questions 19 through 28 are based on the following fact pattern:**

In early 1974, Augustus (“Gus”) Marchand inherited a parcel of land through the will of his grandfather, Cecile Marchand. The land lay mostly in Lowell, Massachusetts, and was described as “Lot A” on a plan entitled: “Compiled Plan of Land in Lowell & Dracut, Mass. for the Estate of Cecile Marchand Scale: 1” = 50 Oct. 25, 1973 Dana F. Perkins & Sons, Inc. Civil Engineers & Surveyors Lowell & Reading, Mass.” The plan was properly recorded at Plan Book 118, Page 5, in the Middlesex North District Registry of Deeds and is shown below:



At the time of his inheritance, Gus was 22 years old and had been battling mental health issues (including hallucinations, disorganized thinking and disorganized speech) his entire life. On July 23, 1974, after several violent episodes, a court of competent jurisdiction declared Gus to be legally insane on account of extreme paranoid schizophrenia, and involuntarily committed Gus to the Danpate Hospital for the Mentally Insane. The family kept the entire incident as quiet as possible.

The prodigal member of the Marchand family was Gus’s brother, Adolphus (“Dolph”). Dolph enjoyed the fine and expensive things in life despite the fact that he rarely engaged in any gainful employment. Dolph was constantly looking for creative ways to raise cash.

On February 18, 1976, Dolph drafted a deed to the parcel of land Gus had inherited, forged Gus’s name to the deed, got it notarized by tricking the notary public into believing he was Gus,

and delivered the deed to Lucinda Luciano, who also believed Dolph was Gus, for \$176,000. The deed described the parcel as follows:

That parcel of land located in the City of Lowell and Town of Dracut, being more particularly shown as "Lot A" on "Compiled Plan of Land in Lowell & Dracut, Mass. for the Estate of Cecile Marchand Scale: 1" = 50 Oct. 25, 1973 Dana F. Perkins & Sons, Inc. Civil Engineers & Surveyors Lowell & Reading, Mass," which plan is recorded in Plan Book 118, Page 5 in the North Middlesex District Registry of Deeds.

Lucinda immediately recorded the deed and moved into the home on the parcel. Dolph took the money and then left on an extended trip to New Zealand to do some serious fly fishing and bungee jumping. Unfortunately, Dolph would meet his fate about a month later when his bungee cord snapped while jumping from a high wire cable car some 134 meters (about 440 feet) over the Nevis River.

From early 1976 until 1987, Lucinda continued to occupy the entire parcel except for that portion extending into the Town of Dracut; that portion was heavily wooded, largely undevelopable, and never occupied by anyone. Upon moving in, Lucinda found that the home was in dire need of repairs. Lucinda replaced the roof, painted the house and garage, and installed a new paved driveway. She also upgraded and continued to maintain the landscaping. Lucinda shoveled the driveway after winter storms and put up holiday decorations each Christmas season. She occasionally took vacations of up to two weeks at a time, during which time she traveled. Lucinda paid all the real estate taxes from 1976 to 1987.

On June 1, 1987, Lucinda sold the parcel to Thelonious Thames for \$336,000. The deed from Lucinda to Thelonious, which Thelonious immediately recorded, recited the same description as the deed from Gus (really Dolph) to Lucinda:

That parcel of land located in the City of Lowell and Town of Dracut, being more particularly shown as "Lot A" on "Compiled Plan of Land in Lowell & Dracut, Mass. for the Estate of Cecile Marchand Scale: 1" = 50 Oct. 25, 1973 Dana F. Perkins & Sons, Inc. Civil Engineers & Surveyors Lowell & Reading, Mass," which plan is recorded in Plan Book 118, Page 5 in the North Middlesex District Registry of Deeds.

Thelonious moved in immediately, occupied the property as had Lucinda, and engaged in the same types of maintenance, upkeep and decoration as had Lucinda. Thelonious paid all the real estate taxes on the parcel from 1987 to the present.

Gus would never regain his sanity. On November 13, 1999, he died at the Danpate Hospital. Gus's only heir at law was his niece, Nelly, who at the time of Gus's death was not quite 14 years old. Nelly had never met Gus. As Gus's sole heir, Nelly inherited all real estate and personal property owned by Gus. Nelly turned 18 on December 30, 2003. She is now about to turn 26 years old.

Two months ago, Nelly discovered a letter that Dolph had written to another family member prior to his death. In the letter, Dolph confessed that he had forged Gus's name to the deed and had gone to New Zealand to hide from his shame. Nelly caused expert handwriting analysts to compare the signature on the deed with both Gus's and Dolph's handwriting. They unanimously agreed that Dolph had forged the deed.

Nelly brought an ejectment action against Thelonious, contending that she rather than Thelonious is the real owner of the parcel. Thelonious counterclaimed, asserting a count for declaratory relief on the ground that he had acquired title by adverse possession.

19. Ignore, for the moment, the fact that the deed from Dolph (posing as Gus) to Lucinda was forged. Was the description contained in that deed legally sufficient to sustain it? (Circle only one.)

YES

NO

20. In the space below, please explain your legal reasoning for your answer to the prior question.

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21. What was the legal status of Lucinda the moment she moved into the house on the parcel after receiving the deed from Dolph (posing as Gus)?

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Question 22 is on the next page.



**22.** In the space below, please explain your legal reasoning for your answer to the prior question.

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**23.** Please state the five (5) elements of adverse possession.

- i. \_\_\_\_\_
- ii. \_\_\_\_\_
- iii. \_\_\_\_\_
- iv. \_\_\_\_\_
- v. \_\_\_\_\_

**Question 24 is on the next page.**

24. In the space provided below, please define and describe each of the elements you just listed above.

i. \_\_\_\_\_  
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ii. \_\_\_\_\_  
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iii. \_\_\_\_\_  
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iv. \_\_\_\_\_  
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v. \_\_\_\_\_  
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**Questions 29 and 30 are based on the following fact pattern:**

A landlord owned a commercial building in the downtown area of a suburb that was suitable for use as a retail store. In 2005, she entered into a twenty (20) year lease with the “Riche and Kreemee Ice Cream Company” that allowed Riche and Kreemee to operate a “retail ice cream establishment” on the premises. The lease expressly prohibited Riche and Kreemee from using the premises for anything other than as a “retail ice cream establishment.” It also proscribed subleases and assignments “without the express written agreement of the landlord.”

In 2008, as Riche and Kreemie was about to go out of business, it approached the landlord and asked whether it could assign its lease to another ice cream retail establishment named “Lickin’ Good Cones, Ltd.” The landlord agreed to the assignment.

One year later, Lickin’ Good Cones was just about out of business because people seemed to think it was an adult sex paraphernalia store rather than an ice cream retail store. Without seeking and obtaining the landlord’s permission, Lickin’ Goods Cones “assigned” the lease to “Jen and Berry’s Ice Cream Specialists Corp.” for “a term of five (5) years.”

Well, Jen and Berry’s also found itself in trouble because people quickly came to think of its name as a cheesy takeoff on “Ben and Jerry’s” with half the quality. Without the permission of the landlord, Jen and Berry’s assigned “the entire interest and remainder” of its lease to the “Wicked Good Lo-Fat Organic Free-Range Frozen Yogurt Company.”

Although the name of Wicked Good Lo-Fat Organic Free Range initially attracted a number of weight watchers and health conscience consumers into the store, they soon discovered that the product was insipid, even unappealing. It has missed the last four months of rental payments.

The landlord is about to sue as many parties as possible for the non-payment of rent.

**Question 29 is on the next page.**

29. Did each of the following parties have the right to assign or sublease to the next party identified in the facts? (Please indicate your answers – “YES/NO and REASONS in the table below.)

Party	“Yes” or No”	Legal Reasons for “Yes” or “No”
Riche and Kreemee		<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
Lickin’ Good Cones		<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
Jen and Berry’s		<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

30. Please indicate whether the respective party will be liable to the landlord for rent in the table below.

Party	"Yes" or No"	Legal Reasons for "Yes" or "No" (Privity of Contract Or Privity of Title, and Why)
Riche and Kreemee		<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
Lickin' Good Cones		<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
Jen and Berry's		<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

Wicked Good Lo-Fat Organic Free		<hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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**Questions 31 through 38 are based on the following fact pattern:**

Thirty years ago, a grantor conveyed a parcel of land by warranty deed to a buyer “so long as the buyer uses the property for church purposes during his lifetime, but if the buyer does not use the property for church purposes during his lifetime, to the East Milwaukee Universalist Baptist Church (EMUBC”).

31. What is the state of the title without applying the rule against perpetuities?

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32. What is the state of the title, applying the rule against perpetuities?

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**Question 33 is on the next page.**



33. In the space below, please describe how you applied the rule against perpetuities.

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The buyer took possession of the parcel of land, built a church on the site, and used the land entirely for church purposes. Five years ago, the grantor died with a will that left all of her property, both real and personal, to the Society for the Prevention of Cruelty to Law Students (SPCLS). At her death, the grantor had only one heir: her son, Sonny.

A year ago, the buyer died with a will that left the property to his daughter. In need of larger facilities, the church on the property moved to another location. Then, the buyer’s daughter discovered oil on the land, erected an oil rig, and has started to drill. Sonny has brought an action against the buyer’s daughter seeking a declaratory judgment that the buyer has forfeited ownership of the land, and that he is the owner in fee simple absolute. Sonny properly joined the EMUBC and SPCLS as parties in the suit. The buyer’s daughter, EMUBC, and SPCLS have raised all appropriate defenses against all parties.

34. Given the facts as stated, and applicable law, who is most likely to be deemed the owner of the present estate in that law suit? (Circle only one answer.)

SONNY                      BUYER’S DAUGHTER                      EMUBC                      SPCLS

35. In the space provided below, please explain the reasoning you employed to reach your answers to the previous question:

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Assume for the final questions in this grouping that Sonny's complaint against the buyer's daughter included a count for waste. EMUBC and SPCLS also cross-claimed against the buyer's daughter for waste. Even if you disagree with the legal conclusion, further assume for this group of questions that either Sonny, EMUBC or SPCLS will be deemed an owner of a future interest in the parcel.

36. What is the legal definition of waste?

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37. Is the buyer's daughter liable for waste?

YES

NO

38. In the space below, please apply the facts to the elements of waste to support the conclusion you reached in answering the last question.

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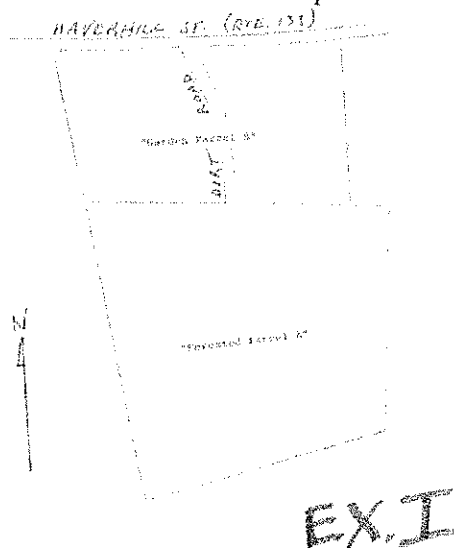
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Questions 39 through 44 are based on the following fact pattern:

Prior to July 23, 1983, Yeoman Crabtree owned a 60 acre parcel of land on Route 133 (Haverhill Street) in Rowley, Massachusetts. Yeoman used the front 20 acres for growing fruits and vegetables for sale at a farm stand on the parcel and elsewhere. The rear 40 acres were heavily-forested and unused.

On July 23, 1983, Crabtree subdivided his entire the 60 acre parcel into two parcels: a 20-acre "Garden Parcel" with frontage on Haverhill Street and a 40-acre "Forested Parcel" with no frontage on any public road. As a consequence of the subdivision, the only actual, free and unobstructed access to the Forested Parcel was via a dirt road which traversed the Garden Parcel. The Garden Parcel, Forested Parcel and dirt road are depicted on the sketch plan below:



Simultaneously with the creation of the subdivision, Crabtree conveyed the Forested Parcel to Rose Blight. Although Crabtree and Blight never discussed or addressed the issue of access to the Forested Parcel, Blight assumed she would be able to use the dirt road. After conveying the

Forested Parcel to Rose Blight, Crabtree continued to use the Garden Parcel as a farm. Rose Blight did not use the Forested Parcel at all.

In 1996, Crabtree sold the Garden Parcel to Ned Carson for \$525,000 by a special warranty deed that included the covenant of seisin, the covenant against encumbrances, the covenant of quiet enjoyment, and the covenant of further assurances. Carson was unaware of Rose Blight's belief that she was entitled to use the dirt road to reach the Forested Parcel.

In 2007, Carson sold the Garden Parcel to John Grogan by a special warranty deed that included the covenant of seisin, covenant against encumbrances, the covenant of quiet enjoyment, and the covenant of further assurances. Grogan also was unaware of Rose Blight's belief that she was entitled to use the dirt road to reach the Forested Parcel.

39. In the table below, set forth and explain the elements of an easement by implication. (Do not include specific facts.)

<b>Elements</b>	<b>Explanation</b>



41. In the table below, set forth and explain the elements of an easement by implication. (Do not include specific facts.)

Elements	Explanation

42. In the space provided below, please apply the elements of an easement by implication to the facts to determine whether the Rose Blight may use the dirt road to access the Forested Parcel. Be sure to clearly state your conclusion: easement by implication or no easement by implication.

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**Questions 45 and 46 are based on the following fact pattern:**

Fifteen years ago, a real estate developer purchased a large industrial building, which he financed by signing a promissory note and granting a mortgage to a bank. The developer spent the next year rehabbing the building and then rented it to a manufacturer for a term of 30 years. The written lease between the developer and manufacturer contained a clause stating: "the tenancy created hereunder shall be subordinate to any mortgage hereafter granted to an institutional lender."

Five years after executing the lease with the manufacturer, the developer borrowed more money and granted another mortgage to an institutional mortgage company.

A year after that, a creditor of the developer obtained a judgment against the developer and properly recorded the judgment in the registry of deeds. A statute in the jurisdiction where the industrial building was located provides that a recorded judgment is the equivalent of any other recorded encumbrance on all real estate owned by the debtor in the recording district.

All of the above-referenced real estate interests were immediately delivered and immediately recorded. None of the referenced mortgages contained due-on-sale clauses.

The creditor recently commenced appropriate foreclosure proceedings.

**45.** A purchaser at the foreclosure will purchase subject to (circle as many as apply):

THE BANK MORTGAGE

THE MORTGAGE COMPANY MORTGAGE

THE MANUFACTURER'S LEASE

THE CREDITOR'S JUDGMENT

**Question 46 is on the next page.**



46. In the space provided below, please apply the facts to the law to justify your answer to the previous question.

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**Questions 47 and 48 are based on the following fact pattern:**

The owner of an uninhabited tract of land mortgaged it to a bank. The bank’s attorney neglected to record the mortgage at that time. A month later, the owner conveyed the tract of land to his niece in consideration of “love and affection.” The niece lacked any knowledge of the mortgage to the bank and immediately recorded her deed. Last week, the niece sold the land to a buyer who plans to build a condominium on the real estate. Although the buyer has not yet recorded his deed, the bank’s attorney finally did record the mortgage after the buyer accepted delivery of the deed from the niece.

The jurisdiction in which the tract of land is located has a statute stating: “No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice unless the same be recorded according to law.”

The buyer just learned of the mortgage to the bank and has just filed a lawsuit against the bank seeking a declaration that the mortgage is not enforceable against the buyer.

**Question 47 is on the next page.**

47. Who will prevail in that lawsuit? (Circle only one.)

THE BUYER

THE BANK

48. In the space provided below, please apply the facts to the law to justify your answer to the previous question.

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**Questions 49 and 50 are based on the following fact pattern:**

A seller conveyed an improved parcel of real estate to a buyer. The deed contained a restriction stating that the buyer, "his heirs, successors, grantees and assigns agree that [the parcel] shall be used only as a single family residence." The buyer promptly and properly recorded the deed, and then moved into the parcel and used it as a single family residence. Ten years later, the buyer sold the parcel to a new buyer. The deed that the buyer delivered to the new buyer made no mention of any limitation on the use of the parcel. The new buyer never moved onto the parcel, choosing instead to leave it vacant. Shortly after the new buyer bought the parcel, a trespasser began adversely possessing the parcel. Some 21 years later, the trespasser obtained a declaratory judgment in a court of competent jurisdiction demonstrating that the trespasser had become the



**Part Two – Suggested Time: 45 Minutes**

Olsen died testate (with a will) in 1995 and left Blackacre, a house and several acres of land located in Town, to his two sons, Al and Bob “for their joint lives and then to the survivor.” Al resided at Blackacre for the past ten years and has paid the taxes during this period. Bob conveyed his interest in Blackacre to Charles in 1999.

Al listed Blackacre for sale with a licensed Broker for \$1 million dollars. Broker negotiated with Paul, to buy Blackacre. On November 1, 2011, Al entered into a written contract with Paul to sell him Blackacre for \$900,000, and Paul gave Al a \$200,000 deposit. Paul believed he would be receiving the entire title from Al. The closing was scheduled for February 2, 2012. Al also agreed to pay Broker a 10% commission for negotiating the sale.

On December 1, 2011, the home on Blackacre burned to the ground. Al died on December 10, 2011 and left a will giving his realty interests to his friend Jim and his personal property to Al’s three surviving children.

On December 15, 2011, Paul notified Fred, the executor of Al’s estate, that he would not buy Blackacre and demanded a refund of the \$200,000 deposit. Fred has refused Paul’s demand to return the deposit. Broker has demanded that Fred pay him the 10% commission.

What are the rights of the parties?

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**PROPERTY  
FINAL EXAMINATION  
Professor Peter M. Malaguti  
Fall 2011 Semester  
Answers and Explanations  
Part One**

**Please understand that these are “aspirational” answers. I have not assumed that any student is capable of including all this information under the stresses, time constraints and space constraints of an examination.**

**Please also understand that these answers are only guides. I also grade on the cogency, organization, and clarity of the student answers.**

**Questions 1 through 4 are based on the following fact pattern:**

About ten years ago, a farmer introduced a number of deer, antelope, buffalo, and peacocks onto his 160 acre farm where he allowed the animals to roam freely. These animals peacefully coexisted with the farm animals already there: cattle, chickens, horses, goats, sheep, and pigs. Over the years, the population of each species doubled or tripled in size. Because of the great care the farmer took in feeding and tending to the animals, almost all returned to the farmer’s barn each day for feed and care. In fact, most of the animals became so tame that they even allowed the farmer’s family and friends to pet them, play with them, and take food from the human hand.

Except for a 30 foot-wide front gate that was never closed, the entire farm was fenced in. Although the animals could walk through the gate and off the farm at virtually any time, it rarely happened. And, when an animal did wander off of the farm, it always came back to the farm where it had been fed and cared for.

The state in which the farm is located imposed a yearly 2% personal property tax on “all farm and household personal property.” The tax law specifically includes “owned farm animals” and “owned pets” within the taxable class of personal property, although it does not define either category and does not list any specific animals that fit within either category.

For the past ten years, the farmer has paid the personal property tax on all the cattle, chickens, horses, goats, sheep, and pigs that have been on his farm. But the farmer has not paid a personal property tax on the deer, antelope, buffalo, and peacocks that have been on the farm. Recently, the state Department of Revenue assessed a personal property tax on the deer, antelope, buffalo, and peacocks on the farm and sought to recover back taxes, penalties and interest for the past 10 years on such animals. Of course, the state does not tax deer, antelope, buffalo, and peacocks in the wild.

The farmer claims that he does not own the deer, antelope, buffalo, and peacocks on his farm.

1. Given the facts described above, as well as a proper application of the law, the deer, antelope, buffalo, and peacocks are: (Circle only one answer below)

DOMESTIC ANIMALS

*WILD ANIMALS*

Question 2 is on the next page.

2. Please state the so-called capture doctrine (including its elements) in its entirety.

*One must deprive a wild animal of its natural liberty in order to own it. This can happen in three ways: killing it; mortally wounding it; or physically controlling it in a trap, net, fence, etc. Also, if the wild animal escapes, and regains its natural liberty, the previous owner's ownership ceases.*

3. In the space below, please make your best argument that the farmer does not own the deer, antelope, buffalo, and peacocks roaming on his farm.

*In order to own these living wild animals, the farmer must have kept them in a cage, fenced in area, or other structure that deprives them of the ability to come and go. Although the wild animals rarely chose to leave the confines of the farm they could have done so at any time, and thus have not been deprived of their natural liberty.*

4. In the space below, please make your best argument that the farmer does own the deer, antelope, buffalo, and peacocks roaming on his farm.

*Try either one of these:*

- 1. The farmer is a business person who invests time and effort into maintaining his wild animal farm. The law should seek to protect the interests and expectations of business persons, and declare the farmer to own his wild animal herd. Certainly, this would protect him if a wild animal wandered off and he sought to retrieve it. At the same time, however, the farmer should expect to pay taxes on the animals since the legal system is protecting his business interests.*
- 2. Although the wild animals technically could have come and gone as they pleased, history shows that they never do. Although the farmer does not have a fence surrounding every last bit of the farm, the fence comes pretty close to doing so. Moreover, his system of maintaining the herd renders them essentially trapped as if they were totally surrounded by a fence.*

Assume for this the next segment of questions that a court of competent jurisdiction decided that the farmer did not own the deer, antelope, buffalo, and peacocks roaming on his farm, and that the farmer therefore was not liable for the personal property tax on such animals.

Subsequently, one of the buffalo knocked down a section of fence on the outskirts of the farm. The farmer removed the felled section of fencing, intending to replace the fence when the materials became available. A hunter, who was lawfully hunting deer in the area during hunting season, came upon the cleared section of fencing and entered onto the farm, not knowing that the land was owned by the farmer. The hunter shot and killed a (what he noted was a remarkably-passive) deer on the farm, and carried it off.

5. Please state the definition of trespass.

*Intentionally going onto someone else's property without permission. The requisite intent is merely to go where you intend to go; one does not have to intend to be a trespasser.*

6. Please apply the facts to the elements of trespass to determine whether the hunter was a trespasser when he entered the farm.

*Whether he realized or not that he was on the farmer's farm, the trespasser intended to go onto the farm and thus met the intent element of trespass.*

7. Upon learning that the hunter had taken a deer from his farm, the farmer sued the hunter for the value of the deer taken. The hunter has defended that suit on the ground that a court decision has already deemed that the farmer did not own the deer, and therefore the farmer cannot recover its value from the hunter. In the space below, please make your best argument that the farmer's lack of ownership of the deer while it was on the farmer's land is irrelevant, and that the farmer does have the right to recover the value of the deer from the hunter.

*Under the doctrine of "ratione soli," although the owner of land does not own the free wild animals that happen upon the land, a person who trespasses onto the land to deprive a wild animal of its liberty forfeits any title s/he acquires to the owner of the land. The obvious purpose of the rule is to discourage persons in pursuit of wild animals to commit trespass while attempting to reduce the wild animal to possession.*

**Questions 8 through 12 are based on the following fact pattern:**

An owner of a parcel of land in a large city built a fully-enclosed, four-story parking garage on the land. The garage was capable of handling 100 parked cars at once. Patrons entered the garage by driving to an entrance door, taking a parking ticket from a machine that automatically dispensed the tickets (with a time stamp placed upon the ticket), waiting for the entrance gate to lift, finding an open space inside the garage, and parking the car into the open space. Patrons were instructed to lock their cars upon parking them, and to take their keys with them; the garage would not be liable for items left in the cars. Patrons left the garage by returning to their cars, driving to the exit door, paying the parking attendant a rate based upon how long the car had been parked in the garage, waiting for the gate to lift after the parking fee had been paid, and driving out of the garage. At no point during this process does any garage employee or agent take the keys or drive the car. On the other hand, a patron cannot remove his or her parked car from the garage until a garage employee lifts the gate (after the payment of the fee).

8. What is the definition of a bailment?

*Rightful possession of someone else's property.*

9. In the space provided below, please apply the elements of bailment to the facts to determine whether the legal relationship between the garage and its patrons is one of bailment. Be sure to clearly state your conclusion: bailment or no bailment.

*Not a Bailment Argument*

*This is not a bailment. Although the car was parked in a space in a garage, the garage did not have possession of the property. One controls an automobile with a key. The car cannot be driven without a key and, without a key, one cannot even gain entry. The facts are clear that no garage employee ever entered the automobile. The garage's admonition to lock the car, and refusal to be liable for items left in the car, further cements its intent not to create a bailment relationship.*

*It is a Bailment Argument*

*The owner of the vehicle gave up at least some quantum of possession to the garage. It could not have removed the car from the garage without the garage's participation: lifting the exit gate. Surely, the garage would not have lifted the gate without a full payment. There is enough possession to create a bailment relationship between the garage and the owner of the car.*

10. Would your legal conclusion as stated in your answer to the last question change if the parking method involved so-called "valet parking" rather than the above-described "park and lock" system of parking? Valet parking occurs when a patron drives to a designated spot and delivers possession of the car and car keys to an attendant who gets into the car, drives it to a parking spot, and then physically returns the car to the patron later on.

YES

NO

11. In the space below, please fully explain why your legal conclusion would or would not change.

*In the valet parking situation, the owner of the car parts with control and possession of the vehicle by giving the keys to the attendant, who enters the car and moves it to a designated location. The attendant has thus obtained "rightful possession of someone else's property," and becomes a bailee.*

12. At common law (as well as currently in some states), there were three types of bailment. If the legal relationship between the garage and its patrons is indeed one of bailment as described above under either the "park and lock" or "valet" scenario, what type of common law bailment would it be?

*A "mutual benefit" bailment. The parking establishment is benefitted by the parking fee the owner of the vehicle pays, and the owner is benefitted by obtaining a secure spot in which to park the automobile.*

**Questions 13 and 14 are based on the prior fact pattern as well as the following supplemental facts:**

One evening, a patron brought his automobile to the "park and lock" garage described above. When the patron returned to get his car several hours later, he found that the automobile was gone. The patron walked throughout all three floors of the garage just to make sure he had not forgotten where he parked the car. He found no car. The patron questioned the parking attendant in the exit booth, who assured him that he had been there all evening, that no one had left without presenting a valid parking ticket and payment, and that he would never allow anyone to leave without doing so. The patron showed the attendant the parking ticket he had received upon entering the garage, and incredulously questioned how his car could be gone when the person who removed it obviously did not have the proper parking ticket.

The patron never recovered his car and subsequently sued the garage for the value of the automobile.

13. If the legal relationship between the garage and its patrons was indeed one of bailment, what was the standard of care that parking garage owed to the patron under the specific type of bailment that you previously identified?

*Ordinary negligence: the parking garage and its employees would have had to act in regard to the car as a reasonably prudent person would act in the same circumstances.*

14. Assuming that the legal relationship between the garage and its patrons was indeed one of bailment, apply the standard of care you just identified to the facts to determine whether the garage should or should not be found liable in a suit brought by the patron.



*The sparse facts present a border-line call. While one might argue that no reasonably prudent parking would have allowed a thief to drive off with the automobile, we are left wondering if there might have been other ways to get a stolen car out of the garage. Although the facts tilt slightly toward finding negligence on the part of the garage, I'll accept a reasoned argument on either side.*

**Questions 15 through 18 are based on the following fact pattern:**

A hotel patron checked into a hotel. Upon entering his room, the patron opened a bureau drawer into which he intended to put some of his clothes. Upon opening the drawer the patron saw money in plain view in the left part of the left drawer of his dresser. The money was wrapped tightly with masking tape, like a brick, with the bills showing. The patron notified the hotel manager of his find, and the hotel manager called the police. The police determined that there were two bundles of money separated by denominations and then bundled together. The bundle contained 46 one hundred-dollar bills and 480 twenty-dollar bills, for a total of \$14,200. The money appeared to be intentionally and meticulously wrapped because all the bills faced the same direction.

The patron immediately claimed ownership of the money, and the hotel manager immediately claimed the hotel's ownership of the money. The police took the money and held it pending the outcome of a legal action between the patron and hotel.

15. What kind of property was the bundled money at the time it was found by the patron in the drawer of the hotel room bureau? (Circle only one.)

LOST PROPERTY

*MISLAID PROPERTY*

ABANDONED PROPERTY

EMBEDDED PROPERTY

TREASURE TROVE

16. In the space provided below, please apply the facts to the law to explain the reasoning for your last answer.

*Abandoned property occurs when someone leaves the item(s) behind with the intent of never returning to retrieve it. It is highly unlikely that any sane person would abandon \$14,200 in cash. Treasure trove occurs when property is secreted away, and enough time has passed that one can feel safe determining that the placer of the property is likely dead and not coming back to retrieve it. This is highly unlikely in the transient setting of a hotel room. A bundle of cash in a hotel room bureau drawer would likely be found by the maid cleaning the room or the next guest. A bundle of money in a bureau drawer clearly is not embedded in the earth. Lost property occurs when its possessor loses possession without realizing it, e.g., a wallet falls out of a pocket. The fact that the drawer was closed when the patron found the bundle of money in it indicates that the stash could not have fallen there. Instead, it was purposely placed there, and then the drawer was closed. And this leads us to our conclusion that the money was mislaid, which occurs when someone purposely puts an item in a particular place, but then forgets to retrieve it.*

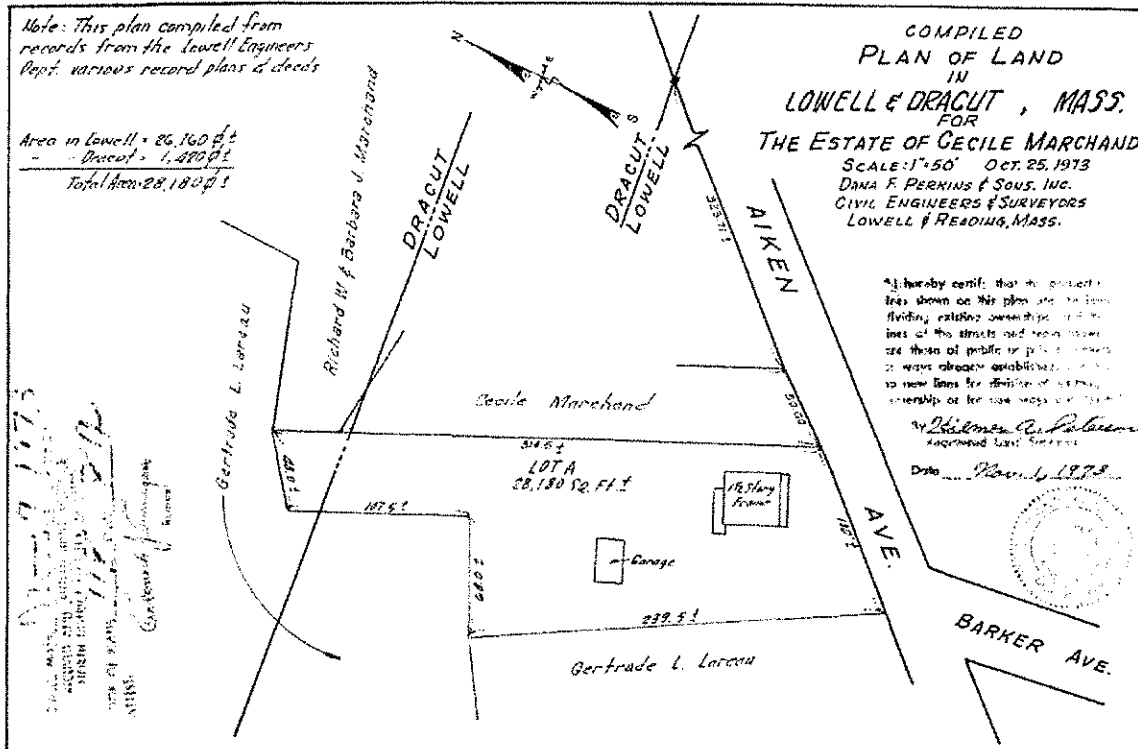
17. Based on the kind of property you have chosen, who should prevail, the patron or hotel? (Circle only one.)

18. In the space provided below, please explain your legal reasoning in choosing your prior answer.

*If the true owner fails to return for it, mislaid property goes to the owner/possessor of the land on which the property was found. The reason for this rule is that the mislayer-true owner of property has at least some chance of retracing his or her steps and finding the mislaid property if the owner/possessor of the land on which it was found maintains possession.*

Questions 19 through 28 are based on the following fact pattern:

In early 1974, Augustus ("Gus") Marchand inherited a parcel of land through the will of his grandfather, Cecile Marchand. The land lay mostly in Lowell, Massachusetts, and was described as "Lot A" on a plan entitled: "Compiled Plan of Land in Lowell & Dracut, Mass. for the Estate of Cecile Marchand Scale: 1" = 50 Oct. 25, 1973 Dana F. Perkins & Sons, Inc. Civil Engineers & Surveyors Lowell & Reading, Mass." The plan was properly recorded at Plan Book 118, Page 5, in the Middlesex North District Registry of Deeds and is shown below:



At the time of his inheritance, Gus was 22 years old and had been battling mental health issues (including hallucinations, disorganized thinking and disorganized speech) his entire life. On July 23, 1974, after several violent episodes, a court of competent jurisdiction declared Gus to be legally insane on account of extreme paranoid schizophrenia, and involuntarily committed Gus to the Danpate Hospital for the Mentally Insane. The family kept the entire incident as quiet as possible.

The prodigal member of the Marchand family was Gus's brother, Adolphus ("Dolph"). Dolph enjoyed the fine and expensive things in life despite the fact that he rarely engaged in any gainful employment. Dolph was constantly looking for creative ways to raise cash.

On February 18, 1976, Dolph drafted a deed to the parcel of land Gus had inherited, forged Gus's name to the deed, got it notarized by tricking the notary public into believing he was Gus, and delivered the deed to Lucinda Luciano, who also believed Dolph was Gus, for \$176,000. The deed described the parcel as follows:

That parcel of land located in the City of Lowell and Town of Dracut, being more particularly shown as "Lot A" on "Compiled Plan of Land in Lowell & Dracut, Mass. for the Estate of Cecile Marchand Scale: 1" = 50 Oct. 25, 1973 Dana F. Perkins & Sons, Inc. Civil Engineers & Surveyors Lowell & Reading, Mass.," which plan is recorded in Plan Book 118, Page 5 in the North Middlesex District Registry of Deeds.

Lucinda immediately recorded the deed and moved into the home on the parcel. Dolph took the money and then left on an extended trip to New Zealand to do some serious fly fishing and bungee jumping. Unfortunately, Dolph would meet his fate about a month later when his bungee cord snapped while jumping from a high wire cable car some 134 meters (about 440 feet) over the Nevis River.

From early 1976 until 1987, Lucinda continued to occupy the entire parcel except for that portion extending into the Town of Dracut; that portion was heavily wooded, largely undevelopable, and never occupied by anyone. Upon moving in, Lucinda found that the home was in dire need of repairs. Lucinda replaced the roof, painted the house and garage, and installed a new paved driveway. She also upgraded and continued to maintain the landscaping. Lucinda shoveled the driveway after winter storms and put up holiday decorations each Christmas season. She occasionally took vacations of up to two weeks at a time, during which time she traveled. Lucinda paid all the real estate taxes from 1976 to 1987.

On June 1, 1987, Lucinda sold the parcel to Thelonious Thames for \$336,000. The deed from Lucinda to Thelonious, which Thelonious immediately recorded, recited the same description as the deed from Gus (really Dolph) to Lucinda:

That parcel of land located in the City of Lowell and Town of Dracut, being more particularly shown as "Lot A" on "Compiled Plan of Land in Lowell & Dracut, Mass. for the Estate of Cecile Marchand Scale: 1" = 50 Oct. 25, 1973 Dana F. Perkins & Sons, Inc. Civil Engineers & Surveyors Lowell & Reading, Mass.," which plan is recorded in Plan Book 118, Page 5 in the North Middlesex District Registry of Deeds.

Thelonious moved in immediately, occupied the property as had Lucinda, and engaged in the same types of maintenance, upkeep and decoration as had Lucinda. Thelonious paid all the real estate taxes on the parcel from 1987 to the present.

Gus would never regain his sanity. On November 13, 1999, he died at the Danpate Hospital. Gus's only heir at law was his niece, Nelly, who at the time of Gus's death was not quite 14 years old. Nelly had never met Gus. As Gus's sole heir, Nelly inherited all real estate and personal property owned by Gus. Nelly turned 18 on December 30, 2003. She is now about to turn 26 years old.

Two months ago, Nelly discovered a letter that Dolph had written to another family member prior to his death. In the letter, Dolph confessed that he had forged Gus's name to the deed and had gone to New Zealand to hide from his shame. Nelly caused expert handwriting analysts to compare the signature on the deed with both Gus's and Dolph's handwriting. They unanimously agreed that Dolph had forged the deed.

Nelly brought an ejectment action against Thelonious, contending that she rather than Thelonious is the real owner of the parcel. Thelonious counterclaimed, asserting a count for declaratory relief on the ground that he had acquired title by adverse possession.

19. Ignore, for the moment, the fact that the deed from Dolph (posing as Gus) to Lucinda was forged. Was the description contained in that deed legally sufficient to sustain it? (Circle only one.)

YES

NO

20. In the space below, please explain your legal reasoning for your answer to the prior question.

*The reference to the lot on the recorded plan made the parcel “locatable”: one can determine the extent and location of the lot using extrinsic evidence. Many believe that descriptions off of plans are now the most accurate.*

21. What was the legal status of Lucinda the moment she moved into the house on the parcel after receiving the deed from Dolph (posing as Gus)?

*Trespasser*

22. In the space below, please explain your legal reasoning for your answer to the prior question.

*Although Lucinda believed she had become the owner upon accepting the deed, this was not the case because Dolph could only sell what he owned (Brooklyn Bridge Rule), which was nothing. She intended to take possession of the property, which belonged to someone else: Gus. Nothing in the facts indicate that Lucinda received permission to take possession of the land from Gus or a proxy. Thus, Lucinda meets the definition of trespass.*

23. Please state the five (5) elements of adverse possession.

- i. *Open & Notorious*
- ii. *Hostile*
- iii. *Exclusive*
- iv. *Actual*
- v. *Continuous*

24. In the space provided below, please define and describe each of the elements you just listed above.

- i. *Open & Notorious: Holding one’s self out to the community as the actual owner of the land. This includes doing things on the land that normal owners of such land do, e.g. paying taxes, mowing the lawn, doing home improvements. Some say that open & notorious requires the adverse possessor to “fly the flag of ownership.” The open & notorious element is usually fairly easy to satisfy as long as the adverse possessor is not attempting to hide his/her possession.*
- ii. *Hostile: Interfering with the owner’s right to exclusive possession is hostile possession of the land. By far, the most common form of hostile possession is trespassing; a trespass is always an affront to the owner’s right to exclude. A non-trespasser, i.e., a co-tenant, is never hostile unless s/he makes it abundantly clear that s/he is occupying adversely or in defiance of the other owner(s)’ rights.*

- iii. *Exclusive: Non-use by the owner during the entire statutory period. To satisfy this element, the owner must essentially allow (even if s/he lacks knowledge) the adverse possessor to continue in possession, meeting all the other elements of adverse possession, for the entire statutory period. Interference by another and later adverse possessor will not break up the exclusivity element, although it may cause the first adverse possessor to lose some rights to the later trespasser if s/he does not act to evict.*
- iv. *Actual: Physical presence on the adversely-possessed property. This does not require the adverse possessor to occupy the land, without leaving, for the entire statutory period. Instead, it requires the adverse possessor to be actually present in the same way a normal owner would be present on the property. Thus, the adverse possessor can go to work, shop and take vacations, as normal owners do.*
- v. *Continuous: Quite simply, meet all of the other four adverse possession elements for the full statutory period, which most commonly is 20 years.*

25. In the space below, please describe “tacking” and its elements. (Do not address specific facts.)

*Tacking allows successive adverse possessors to add their time together (or tack) to achieve the continuous element (usually 20 years) of adverse possession. To tack, there must be privity of title/estate which is manifested by a deed, will, intestate distribution or other legally-recognized method of transferring real estate. While blood relations between putative tackers often cause the parties to create privity by way of will or intestate distribution, mere blood relation without such is not enough to allow tacking.*

26. In the space below, please describe how “tolling” works in the context of adverse possession. (Do not address specific facts.)

*The statute of limitations should not run against someone who has a disability preventing him or her from commencing an ejectment action against an adverse possessor. Such disabilities include: incompetence, minority and jail (sometimes). A disabled owner will receive 10 years after the disability is removed to eject a trespasser, but in no case less than 20 years after the trespass began. For tolling to occur, the disability must be in place when the adverse possession begins.*

27. In the space below, please describe how “constructive adverse possession,” its elements, and how works in the context of adverse possession. (Do not address specific facts.)

*The doctrine of constructive adverse possession essentially acts as an exception to the rule that the adverse possessor obtains title to only that portion of the land s/he actually possesses. Constructive adverse possession allows the adverse possessor to obtain title to the entire parcel described in a deed delivered to him or her (not just that actually possessed) provided:*

1. *At the time of delivery, the deed was defective due to a forgery, lack of capacity, lack of ownership, or some other reason; and*

2. Upon receiving the deed, the adverse possessor had a good-faith belief that s/he had truly become the owner of the entire parcel described in the deed.

*In order to employ the constructive adverse possession doctrine, the adverse possessor must have first met all the “regular” elements of adverse possession. Thus, the ultimate effect of adverse possession is to “boost” the amount of land to which the adverse possessor obtains title.*

28. In the space below, please apply the elements of adverse possession to the facts to determine whether Nelly or Thelonious owns the parcel. If you determine that Thelonious is the owner, you should address how much of the land he acquired. You should also address the issues of tacking, tolling and constructive adverse possession in your analysis. (Please note that the lines for your answer run onto the next page and fill the whole next page.

Open & Notorious: *This element is satisfied. Together, Lucinda and Thelonious have been using that land in issue as many property owners in Lowell and Dracut, Massachusetts do: as a residence. They have performed snow shoveling, landscaping, made repairs, constructed a driveway, paid taxes, and have done what normal residential owners do all the time. They have held themselves out to the community as true owners. Certainly, nothing in the facts suggests that they were attempting to hide their use of the land.*

Actual: *This element is satisfied. Lucinda and Thelonious were physically present on the land on an ongoing basis.*

Exclusive: *This is satisfied. Nothing in the facts demonstrates that anyone else took meaning possession or interfered with the possession of Lucinda and Thelonious.*

Hostile: *Although they possessed subjective good faith, both Lucinda and Thelonious were trespassers; they both intentionally possessed Gus’s property without his permission. Trespass alone constitutes the requisite hostility.*

Continuous: *This element is satisfied through tacking. Because Lucinda gave Thelonious a deed – a formally-recognized real estate title transfer vehicle – there is privity of title between the two and they can tack their time together. With Lucinda possessing from 1976 to 1987 and Thelonious from 1987 to present, the two have possessed for 44 straight years (well over the required 20 years).*

*The only possible glitch here is Gus’s disability and the possible tolling issue it created. He did go insane before Lucinda commenced her adverse possession in 1976. But Gus’s disability ended when he died in 1999. Although his heir, Nelly, was only 14 years old, it could not have caused the tolling to continue because she was not the owner in 1976 and her minority thus could not have been employed to extend Gus’s disability. Nelly would have had 10 years to eject Thelonious under the tolling rule (Lucinda and Thelonious had already been there 33 years when Gus died). She failed to commence an ejectment action by November 13, 2009, and thus lost the land by adverse possession.*

How Much Land did Thelonious Acquire?

*Normally, Thelonious would only get title to the land he actually occupied, which would have excluded the Dracut portion of the land. However, constructive adverse possession applies: the deed to Lucinda was defective, and Lucinda believed she got the who parcel described in the deed when Dolph sold it to her. Thelonious likewise proceeded in good faith. Accordingly, under constructive adverse possession, Thelonious acquired title to the entire parced dsscribed in the two deeds, including the Dracut portion.*

**Questions 29 and 30 are based on the following fact pattern:**

A landlord owned a commercial building in the downtown area of a suburb that was suitable for use as a retail store. In 2005, she entered into a twenty (20) year lease with the “Riche and Kreemee Ice Cream Company” that allowed Riche and Kreemee to operate a “retail ice cream establishment” on the premises. The lease expressly prohibited Riche and Kreemee from using the premises for anything other than as a “retail ice cream establishment.” It also proscribed subleases and assignments “without the express written agreement of the landlord.”

In 2008, as Riche and Kreemie was about to go out of business, it approached the landlord and asked whether it could assign its lease to another ice cream retail establishment named “Lickin’ Good Cones, Ltd.” The landlord agreed to the assignment.

One year later, Lickin’ Good Cones was just about out of business because people seemed to think it was an adult sex paraphernalia store rather than an ice cream retail store. Without seeking and obtaining the landlord’s permission, Lickin’ Goods Cones “assigned” the lease to “Jen and Berry’s Ice Cream Specialists Corp.” for “a term of five (5) years.”

Well, Jen and Berry’s also found itself in trouble because people quickly came to think of its name as a cheesy takeoff on “Ben and Jerry’s” with half the quality. Without the permission of the landlord, Jen and Berry’s assigned “the entire interest and remainder” of its lease to the “Wicked Good Lo-Fat Organic Free-Range Frozen Yogurt Company.”

Although the name of Wicked Good Lo-Fat Organic Free Range initially attracted a number of weight watchers and health conscience consumers into the store, they soon discovered that the product was insipid, even unappealing. It has missed the last four months of rental payments.

The landlord is about to sue as many parties as possible for the non-payment of rent.

29. Did each of the following parties have the right to assign or sublease to the next party identified in the facts? (Please indicate your answers – “YES/NO and REASONS in the table below.)

Party	“Yes” or No”	Legal Reasons for “Yes” or “No”
Riche and Kreemee	YES	Landlord gave R & K express permission to assign.
Lickin’ Good Cones	YES	Under the rule in <u>Dunpor’s Case</u> , once a landlord grants permission for a tenant to assign, “the genie is out of the bottle;” that permission will be inferred for the remainder of the lease.
Jen and Berry’s	YES	Under the rule in <u>Dunpor’s Case</u> , once a landlord grants permission for a tenant to assign, “the genie is out of the bottle;” that permission will be inferred for the remainder of the lease.

30. Please indicate whether the respective party will be liable to the landlord for rent in the table below.

Party	“Yes” or No”	Legal Reasons for “Yes” or “No” (Privity of Contract Or Privity of Title, and Why)
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Riche and Kreemee	<i>YES</i>	<i>Although R &amp; K assigned the lease and destroyed the privity of title it had with landlord, the privity of contract created upon execution of the lease remained. R &amp; K will remain liable under privity of contract until the lease is fully discharged.</i>
Lickin' Good Cones	<i>YES</i>	<i>LGC never had privity of contract with the landlord because it was never a party to the original lease. But it did obtain possession and thus came into of privity of title upon taking as assignee. Although LGC used the word "assigned" when it conveyed to J &amp; B, the conveyance was not for the entire remaining term, making it a mere sublease. This assured that possession will eventually return to LGC before going straight back to landlord, which is sufficient to maintain privity of title between LGC and landlord.</i>
Jen and Berry's	<i>NO</i>	<i>Despite the fact that it was labeled an "assignment," LGC's conveyance to J &amp; B was a sublease because the term was for less than the full amount remaining onb the lease. This means that possession will never go directly from J &amp; B to the landlord because it will stop over first with LGC. Of course, there never was privity of contract between landlord and J &amp; B because they were never parties to the same lease.</i>
Wicked Good Lo-Fat Organic Free	<i>NO</i>	<i>The sublease erected a "firewall." WGLFOF's possession will stop off with LGC before going to landlord: no privity of title. Of course, there never was privity of contract between landlord and WGLFOF because they were never parties to the same lease.</i>

**Questions 31 through 38 are based on the following fact pattern:**

Thirty years ago, a grantor conveyed a parcel of land by warranty deed to a buyer "so long as the buyer uses the property for church purposes during his lifetime, but if the buyer does not use the property for church purposes during his lifetime, to the East Milwaukee Universalist Baptist Church (EMUBC").

31. What is the state of the title without applying the rule against perpetuities?

*Buyer owns a fee simple subject to executory limitation.*

*EMUBC owns an executory interest.*

32. What is the state of the title, applying the rule against perpetuities?

*Buyer owns a fee simple subject to executory limitation.*



*EMUBC owns an executory interest.*

33. In the space below, please describe how you applied the rule against perpetuities.

*Because the executory interest in EMUBC is limited in time, we cannot not use the RAP shortcut and merely cut it out. By the terms of the grant the executory interest in EMUBC is certain to vest or fail, at the latest, at the death of the buyer. Thus, there is no RAP violation.*

The buyer took possession of the parcel of land, built a church on the site, and used the land entirely for church purposes. Five years ago, the grantor died with a will that left all of her property, both real and personal, to the Society for the Prevention of Cruelty to Law Students (SPCLS). At her death, the grantor had only one heir: her son, Sonny.

A year ago, the buyer died with a will that left the property to his daughter. In need of larger facilities, the church on the property moved to another location. Then, the buyer's daughter discovered oil on the land, erected an oil rig, and has started to drill. Sonny has brought an action against the buyer's daughter seeking a declaratory judgment that the buyer has forfeited ownership of the land, and that he is the owner in fee simple absolute. Sonny properly joined the EMUBC and SPCLS as parties in the suit. The buyer's daughter, EMUBC, and SPCLS have raised all appropriate defenses against all parties.

34. Given the facts as stated, and applicable law, who is most likely to be deemed the owner of the present estate in that law suit? (Circle only one answer.)

SONNY

*BUYER'S DAUGHTER*

EMUBC

SPCLS

35. In the space provided below, please explain the reasoning you employed to reach your answers to the previous question:

*Grantor had no interest in the land because there was no RAP violation. Accordingly, neither Sonny nor SPCLS obtained any interest to foreclose on. This leaves only daughter and EMUBC standing. EMUBC would have prevailed if the oil rig had been erected before buyer's death, but the grant called for forfeiture only if the property had been used for other than church purposes while buyer was alive. Since the condition expired on buyer's death, and EMUBC's executory interest expired with it, buyer's daughter was not encumbered by the condition and was free to erect the oil rig.*

Assume for the final questions in this grouping that Sonny's complaint against the buyer's daughter included a count for waste. EMUBC and SPCLS also cross-claimed against the buyer's daughter for waste. Even if you disagree with the legal conclusion, further assume for this group of questions that either Sonny, EMUBC or SPCLS will be deemed an owner of a future interest in the parcel.

36. What is the legal definition of waste?

*The permanent or lasting destruction or substantial physical damage of real estate.*

37. Is the buyer's daughter liable for waste?

YES

NO

38. In the space below, please apply the facts to the elements of waste to support the conclusion you reached in answering the last question.

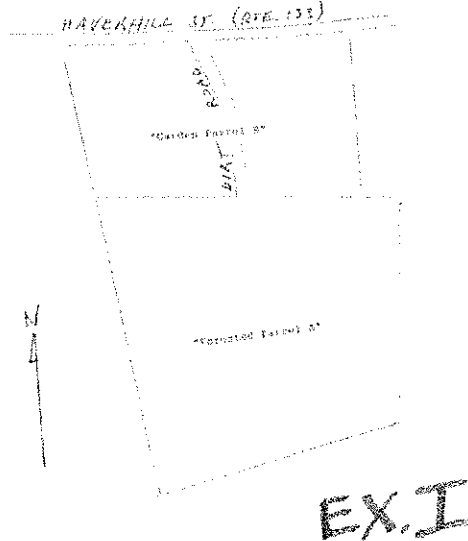
*Even if it had still be conditional rather than absolute, buyer's daughter owned a fee simple, and all fee simple owners are entitled to commit waste.*

**Questions 39 through 44 are based on the following fact pattern:**

Prior to July 23, 1983, Yeoman Crabtree owned a 60 acre parcel of land on Route 133 (Haverhill Street) in Rowley, Massachusetts. Yeoman used the front 20 acres for growing fruits and vegetables for sale at a farm stand on the parcel and elsewhere. The rear 40 acres were heavily-forested and unused.

On July 23, 1983, Crabtree subdivided his entire the 60 acre parcel into two parcels: a 20-acre "Garden Parcel" with frontage on Haverhill Street and a 40-acre "Forested Parcel" with no frontage on any public road. As a consequence of the subdivision, the only actual, free and unobstructed access to the Forested Parcel was via a dirt road which traversed the Garden Parcel.

The Garden Parcel, Forested Parcel and dirt road are depicted on the sketch plan below:



Simultaneously with the creation of the subdivision, Crabtree conveyed the Forested Parcel to Rose Blight. Although Crabtree and Blight never discussed or addressed the issue of access to the Forested Parcel, Blight assumed she would be able to use the dirt road. After conveying the Forested Parcel to Rose Blight, Crabtree continued to use the Garden Parcel as a farm. Rose Blight did not use the Forested Parcel at all.

In 1996, Crabtree sold the Garden Parcel to Ned Carson for \$525,000 by a special warranty deed that included the covenant of seisin, the covenant against encumbrances, the covenant of quiet enjoyment, and the covenant of further assurances. Carson was unaware of Rose Blight's belief that she was entitled to use the dirt road to reach the Forested Parcel.

In 2007, Carson sold the Garden Parcel to John Grogan by a special warranty deed that included the covenant of seisin, covenant against encumbrances, the covenant of quiet enjoyment, and the covenant of further assurances. Grogan also was unaware of Rose Blight's belief that she was entitled to use the dirt road to reach the Forested Parcel.

39. In the table below, set forth and explain the elements of an easement by implication. (Do not include specific facts.)

Elements	Explanation
<i>Common Ownership</i>	<i>There are two or more contiguous parcels that were owned in common ownership as one parcel. The parcels have been subdivided (broken into two or more lots) to create the easement issue.</i>
<i>Quasi Easement</i>	<i>Some kind of road, trail, path, waterway, track or other method of transportation existed before the subdivision that would have crossed into each of the subdivided parcels, had they been divided before the subdivision.</i>
<i>Quasi Dominant Estate</i>	<i>If the subdivided parcels had existed prior to the subdivision, one of them would have benefitted from the road, trail, path, waterway, track or other method of transportation.</i>
<i>Quasi Servient Estate</i>	<i>If the subdivided parcels had existed prior to the subdivision, one of them would have been burdened by the road, trail, path, waterway, track or other method of transportation.</i>
<i>“Reasonable” Necessity</i>	<i>There is no reasonable method of attaining access to the quasi-dominant estate; that is; it will either be very expensive or very difficult to take steps to reach the quasi-dominant estate.</i>

40. In the space provided below, please apply the elements of an easement by implication to the facts to determine whether the Rose Blight may use the dirt road to access the Forested Parcel. Be sure to clearly state your conclusion: easement by implication or no easement by implication.

*Common Ownership*

*Yeoman Crabtree owned on large lot and subdivided it into two contiguous lots, with Rose’s lot lacking frontage onto any public way. This element has been satisfied.*

*Quasi Easement*

*A dirt path extended from the public road across the parcel that Yeoman retained, and onto the parcel that Rose purchased. This element is satisfied.*

*Quasi Dominant Estate*

*Once created, Rose’s back parcel benefitted from the quasi-easement, giving her a quasi-dominant estate.*

*Quasi Servient Estate*

*Once created, Crabtree’s front parcel was burdened by the quasi-easement, giving him a quasi-dominant estate.*

*“Reasonable” Necessity*

*There is no reasonable method for Rose to attain access to the quasi-dominant estate; she is entirely landlocked. (Note: she would also satisfy the requirements for a “strict necessity” under the analysis for an easement by necessity).*

41. In the table below, set forth and explain the elements of an easement by necessity. (Do not include specific facts.)

Elements	Explanation
<i>Common Ownership</i>	<i>There are two or more contiguous parcels that were owned in common ownership as one parcel. The parcels have been subdivided (broken into two or more lots) to create the easement issue.</i>
<i>“Strict” or “Absolute” Necessity</i>	<i>One of the parcels is entirely landlocked; even the expenditure of great sums of money would fail to achieve access.</i>

42. In the space provided below, please apply the elements of an easement by necessity to the facts to determine whether the Rose Blight may use the dirt road to access the Forested Parcel. Be sure to clearly state your conclusion: easement by implication or no easement by implication.

*Common Ownership*

*Yeoman Crabtree owned on large lot and subdivided it into two contiguous lots, with Rose’s lot lacking frontage onto any public way. This element has been satisfied.*

*“Strict” or “Absolute” Necessity*

*There is no reasonable method for Rose to attain access to the quasi-dominant estate; she is entirely landlocked. This element is satisfied.*

For the remaining questions in this segment, assume that Rose Blight will be successful in asserting easement rights to the dirt road. John Grogan has sued both Ned Carson and Yeoman Crabtree for breach of deed covenants.

43. In his law suit, Grogan will:

YOU MAY CIRCLE ONE ANSWER BELOW.

PREVAIL AGAINST  
CARSON ONLY

*PREVAIL AGAINST  
CRABTREE ONLY*

PREVAIL AGAINST BOTH  
CARSON AND CRABTREE

PREVAIL AGAINST NEITHER  
CARSON NOR CRABTREE

44. In the space provided below, please apply the facts to the law to justify your answer to the previous question.

*Grogan vs. Carson*

*Carson gave Grogan a special warranty deed, meaning he is only liable for title issues that he created. Carson did not create the easement at issue; Crabtree did. Essentially, the special warranty deed immunizes Carson from a suit in regard to the easement.*

*Grogan vs. Crabtree*

*Crabtree also gave a special warranty deed and he also is only liable for title issues that he created. But, because Crabtree created the easement, the special warranty deed does not immunize him. Crabtree would be liable under the covenant of quiet enjoyment, which runs with the land (they are enforceable by remote grantees). The only problem is that the covenant of quiet enjoyment is not breached until there has been an actual use of the easement; the facts do not suggest that Rose has ever used the easement. So Crabtree will prevail (at least for now) on the covenant of quiet enjoyment.*

*Grogan will lose on the covenant of seisin because both Crabtree and Carson had seisin/ownership to grant him. An easement is an encumbrance and results in a breach of the covenant against encumbrances, but for the fact that Carson is not liable (his special warranty deed immunizes him because he did not create the encumbrance) and the covenant encumbrance is not enforceable against Crabtree because it does not run with the land (is not enforceable against remote grantees).*

*So, at least at this time Grogan will prevail against no one.*

**Questions 45 and 46 are based on the following fact pattern:**

Fifteen years ago, a real estate developer purchased a large industrial building, which he financed by signing a promissory note and granting a mortgage to a bank. The developer spent the next year rehabbing the building and then rented it to a manufacturer for a term of 30 years. The written lease between the developer and manufacturer contained a clause stating: "the tenancy created hereunder shall be subordinate to any mortgage hereafter granted to an institutional lender."

Five years after executing the lease with the manufacturer, the developer borrowed more money and granted another mortgage to an institutional mortgage company.

A year after that, a creditor of the developer obtained a judgment against the developer and properly recorded the judgment in the registry of deeds. A statute in the jurisdiction where the industrial building was located provides that a recorded judgment is the equivalent of any other recorded encumbrance on all real estate owned by the debtor in the recording district.

All of the above-referenced real estate interests were immediately delivered and immediately recorded. None of the referenced mortgages contained due-on-sale clauses.

The creditor recently commenced appropriate foreclosure proceedings.

45. A purchaser at the foreclosure will purchase subject to (circle as many as apply):

*THE BANK MORTGAGE*

*THE MORTGAGE COMPANY MORTGAGE*

*THE MANUFACTURER'S LEASE*

THE CREDITOR'S JUDGMENT

46. In the space provided below, please apply the facts to the law to justify your answer to the previous question.

*The general rule of priorities is "first in time, first in right," which if applied without exceptions would create the following priority schedule: (1) bank, (2) manufacturer, (3) mortgage company, (4) creditor. But there was an exception; the manufacture agreed to subordinate to "institutional lenders." So, the actual priority is: (1) bank, (2) mortgage company (which is an institutional lender), (3) manufacturer, and (4) creditor (which is not, to our knowledge, an institutional lender). The creditor's lien will be extinguished at foreclosure, and the purchaser will take subject to the bank, the mortgage company and the lease of the manufacturer.*

**Questions 47 and 48 are based on the following fact pattern:**

The owner of an uninhabited tract of land mortgaged it to a bank. The bank's attorney neglected to record the mortgage at that time. A month later, the owner conveyed the tract of land to his niece in consideration of "love and affection." The niece lacked any knowledge of the mortgage to the bank and immediately recorded her deed. Last week, the niece sold the land to a buyer who plans to build a condominium on the real estate. Although the buyer has not yet recorded his deed, the bank's attorney finally did record the mortgage after the buyer accepted delivery of the deed from the niece.

The jurisdiction in which the tract of land is located has a statute stating: "No conveyance or mortgage of real property shall be good against subsequent purchasers for value and without notice unless the same be recorded according to law."

The buyer just learned of the mortgage to the bank and has just filed a lawsuit against the bank seeking a declaration that the mortgage is not enforceable against the buyer.

**Question 47 is on the next page.**

47. Who will prevail in that lawsuit? (Circle only one.)

*THE BUYER*

THE BANK

48. In the space provided below, please apply the facts to the law to justify your answer to the previous question.

*Because the recording statute does not require the buyer to record his deed to be protected from prior grantees, the jurisdiction is a pure notice jurisdiction. Buyer will be protected the instant he receives the deed, even though he has not recorded it. The bank had not yet recorded its mortgage when the buyer accepted his deed, so the buyer will prevail over the bank.*

**Questions 49 and 50 are based on the following fact pattern:**

A seller conveyed an improved parcel of real estate to a buyer. The deed contained a restriction stating that the buyer, "his heirs, successors, grantees and assigns agree that [the parcel] shall be used only as a single family residence." The buyer promptly and properly recorded the deed, and then moved into the parcel and used it as a single family residence. Ten years later, the buyer sold the parcel to a new buyer. The deed that the buyer delivered to the new buyer made no mention of any limitation on the use of the parcel. The new buyer never moved onto the parcel, choosing instead to leave it vacant. Shortly after the new buyer bought the parcel, a trespasser began adversely possessing the parcel. Some 21 years later, the trespasser obtained a declaratory judgment in a court of competent jurisdiction demonstrating that the trespasser had become the owner of the parcel by adverse possession. The trespasser promptly and properly recorded that declaratory judgment.

The trespasser has announced that she intends to begin construction of an addition onto the existing building and use the parcel as a half-way house for recovering drug addicts. The seller, who still lives in the same neighborhood, has brought a suit against the trespasser.

49. In that law suit, the seller will:

*PREVAIL*

*LOSE*

*Note: Because the question is vaguely worded by failing to specify if the seller is seeking an injunction or monetary damages, I'll accept either answer.*

50. In the space provided below, please apply the facts to the law to justify your answer to the previous question.

*The seller will prevail if he is seeking an injunction; the three requirements for a covenant to run in equity are: (1) intent that the covenant run with the land, (2) the covenant must touch and concern the land, and (3) the person against whom the plaintiff seeks to enforce the covenant has notice of the covenant.*

*The fact that the covenant expressly stated that it was binding on "heirs, successors, grantees and assigns" demonstrates that the grantor intended for it to be binding well beyond the immediate grantee. In addition, the covenant was recorded demonstrates that the covenant was intended to be more than a contract covenant; it was intended to run with the land. This element was met.*

*All use restrictions are deemed to "touch and concern" the land. The requirement of use of a single family residence is a use restriction. This element was met.*

*Finally, the covenant was recorded in the chain of title and gave the trespasser constructive notice that it existed. This element was met.*

*If the seller is seeking monetary damages, he will lose. The first two elements for a covenant running at law are the same for a covenant running in equity: intent and touch and concern. As described above, those elements have been satisfied. The third element, however, is different. Instead of notice, covenants running at law require privity of title (chain of title). An adverse possession breaks the chain of title and destroys privity. That is what occurred here, and the privity of title element has not been met for a covenant running at law. The seller cannot obtain monetary damages against the trespasser.*